Neutral Citation Number: [2009] EWHC 255 (TCC)

Case No: HT-08-331

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: Tuesday, 17th February 2009

Before:

MR JUSTICE COULSON

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Between:

SEELE AUSTRIA GmbH Co **Cla**

- and -

TOKIO MARINE EUROPE INSURANCE LIMITED **Defe**

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Adrian Williamson QC and Marcos Dracos (instructed by **Bryan Cave**) for the **Claimant**

Paul Reed and **Jeffrey Thomson** (instructed by **Kennedys**) for the **Defendant**

Hearing dates: 16th January and 5th February 2009

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Judgment

Mr Justice Coulson :

A. INTRODUCTION

1. Although these proceedings are new to the TCC, they have had a long and rather unfortunate history, some of which is relevant to the applications to amend and to strike out now before the court. In consequence, this Judgment is perhaps rather longer than I would have wished.

2. By proceedings started in the Commercial Court in June 2006, the claimant, who carries out business as a specialist curtain wall and glazing contractor, seeks an indemnity, alternatively damages, from the defendant insurers. The claim arises out of a project policy of insurance relating to works at St. Martin's Court, 3 Paternoster Square, London, EC4. The claimant designed and installed glazing which was defective and had to be repaired, and subsequently made a claim against the defendant under the policy in respect of various costs and losses incurred as a result. The original claim was put at just over £1million.

3. In June 2007, following a hearing of liability issues the previous month, Field J dismissed the claimant's claim. His judgment can be found at [2007] EWHC 1411 (Comm). He concluded that the

indemnity at Memorandum 18(3) of the policy, in respect of intentional damage necessarily caused to the works to enable a defect to be made good, depended on the existence of accidental damage to the insured property, and that it was not an additional and free-standing indemnity capable of applying where no such accidental damage had occurred. In a judgment dated 7th May 2008 ([2008] EWCA Civ 441), the Court of Appeal (Moore-Bick and Richards LJJ, Waller LJ dissenting) reversed this decision.

4. In the autumn of 2008, the action was transferred to the TCC. At the first CMC before me on 26.11.08, the claimant sought to amend its particulars of claim. The defendant made clear that the amendments were opposed for reasons which would require some considerable time to develop. It was also said that the defendant would seek to strike out the existing claim, and an application has now been made to that effect. I therefore gave directions leading up to a one day hearing on 16th January 2009, at which these matters could be addressed.

5. The amendments themselves fall into two distinct categories. The first category, namely the amendments to paragraphs 11, 12 and 13 of the draft amended particulars of claim, seek to allege that the majority of the defects in the windows were due to bad design, rather than bad workmanship. This matters very much, because the Court of Appeal held that workmanship deficiencies to each window represented a separate occurrence/event, and would thus permit the defendant to apply the retained liability (or deductible as it was called) of £10,000 to each repaired window. If, on the other hand, the defects to the repaired windows were due to design errors, it has long been accepted by the defendant that such defects, repeated throughout the glazing works, would constitute only one event or occurrence under the policy, and therefore give rise to one deductible of £10,000 in respect of all the windows.

6. Through no fault of counsel, the arguments in respect of this first category of amendments, which I shall call the design amendments, occupied the entirety of the hearing on 16th January. On behalf of the defendant, Mr Reed (who appeared both before Field J and the Court of Appeal) made clear that his principal submission was that the Court of Appeal had ruled that the cause of the defects in the windows was bad workmanship, and that such a ruling could not now be opened up. Alternatively, he submitted that, at the very least, the 'design v workmanship' issue could and should have been raised for determination, by either Field J or the Court of Appeal. Either way, he said, it would be an abuse of the process to allow the matter to be raised now.

7. Mr Williamson QC was not involved in these proceedings until the hearing before the Court of Appeal. On behalf of the claimant, he accepted that the case had suffered from a number of procedural mishaps at first instance, but he maintained that the 'design v workmanship' issue had never been determined and that, in all the circumstances, it would be wrong and unfair to deprive the claimant now of the opportunity of raising this new case.

8. It is the defendant's case that, if I refuse the claimant permission to make the design amendments, the application of the deductible would reduce the value of the (new) claim by about 50%. In other words, on that analysis, the design amendments are potentially worth about £450,000-£500,000. The claimant disagrees, and submits that the point is worth no more than £180,000 at most.

9. The second category of amendments concerns the quantum of the claim. The relevant amendments are set out at paragraphs 16-20 of the draft amended particulars of claim. Although these amendments have the effect of reducing the overall quantum to £965,000 odd, Mr Reed objects to these amendments because, he says, either they seek to introduce claims for consequential loss which fall outside the general law of insurance and/or the express terms of the policy, or they amount to a composite claim in circumstances where the court has no power to apportion such a claim. He also

makes various complaints about their form and the absence of proper particulars. It is Mr Williamson's principal submission that these objections amount to no less than a trial of the remaining issues in the action, or at least a large number of them, which would be wholly inappropriate on an application to amend. In order to decide these issues, it is therefore necessary for me to consider at least some elements of insurance law and, again, some aspects of the proceedings so far.

10. I shall call the amendments at paragraphs 16-20 of the draft amended particulars of claim the quantum amendments. The arguments in respect of the quantum amendments occupied a further day of court time on 5th February 2009. The same (or similar) arguments were also relevant to the separate application by the defendant to strike out the existing proceedings.

11. Because the principles and issues involved in the two sets of amendments are so different, I propose to deal with them separately. Accordingly, having set out some principles applicable to amendments generally at **Section B** below, I turn to address first the design amendments. At **Section C**, there is a summary of the relevant principles of issue estoppel and abuse of process. At **Section D**, there is a detailed chronology of the history of this action, both at first instance and in the Court of Appeal. At **Section E**, I set out my analysis of the issue estoppel/abuse of process arguments and my conclusions as to whether or not the design amendments should be allowed.

12. Thereafter, at **Section F**, I set out the relevant principles of insurance law which the defendant maintains are relevant to the quantum amendments, and at **Section G**, I set out the relevant factual background in respect of those amendments. At **Section H**, I set out my analysis and conclusions as to whether the quantum amendments should be permitted and/or whether the existing claim should be struck out. In addressing both sets of amendments and the application to strike out, I have been greatly assisted by the lucidity of counsel's written and oral submissions.

B. APPLICABLE PRINCIPLES ON AMENDMENT

13. Generally, a party wishing to amend pursuant to CPR 17.3 will be permitted to do so if:

a) The amendments have a real prospect of success such that they are properly arguable: see **Flexitallic Group Inc v T& N limited** , 19.12. 01, QB, unreported;

b) Any prejudice caused by the amendments can be compensated for in costs and the public interest in the administration in justice is not significantly harmed: see **Cobbold v Greenwich LBC**, 9.8.99, CA, unreported.

14. However, a party will not generally be permitted to amend:

a) To add a new claim outside the limitation period, unless it arises out of the same or substantially the same facts as a claim already pleaded (CPR 17.4);

b) To raise a claim which is an abuse of the process of the court, because such a claim would be liable for immediate striking out (**Attorney General v Barker** [2000] 1 FLR 759);

c) To raise a claim which is not maintainable in established law (**Mandrake Holdings Limited v Countrywide Assured Group Plc** [2005] EWCA Civ 638).

It is the exception to the general rule (that amendments will normally be permitted) noted at paragraph 14b) above which is relevant to the design amendments; it is the exception at paragraph 14c) above which is relevant to the quantum amendments.

15. It is appropriate at this stage to say a word about one of the principal submissions made by Mr Williamson on behalf of the claimant. He pointed out that the threshold test to amend was a low one (see paragraph 13 above), and that, on an application to amend, the court should not investigate to the nth degree what happened in the earlier stages of the trial, and/or the precise state of the law that might govern the underlying disputes between the parties. He said that such points were matters for the trial, not the application to amend. In my judgment, that submission has some force in relation to the quantum amendments: there is a limit to the investigation into the law that a court should undertake on an application to amend. But in relation to the design amendments, it seems to me that, now that issue estoppel/abuse of process has been raised by the defendant, it is necessary for the court to determine that issue comprehensively. In this of all cases, it would be wholly unsatisfactory for the amendments to be allowed, on the basis that the substantive arguments should be heard at a later date, only for the issue estoppel/abuse of process points to prove successful at trial.

C. APPLICABLE PRINCIPLES IN RESPECT OF ABUSE OF PROCESS

C1. Issue Estoppel

16. If an issue has already been decided by a court of competent jurisdiction, it cannot subsequently be re-litigated. This is called issue estoppel. In **Thoday v Thoday** [1964] P 181 at 198, Diplock LJ (as he then was) said:

“There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.”

17. In order to demonstrate issue estoppel, the party seeking to resist the new claim needs to show that such a claim raises an issue which:

a) Has already been litigated;

b) Has already been decided;

c) Was a necessary ingredient in the cause of action being advanced.

Even if all that is made out, it may be possible to permit re-litigation of the issue if special circumstances apply: see **Arnold v The National Westminster Bank Plc** [1991] 2 AC 93.

18. The issue in question must be one which forms “a necessary ingredient in a cause of action [which] has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue”: Lord Keith at page 105 of **Arnold.** This has caused some difficulty in ascertaining precisely what was involved in the earlier decision of the court. In **Carl Zeiss Stiftung v Rayner and Keeler Limited (No 2)** [1967] AC 853, Lord Wilberforce suggested this formulation:

“One way of answering this is to say that any determination is involved in a decision if it is a ‘necessary step’ to the decision or a ‘matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision’ (**Reg v Inhabitants of Hartington Middle Quarter Township** 4 E&B 780, 794). From this it follows that it is permissible to look not merely at the record of the judgment relied on, but at the reasons for it, the pleadings, the evidence (**Brunsden v Humphrey** [1884] 14 QBD 141, CA) and if necessary other material to show what was the issue decided (**Flitters v Allfrey** LR 10 CP 29). The fact that the pleadings and the evidence maybe referred to, suggest that the task of the court in subsequent proceedings must include that of satisfying itself that the party against whom the estoppel is set up did actually raise the critical issue, or possibly, though I do not think that this point has yet been decided, that he had a fair opportunity, or that he ought, to have raised it.”

19. It seems clear that issue estoppel will apply to the determination of preliminary issues, or even interlocutory matters, decided earlier in the same action between the parties. The parties cannot subsequently in those same proceedings advance arguments or adduce further evidence directed to showing that the issue in question has been wrongly determined. In **Fidelitas Shipping Co Limited v V/O Exportchleb** [1966] 1QB 630, Diplock LJ said:

“Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. There only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence; but such application shall only be granted if the appellate court is satisfied that the fresh evidence sought to be adduced could not have been available at the original hearing of the issue even if the party seeking to adduce it had exercised due diligence.”

