

Neutral Citation Number: [2025] EWHC 1010 (TCC)

Case No: HT-2022-000435

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

Royal Courts of Justice, Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 28 April 2025

Before :

HHJ Stephen Davies sitting as a High Court Judge

Between :

MISS MICHELE CARRINGTON

Claimant

- and -

**AMERICAN INTERNATIONAL GROUP
UK LIMITED**

Defendant

James Newman (instructed by **HQ Law, Horsham**) for the **Claimant**

Elizabeth Boon (instructed by **Mills & Reeve, Manchester**) for the **Defendant**

Hearing dates: **19 March 2025**

Draft judgment sent **11 April 2025**

APPROVED JUDGMENT

Remote hand-down

This judgment was handed down remotely at 10:00am on 28 April 2025 by circulation to the parties or their representatives by email and by release to The National Archives.

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

His Honour Judge Stephen Davies

HHJ Stephen Davies:

1. This is my judgment on the three points which were argued before me on 19/3/25, namely: (a) the Defendant's submission that the Claimant should be refused permission to amend to rely on the case advanced in the current Amended Particulars of Claim served on 10/1/25; (b) the Defendant's submission that the claim should be struck out for breach of an unless order made on 11/10/24 (coupled with the Claimant's responsive submission that if there has been a breach she should have relief from sanctions); and (c) the Defendant's application dated 28/1/25, under which it seeks orders that the claims against it in relation to breach of an alleged duty to review and inspect be struck out under CPR Part 3.4(2)(a) and/or that summary judgment be entered against the Claimant on such claims under CPR Part 24.
2. The respective cases were fully and persuasively advanced by counsel for the Claimant and for the Defendant, to both of whom I am grateful.
3. The approach I adopt in this judgment is as follows. First, I will summarise the relevant facts. Second, I will consider the case advanced in the current version of the Amended Particulars of Claim. Third, I will address the merits of the strike-out/summary judgment application, because my determination on that application will be relevant to my consideration of the Defendant's submissions on amendment and/or strike-out for breach of unless order. Fourth, I will address the discretionary factors which are relevant to the amendment. Fifth, and finally, I will address the strike-out for breach of unless order / relief from sanctions issue.

The relevant facts

4. Since before 2010 the Claimant has been the owner of a house at 46 Thatcher Avenue, Torquay, Devon. It is a two-storey dwelling located adjacent to the sea overlooking Torbay in an exposed coastal location. For many years she has suffered from a number of significant medical conditions, and has been largely housebound though able to live independently with the assistance of a full-time live-in carer.
5. In 2010 Mr Godfrey, who is now retired and in his 90's, offered professional services as an architect, surveyor and contract administrator through two companies: the previous First Defendant, Godfrey Partnership Limited (**GPL**); and Godfreys Architects and Surveyors Limited (**GAS**). GAS had already been dissolved by the date these proceedings were issued, whereas GPL was dissolved after issue.
6. Originally GPL was the First Defendant. The Second Defendant, American International Group UK Limited, was sued as professional indemnity insurer of GAS at the relevant times under the provisions of the Third Parties (Rights against Insurers) Act 2010. Following the dissolution of GPL it is now sued in the same capacity in relation to GPL and is now the sole Defendant. For present purposes it is sufficient to refer to the two companies and to AIG collectively as Godfrey, because any issues as to which company performed which services and on what basis, and as to AIG's coverage for any liability which may be established against each company, are not material for the purposes of the present judgment.
7. Most of the following summary is taken from the Amended Particulars of Claim in its current form. Whilst the key issues are likely to be the subject of dispute at trial, it is common ground

on the authorities that in relation to the strike-out / summary judgment application and the amendment application I can and should proceed on the basis that the Claimant will be able to establish the facts as alleged by her at trial, save and to the extent that the Defendant is able to demonstrate at this stage that she has no real prospect of doing so.

8. In 2010 the Claimant approached Mr Godfrey to provide professional services in relation to her intention to extend and refurbish her property. Godfrey provided, and she accepted, a revised fee proposal dated 22/12/10 to provide a full architectural, surveying and contract administration service from inception / feasibility stage to completion and certification of final payment to the contractor (the services as specified in the RIBA form of appointment work stages A to L) for an agreed percentage fee based upon the estimated cost of the works.
9. Godfrey produced plans sufficient to obtain planning permission and conditional Building Regulations approval (with structural information “to follow”). It then produced a specification to enable the works to be tendered. A key issue between the parties is whether the plans and specification, together with the structural engineer’s information, was sufficient for construction purposes (as Godfrey alleges) or whether further detailed construction drawings, providing further details and information, was required for construction purposes (as the Claimant alleges).
10. Following a tender process a company known as Ease Development Services Limited (‘Ease’) was appointed to carry out the works described in the specification and plans under a JCT Minor Works contract (JCT MWC) with a contract sum of £231,425.21 plus VAT, of which one third represented provisional sums. It is the Claimant’s case that sufficient enquiries were made to satisfy herself and Godfrey that Ease was a reputable contractor and, further, that she made Godfrey fully aware that the contract sum was at the outer limit of her budget and that she could only afford it by remaining in occupation with her carer whilst the works were being undertaken.
11. The works commenced in May 2012 with a scheduled contract completion date of 2/11/12.
12. In fact, the works continued for over a year until June 2013, when: (a) Godfrey gave notice of its resignation (although within a month of that resignation Godfrey also granted a 27 weeks extension of time to Ease); (b) Ease left site and did not return, issuing a termination notice on 22/7/13 based on a failure to issue relevant construction and technical details and on non-payment. There are disputes as to the extent and value of the works as then undertaken as well as about the extent to which they were suitable and/or in compliance with the contract. The Claimant’s case is that very little had been done, particularly in relation to the structure and external envelope (including the roof), and that much of what had been done was unsuitable and not in compliance with the contract. In contrast, at the time Godfrey had estimated that the value of the completed contract works was approx. £200,000 and Ease had estimated that there was approx. 6 weeks’ work left on site.
13. It is common ground that neither Godfrey nor Ease resumed performance of their respective contracts and no further works were undertaken to complete the project. The Claimant remained at the house until she moved into her mother’s house in 2015, where she has remained ever since, because - she says - the house was unfit for human habitation and because she is unable to afford the remedial works, which on her case are both extensive and expensive.

14. The claim was issued in November 2022. It is common ground that the Claimant is not entitled to rely upon causes of action accruing before 17/9/12 which, given the chronology means, as the Claimant has had to accept and as I have declared in my order of 11/10/24, that any claims for breach pre-dating 17/9/12 were statute-barred, with the result that the Claimant is not entitled to bring any claims other than in relation to: (i) alleged breaches of RIBA stages J - L (i.e. the construction phase duties); (ii) alleged breaches of duty to review post-dating 17/9/12; or (iii) alleged breaches of duties owed under the Building Contract as then pleaded at paragraph 28 of the then Amended Particulars of Claim
15. The claim has had a lengthy procedural history, due largely – it must be said - to the Claimant’s failure to plead her case in a way which clearly identified each alleged breach of duty, each alleged loss suffered, how each alleged breach caused each alleged loss and the basis on which it is said that these claims are not statute-barred.
16. As I have observed at the two previous hearings which have taken place before me, and as is well known to those practising in the field of professional negligence in construction cases, whilst it can be relatively easy to plead and prove a case on breach by a construction professional such as Godfrey, and whilst it can also be relatively easy to plead and prove a case as to the losses suffered as a result of the failure of a construction project, it is often far more difficult to plead and prove how the alleged breaches have caused the alleged losses. This is because the professional is not normally also responsible for undertaking the works and will not normally have warranted that the works can and will be carried out at the cost agreed with the contractor and within the timescale agreed with the contractor. That difficulty is even more acute in a case such as this, where the Claimant did not take prompt steps to replace Godfrey and nor did she instruct nor pay for the existing contractor, or a replacement contractor, to complete the works to a suitable standard. Here, the limitation issues present a yet further difficulty.
17. However, this does not mean that it is impossible to plead and prove a claim on the basis that due to the Claimant’s particular circumstances, if – as she says – they were made known to Godfrey at the time of contracting, she was unable to afford to take the necessary remedial measures in 2013 and that continuing inability has led to substantial delay and cost, both financial and personal. If so, then the Claimant is entitled to be compensated for such losses: see the discussion in *Keating on Construction Contracts* (12th edition) at paragraph 9-018ff. However, the Claimant has the burden of pleading and proving her case on such a basis.
18. The Claimant cannot and will not be permitted to plead such a claim in broad and vague terms, in the hope of avoiding having to confront and address these issues, because that would prevent the Defendant from pleading a sufficiently detailed response, and would make it difficult, if not impossible, to set a sufficient agenda for case management (including effective alternative dispute resolution) and for any eventual trial.
19. At the two previous hearings I was satisfied that the Claimant had failed to plead her case in acceptable terms. I have given her two chances to re-plead her case properly and in sufficient detail to enable the Defendant to respond and for the case to be properly case managed and tried. The question which I must now decide is whether the Claimant has now done enough to allow her case to proceed further, as she says she has, or whether she has still failed to plead a case which ought to be allowed to proceed to trial, as the Defendant contends.

20. The Claimant served her original Particulars of Claim on 30/3/23 and the Defendant served its Defence on 5/7/23. The Claimant made two applications to amend. The first was withdrawn before the first hearing. As regards the second, which was due for consideration at the first effective case and costs management conference on 23/1/24, I gave directions which had as their starting point my acceptance of the Defendant's complaint that neither the Claimant's existing or draft amended Particulars of Claim was properly or sufficiently pleaded. I directed that she should serve an Amended Particulars of Claim by 19/3/24, which properly pleaded her case in accordance with the detailed requirements set out in the schedule attached to that order, which were designed to address the deficiencies in her pleaded case.
21. I also gave case management directions, including provision for a mediation on close of statements of case, and also including permission for both parties to rely upon expert evidence from an architect, a building / quantity surveyor and a property valuer. I directed that the case should be transferred to the Bristol TCC and tried over 8 days in summer 2025. I also directed that "in default of compliance, the Defendant shall be entitled to apply for an order striking out the claim to the extent that it remains inadequately particularised". I also ordered that the Claimant should pay the costs of the amendments.
22. Having seen the Amended Particulars of Claim then served, the Defendant made a strike-out application which, after some delay due to finding a date convenient to me and to both counsel, was listed before me on 11/10/24.
23. At this second hearing, I expressed my view that the draft Amended Particulars of Claim, albeit an improvement on the previous version, remained deficient because it was difficult if not impossible to understand the Claimant's full and detailed case on breach, loss, causation and limitation. That was particularly so because whilst allegations of breach were pleaded in the main body of the pleading, the case on remedial works and costings appeared in Appendix 4, which was a copy of the report in schedule form produced by a building surveyor (**the Croft report**) in Appendix 4. In order to even attempt to see the details and the linkage it was necessary to refer to Appendix 5, which was intended to operate as a form of Scott Schedule, which included the Claimant's case in separate columns in relation to: (i) breach of contract and limitation; (ii) breach of duty of care and limitation; (iii) particulars of breach; (iv) particulars of causation of loss and damage; and (v) particulars of remedial works and loss and damage by reference to Appendix 4. The inter-relationship between these three elements of the statement of case was far from clear. Of further and particular concern was that the pleading attempted to skate over the limitation issues by failing to plead in clear terms what breaches occurring on or after 17/9/12 caused what problems and with what consequences and, also, that there was repeated reference to particulars of breach as "including" the matters pleaded, which it appears was intended to seek to give the Claimant the opportunity to add further unpleaded particulars at some further stage, notwithstanding that the Defendant would not have had the opportunity to consider them beforehand.
24. By the time of the hearing there was an acceptance by the Claimant that the current version was inadequate and unacceptable in the respects identified above and that the limitation issues meant that a number of the existing pleaded claims could not be sustained in their current pleaded form. In the event, as well as making the declarations referred to above to clarify what the Claimant could and could not allege given the limitation issues, I also ordered that unless the Claimant filed and served by 23/12/24 a replacement Amended Particulars of Claim which complied with the specified requirements set out in that order her claim should be struck out.