20. Although both Lord Wilberforce in **Carl Zeiss,** and Diplock LJ in **Fidelitas,** suggested that issue estoppel might extend to issues which were not - but should have been - decided in the previous litigation, or at an earlier stage of the same litigation, that eventuality is probably now best described as **Henderson** abuse, by reference to the decision in **Henderson v Henderson** [1843] 3 100. It is to that topic therefore that I now turn.

C2. Henderson Abuse

21. The decision in **Henderson v Henderson** is authority for the proposition that the court “will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case”.

22. In **Johnson v Gore Wood and Co (a Firm)** [2002] 2 AC 1, Lord Bingham restated these similarities between issue estoppel and **Henderson** abuse as follows:

“The underlying public interest is the same; but there should be finality in litigation and that a party should not be twice vexed in the same manner. This public interest is reinforced by the current emphasis on efficiency and economy in the context of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse of the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it were to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element

such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the abuse proceedings involves what the court regards as unjust harassment of a party. It is however wrong to hold that because the matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic approach to what in my opinion should be broad merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question, whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

23. On a closer analysis, it can be seen that some of the elements of **Henderson** abuse are rather different to those arising under issue estoppel. For example, the principle is not, on any view, limited to the ingredients of a cause of action. In addition, the requirement that, in order for a finding of **Henderson** abuse, there needs to be a "broad merits-based judgment" means that the court must consider all the circumstances when analysing whether it is an abuse for a party now to raise an issue that it could have raised in either previous proceedings or in an earlier stage of the current proceedings. In addition, there will rarely be a finding of abuse without the court deeming the subsequent claim to amount to unjust harassment or oppression.

24. Thus, the mere fact that the issue could have been raised before, but was not raised, will not, of itself, amount to **Henderson** abuse. A finding that an issue could have been raised is not the same as whether, in the round, that issue should have been raised: see **Dexter v Vlieland-Boddy** [2003] EWCA 14 and **Aldi Stores v WSP Group Plc** [2007] EWCA Civ 1260.

25. Another example of this principle is the decision of the Court of Appeal in **Tannu v Moosajee** [2003] Civ 815, a case which Mr Williamson submitted bore at least some resemblance to the present case. In **Tannu,** there was a trial of liability at which the judge concluded that there was a partnership between the parties pursuant to which the claimant had paid the defendant the sum of £110,000. He dissolved the partnership and ordered the taking of accounts. During that process, the defendant alleged that the money had been paid to her in exchange for 50% of the partnership, to do with as she pleased. The claimant denied that, and asserted that the £110,000 was a capital contribution to the partnership, maintaining that the defendant was estopped from alleging that the £110,000 had been paid in exchange for 50% of the partnership. The Master agreed that the judge's findings at the liability hearing meant that the defendant could not deny that the sum was a capital contribution, but Lloyd J found that, because he had failed to raise the issue of capital contribution in response to the defendant's defence and/or at the first trial, the claimant was prevented by the principles of **Henderson** abuse from denying that the £110,000 was the purchase price for a half-share in the partnership.

26. The Court of Appeal allowed the appeal, concluding that the claimant was not prevented from raising the contribution issue because, at the original trial, "neither party addressed evidence or argument which was directed specifically to the question of the terms of the partnership. Despite the fact that there are passages in the judgment of Judge MacDuff QC in which he appears to be dealing with the basis on which the £110,000 was paid, I am satisfied that he did not in fact decide that issue": see the judgment of Dyson LJ at paragraph 35. He went on to say that it was always possible that, if the taking of accounts was ordered, that might give rise to issues as to the terms of the partnership itself.

27. I consider that **Tannu** is also important for two other reasons. First, the Court of Appeal expressly recognised that **Henderson** abuse could apply to the later stages of the same litigation, although they expressed the view that such a situation was "unusual". It seems to me that there is no reason in principle why **Henderson** abuse should not be applicable, just like issue estoppel, to the later stages of the same action. It is however no more than common sense to observe that it might be significantly easier for a party facing a **Henderson** abuse allegation to defeat it if the point arose for decision in the same proceedings, rather than in a subsequent action, for the reasons explained by the Court of Appeal in **Tannu**.

28. Secondly, in **Tannu**, the Court of Appeal noted that all of the difficulties stemmed from the failure to define precisely the issues to be dealt with at the first hearing. Such difficulties are, sadly, not uncommon. In **McLoughin v Jones** [2002] 2 WLR 1279, the Court of Appeal pointed out that the trial of the preliminary issues in that case was doomed because of the nature of the issues, and the failure to define them properly. They indicated that only potentially decisive issues of law should be dealt with by way of preliminary issue, and that even then they should be decided on the basis of a schedule of agreed or assumed facts. I am in no doubt at all that the arguments in the present case about issue estoppel/abuse of the process also stem from this same failure to clarify one particular issue at the outset.

29. With these principles in mind I turn, in **Section D** below, to consider the factual background to the issue estoppel/**Henderson** abuse argument.

D. THE RELEVANT EVENTS AND DOCUMENTS IN RESPECT OF THE DESIGN AMENDMENTS

D1. The Pleadings

30. The particulars of claim, drafted by David Sears QC and dated June 2006, put the claim by reference to Memorandum 18(3) and highlighted the indemnity in respect of "intentional damage necessarily caused for the Insured Property (a) to enable the replacement repair or rectification of Insured Property (a) which is in a defective condition". That Memorandum also went on to make clear that the indemnity was "subject to the Insured's Retained Liability being the first £10,000 of the cost of each and every occurrence or series of occurrences arising out of any one event but the Insurers Liability shall be limited to £2,500,000 of the cost of each and every occurrence or series of occurrences arising out of any one event…." Nowhere in the particulars of claim was any distinction drawn between defects attributable to workmanship and defects attributable to design.

31. The 'design v workmanship' issue first emerged as a result of paragraph 11b of the defendant's defence. There, the defendant pleaded that the claimant was responsible "for the first £10,000 of each and every occurrence or series of occurrences" and went on to assert:

"Workmanship deficiencies to each window are to be treated as one occurrence or one event. Accordingly in respect of the loss and damage to each window there is a deductible of £10,000 to be applied"

I consider that, by this positive averment, the defendant was asserting that the windows suffered from workmanship deficiencies, which meant that a deductible of £10,000 would apply to each window.

32. At paragraph 6.4 of its reply, in answer to paragraph 11b of the defence, the claimant denied that the deficiencies in each window were to be treated as one occurrence or one event, and positively asserted that the deficiencies in all the windows comprised a series of occurrences arising from one

event, with the result that the total retained liability under Memorandum 18(3) was £10,000. Although that part of the reply did not address the specific 'design v workmanship' issue, paragraph 5.3 of the same pleading provided some clue as to the claimant's case on that issue. That set out the defects that had been found on an investigation of the windows, and appeared to suggest that, of the three defects, one was a matter of design, one was a matter of workmanship, and one could be either or both. The paragraph was in these terms:

"5.3.1.The thickness of the termination bar was not appropriate and/or the distance between fixings was excessive.

5.3.2. During the offsite installation, the position of the fixings were determined by the drawings which were drawn in error and they showed the fixings spaced at too great a distance between each one.

5.3.3. During installation on site, the fixing of the membrane to the substructure was inadequate and/or there was insufficient sealing of patches on the Halfen channels and/or holes in the membrane were not discovered and sealed."

I conclude that the bald allegation at paragraph 5.3.1 could be either design or workmanship. The allegation at paragraph 5.3.2 was obviously design and the allegation at paragraph 5.3.3 was equally obviously workmanship.

33. It should also be noted that, at the same time, the defendant sought particulars from the claimant as to the detail of their case as to the defects in the windows. The replies (paragraph 2 of the claimant's further information) do no more than repeat paragraph 5.3 of the reply set out above.

D2. Pre-Trial

34. There was a CMC before David Steel J in December 2006. In advance of that CMC, the parties had exchanged proposed lists of issues and debated the best way of disposing of the action. The claimant's position was summarised in the skeleton argument produced by Mr Sears QC for that CMC:

"In essence, both [parties] are proposing that matters of principle (e.g. issues relating to policy interpretation etc) are dealt with in advance of any hearing in which the actual cost of the remedial works is investigated. It probably matters not whether it is called a trial on liability or a trial of preliminary issues."

Mr Reed's skeleton argument put the point in this way:

"The parties appear to be in agreement that all issues regarding the interpretation of the policy or to be determined at the liability trial, including the meaning of 'intentional damage' in Memorandum 18 (3) and which of the heads of loss (if any) pleaded in paragraph 14 of the particulars of claim fall within the meaning to be given to those words."

35. In the event, David Steel J ordered a trial of what he described as "liability issues" to take place prior to the trial on quantum. Those issues were identified as Issues 1-13 set out in the Annex attached to the Order. It was envisaged that the trial of those issues would take place with oral evidence and there were directions for the exchange of witness statements and the like.

36. The relevant issue for present purposes is Issue 13. That was in the following terms:

"Whether or not workmanship deficiencies to each window are to be treated as one occurrence or one event for the purposes of Memorandum 18(3)."

It certainly appears that the reference to ‘workmanship deficiencies’ had its origin in paragraph 11b of the defendant’s defence.

37. Mr Reed submitted that, by reference to subsequent correspondence and later events, the issues for the first trial were somehow widened out from the 13 Issues identified and ordered by David Steel J. I do not accept that there was any formal change: there is no correspondence, or any other event, which demonstrates any such agreed result, and no subsequent order of the court. I am confident that the parties prepared for the hearing before Field J on the basis of the 13 Issues ordered by David Steel J. But I am also sure that both parties did so on the basis that those 13 Issues represented all the liability and causation issues that existed between the parties.

38. Those issues, of course, included Issue 13 which, as I have indicated, was drafted by reference to paragraph 11b of the defendant’s defence, which had taken the point that workmanship deficiencies were not one overall event but arose in respect of each window. That issue was a matter on which both sides adduced evidence for the trial. On behalf of the defendant, Mr Thomas Rice provided a witness statement in which, at paragraphs 42-48, he set out, in some detail, his evidence as to the defects in the windows. He concluded that part of his statement with these words:

“I recall that at the time my view and the consensus on site was that a number of the problems were due to Seele Austria’s poor workmanship. This included the fixing of the membrane to the structure and sealing of patches on the Halfen channels and holes in the membrane.”