I ordered her to pay the costs of the amendments and of the strike-out application. I directed a further case management conference to take place on 28/1/25, before which the Defendant should confirm whether or not it accepted that the Claimant had complied with the unless order.

25. The specified requirements were that:

- i) Each allegation of breach must be fully and properly pleaded, explaining whether the breach is a breach of contract (if so specifying the relevant contractual term/s breached) and/or an allegation of negligence (if so specifying the particular obligation/s breached) and providing full details of each allegation.
- ii) In respect of each such allegation the Claimant must set out a positive case as to why the allegation is not statute-barred, explaining when it is said the obligation / breach in question arose and when (over what period) the events alleged to constitute breach occurred. If it is said that it is a breach of a continuing obligation proper details must be given.
- iii) In respect of each such allegation the Claimant must set out a positive case as to what the consequences were of such breach, whether alone or in combination with other alleged breaches, and bearing in mind that the consequences have to be judged in the light of the Claimant's case that the design works undertaken by the Defendant pre-construction stage (for which she cannot claim) were seriously defective and in the light of the Claimant's acceptance that the construction works had already commenced before 17 September 2012, so that the Claimant must clearly explain on what basis breaches occurring after that date made a material difference to the pre-existing position. The Claimant must set out a positive case as to whether or not she is saying that the consequences would have been that Ease would have properly performed the building contract to completion, explaining the basis on why she says so, and whether she says that would have been at the original contract cost or at some extra costs, which is nonetheless less than the cost she says she will now incur, again providing details (and again explaining how breaches which are not time-barred made a material difference to the existing position). If not, then the Claimant must set out a positive case as to what would have happened and how and why she would have been in a better position as a result.
- iv) In respect of each such allegation the Claimant must set out a positive case as to what loss and damage she has suffered as a result of such breach and its consequences, again whether alone or in combination with other alleged breaches and again explaining how breaches which are not time-barred made a material difference to the existing position. Insofar as the claims are made on the basis of the Claimant's inability to fund completion works after the termination of the contract by Ease, including in particular any overall increase in construction costs and/or the costs of alternative accommodation, the Claimant must set out particulars of her case as to how – if at all – her financial position was made known to the Defendant pre-contract and/or pre-breach and why her financial position was such that she was unable to fund completion post termination by Ease and/or to fund sufficient works to enable her to continue living in the property but able to fund the costs of renting alternative accommodation.

26. The Claimant duly provided her Amended Particulars of Claim, a little late but that was not the subject of complaint. The Defendant's response, as summarised in her skeleton argument served for the hearing on 28/1/25, was that: (a) "whilst the Claimant has complied with the form of the unless order set out at paragraph 1 of the Order dated 11 October 2024, the Claimant

has not complied with the substance, and in particular, the Claimant has still failed to plead a coherent case (particularly on causation) and/or one that has a real prospect of success”; and (b) “in those circumstances, the Defendant has also applied for reverse summary judgment, on the basis that the Claimant has no real prospect of succeeding on a number of key issues”.

27. It was agreed that, given the nature of the complaint and the newly introduced application for strike-out/summary judgment, the Claimant was entitled to time to consider and file evidence in response and, thus, the hearing was adjourned to 19/3/25.
28. In response to the application the Claimant has served a witness statement made by her on 5/3/25 as well as a second expert report from her architectural expert Mr Smart dated 4/3/25. I need not refer to the details save where necessary. In short, they substantially support the case as advanced in the Amended Particulars of Claim.

The Claimant’s current pleaded case

29. I need to set out in some detail the Claimant’s case as advanced in the Amended Particulars of Claim.
30. The statement of case begins by pleading Godfrey’s contractual appointment and its terms and the contractual and tortious duties of care arising, in terms which are not the subject of complaint, the new pleaded case as to breach, causation and loss begins at paragraph 28A on page 9 of the Amended Particulars of Claim and continues through to paragraph 40 on page 63. On any view, it is a lengthy and detailed and, on first reading, a properly pleaded case.
31. I should also record at this stage that the pleaded case as to the Defendant’s contractual duties includes reference to performance of the express duty imposed on the contract administrator under JCT MWC clause 2.3 to “issue any further information and instructions necessary for the proper carrying out of the Works”.
32. As to breach, the Claimant begins by pleading an overview in paragraphs 28A and 28B.
33. In paragraph 28A the Claimant alleges that the construction information provided before and during the construction phase was incomplete and deficient, that there was further failure to provide the missing information during the construction phase as required by clause 2.3, and that during the construction phase Godfrey failed to provide further construction information as requested by Ease.
34. As to breach of the alleged duty to review, in paragraph 28B the Claimant alleges that the construction works to the external fabric of the building commenced in or around October / November 2012, with part of the roof being removed in November 2012. She pleads that at this stage Godfrey “should have been aware of the inherent omissions and inadequacies within its issued construction information which made it necessary, or at least prudent, to review the design and specification for works which were at that stage substantially incomplete or had not been started”. She pleads that “had it done so [Godfrey] would have remedied the omissions and inadequacies by issuing variation instructions and/or additional construction information to Ease” and that Ease “would have been able to complete the Project for the

contract sum, subject to the provisional sums being instructed by [Godfrey] within the stated sums, and would not have abandoned the Project”.

35. In short, paragraph 28B summarises the Claimant’s case on duty to review, which is then pleaded in detail over the following paragraphs. Thus, in paragraphs 28C - 28E the Claimant pleads her case as to the works which had either not been started or not been completed as at 17/9/12 and as at November 2012, alleging that very substantial elements of the structure and external elements were far from complete.
36. Then, under the heading “Structural and External Envelope work commenced after 17 September 2012”, the Claimant pleads a detailed case in relation to the separate items of work comprised with the structure and external envelope. This begins with the roof and associated works in a lengthy and detailed section running from paragraphs 28F to 28N, where the Claimant begins by identifying the deficiencies in the construction information provided and continues by alleging that concerns about this were raised by the Claimant and by Ease with Godfrey in October 2012 and subsequently, including concerns about defects and water penetration, but that he failed to address them. It is pleaded that, in those, circumstances Godfrey ought to have reviewed its inadequate roof works design and provided the requisite information, but failed to do so. In paragraph 28L it is pleaded that “had Godfrey properly discharged their obligations under the appointment, it would have taken the following steps”, which are identified as being steps which Godfrey “should” or “would” have taken. It is then pleaded that this “would have made a material difference because Ease, as a competent building contractor, would then have completed the Roof Works based upon proper specifications and construction drawings for the specified contract sum”. In paragraph 28M the Claimant pleads her case as to why, in the circumstances, the claim in relation to the roof design was not statute-barred as at 17/9/12. In paragraph 28N she pleads that the consequence was that the roof works were defective as particularised in sub-paragraphs (a) – (z). She concludes that “the loss and damage caused by these defects are set out below at paragraph 28AJ”, to which I shall refer below.
37. The same approach is then repeated in relation to the other items comprising the structural and external envelope. Thus, the case in relation to structural steelwork at paragraphs 28O to 28T is pleaded in substantially similar terms, as is the case in relation to external windows and doors (paragraphs 28U to 28AC) and damp proofing and insulation works (paragraphs 28AD to AI).
38. Paragraph 28AJ is headed “Particulars of Loss and Damage caused by [Godfrey’s] failures in respect of the Structural and External Envelope”. It is alleged that: (a) these works account for approximately 80% of the defects that have been identified and are the main causes of the water ingress into the Property; (b) “Had [Godfrey] complied with their design, detailing, coordination and inspection obligations under the Appointment in respect of the building envelope including the Roof Works, the integration and coordination of Structural Steelwork, the integration and coordination of External Windows and Doors and the Damp Proofing and Thermal and Acoustic Insulation, the Claimant would not have suffered the following loss and damage”; (c) “Following the removal of part of the roof structure in November 2012, and [Godfrey’s] failings in respect of the Roof Works, the Steelwork and the external doors and windows, the external fabric of the Property is not watertight thereby allowing water to enter into the Property”; (d) “During the course of these works between November 2012 and June 2013 the Property suffered prolonged exposure to water ingress causing extensive damage to the interior of the Property. This not only delayed the

commencement of the internal works but caused damage to the internal works that had been undertaken by Ease”; (e) “In Appendix 4 to these Amended Particulars of Claim, the Claimant has set out the necessary works that are required to rectify the defects in the works and the subsequent damage caused by the defects. The total value of the rectification works is £800,800.27”.

39. It is thus necessary to cross-refer to Appendix 4. This is an amended version of the Appendix 4 which was attached to the previous statement of case. In its native form it comprises an excel worksheet, extending over 72 pages, which includes all of the works said to be “required for rectification of defective work and inadequate design/specification”. The works are identified within the “elements” column by reference to the works items in question, beginning with the building services and continuing with the damp proofing and including the individual items within the structural and external envelopes, such as external walls, roofs & roof terraces & solar shading and windows, structural steelwork and external doors.
40. Each works item has a separate sub-total, and at the end of the worksheet the total is stated as being £800,800.27. The difference between this and the version previously served is that the previous version total came to £1,249,176.88, which shows that the appendix has been revised since its previous iteration and the value reduced significantly.
41. During the course of the hearing, in response to my request for an explanation as to how it could be that the figure claimed in respect of the structural and external envelope could include costs for work items which do not fall within the structure or external envelope, Mr Newman took instructions and explained that this was a pure calculation error and that the figure should only properly be the total for the addition of all of the specified work items within the pleaded case for the structure or external envelope, which could easily be identified from the sub-totals in Appendix 4.
42. This, I am satisfied, was a careless error rather than a deliberate and improper attempt to seek to include costs under this head which could not properly be included. That this is plainly the case is apparent from the following section of the pleading, at paragraphs 28AK to 28AQ, which sets out the pleaded case in relation to the alleged breach by Godfrey of its pleaded obligation to review its design post 17 September 2012 in respect of the remaining works.
43. Here, what is pleaded is an allegation that consequent upon the matters pleaded above in relation to the whole of the structural and external envelope Godfrey ought, when reviewing such matters, to have realised the need to undertake a review of “all of the designs and specifications for the remaining works” (paragraph 28AK) with the result that it would have discovered specified defects in the external walls and cladding, soffits and fascias, building services (mechanical and electrical), decorative, fixtures and fittings, and also in relation to driveway, paving, fencing and landscaping and to external steps and front retaining wall and groundworks, where the complaint is that no design details or any specification was provided. The specific items of loss are pleaded in paragraph 28AQ by reference to the specified sections of Appendix 4 which is where these work items are to be found, which is why, as I have said, it would have been obvious to any careful reader of the pleading that the total claimed in paragraph 28AJ was an error.