That evidence was, of course, entirely in line with the defendant’s pleaded case, that the defects were attributable to workmanship errors.

39. The claimant called two principal witnesses on these matters. Mr Holzleitner dealt with the nature of the defects in his first statement. He said at paragraph 28:

“It took some time to discover the cause of the leaks and prepare a remedial scheme. We discovered two principal faults, firstly, the membrane was not properly fixed to the concrete pillars and permitted water penetration. This was a workmanship fault. Secondly, it appeared that the aluminium strip which clamped the membrane to the body of the window was not fixed strongly enough to the window (not enough screws) and the membrane was not properly glued/clamped to the window under the aluminium strip. This was a design fault.”

The claimant also relied on a witness statement from Mr Leuthner. He dealt even more clearly with the ‘design v workmanship’ issue, and said at paragraph 32:

“…these defects were caused by:

32.1 mistakes in the design of the window, in particular the sealing strip of the membrane was designed only to be screwed down every 30cm and the membrane was not glued on both sides.

32.2 incorrect assembly of the window elements, in that the membranes were not properly sealed to the window frame.

32.3 defective installation in that the membranes were not properly glued to the concrete structure.”

On its face, that evidence seemed to suggest two workmanship defects, and just one design defect.

40. Following the exchange of these witness statements, the claimant’s solicitors wrote to the defendant’s solicitors, expressly accepting that the List of Issues as currently drafted “may mean that the question of the works required to remedy the defects and damage falls to be dealt with next week

[at the liability trial].” In consequence, the claimant served a second statement from Mr Holzleitner. This dealt in some detail with the remedial works. It also contained detailed comments on many paragraphs of Mr Rice’s statement. Mr Holzleitner did not, however, comment upon paragraphs 42-48 of Mr Rice’s statement; nor did he seek to challenge the detailed reasons why Mr Rice had concluded that the defects were matters of workmanship (a view with which, as we have seen, Mr Leuthner largely agreed).

D3. The Trial Before Field J

41. In his written opening on behalf of the claimant, Mr Sears QC said, at paragraph 30.3, that the defect “was a defect in design and/or workmanship” and that the loss was one loss for the purposes of aggregation under the policy. In his opening, Mr Reed accepted that design defects constituted one occurrence or event but that, by their very nature, workmanship defects were unique and did not comprise a series of occurrences arising from one event. Accordingly, he maintained that each window which had to be repaired because of workmanship defects was to be treated as a separate occurrence or event.

42. The liability hearing began on the 21st May 2007. Right at the outset, Field J said that he needed more assistance on “the detail of the type of [remedial] works done” to the windows. He went on to say:

“I hope very much that a schedule can be constructed indicating the agreed matters and the non-agreed matters. This is not really a court that is used to wading through a Scott Schedule… it would be far better if the parties can make substantial agreement as to the answers to the questions which really go to factual matters”.

There was no schedule, either at that point in the trial or subsequently, and no ‘substantial agreement’ (or any agreement) was ever reached.

43. Mr Rice, Mr Holzleitner and Mr Leuthner all gave evidence. The parties then put in detailed closing submissions. I accept Mr Williamson’s submissions that (to the extent that it remained in dispute) neither party appeared to deal in any detail in their closing submissions with the ‘design v workmanship’ issue.

D4. The Judgment of Field J

44. Field J made plain at paragraph 1 of his Judgment that it was in respect of “a set of issues designed to determine whether the claimant is entitled to be indemnified” under the policy in question. That, so it seems to me, confirms my view that what the Judge – and the parties – were engaged on was a trial of the 13 Issues attached to the order of David Steel J. At paragraph 5 of his Judgment, Field J dealt with the defects in this way:

“The windows leaked for a number of reasons, including; (i) the incorrect installation at the factory of a termination bar; (ii) the use of too few screws to fix the EPDM membrane through an aluminium strip to the frame; (iii) faulty gluing and clamping of the membrane to the frame under the aluminium strips; (iv) faulty fixing of the membrane to the concrete pillars; (v) the penetration of the EPDM membrane by the fixing bracket for the stone adjacent to the termination bars; (vi) pin holes in the EPDM membrane caused by in situ welding by Seele; and (vii) the failure to seal the Halfen channel”.

45. The majority of the Judgment was taken up with the principal issue between the parties, namely whether or not there was any liability at all on the part of the defendant under the policy. At

paragraph 27 Field J referred, in passing, to the ingress of water “by reason of the defective design and installation of the windows…” At paragraph 28, he concluded that the claimant was not entitled to an indemnity under Memorandum 18(3) for any of the loss it claimed to have suffered by reason of the defects.

46. Field J then went on to deal with some of the other Issues in the list. He did this, as he explained at paragraph 32 of his Judgment “both out of deference to the detailed arguments both sides have advanced and because some limited consideration of these matters is necessary for the questions ordered to be tried to be answered in their entirety”.

47. There was, however, a procedural mishap in relation to Issue 13, the issue concerned with workmanship deficiencies and the deductible. For reasons which have never been clear, Field J answered that question by reference to a concession that he said the claimant had ‘rightly’ made, to the effect that the answer to Issue 13 was Yes. When the draft judgment was sent out to the parties for their comment, it was pointed out to him that no such concession had been made although, rather unhelpfully, the joint corrections went on to say that a concession had been made on the part of the defendant, without pointing out that this concession related to design, not workmanship. Be that as it may, again for reasons which are unexplained, the approved version of the Judgment contained no correction, so that the (agreed) error as to the claimant’s purported concession was maintained in the approved version of the final Judgment.

D5. The Appeal

48. The claimant appealed on a wide range of matters. Those included not only the principal issue as to whether or not there was any liability at all on the part of the defendant under the policy, but also Issue 13. Permission to appeal on all matters was granted by Rix LJ. However, again for reasons which are not entirely clear to me, the hearing before the Court of Appeal did not address all of the issues for which permission to appeal had been granted. It is, however, common ground that, at that hearing, not only was the issue as to the defendant’s fundamental liability under the policy dealt with but that, in addition, Issue 13 was also addressed by the Court of Appeal. The parties now differ fundamentally as to the effect of the Court of Appeal’s ruling on that Issue, and those differences lie at the heart of the issues concerned with the design amendments which I have to decide. It is therefore necessary to set out some of the exchanges in the Court of Appeal, as well as their subsequent Judgment.

D6. The Hearing Before The Court of Appeal

49. The hearing on the deductible issue (Issue 13) was shaped by paragraph 16 of the claimant’s grounds of appeal, for which permission had been granted. It was there said that Field J ought to have held that the deficiencies which existed in all of the windows were to be treated together as one overall occurrence or event, that event being either: a) the incidence of intentional damage; or b) the installation of the defective windows; or c) alternatively the water testing.

50. In the claimant’s skeleton argument, which heralded the involvement of Mr Williamson QC in this action, the question of the deductible was dealt with in section 8. The ‘design v workmanship’ issue was not expressly addressed. On closer analysis there was, perhaps, an attempt to move away from the wording of Issue 13 (which expressly referred to workmanship deficiencies): for example at paragraph 8.3 of the skeleton, it simply addressed “the deficiencies which existed in all the windows”.

51. Mr Reed’s skeleton argument for the Court of Appeal dealt with the arguments about the deductible at paragraph 30. He there made a number of crisp points in support of the defendant’s

case, namely that there were workmanship defects in each of the windows, and that it was difficult if not impossible for the claimant/appellant to maintain its submission that such defects were to be grouped together as one event or occurrence.

52. The hearing before the Court of Appeal took place on 13 and 14 February 2008. The majority of the submissions related to the policy point, and it seems that the deductible issue was, as Mr Williamson put it before me, ‘something of a tail end charlie’. But that is not to say that the Court of Appeal did not spend some considerable time wrestling with the point, as the extracts from the transcript noted below make only too clear.

53. At the outset of his submissions, Mr Williamson made plain (transcript page 5C) that, for the purposes of his main submissions, the findings which Field J had made at paragraphs 1-6 inclusive of his Judgment were not challenged and were sufficient for his purposes. That of course included paragraph 5 of the Judgment, set out at paragraph 44 above. Mr Williamson went on to say that the defects, as summarised by the Judge at paragraph 5, “essentially consisted of bad workmanship in relation to the weather-sealing between the punched windows and the surrounding structure”.

54. Mr Williamson’s submissions to the Court of Appeal as to the deductible commenced at page 40F of the transcript. The main submission that he made was the same as that which had been made by Mr Sears QC before Field J, namely that, without expressly addressing the possible consequences of the ‘design v workmanship’ point, it was the claimant’s case that there was “essentially a common problem and essentially [a] common solution”. He went on to say:

“Because what the excess is dealing with is the occurrence or series of occurrences arising out of any one event and the event, in my submission, is the installation of the windows in a commonly defective fashion and the occurrence and occurrences is the campaign of work arising out of that.”

55. Having made that submission there was then this exchange:

“A Member of the Bench: The defects were, as it were, a result of faulty workmanship, is that right?

Mr Williamson: That is right, yes

A Member of the Bench: And were the workmen all acting pursuant to, as it were, a standard set of instructions or were they just all doing the job badly in slightly different ways?

Mr Williamson: I am not sure there was any evidence about that particular point.

A Member of the Bench: Is there not more than one cause of the problems that the judge identified? It is not just…incorrect installation, use of too few screws, faulty doing, faulty fixing, penetration, pin holes in, failures to see it; lots of different problems

Mr Williamson: That is right but just going back to the language of the clause; in simple terms, one has this. One has installation of windows at a particular time, a particular phase of the works which, it is discovered subsequently, have a number of common problems albeit more than one problem.”

56. At this point, there was an intervention from Mr Reed dealing with the issue as to remedial works on each window, it being apparent that not all of the windows had been tested. Once a sample had been tested, as Mr Reed put it at page 43E of the transcript, “there was found to be problems with workmanship and, therefore, they were directed to rectify that and they went about that by dealing with every window as I understand it”. A little later in that exchange Mr Reed explained the nature of some of the defects in greater detail, such as the termination bar and the flexible seal.

57. Following that exchange, Mr Williamson resumed his submissions in this way:

“I accept because the judge has obviously so found at paragraph 5 of his judgment that there are a number of different workmanship defects and there is not any analysis in the judgment certainly as to which defect applied to which window. I put my submission a little more broadly than that which is to say, and you have this submission, the event is the intentional damage and is part of the remedial scheme which is one event, but alternatively, the event is broadly failure to install the windows in an adequate fashion giving rise to an occurrence or a series of occurrences, either a common workmanship defect or a series of workmanship defects then giving rise to the need for remedial works. That is what I say about deductible”.