44. This section therefore pleads a case based not on there being a duty to review in relation to specific issues arising in relation to these specific work items, but a duty to conduct a more fundamental review of the entirety of the remaining works based on what Godfrey ought to have appreciated at that stage was the fundamentally deficient performance of its contractual duties in relation to the design and specification of the works.
45. The Defendant has not advanced a case in relation to this section on the basis that it is not reasonably arguable that this extended duty of review could arise in such circumstances. In my judgment, if the Claimant's premises is made out, i.e. that Godfrey ought to have realised that the existing construction information in relation to the structural and external envelope was hopelessly insufficient, then it is at least reasonably arguable that a competent professional in his position ought also to have appreciated the need to undertake the same review in relation to the whole of the remaining construction information.
46. However, there is more substantial problem in relation to the following section, paragraphs 28AR to 28AV, where there is a discrete allegation in relation to an alleged failure to inspect and properly certify interim payments.
47. In paragraph 28AR the Claimant identifies specific work items where the complaint is that Godfrey "failed to properly inspect the work undertaken by Ease and certified work that was defective and/or not properly executed in accordance with [his] Design and Specification, in that [he] failed to identify the following defects". The specified defects begin with an allegation in relation to an alleged failure at (a) to fireproof the steelwork and continue through to an alleged failure at (y) to use a non-specified roof finishing, where all (bar the last) allegations are cross-referenced to specific sections within the Croft report.
48. In paragraph 28AS the Claimant alleges that "throughout the currency of the Project, the Claimant informed the Companies of defects and potential defects". The Claimant continues in paragraph 28AS with a form of wording which, her advisers must have known from the previous hearing, was unacceptable, namely "In particular, but not limited to ...", before pleading various notifications from (a) through to (h), which are not cross-referenced to the individual defects pleaded in paragraph 28AR, and include "the facts and matters set out above at paragraphs 28I, 28P and 28AF". In paragraph 28AT it is pleaded: "Each of the defective works identified above was commenced on or after 17 September 2012", which explains why the Claimant says that this claim is not statute-barred, but does not make clear whether these are the defects pleaded in paragraph 28R or 28AS.
49. In paragraph 28AU it is pleaded that "the defects set out above at paragraph 28AT would have been visible and so obvious that any Architect/Contract Administrator acting with reasonable care and skill should have identified them when carrying out their site inspections, further, as set out above the Claimant was in constant contact with [Godfrey] orally and by email and informed [Godfrey] of the existence of some of these defects. In the premise, [Godfrey] should have issued an instruction pursuant to clause 3.4 of the Building Contract requiring Ease to rectify the defects alternatively, [Godfrey] should have made an appropriate deduction from the relevant payment certificate".
50. And finally, in paragraph 28V, it is pleaded that "Had [Godfrey] informed Ease of these defects it would have made a material difference because, Ease would have been in a position to, and

would have, rectified them. The Claimant has thereby suffered loss and damage, namely the sum of £800,800.27 to rectify the defective works. The rectification works are set out in Appendix 4 attached to these Particulars of Claim”.

51. Leaving aside the uncertainty of knowing whether these defects are those referred to in paragraph 28AR (which reading the pleading alone seems most likely) or paragraph 28AS (which seems less unlikely but is not implausible), the fundamental problem with this section of the pleaded case is that, unlike in relation to the previous sections, there is no basis for contending either that the consequences of these alleged breaches extend to all of the works items set out in Appendix 4 (because they plainly do not) or that it is possible to identify which breaches can be cross-referred to which items within Appendix 4. When I raised this difficulty with Mr Newman the best he could do, after taking instructions, was to say that the Claimant’s case was that these breaches were so extensive, for example the failure to fireproof the steelwork, that in order to remedy them all of the works identified in Appendix 4 were necessary. However, it is plain from a perusal of the lengthy and detailed Appendix 4 that this cannot credibly be so in relation to each and every pleaded breach and/or item of work and further, and in any event, this is not a case which is pleaded.
52. What makes this pleading defect even worse is that in their letter of 20/1/25 the Defendant’s solicitors had asked the following question: “It is assumed that the claim for £800,800.27 in paragraph 28AV which relates to the limited number of workmanship defects at paragraph 28AR is a mistake. Please clarify what sum is sought under this claim”. The Claimant’s letter in response of 23/1/25 had stated: “Paragraph 28AV is not limited to paragraph 28AR. See paragraph 28AS, in particular the cross referencing at 28ASa. The sum claimed is to rectify all defects in the Works as set out in Appendix 4. It is the Claimant’s case that if [Godfrey] had reviewed the design and provided information required by Ease then the defects would not have occurred or would have been corrected and the Works would have been completed free from defects”.
53. In short, the Claimant seems to be seeking to assimilate the consequences of the pleaded failure to inspect and certify to the consequences of the pleaded failure to review, when the two allegations are – and must be – separate and distinct with separate and distinct consequences. To take such an approach to what was a perfectly reasonable question, when if it had been taken seriously it ought to have revealed – if this was not already obvious – a fundamental flaw in this part of the pleading, seems to me to have been a return to the previous bad old ways which had resulted in the previous two orders at the two previous hearings.
54. I shall have to consider the consequences of this later in this judgment. In the meantime, I can briefly conclude my review of the Amended Particulars of Claim.
55. In paragraphs 28AW to 28BC there is a further discrete allegation pleaded in relation to interim certificate 8 in respect of which a discrete claim for £41,605.73 plus costs is made. Godfrey accepts that this (modest) claim, which does plead a clear link between alleged breach and alleged loss, is not liable to be struck out or the subject of summary judgment on the real prospect of success basis.
56. From paragraphs 28BD to 28BM the Claimant pleads her case as to the consequences of Godfrey’s alleged breaches. In summary, she contends that but for Godfrey’s breaches the

works would have been completed within the contract sum which she could have afforded to pay. She contends that after obtaining a report from Croft building surveyors in January 2014 she attempted to engage with Godfrey and Ease with a view to having the works completed, but they both failed or refused to engage with her. She says that she then had the remedial works tendered, but that only one contractor tendered, in the sum of approx. £440,000 net of VAT and construction administration fees. She says that she was unable to afford to have the works undertaken at that cost due to her financial circumstances, given how much she had already paid Ease. She says that due to the continuing condition of the house which, she says, had been left structurally unprotected from the elements, and notwithstanding that she had already spent £19,000 in the meantime seeking to make the part of the property she lived in habitable, she was forced to leave the house in March 2015 to live free of charge in her mother's house, which is where she has remained ever since.