58. Towards the end of the first day, when dealing with a different point, Lord Justice Richards identified the somewhat unsatisfactory nature of the appeal proceedings generally in these terms:

“It is quite close in places to a moot some of this. There are some points of general findings in the air, without it being clear how they are going to be applicable to a concrete set of facts and very difficult to determine the correctness or otherwise of those matters without having a concrete set of facts.”

I respectfully agree with that comment; it seems to me that this difficulty was one which Field J himself identified at the outset of the trial before him (paragraph 42 above) but which had never been resolved.

59. In making his submissions, Mr Reed got onto the question of deductible on the second day (transcript page 33E). The transcript demonstrates that, early on in his submissions, a Member of the Bench put to Mr Reed the problem that “in order to discover whether the deductible applies to individual windows you have to find out what the claim is; what the event is; what the occurrence is, have you not?” The absence of a proper schedule or set of agreed facts was again the subject of comment.

60. Mr Reed repeated his concession that, if the problem was a design defect it would be generic, and thus one event, but the difficulty came when the defect was workmanship. Mr Reed accepted, in answer to another question from the Bench that, if all the defects were due to one erroneous method of construction, then that might also be a generic or systematic error. However he made plain that that was not the case here. He said:

“The best I can say is there were a whole range of errors as we can see from the judge’s judgment; incorrectly putting in screws to not correctly sealing cuts and screw holes and they were actually put through this material, through to the termination bar not being correctly…. For this purpose all I need to say is that the judge cited at least five examples of possible …

A Member of the Bench: I do not think they were exhaustive either.

Mr Reed: No, they were not… of workmanship errors. It has not been the appellant’s case to date that all that arises out of one failure to specify a method statement with particular accuracy or… there is a theme that runs throughout, common to all. What we say is the contrast between design and workmanship is that workmanship by its very nature is something which is, every time it happens, a new occurrence or event because it is the individual making an error in and about his labour which he applies to the construction of whatever item it is.”

61. A little later, a Member of the Bench asked Mr Reed whether they knew enough about the facts to decide the issue of the deductible. Mr Reed again reiterated that there were a number of non-specific,

identified workmanship defects applicable to the windows. The Court observed that, on the judge's findings, the windows were being removed because their workmanship was defective in each case.

62. In his submissions in reply, Mr Williamson dealt again with the question of the deductible, starting at page 48F of the transcript of day 2. Again the point he made was that the workmanship defects were effectively generic defects. However, during those submissions in reply, a number of important things happened. First, Mr Williamson referred the Court of Appeal to the witness statement of Mr Leuthner (paragraph 39 above) which had identified one design error in respect of the sealing strip and two workmanship errors in respect of the absence of proper sealing and the failure properly to glue the membranes. He summarised that evidence at page 50A as being 'one design issue and two workmanship issues'. The Court of Appeal considered that evidence (and its adequacy) in some detail (see page 50B-C of the transcript). Various unanswered questions were identified, but a Member of the Bench observed "anyway, we are where we are".

63. Mr Reed did not accept that that was the only evidence on the issue, and referred the Court of Appeal to the detailed evidence of Mr Rice, which I have identified at paragraph 38 above. He said that it was Mr Rice's evidence (to the effect that the deficiencies were matters of workmanship), that had been encapsulated in Field J's Judgment. Again the Court of Appeal considered that evidence in some detail and again the point was made that, although there were questions that were not answered, the Court was stuck with the evidence that it had and that, as one Member of the Bench put it at page 51A, "we are not going to get any more help other than what we have here".

64. Mr Williamson submitted to the Court of Appeal that this exchange demonstrated the difficulties, because not only had the Judge erroneously thought that there had been a concession by one party to the other, but that, in addition, as he put it:

"… It is not clear to me, looking back on the papers, to what extent the issues of the kind your Lordships have been raising were actually gone into, debated, and certainly not decided. So there we are."

And on that rather fatalistic note, he moved on to deal with other matters.

D7. The Judgment of the Court of Appeal

65. The majority of the Judgment of the Court of Appeal was concerned with the central question of whether or not the defendant was liable under the Policy. Waller LJ considered that there was no such liability, but Moore-Bick and Richards LJJ both concluded that there was liability in principle under the policy. The judgment of Field J was therefore overturned on the central question.

66. The only paragraph of the judgment of Moore-Bick LJ on this issue, which is relevant to the application before me, is paragraph 48 which read as follows:

"I think it is clear that the defects in the sealing of the windows had to be rectified because they allowed water to enter the building. Sooner or later that would have caused physical damage to internal finishing and perhaps to other parts of the building, such as electrical installation. Mr Williamson submitted that some damage had been caused to the windows by the defective workmanship and it is true to say that the judge found that pin holes had been made in the sealing membrane by welding carried out by Seele's workmen on site, but I think that is properly to be regarded as part and parcel of inherently faulty workmanship rather than as consequential damage. The other defects identified by the judge are all in the nature of defects in the construction or the consequence of slipshod work. This was not a case, therefore, in which work carried out by Seele was

damaged due to a defect in workmanship; poor workmanship simply caused each of the windows to be defective."

67. Paragraphs 52-57 of Moore-Bick LJ's Judgment dealt with the question of the deductible. It is unnecessary for me to set out all of those paragraphs. However, at paragraphs 56-57, Moore-Bick LJ dealt in turn with each of the three possibilities a), b) and c) identified in the grounds of appeal, and referred to at paragraph 49 above. His conclusions were as follows:

"56. I can start with the water-testing. That was not the cause of the damage; it merely demonstrated that there were deficiencies in the sealing of the windows, which simply throws one back to the installation of the defective windows. **I do not think that the installation of defective windows can be regarded as an event for these purposes either, however. If they had all suffered from a common defect in design and manufacture which lay at the root of the problem, it might have been possible to argue, despite the number of separate units involved, that the installation of windows with a common defect was an event for these purposes, but as I understand the judge's findings, that is not really the case. It is true there were defects in the design and manufacture of the termination bars, but it is not at all clear that of itself was sufficient to cause each of the seals to fail. Rather the impression one obtains from the findings in paragraph 5 of the judgment below is that poor workmanship was really to blame. It seems fairly clear that similar shortcomings in workmanship affected all the windows and I am prepared to assume for present purposes that in each case the same mistakes were made.** However there is no evidence that those mistakes were attributable to a single event, such as giving the workmen wrong instructions which they then conscientiously followed so as to produce a series of similar defects. Again, had that been the case, it might have been possible to argue that giving faulty instructions was the unifying event, but the judge's findings point to the conclusion that the defects were simply the result of poor workmanship repeated over and over again.

57. That leaves the implementation of the programme of work to make good the defects in the windows. The fact that all the access damage formed part of single programme of remedial works no doubt represents a unifying factor of a kind, but I do not think that either the decision to carry out the programme of remedial work or the implementation of that programme amounts to an event of the kind contemplated by the clause. The remedial work provided the context in which the damage was caused, but was not itself the underlying cause of it. That lay in the defects which gave rise to the need for it. In these circumstances I do not think that it is possible to identify a single event that can be regarded as the underlying cause of all the access damage required to enable the defective sealing membranes to be renewed."

68. Accordingly Moore-Bick LJ concluded that the answer to Issue 13 was: "the workmanship deficiencies to each window represent a separate occurrence; there was a series of occurrences, but they did not arise out of one event." Richards LJ agreed with that analysis and that answer.

E. ANALYSIS AND CONCLUSIONS IN RESPECT OF THE DESIGN AMENDMENTS

E1. Issue Estoppel

E1.1. Was The 'Design v Workmanship' Issue Raised Before And Determined by Field J?

69. In my judgment, the issue as to whether or not these defects were a matter of workmanship or a matter of design was an issue that was before Field J and was determined by him in favour of the defendant. I have reached that conclusion for a number of reasons.

70. First, at paragraph 11b of its defence, the defendant expressly raised the argument that the defects were matters of workmanship, and therefore the deductible applied in respect of every repaired window. It was therefore for the claimant to counter that argument. The claimant did that in two ways. Its primary submission was that, even if the defects were matters of workmanship, there was still only one event, for the reasons argued (ultimately unsuccessfully) by first Mr Sears and then Mr Williamson. But the claimant's second (and alternative) argument was to argue that at least some of the defects were matters of design. That case was expressly pleaded at paragraph 5.3 of the reply and in paragraph 2 of the answers to the request for further particulars. Accordingly there was, on the face of the pleadings, an issue between the parties as to whether at least some of these defects were deficiencies of design rather than workmanship.

71. Secondly, that issue was the subject of evidence adduced by both parties. I have set out that evidence at paragraphs 38 and 39 above. It was plain on the face of the witness statements that there was at least a measure of agreement between the parties that many of the defects in the windows were indeed matters of workmanship. But from the evidence of both Mr Holzleitner and Mr Leuthner, it seems clear that the claimant was maintaining that there were at least some design defects as well. On the face of paragraph 5 of the Judgment of Field J, he resolved this (limited) dispute in favour of the defendant.

72. Thirdly, whilst Issue 13 made express reference to workmanship deficiencies, and made no express reference to design, that was simply because the defendant had pleaded a positive case as to workmanship deficiencies. If the claimant wished to have a favourable answer on Issue 13, then one obvious way to achieve that was to obtain findings to the effect that the deficiencies were, at least in part, matters of design. That was what, particularly through the statements referred to above, they endeavoured to do. I consider that the differences between the parties on this issue were evident prior to the trial before Field J, and became even more marked when the concession was made by the defendant in opening that design deficiencies were indeed one single event/occurrence.

73. Of course I accept that the 'design v workmanship' issue was not as clearly identified as some of the others in the list adopted by David Steel J. I also accept that the absence of a schedule of the kind requested by Field J at the outset of the hearing only served to muddy the waters still further. But neither of these factors can detract from the conclusion that the 'design v workmanship' issue was in play on the pleadings and was a matter on which both sides adduced evidence. It was also a matter on which the differences between the parties were limited; Mr Leuthner, for example, agreed that two out of the three defects were indeed matters of workmanship, not design.

74. Most important of all, I am in no doubt that the (strictly limited) 'design v workmanship' issue was determined by Field J in favour of the defendant. Although it might fairly be said that paragraph 5 of his Judgment is a little equivocal at times, it leads the reader to the overwhelming conclusion that the Judge had concluded that the defects in the windows were matters of workmanship.