57. In paragraphs 29 onwards the Claimant pleads her case on loss and damage. She contends that the comparison is between the position she would have been in from November 2012, but for Godfrey's breaches, and her actual position, identifying the cost of rectification of the defects by reference to Appendix 4.
58. In paragraph 33 she pleads, as an alternative, the diminution in value of the property by reference to its current value as is compared to the value she says it would have had but for Godfrey's breaches, where the difference is pleaded as being £1,254,593.00.
59. In paragraph 34 she pleads a claim for loss for the deprivation of the benefit of her occupation of the property from November 2012, claiming a combination of her loss of occupation by reference to the rental value of the lower ground floor which she intended to occupy and the loss of rental of the part which she had intended to rent out over the summer. The total claim amounts to £468,350 to April 2023 and continuing.
60. In paragraph 35 she claims incidental costs of approx. £35,000 and, finally, in paragraphs 36 to 40 she claims general damages and various specific and relatively modest sums.

The Defendant's strike out / summary judgment application

61. The Defendant's overarching submission is that on a proper application of the real prospects of success test the claim as now sought to be advanced has no more of a real prospect of success than the previous versions and, accordingly, the court should grasp the nettle and bring this hopeless claim to an end.
62. Although the Defendant also refers, quite reasonably, to the delay which has already taken place in respect of these proceedings and the potential impact on such delay on the recollection of witnesses, including Mr Godfrey who is now in his 90's, whilst that might be a factor relevant to the exercise of a discretion it cannot be a basis for strike-out / summary judgment application.
63. In her skeleton argument for this hearing Ms Boon has contended that the claim still lacks reality, in that in contrast to the modest value of the original contract and the modest contemporaneous valuations of the outstanding works and defective works, and in contrast to the Claimant being willing to live in the house throughout, she is now alleging that the house

is uninhabitable and is claiming repair costs (which, albeit reduced from around £1,250,000, still remain at around £800,000), or around £1,250,000 in respect of alleged diminution in value (in the alternative), together with around £470,000 for loss of rent (on a new factual basis) and, finally, various other consequential losses in the total sum of around £150,000.

64. These are points which can be, and no doubt would be, made at any trial. They clearly have forensic force and the evidential burden will be very firmly on the Claimant to justify these claims at trial. Again, however, these general submissions do not in my view in themselves justify a strike-out of or summary judgment on the claim.
65. Ms Boon also submits that the Claimant has still failed to understand and to plead that, as a matter of law and fact, Godfrey is not responsible for the failings of Ease and the Claimant herself.
66. In my judgment, this submission is misconceived insofar as it suggests that the failure to give specific credit for some specified elements of the overall loss either means that the claim cannot and should not be allowed to proceed or otherwise demonstrates that the Claimant has not complied with the unless order of 11/10/24. If the Claimant has pleaded a claim which discloses a reasonably arguable basis for alleging that all of her losses have been caused by one or more pleaded breaches of duty by Godfrey, it cannot be a ground for refusing her the right to take that case to trial that Godfrey may plead in its defence, and may succeed at trial upon, a case that some, or even all, of her losses have in fact not been caused by any breaches by Godfrey.
67. I therefore address the four specific arguments advanced by Ms Boon. They may be summarised as follows.
68. First, in relation to the newly pleaded breach of a duty to review, it is said that this could only apply where the architect had previously provided a design and then had cause to review that design. Here, it was said, since the Claimant's primary case is that no design was provided, it cannot now be argued that there was a design to review. It is submitted that even if the complaint is that Godfrey should have advised or warned that no detailed and accurate construction information had been provided, that would have different causal consequences to a duty to review. It is submitted that since the Claimant herself asserts that both she and Ease were aware at the time that this information was lacking, because it was continuously requested, this complaint goes nowhere.
69. Second, in relation to the pleaded causative consequences of the alleged breach of the duty to review, it is submitted that the Claimant's case, which is that Godfrey would have provided the necessary construction information and Ease could have completed the project for the contract sum, is based on asking the wrong question. The right question is not what Godfrey should have done but what Godfrey would have done. It is submitted that, based on the Claimant's own pleaded case, Godfrey's response at the time was to say that there was no need for further construction information to be provided and, hence, it cannot now be said that in this counter-factual hypothesis Godfrey would have done something different.
70. Third, further in relation to the pleaded causative consequences of the alleged breach of the duty to review, the Claimant's case founders on the fact that Ease continued with the building

works notwithstanding that, on the Claimant's own case, Ease was aware that the construction information which Godfrey had provided was obviously deficient and inadequate. It is said that what Ease should have done was to say that they would not proceed further until the necessary construction information was provided. It is said that, on that basis, the Claimant's loss would have been limited to the additional cost which she would have had to pay a replacement professional to provide the necessary information and the loss and expense incurred by Ease due to the delay in the meantime.

71. Fourth, and finally, in relation to the duty to inspect, it is said that the Claimant has no real prospect of success in proving her alternative case i.e. that had Godfrey complied with its duty to inspect, it would have identified all of the defects now alleged, would have issued an instruction requiring Ease to rectify the defects, and Ease would have rectified them (and would not have abandoned the Project) or, alternatively that the cost of such defective work would have been deducted from the relevant interim certificate. It is submitted that if the defects now alleged were due to Godfrey's failure to provide adequate construction information then it is not credible that Ease would have agreed to and have rectified these defects without extra payment.