75. What is more, that is precisely how paragraph 5 of Field J's judgment was treated subsequently, both by the claimant and by the Court of Appeal. At paragraphs 53, 55 and 57 above I have already referred to Mr Williamson's acceptance that paragraph 5 was indeed a finding that the defects were due to poor workmanship. And, as I have already pointed out, Moore-Bick LJ at paragraphs 48 and 56 of his own Judgment, also concluded that the Judge's findings at paragraph 5 lead to the conclusion that "poor workmanship was really to blame".

76. It seems to me therefore, that, on that analysis, Field J decided - on the basis of the evidence before him - that these defects were matters of workmanship. Furthermore, those findings were not

the subject of an appeal: the issue that arose in respect of Issue 13 in the Court of Appeal was rather different, and arose out of the Judge's error in attributing a concession to the claimant which it had not made. Mr Williamson made plain to the Court of Appeal that he did not contest paragraph 5 of Field J's Judgment.

77. For those reasons, therefore, it seems to me that paragraph 5 of Field J's Judgment amounted to a finding that the defects in the windows were matters of workmanship and that, absent special circumstances, this is a finding which cannot now be opened up by the claimant in an attempt to amend its claim to allege that the majority of the defects were matters of design, after all.

E1.2 Was The 'Design v Workmanship' Issue Raised Before And Determined By The Court Of Appeal?

78. Now assume that I am wrong, and the 'design v workmanship' issue was either not before Field J and/or not decided by him. The question then becomes whether that issue was raised before and/or decided by the Court of Appeal. In my judgment, the answer is that it was.

79. I have set out at some length, at paragraphs 53-64 above, passages from the transcript of the hearing before the Court of Appeal in which the Court wrestled, during the oral argument, with the evidence on this issue, and the parties' respective submissions. The Court plainly found the situation to be unsatisfactory: hence the repeated comment that "we are where we are". But by the same token, the Court resolved that it had to do its best on the limited material available. The Court expressly asked questions about the nature of the defects and whether they could be attributable to errors of design or workmanship.

80. Furthermore, at paragraphs 48 and 56 of the Judgment of Moore-Bick LJ (in particular in the passage that I have highlighted at paragraph 67 above), the Court of Appeal reached an unequivocal answer on that issue. Having noted that there were certain defects in the design or manufacture of the termination bars, Moore-Bick LJ then put that item to one side because, in his view, it was insufficient to have caused the seals to fail. He emphasised that it was poor workmanship that was to blame for the significant defects. He concluded that the judge's findings pointed to the conclusion (with which he apparently agreed) that the defects "were simply the result of poor workmanship repeated over and over again". Moreover, in reaching this conclusion, it seems to me that he was doing no more than acknowledging Mr Williamson's acceptance (paragraphs 53, 55 and 57 above) that the defects were matters of workmanship.

81. Accordingly, if (contrary to my primary view) the 'design v workmanship' issue was either not squarely before or was not determined by Field J, then it was a matter which was before the Court of Appeal and was determined by them, in particular in the Judgment of Moore-Bick LJ. Again, therefore, absent special circumstances, the question of issue estoppel must arise as a result of the claimant's attempt to plead a new case that the defects were almost exclusively matters of design. I deal below with the three points taken by Mr Williamson which might be said to amount to special circumstances: the potential confusion in the way in which the issue emerged; the submission that any finding as to workmanship was not part of the claimant's cause of action, so that issue estoppel is inapplicable in principle; and the fact that the claim which gives rise to the assertion of issue estoppel arises in the same proceedings as the earlier findings.

E1.3. The Potential Confusion

82. Another of the themes underpinning the whole of Mr Williamson's submissions was what he suggested was the potential confusion between the parties (and the various courts who heard these matters) as to whether or not the 'design v workmanship' issue was really in play at all. In my judgment, for the reasons set out below, there was or should have been no such confusion but, if there was, it was a matter within the claimant's knowledge and control.

83. I have already explained at paragraph 31 above that, in my judgment, the 'design v workmanship' issue arose the moment that the defendant pleaded a positive case that the workmanship defects would give rise to one occurrence/event per repaired window. From then on, the claimant had to decide what its response was to such a case. Although the claimant's primary argument was that, even if the defects were due to workmanship, they still arose out of a single event, the pleadings and the evidence made clear that the claimant also put forward an alternative argument, that at least some of the defects were attributable to design. Such a case was both pleaded and advanced in the evidence. There can be no question of confusion.

84. It may be that, with hindsight, the claimant wishes that its own case had been more fully pleaded or more fully advanced in the evidence. But it seems to me that that is irrelevant. The design argument was open to the claimant and the claimant duly advanced it, albeit in a less than convincing way. By the time the matter got to the Court of Appeal, the concession was made (see paragraphs 53, 55 and 57 above) that the defects were indeed matters of workmanship. In the light of the evidence (and in particular the claimant's own evidence that at least two out of three of the defects were matters of workmanship anyway), and the specific findings of Field J, I consider that that concession was rightly made.

85. For these reasons, I do not accept that there was any confusion in relation to this issue before Field J, or indeed the Court of Appeal. But if there was, it seems to me that it was the claimant's responsibility, because it stemmed from the way in which the claimant chose to put its case originally. Certainly once the concession had been made by the defendant at the outset of the hearing before Field J, the claimant could have been in no doubt that, if it had a sustainable case as to design deficiencies, now was the time to make it. And even assuming (which I do not accept) that the concession took the claimant by surprise, then at the very least, what should have happened before Field J was a clear statement by counsel then representing the claimant that this was a matter which could not be dealt with at the trial and which would have to be left over until a later hearing.

86. I do not believe that this last point can be over-emphasised. It is the claimant's case on this application that the design allegations are, essentially, new and have not been raised or decided before. I venture to suggest that both tribunals would have been surprised had it been suggested that all of the evidence and the submissions about the nature of the defects in the windows (and whether they were workmanship or design) existed in a sort of vacuum, and that the claimant would have another chance to run a completely different case as to the cause of the deficiencies at some later date. The Lord Justice of Appeal who repeatedly observed that "we are where we are" would, I think, have been surprised to have been told that, actually, we were not there at all, and that none of the details with which he was struggling mattered in any way, because it was always open to the claimant to run a new and different case as to the cause of the deficiencies in the windows at a later date. In fact, no such suggestion or warning was made to Field J or the Court of Appeal because, in my judgment, that was not how the claimant saw the case.

87. Accordingly, I conclude that, in truth, there was no confusion on this point. If there was, the claimant had numerous opportunities to deal with it and did not take them. That is not therefore a special circumstance which could operate to deny the issue estoppel argument.

E1.4. The Argument As To The Cause Of Action

88. Mr Williamson's next point was the submission that, because the operation of the deductible formed no part of the claimant's cause of action, issue estoppel could not arise. I have concluded that, if the application of the issue estoppel principle should be so restricted (as to which I reach no conclusion), the principle would still apply in the present case.

89. I accept Mr Reed's submission that the £10,000 deductible was identified in the contract of insurance and was described as a "Retained Liability". In other words, if an event had occurred which cost £9,999 to remedy, then the claimant would have had no cause of action at all, because the claimant's retained liability would have overtopped the amount of any putative claim.

90. On that analysis, in order to have a valid cause of action in a situation like this, the claimant needed to demonstrate a liability on the part of the defendant which was greater than the liability which the claimant itself had retained. Being able to demonstrate this was an inherent ingredient of the claimant's cause of action. Thus, the Court of Appeal's decision on the deductible point at Issue 13, which was itself a reflection of the 'design v workmanship' issue, went to an element of the claimant's cause of action. The principle of issue estoppel would therefore apply to this issue.

E1.5. The Same Proceedings

91. The final point is whether the fact that this debate has arisen at a later stage of the same proceedings, rather than in subsequent proceedings, makes any difference to the issue estoppel argument.

92. In my judgment, there will be cases where the fact that the issue estoppel argument arises at a later stage of the same proceedings may constitute a 'special circumstance' of the type envisaged in **Arnold**. I am conscious that the CPR encourages the parties and the court to try and find ways in which the underlying disputes between the parties can be resolved in the quickest and most cost-effective way possible, having regard to the overriding objective. This means that there has been an increase in the number of cases which are resolved by way of preliminary issues, sub-trials and the like. In those circumstances, it is possible to see how a potential issue might slip completely through the net early on, and be decided as it were by default, only for it to become of great significance and relevance at a later date. In such circumstances, I could see that a court may baulk at the potentially draconian consequences of the issue estoppel principle.

93. However, I am also satisfied that this is not such a case. The 'design v workmanship' issue was on the pleadings and was the subject of evidence. It was decided by both Field J and by the Court of Appeal without any indication of dissent from either side, and without any suggestion that the issue was, in fact, something to be determined at a later date. In those circumstances, it would I think be wrong to allow the matter to be litigated all over again. A claimant in an action which has already taken up the time of the Commercial Court and the Court of Appeal, and where quantum still has to be determined, cannot be surprised if the court looks askance at the suggestion that, almost two years after the first liability trial, an issue that has already been decided on the merits, and not by default, should be the subject of a new hearing.

E1.6. Summary On Issue Estoppel

94. In my judgment, the ‘design v workmanship’ issue has been determined by Field J and by the Court of Appeal. They both concluded that the defects were essentially matters of workmanship, not design, and that, in consequence, the single occurrence/event argument failed. For the reasons which I have given, there are no special circumstances which would prevent the issue estoppel point from being taken and applied.

95. Just leaving aside the point of principle for a moment, I should add that, in my judgment, it would be contrary to the CPR and the overriding objective to allow this liability question to be opened up again. It would be both harassing and oppressive for the defendant to face a second liability trial on matters which were canvassed before (and determined by) Field J and the Court of Appeal. The parties always envisaged a trial on liability and then a quantum hearing. They have had a trial on liability, with a further hearing in the Court of Appeal. The Court of Appeal has made findings which, subject to the quantum amendments dealt with below, would allow the quantification of the claim now to be made. It would be inappropriate, and contrary to the overriding objective, to allow the claimant to amend to run a new case which opens up those findings.

96. Accordingly, I have concluded that the design amendments should not be allowed because they are seeking to reopen an issue which has already been decided by both Field J and the Court of Appeal.

E2. Henderson Abuse

E2.1. Introduction

97. Now let us assume that I am wrong, and that the ‘design v workmanship’ issue was not raised before or determined by Field J or the Court of Appeal. Is it an issue which could and should have been canvassed before and determined by Field J and/or the Court of Appeal and, if so, on a broad, merits-based judgment, should the claimant be allowed to raise the design amendments at this stage? For the reasons set out below, I have concluded that, on this assumption, the design amendments could and should have been raised before and determined by Field J and the Court of Appeal, and that it would be contrary to the principles of **Henderson** abuse to allow those amendments to be made now. This conclusion would also be relevant if, again contrary to my primary view, the principle of issue estoppel is inapplicable because the deductible/retained liability issue was not a part of the claimant’s cause of action.

E2.2. Could The Issue Have Been Raised Before?

98. On the assumption that the issue was not raised before, there can be no doubt that it could have been raised both before Field J and the Court of Appeal. The workmanship case was pleaded by the defendant; the design case was the obvious counter to it, made more so by the concession at the outset of the hearing before Field J that design was one event for the purposes of the deductible. There were passages in the witness statements that dealt with it. Thus, it cannot seriously be argued that this issue could not have been raised for determination.

E2.3 Should The Issue Have Been Raised Before?

99. In my judgment, there can also be no doubt that (on the assumption that it was not) the issue should have been raised both before Field J and before the Court of Appeal. I reiterate the points made above. The parties wanted to have one hearing on liability/policy matters, so that they would either be in a position to resolve the dispute without a further hearing or, failing that, have a hearing simply devoted to the figures. It was therefore the parties’ clear intention to have a hearing on all the

issues of liability before Field J. Although, as a matter of form, that hearing was a trial of 13 defined Issues (as opposed to a sub-trial on liability), I am in no doubt that this would have been regarded by the parties as a distinction without a difference, because these 13 Issues were regarded by both parties as the issues that arose between them on liability. In addition, of course, Issue 13 was a perfect vehicle for the 'design v workmanship' issue to be discussed and determined.

100. Just standing back from the detail, it is worth considering the contrary position. The claimant must now argue that, although the 'design v workmanship' issue was plainly one way in which the deductible point could be finally determined, and although both parties had evidence on that issue, that issue was (for unspecified reasons) not to be dealt with by Field J, and was only to be determined at a further (unspecified) hearing at a later date at which at least some of the evidence adduced before Field J would be relevant all over again. And, what is more, this odd way of conducting civil litigation was never mentioned to, let alone accepted by, the other side or Field J or the Court of Appeal. I am afraid that I consider such a submission to be untenable.

101. There are also wider issues here. If there is no schedule of agreed or assumed facts (as per **McLoughlin)** then, in a case of this sort, the judge has to work out the factual basis of the claim, in order to decide whether or not the policy answers to that claim or not. Despite Field J's request, the parties did not produce a schedule (for "wading through" or otherwise), or a list of agreed facts. The only alternative, therefore, was for the parties to adduce evidence as to the factual basis of the claim so that the issues of liability could be properly determined. The onus was therefore on the parties to raise all policy/liability matters which the judge was required to determine at that trial.

102. Moreover, I consider that it was impossible for a court to consider either whether the claim fell within the policy at all, or the nature and extent of the remedial work (another point that was relevant to the claims being made) without knowing what defects were being rectified and how they had arisen. That explains why the 'design v workmanship' issue was raised for discussion on a number of occasions at the hearing before the Court of Appeal. That is a further reason why the issue as to whether these defects were matters of design or workmanship really had to be dealt with at the trial in front of Field J and the subsequent appeal.

E2.4 The Merits

103. Having concluded that the 'design v workmanship' issue could and should have been raised and determined at the hearing before Field J (and therefore, by extension, before the Court of Appeal) the next question is whether, taking a broad, merits – based approach to the facts, it is appropriate for the court to conclude that it would be contrary to the **Henderson** abuse principles, set out in **Section C. 2** above, to permit these amendments. How much was all this within the claimant's control, and to what extent would the defendant be gaining some sort of unfair windfall if the amendments were not now permitted?

104. As to control, I have set out the relevant facts above. The 'design v workmanship' issue could and should have been raised by the claimant: indeed, it was plainly and obviously in the claimant's interests to raise it at an early stage. Apparently, because the claimant felt that it had a better argument (to the effect that workmanship was one event), it did not pursue the design case with very much vigour and its evidence on the point was best described as thin. But that was entirely a matter for the claimant; it was part of the tactical decisions that it took two years ago. It was always within its control to raise the design case more forcefully, if of course it had the evidence to do so (which it may well not have done). Thus, this is not a case where the failure to raise or have determined the critical issue was outside the claimant's control.

105. Furthermore, I reject the submission that, in some way, the defendant will gain an unfair windfall if the design amendments are not allowed. The defendant has made its own case clear from the outset: that these defects were questions of workmanship and therefore gave rise to a whole series of separate occurrences for the purposes of Memorandum 18(3). The defendant has fought and won a liability hearing and, although it lost on the principal liability issue before the Court of Appeal, it was successful on the deductible issue. It would be wholly inappropriate to allow the defendant to be deprived of the fruits of that victory by allowing the claimant to open up the 'design v workmanship' issue at this late stage.

E2.5 The Same Proceedings

106. For completeness, I ask myself the same question as before, namely whether the fact that this point arises in on-going proceedings (as opposed to subsequent litigation) should make any difference to the outcome. Again I have concluded that it should not. The reasoning in paragraphs 91-93 above applies again.

107. Again, I accept that, where certain issues are dealt with by the court in advance of others, genuine mistakes may occur, where it would be unfair and unreasonable to prevent one party from raising an issue on the merits which, for whatever reason, has not been the subject of a clear determination before. **Tannu** and **Aldi Stores** are good recent examples of such a case. But at the same time, the court should be astute to prevent a claiming party from putting its case one way, thereby causing the other side to incur considerable expense, only for the claiming party to lose and then come up with a different way of putting the same case, so as to begin the process all over again. The Civil Procedure Rules are designed to avoid the litigation equivalent of death by a thousand cuts. I have no doubt that, on the basis of the facts as I have summarised them in **Section D** above, it would be wrong and unfair to allow the claimant in these proceedings to go back to square one and attempt to run a case which could and should have been raised years ago.

108. Therefore, even if it is "unusual" for **Henderson** abuse to arise in the same proceedings, then I consider that, on the facts of this case as set out in **Section D** above, it is appropriate for those principles to apply here. It would be plainly oppressive for the defendant to be vexed again with this issue, on which it has already been successful.

E2.6 Summary

109. Accordingly, I consider that, if I am wrong as to issue estoppel, the proposed design amendments fall foul of the principles relating to **Henderson** abuse. The design amendments could and should have been raised before and, on a broad merits-based approach, it would be unreasonable in the circumstances to allow those matters to be raised afresh now.

E3 Conclusions As To Design Amendments

110. For the reasons set out in **Section E1**, I have concluded that the issue underlying the design amendments has already been determined against the claimant and cannot now be opened up.

111. If I am wrong about that then, for the reasons set out in **Section E2** above, I have concluded that the case advanced by the design amendments could and should have been raised years ago and that it would be unfair, contrary to the CPR, and an abuse of the process of the court to allow such a case to be raised at this stage.

112. For those reasons, therefore, I refuse to allow the design amendments.

F. THE APPLICABLE PRINCIPLES IN RESPECT OF THE QUANTUM AMENDMENTS

F1. General

113. Plainly, the principles concerned with amendments generally noted in **Section B** above are applicable to the quantum amendments. By reference to the decision of the House of Lords in **Three Rivers DC v Bank of England** (No 3) [2001] UKHL 16, Mr Williamson reiterates his submission that substantial disputes of fact and law should not be the subject of extensive debate on an application to amend or an application to strike out; that such disputes are properly matters for the trial. He relies on the words of Lord Hobhouse of Woodborough who said that, whilst at the trial, the test was which party's case was more probable, having regard to the burden of proof, at the interlocutory stage "the criterion… is not one of probabilities; it is absence of reality".

114. The remaining principles of potential relevance concern the law of insurance, it being Mr Reed's case that the quantum amendments are contrary to a number of such principles. It is to them that I now briefly turn.

F2. Consequential Loss in Insurance Contracts

115. It is a general rule of insurance law that, unless the policy provides otherwise, it will not extend to consequential loss: see **Theobald v The Railway Passengers Assurance Co** [1854] 10 EX 45. The claim will usually be restricted to the loss which is immediately connected with the insured event and, in the case of property insurance, an 'incident of the property' insured: see **Castellain v Preston** [1883] 11 QBD 380.

116. However, it is important to note that the meaning of 'consequential loss' is not immutable and may vary according to the context: see **The Law of Insurance Contracts,** 4th Edition, by Malcolm Clarke, paragraph 16-2A4 and **Treitel on Contracts**, chapter 21, section 1(2)(e).

117. The majority of the cases concerned with the recoverability or otherwise of consequential loss in the insurance context are concerned with loss of profit, loss of trading opportunities and the like. The claimant in the present case does not make a similar claim.

F3. Delay Costs

118. However, in the present case, some at least of the claims now being made by the claimant against the defendant are in respect of delay costs. Mr Reed drew my attention to the case of **The Field Steamship Company Limited v Burr** [1899] 1 QB 579, where the costs of unloading a putrid cargo were disallowed. AL Smith LJ said:

"If loss is occasioned by delay in the discharge of cargo, whether sound, unsound, or putrid, at the port of destination, this is not damage to hull and machinery, and the loss must be covered, if covered at all, by one of those policies which cover losses not undertaken by underwriters upon a policy upon hull and machinery, or possibly by a policy upon freight. A delay occasioned by discharging cargo is not, as before stated, a deprivation of the use of the hull and machinery to the owner by reason of an injury to the subject-matter insured, and forms no part of the deterioration to hull and machinery for which an underwriter upon hull and machinery is alone liable and a fortiori the mere extra expense of getting out the cargo is no part of his liability."

119. On the basis of that, rather elderly authority, it would appear that delay costs may be regarded as consequential loss and may, therefore not be recoverable although, ultimately, that will depend on the construction of the particular contract of insurance in question.

F4. "In Respect Of"

120. It is part of the claimant's case in the underlying action that, although Exception 4 purported to exclude "penalties under contract for delay or non-completion or consequential loss not specifically provided for herein", the words in Memorandum 18(3) were wide enough to include consequential loss. The words in question are:

"The Insurers will additionally indemnify the Insured **in respect of** intentional damage necessarily caused to the Insured Property…"

121. There was a dispute about the proper interpretation of the phrase "in respect of" and reference was made to the recent Court of Appeal decision in **Tesco Stores Limited v Constable and Others** [2008] EWCA Civ 362. In that case Tuckey LJ said that the words 'in respect of' meant 'for' and not merely 'caused by', 'consequential upon' or 'in connection with'. He went on to say that, under the policy in question, the liability had to be "for loss and/or damage to material property of the person whose property it is - liability for loss suffered by someone else as a consequence of such damage is not 'in respect of' it". This was sufficient to defeat the claimant's claim because the property in question was not owned by the claimant or the party it had agreed to compensate in a deed of covenant. Mr Williamson contended that such a decision was of no assistance to the present case, where the Court of Appeal have already found that the terms of the policy did allow the claimant to recover the costs incurred in respect of accessing the windows.

G. THE FACTUAL BASIS OF THE QUANTUM AMENDMENTS

G1. The Original Claims

122. The quantum of the original claim was pleaded at paragraph 13 of the particulars of claim in the following terms:

"13.1. The cost of dismantling and/or reinstating works by others- £638,860.11.

13.2. The cost of supervising dismantling/reinstatement of works by others- £84,808.63

13.3. The cost of installing replacement windows- £427,987.00

13.4. Materials- £40,081.84

13.5. Additional tests- £13,601.14

13.6. Supervision of the claimant's own remedial works- £32,367.76

Total £1,237,709.48".

123. Both Field J and the Court of Appeal ruled that the claimant was not entitled to the costs of remediation; that their claim had to be limited to the costs of access. That is accepted by Mr Williamson. In consequence of that, the claims noted above at paragraphs 13.3, 13.4, 13.5, and 13.6, all fall outside the terms of the policy. The proposed amendments delete each of those four items. I regard those proposed amendments as being entirely in line with the earlier decision of the Court of Appeal. I accept Mr Reed's submission that, but for the proposed deletions, he would be entitled to strike out those four items from the quantum of the claim.

124. The claim at paragraph 13.2 is replicated in full in the proposed amendments at paragraph 19. Particular points arise in relation to this head of claim which are dealt with in **Section H8** below. For

present purposes, I am content to assume that this item may be recoverable under the terms of the judgment of the Court of Appeal.

125. That leaves the largest item of the original claim at paragraph 13.1, in the sum of £638,860.11. That item of claim may also be recoverable, either in whole or in part, as a result of the Court of Appeal's decision. In other words, that item may comprise or at least include the costs of access, which it has been decided the claimant can recover in principle under the policy. That item is the subject of the most detailed of the proposed amendments (paragraphs 14-18 of the new pleading) where, amongst other things, the total has been increased to £890,072.71. However, before going on to look at those amendments, it is necessary to consider how the original claim for these costs under paragraph 13.1 was dealt with at the trial.

G2. The Access/Remediation Items Before Field J

126. As we have already seen, Issues 1-13 did not include any quantum issues. However, the claim at paragraph 13.1, which was itself the subject of a breakdown attached to the claimant's further information, was the subject of detailed evidence from both sides. Further, at the close of the trial, Field J asked for a schedule which took each of the items that made up the claim in paragraph 13.1 and set out the parties' competing contentions in relation to each item.

127. It is unnecessary, in an already over-long Judgment, for me to set out the detail of that schedule. But I note that the claimant's case in relation to the majority of the items was that the costs were incurred either to enable access for remediation works and/or 'in order to carry out remedial works'. Moreover, the defendant's case in relation to the majority of the items was that, to the extent that they were costs of remediation, they were irrecoverable. The defendant also said that, no separate sum having been identified for access costs, the claim was a composite claim which could not succeed. In addition, the defendant took the point that many of the items were, in truth, consequential costs (because, for example, they related to delay) although, as Mr Reed accepted, the points of principle as to consequential loss, identified in **Section F2-F4** above, were not argued before Field J.

G3. The Judgment Of Field J

128. The judge did not, in his judgment, go through each of the items that made up the claim and resolve the disputes as noted in the schedule. Instead, he dealt with certain quantum disputes in a more general way, following on from his conclusion (cited in paragraph 46 above) that he should deal with certain other matters, despite his view that the claimant had no claim under the policy.

129. In paragraph 34 of his judgment, having said that it was plain that the cost of repairing and rectifying the defects in the windows were not covered by the policy, because such costs were not in respect of intentional damage, Field J went on to say, in respect of access costs, that:

"Moreover, the onus is on Seele to establish that a cost for which it seeks to be indemnified under Memorandum 18 (3) was solely in respect of access works to enable the repair and rectification or that a specified part of a charge it had to bear is solely referable to such works."

130. At paragraph 37, the judge dealt with 'costs levied in respect of delays and parallel working'. He differentiated between: a) delays to the project caused by the access work on the cladding and internal finishes; and b) measures that were necessary to allow the access works to be carried on at the same time as other work on the project. He rejected the claim at a), saying:

“In my opinion, costs due to delay are not ‘in respect of’ the intentional access work. Further, such costs in the context of this Contractors All Risk policy are a consequential loss, and as such are excluded by Exception 4. Additionally, the onus of proof being on Seele, the evidence did not establish that the delays that were charged for were caused solely by the access works or that there was a reliable basis of apportionment.”

As to b), the costs of parallel working, the judge said that:

“… if such measures only had to be taken because of the remedial access works and the timing of the works was determined by consideration of the overall impact of such work on completion of the project, the costs of such measures would in my opinion be recoverable under Memorandum 18(3)”.

131. At paragraph 39 Field J also addressed, briefly, the issue of apportionment:

“Where a charge was made for the provision of facilities which were needed partly because of the access remedial works and partly for some other reason, Seele submitted in its written closing submissions that the charge could be apportioned. This was the first time of apportionment surfaced at the hearing. In his closing submissions in reply, Mr Reed submitted that as a matter of principle, there is no right to an indemnity for an apportioned sum. It seems to me that there is considerable force in Mr Reed’s argument but I decline to express a concluded view, particularly since I have not had the benefit of any submissions from Mr Sears in reply to Mr Reed.”

G4. The Appeal

132. The claimant endeavoured to appeal those findings of Field J which I have set out above. The relevant paragraphs of the grounds of appeal are 9-13, which were in the following terms:

“9. The learned judge held that on a true construction of the Policy, and/or as a matter of general law, the onus was on the Appellant to establish that a cost for which it seeks to be indemnified under Memorandum 18(3) was a) solely in respect of access works to enable repair and rectification or b) that a specified part of the charge it had to bear was solely referable to such works. The Appellant contends that the learned Judge erred in law and ought to have held that, on a true construction of the Policy and/or as a matter of general law, it was not necessary for the Appellant to show that there was no other cause, and/or that the Appellant was in any event entitled to be indemnified for costs which relate partly to remedial access works, and partly to other works (even if those works are not within the scope of coverage), provided that either the remedial access works were the dominant and/or primary cause for incurring the costs, or in the quantum hearing there is an evidentiary basis on which to apportion such costs.

10. The learned judge held that, on a true construction of the Policy, even if Memorandum 18(3) did apply, the Appellant would only be entitled to the direct cost of the dismantlement and the reinstatement of the cladding and internal finishes, which was required to give access to the defective windows. The Appellant contends that the learned judge erred in law and ought to have held that, on a true construction of the Policy, Memorandum 18(3) encompasses and includes a) indirect costs of dismantling and reinstatement work, and b) costs arising from the works on the windows and the defective parts.

11. The learned judge held that on a true construction of the Policy costs levied on the Appellant in respect of delays to the project caused by the access work on the cladding and internal finishes were in any event irrecoverable because a) they were not “in respect of” intentional damage necessarily caused to gain access to remedy a defect, and b) they were consequential losses excluded by

Exception 4 of the Policy. The Appellant contends that the learned judge erred in law and ought to have held that, on a true construction of the Policy, costs levied on the Appellant, which costs arose from delays caused by intentional damage, and incurred as a result of an altered time schedule for carrying out the works, were recoverable under the Policy because a) they were “in respect of” intentional damage, and b) were not consequential losses within the meaning of Exception 4.

12. The learned judge held that costs levied on the Appellant in respect of delays to the project caused by the access work on the cladding and internal finishes were irrecoverable for the additional reason that the evidence did not establish a) that the costs levied were caused solely for the purposes of the access works or b) that there was a reliable basis for apportionment. The Appellant contends that the learned Judge erred in law and ought to have held that it was not necessary for the Appellant to establish that the sole cause of those charges was the access works, and that any apportionment issues in respect of each charge were really quantum issues falling under Issue 14, and hence were to be determined after trial of the issues of liability (Issues 1-13).

13. The learned Judge held that costs levied on the Appellant in respect of measures that were necessary to allow the access works to be carried on at the same time as other work on the project were recoverable by the Appellant only if such measures had to be taken because of the remedial access works and the timing of those works was determined by consideration of the overall impact of such work on the completion of the project. The Appellant contends that the learned judge erred in law and ought to have held that these costs were recoverable even if the measures were taken partly for the purpose of remedial access works, and partly for other reasons, provided that the dominant and/or primary cause for the costs was the remedial access works, or alternatively if a reliable basis of apportionment could be established when determining issues of quantum.”

133. In essence, therefore, the claimant challenged the judge’s findings as to apportionment, consequential loss, the meaning of ‘in respect of’ and whether a cost should be solely attributable to the access works in order to be recoverable. On 26.9.07, Rix LJ granted the claimant permission to appeal on all grounds, which therefore included the grounds noted in paragraph 132 above.

134. However, the argument in the Court of Appeal was essentially limited to the principal issue of liability under the policy, and the deductible point referred to above. The issues raised in grounds 9-13 were not argued. This was dealt with at paragraph 59 of the judgment of Moore-Bick LJ in the following terms:

“A number of other issues decided by the judge in the course of answering the questions raised by the preliminary issues were the subject of appeal. However, since they are primarily relevant to the determination of damages, it was agreed between the parties that they should make submissions on the status of those decisions at the trial of damages and that, insofar as they might be held to be binding, they should be challenged, if necessary, on appeal from the later judgment, subject to obtaining permission to appeal in the ordinary way. It is unnecessary, therefore, to consider them on the present appeal.”

135. Accordingly, I am in the slightly unusual position in which a number of the points relied upon by Mr Reed in opposing the amendments are matters on which he has been successful, at least up to a point, in front of Field J, but in respect of which Rix LJ has granted the claimant permission to appeal, and which appeal, by the agreement of the parties, has not yet been resolved.

G5. The Amendments

136. As noted above, the amendments properly delete the original paragraphs 13.3-13.6. They continue the claim for supervision in the sum of £84,808.63. And they replace the claim for dismantling and/or reinstating works by others of £638,860.11 with a total claim of £890,072.71 said to be "the third party access costs". These costs are the subject of Annex 3 in which they are the subject of a one-page breakdown. Many of these items were the same as the items claimed under the original paragraph 13.1, but some of the items have been altered and some are entirely new. It is not unfair to describe Annex 3 as being somewhat skeletal in nature. No breakdowns or other supporting material for the individual figures have been provided.

H. ANALYSIS AND CONCLUSIONS IN RESPECT OF QUANTUM AMENDMENTS

H1. The Defendant's Objections

137. The defendant objects to the quantum amendments. The objections as to the separate supervision claim are dealt with at **Section H8** below. The principal disputes arise in connection with the new claim for the third party access costs. The points taken by the defendant range from objections of principle to criticisms of the cogency of the new claim, and the lack of proper particularisation. I endeavour to deal with what I perceive to be the points of principle at **Sections H2-H5 below**, before looking at the specific cogency/pleading points at **Sections H6-H7 below.**

H2. Access Costs

138. The claims made in Annex 3 are said to be third party access costs. Such costs are recoverable in principle, as a result of the decision of the Court of Appeal. There is therefore no reason in principle why such costs should not be the subject of this amendment.

139. The defendant complains that many of these items were originally said to be straightforward remedial costs and that therefore, even if they include an element of access costs, they must also include sums which cannot be recovered. The defendant maintains that it is entitled to know how the claimant puts its case in relation to each of these items. Specifically, by reference to the claimant's own grounds of appeal (paragraph 132 above), the defendant maintains that it is entitled to know what amount within these items is being apportioned to access costs and why, and/or, if the claimant maintains that the dominant cause of the entire item was access, what the particulars are of such a case on causation.

140. I have considerable sympathy for the defendant's position. I do not believe that it is acceptable for the claimant to put forward a claim in these circumstances without providing that sort of information. But, so it seems to me, that is a matter of pleading and particulars; it is not a matter of underlying principle. I therefore return to it in **Section H6** below.

H3. Parallel Working Costs

141. It appears that some elements within the amended claim are in respect of parallel working costs. It seems to me that, as a matter of principle, such costs can be properly claimed in these proceedings, particularly given what Field J said about them in his judgment (see paragraph 130 above). Again it may well be said by the defendant that, to the extent that the access costs claim includes for parallel working costs, such costs should be expressly identified. Again I have sympathy with that suggestion; but again it seems to me that it is something which goes not to principle, but to the formulation and particularisation of the amendments themselves.

H4. Consequential Loss

142. It is, I think, difficult to describe these claims as claims for consequential loss in the conventional sense, namely loss of profit and so on. By the same token, however, it does appear that a number of these costs may be properly described as delay-related costs and, in accordance with the principles noted above, those might well be classified as consequential losses (see paragraphs 118-119 above). For that reason, Mr Reed argues that I should not grant permission to amend.

143. There are, as I see it, three separate difficulties with that argument. The first is that, in order for me to accept that submission, I would have to try out and decide all of the points of principle noted in **Section F2-F4** above. It would amount to a trial of a series of preliminary issues of law. It would not be appropriate to turn the application to amend into some form of (further) preliminary issue hearing. I should have thought that, in this of all cases, the parties would be sympathetic to such a view.

144. Secondly, even if I was minded to try and resolve these issues in advance of the quantum hearing, it may well be impossible for me to do so without hearing oral evidence as to factual matrix and the like. Again, it seems to me that it would not be appropriate to refuse the application in advance of any such hearing.

145. Thirdly, it does not seem to me to be appropriate to decide these points of law on an interlocutory basis. After all, although a number of these points were decided against the claimant by Field J, Rix LJ gave the claimant unqualified permission to appeal on such points. I think Mr Williamson is right to say that Rix LJ's decision is binding on me, certainly for the purposes of this application. On an interlocutory application of this kind, I would be very reluctant to reach decisions which effectively deprived the claimant of the benefit of that permission to appeal.

146. Accordingly, it seems to me that, as things presently stand, the claimant can endeavour to persuade a judge at trial that it is entitled, under this contract of insurance, to recover delay costs. Thereafter, the status of any judgment on that issue, and its interaction with both the earlier decision of Field J, and the permission to appeal granted by Rix LJ, would be the subject of the sort of debate envisaged by Moore-Bick LJ in paragraph 59 of the judgment of the Court of Appeal.

147. There is a separate point, to the effect that the specific delay costs have not been properly or separately identified within the relevant item. I repeat what I have said before: that seems to me to be a legitimate point on the form of the pleadings, but I do not regard it as a point of principle.

H5. Causation

148. Following the hearing on 5th February, there was a further round of argument about whether the quantum amendments should be permitted in principle. The defendant alleged that there were two proximate causes of the loss – access costs on the one hand, which were covered by the policy, and the costs of remedying design and workmanship defects on the other, which were excluded under Memorandum 18(2) – and the court had no power to apportion loss between the two: see **Wayne Tank and Pump Co v Employers' Liability Assurance Corp** [1974] QB 57.

149. In many ways, this is a variant of the dominant cause argument noted above: was the cause of the expenditure the access, or the rectification of defects in design and workmanship? I therefore incline to the view that this may be principally a matter of pleading form, not principle. But, to the extent that it is a point of principle, its existence does not seem to me to be a reason to refuse the amendments, for the same reasons as are noted in paragraphs 143-146 above. These are points of law which should not be decided on an interlocutory basis; they may require evidence of fact; and are at

least potentially caught by the permission to appeal (because, on one view, they were within the claimant's grounds of appeal 9, 12 and 13).

H6. Dominant Cause/Apportionment of Cost

150. As noted above, one of the recurring themes in the defendant's case is that the claimant has refused to give proper particulars of its claim that either the dominant cause of a particular item was the access to the windows, or that, on an apportionment of the total cost, the claimant would be entitled to at least a proportion of the items claimed as access costs. As I have indicated, I have some considerable sympathy with that criticism. In a case where at least some of these claims may have been made under a different or at least a broader head (namely remedial works), and where that broader head of claim has been ruled out by the Court of Appeal, it does seem to me that it is incumbent upon the claimant to spell out how and why such sums are recoverable in any event.

151. Accordingly, I have concluded that, in relation to each of the items in Annex 3, the claimant ought to provide particulars as to its case as to the dominant cause (in both senses in which it arises here) and/or the basis of the cost apportionment sought. I also think that, where a claim is for delay costs, or parallel working, the claimant needs to spell that out, and identify the basis for the individual claim under the policy. I make clear that I do not expect this case to be extensively pleaded, but there must be sufficient information as to the way in which the claimant has approached these items in order for the defendant to know, on each of them, the case that it has to meet. I do not accept Mr Williamson's proposition that this can all be left over to the trial; whilst the judge's findings as to the dominant cause and/or the judge's apportionment exercise will depend, of course, on the evidence that is adduced, it is important for the parameters of that evidence to be set out plainly in the pleadings before the start of the trial.

H7. Lack Of Supporting Information

152. Mr Reed made a number of other criticisms of the items in Annex 3, and in particular, the dearth of information supporting each line item. Again, I sympathise with that criticism. It seems to me, particularly in the light of the history of this case, that the claimant really must provide a proper pack of detailed information relating to the quantum of the claim, so that the defendant can know what sum is claimed and how that sum is made up. This may, in turn, lead to the realisation that Annex 3 itself must be expanded or even rewritten.

H8. The Claim At Paragraph 19

153. As noted above, this is the claim for supervision. It seems to me that, as a matter of principle, it is arguable that such a claim is recoverable, provided that it can be demonstrated that it relates to access costs. The dominant cause/apportionment point may well arise again.

154. The points taken by Mr Reed in relation to this item include the suggestion that the bulk of the remedial works had been completed by the time the costs claimed under this item started to be incurred, so it cannot be recoverable. I can reach no conclusion on that point without hearing evidence. It cannot be a ground to refuse the amendment at this stage. However, the point having been raised by Mr Reed, it seems to me sensible for the claimant to consider it because, if this item is maintained and it turns out that Mr Reed is right on the facts, the claim will fail and severe cost orders may be made against the claimant in consequence.

H9. The Settlement

155. At one point in his submissions on behalf of the defendant, Mr Reed made the point that the settlement up the line between the claimant and Bovis Lend Lease (the project manager for the works) meant that, potentially, the total quantum of this claim could not be more than £350,000. There is a paragraph in Field J's judgment which touches on that issue. However, Mr Williamson demonstrated that that was not necessarily right, as a result of the relatively complex system of charges and contra charges operated between the parties. In any event, it does not seem to me that the settlement issue has any relevance to the application to amend.

H10. Summary

156. For the reasons set out above, I have concluded that there is no reason of principle to prevent the claimant from making the amendments identified in the draft particulars of claim. I therefore give permission for those amendments.

157. However, I consider that the particulars and supporting information in respect of the two live claims, namely the claim for £890,072.71 for third party access costs, and the claim for £84,808.63 for supervision, leave a good deal to be desired. This claim has been going on for too long, and has suffered too many 'mishaps' in the past, for the court to accept that, in some mysterious way, everything will turn out alright on the night. Accordingly, I require the claimant, within 28 days of today, to provide particulars of these two heads of claim. These particulars will:

a) Identify how each component figure is made up;

b) Come accompanied with a file, suitably divided, in which the documents which identify and support each component part of the claim are set out.

In other words, I envisage a quantum file which will contain every last relevant piece of paper that explains how these figures have been calculated or otherwise arrived at.

158. In addition, in relation to each of the items that make up the £890,072.71, I require the claimant to set out, in relatively brief terms, the detail of its case on dominant cause and/or apportionment of cost, whether (and if so to what extent) the claim includes a claim for delay costs, parallel working etc, and indeed any other point of relevance that has been raised during the extensive debate about these amendments. The defendant will then know the case that it has to meet, and those particulars as to dominant cause and/or apportionment etc. can be the subject of oral evidence at the quantum hearing.

159. I make clear that the provision of the information referred to at paragraphs 157 and 158 above is required for case management purposes in order to ensure a fair and proper trial. If any points arise on that information, they can be dealt with in the usual way. The necessary provision of this information does not affect my decision to give the claimant permission to make the quantum amendments.

I. CONCLUSIONS

160. For the reasons set out in **Section E** above, I refuse to allow the design amendments.

161. For the reasons set out in **Section H** above, I allow the quantum amendments. In addition, I require the claimant to provide the further particulars in relation to the quantum amendments, noted in paragraphs 157 and 158 above, within 28 days.

162. All consequential matters, including costs, will have to be dealt with at a separate hearing if they cannot be agreed.