Breach of duty to review – no real prospect of success

72. In paragraph 27 of her skeleton Ms Boon submitted that "all of the caselaw supporting a 'duty to review' arise in circumstances where the architect has previously provided a design, and then has had cause to review the design they provided. Here, the Claimant's primary case is that the Companies have failed to provide that design. Accordingly, there is no design as such to 'review'".
73. The authorities were comprehensively analysed by Eyre J in *Lendlease Construction (Europe) Ltd v Aecom Ltd* [2023] EWHC 2620 (TCC) at paragraphs 151 onwards, so that there is no need for me to take unnecessary time and space by conducting my own review of what he referred to as a continuing duty to advise or to warn or to review the state of the works. The following points emerge as relevant to this case.
74. In *New Islington & Hackney Housing Association Ltd v Pollard Thomas & Edwards Ltd* [2001] BLR 74 Dyson J accepted that in general a designer who also supervises or inspects work is under an obligation to review the design until it has been constructed and, after that, if something occurs to make it necessary or at least prudent for the designer to do so. Whether, however, that was the case would always depend on the particular terms of the contract.
75. In *Oxford Architects Partnership v Cheltenham Ladies College* [2006] EWHC 3156 (TCC) Ramsey J held that the cause of action for a failure properly to review the design is a different cause of action from a failure to provide a proper design in the first place. The causes of action will therefore accrue on different dates.
76. There is nothing in any of these authorities which states or even suggests that the duty to review can only arise where a design has already been provided. Whilst it may at first blush be said to be self-evident that there can be no duty to review something which has not actually been produced, in my judgment that is too simplistic an analysis in the real world of building design and construction and the answer will all depend on the particular facts of the case.

77. If, for example, a structural engineer is contracted to design the foundations for a new build property and does so, but not also contracted to supervise or inspect the foundation works during the construction phase, nor informed of any problems experienced during the course of the construction, nor asked to advise on any issues arising during construction, then it will be reasonably obvious that any pleading alleged breach of a duty to review as a means of seeking to circumvent any limitation period applicable to a claim of breach in the original design will not be permitted. If, however, the same structural engineer was contracted to provide a general structural design, but failed to design one particular element of that design, and this was not picked up at that design stage, but was also contracted to supervise or inspect the works and failed to appreciate the absence of or to provide the missing design at construction stage, it seems to me to be reasonably arguable that they could be held liable for breach of a duty to review at that stage.
78. Furthermore, if someone is contracted to produce a design it is inherently unlikely that they will provide nothing at all. It is more likely that they will produce a design which either does not address a particular feature of the works or is deficient in relation to that particular feature. The deficiency might be small but significant, or so gross as to amount for all practical purposes to no design. Again, it does not seem to me to be reasonably obvious that there should be no duty to review in the former case but a duty to review in the latter case.
79. In my judgment there is no obvious distinction in principle between someone who is contracted to design but does not in fact do so, and someone who is contracted to design and does so, whether competently or negligently. In every case where such person is also under a duty to supervise or to inspect then it is – subject always to the express terms of the contract – in my view at least reasonably arguable that, if something occurs to make it necessary or at least prudent for them to consider whether a sufficient design has been provided to enable the structure to be properly built, they must consider that question even if they have provided no design at all, just as much as if they had provided some design.
80. Further, and in any event, as is made clear in paragraph 28A of the Amended Particulars of Claim, in fact the pleaded case is based not on Godfrey providing no construction information at all, but failing to provide the necessary details to facilitate adequate construction. In short, it appears that both parties agree that Godfrey proceeded on the basis that the design drawings and specification already produced, and the structural engineer's details also provided, were sufficient for construction, so that nothing further needed to be issued. The difference between them is that Godfrey maintains that this was a justifiable decision, whereas the Claimant contends that what had already been provided did not provide sufficient information for the construction phase. Thus, it is not a question of Godfrey never having provided any design information at all. On the Claimant's case, it is a question of Godfrey deciding that there was no need to provide any further construction phase specific design information and then, when circumstances arose when he ought to have appreciated the need to review this decision, either failing to review whether or not the design already issued was sufficient or deciding, wrongly, that there was no need to review the design. It follows in my judgment that it is at least reasonably arguable that the factual premise behind this submission is made out on the facts as they may be found at trial.
81. Moreover, as regards the contention that the duty, if any, is properly a duty to 'advise' or 'warn' that no detailed and accurate construction information had been provided, which has different causal consequences to a duty to 'review', in my judgment this is at least reasonably arguable

a distinction without a difference. On the Claimant's case, what Godfrey was obliged to do was to review whether the design construction information he had provided was sufficient, in response to the expressions of concern about the lack of fully detailed and accurate construction information. What the causal consequences of the alleged failure to do so are is the subject of the second argument advanced by Ms Boon, to which I now turn.

Duty to review - causation – no real prospect of success

82. Ms Boon summarises the Claimant's case as being that, had Godfrey not been in breach of its duty to review design, he would have noted the obviously deficient construction information, and would then have gone on to provide the relevant (detailed and accurate) construction information and Ease would have been able to complete the project for the contract sum (subject to the provisional sums being as stated) and Ease would not have abandoned the project.
83. She contrasts "would" with "should". Her case is that the question has to be decided by reference to what Godfrey would have done. She submits that, on the Claimant's own pleaded case, when in fact the absence of design / construction information was expressly raised by the Claimant and by Ease with Godfrey in October and November 2012, Godfrey did not go on to provide relevant (detailed and accurate) construction information. Instead, he said that the plans as provided contained all the relevant details and, accordingly, that there was sufficient detail in the drawings and specifications that Ease had been provided with to construct the works. Accordingly, Ms Boon submits that in the counter-factual scenario to be considered in this case, i.e. what would have happened had Godfrey performed its review duty properly, there is no basis for considering that he would have acted any differently and, hence, it cannot be said that the Claimant has suffered any loss.
84. The first issue which arises is whether the causation issue has to be decided by reference to what Godfrey would have done or what they should have done.
85. On reading the papers I recalled that a similar issue had previously arisen in the context of medical negligence cases. That topic is considered by *Jackson & Powell on Professional Liability* (9th edition) at paragraph 13-093, entitled: The application of the Bolam test in causation: Bolitho. The position is crisply summarised at paragraph 13-093 as follows:

“Where a question arises as to what treatment would have been administered had the defendant not committed the breach of duty complained of, the claimant can discharge the burden of proof on causation in one of two ways. The claimant will succeed on causation if he satisfies the court that the defendant would, had he not committed the breach of duty complained of, have taken action which would have avoided the claimant's injuries. Alternatively, the claimant will succeed on causation if he establishes that the proper discharge of the defendant's duty towards him required that the defendant take such action (even if, in fact, the defendant would not have taken such action). In other words, a defendant cannot escape liability by saying that the damage would have occurred in any event because he would have committed some further or alternative breach of duty after or instead of the failure which in fact took place”.

86. The authorities cited in support are *Bolitho v City & Hackney HA* [1998] AC 232 HL, which was a clinical negligence case, and *Coudert Bros v Normans Bay* [2003] EWCA Civ 215, which was a solicitor's negligence case in a commercial context. It is unnecessary in the context of a strike-out application to consider these authorities in detail. It is sufficient to say that it is at the very least clearly arguable that the question is what the professional should have done. It is worth referring to what Laws LJ said in the *Coudert* case, where the facts were complex, but the relevant point for present purposes is stated at paragraph 64:

“First, although I entertained considerable doubts about the matter while the case was being argued, I have reached the clear conclusion that in principle a defendant should not be allowed to rely on a wrong perpetrated by himself in order (in whole or part) to break the chain of causation put forward by the claimant to establish and quantify the damage sustained by him by reason of the defendant's breach of contract or tort. This may be seen (as Waller LJ expresses it: paragraph 46) as an application of the general rule of the common law that a party may not rely on his own wrong to secure a benefit, and I agree that some support is to be found for that approach in the speech of Lord Browne-Wilkinson in *Bolitho*. But I think it is also consonant with modern ideas of causation now being developed in the cases. Authority supports the proposition that the resolution of causation issues, certainly in the law of tort, is by no means merely a fact-finding exercise; in many instances it is an evaluative judgment, concerned to establish the extent to which a defendant should justly be held responsible for what has befallen the claimant. This seems to me to be vouchsafed in particular by the opinions of Lord Bingham and Lord Hoffmann in *Fairchild* [2002] 3 WLR 89 at paragraphs 10–12 and 52–54 respectively; to which may be compared, in the context of damages for loss of a chance, the observations of Kirby J in the High Court of Australia in *Chappel v Hart* [1999] Lloyd's Law Reports: Med 223 at 245, 246, cited by Latham LJ in this court in *Gregg v Scott* [2002] EWCA Civ 1471.”

87. In oral submissions Ms Boon acknowledged the point, but argued that it did not avail the Claimant here because she had chosen to plead her case on the basis of what Godfrey would have done, as opposed to what Godfrey should have done. However, as I noted above, in fact the Claimant's case, as pleaded for example in paragraph 28L, is not firmly tied to a case as to what Godfrey would have done. Instead, it pleads without expressing any clear differentiation a case based on what Godfrey would and should have done. This is not surprising, in that it must, I think, be obvious that in all but the most unusual of professional negligence cases (an exception might be where a claimant needs to allege that the defendant would have acted in a way which they ought not, properly, to have done, but which would actually have benefitted the claimant and avoided the relevant loss) a claimant will allege that the defendant would, in the counter-factual scenario, act in the way in which they ought, competently, to have done.
88. Further, as recognised in the *Coudert* case, if a defendant chooses to plead that in fact they would have acted in a different way, the claimant is then entitled to plead in their Reply that a competent professional should not have acted in such a way, with a view to establishing that the defendant cannot successfully rely on such an as a defence. In short, therefore, it seems to me that this alternative argument cannot avail the Defendant here either as a matter of pleading.

89. Finally, as Mr Newman submitted, simply because Godfrey did not in fact act differently when the sufficiency of the construction information was questioned does not mean that he would not have acted differently in the counter-factual scenario had he in fact complied with his duty to review. If this point ever arose, the trial judge would have to make a finding as to what he would have done, based on an assessment of all of the evidence, which might or might not include what he said in cross-examination, if called as a witness, and would not be bound to accept Godfrey's pleaded case that he would not have done so.
90. In the circumstances, I am satisfied that the Claimant's case in relation to this causation point has reasonable prospects of success.

Duty to Review - Consequences – No real prospect of success

91. Ms Boon's third argument is that this case is to be distinguished from a case where it is alleged that a designer has produced deficient construction drawings and, despite being under a duty to review them, has failed to do so. She accepts that if, in such a case, the consequence was that the builder proceeded to build defectively in reliance on those deficient design drawings, in ignorance of the deficiencies, then the claimant would have a case in relation to the cost of remedying the defective work. Her submission is that there is an essential difference between that case and the present case. Here, the Claimant's case is that Godfrey failed to produce sufficient construction information, despite Ease stating that the information provided was insufficient, but that Ease nonetheless proceeded to build in accordance with the information provided until it left site, leaving the house unprotected from the elements, despite knowing all the while that the construction information provided by Godfrey was insufficient. She submits that in such circumstances Ease's conduct completely extinguished any causative impact of Godfrey's alleged breach, so that the Claimant has no real prospect of establishing causation at trial in relation to any such breach.
92. In support of this submission Ms Boon referred me to *Jackson & Powell* at 9-208 in relation to the law on remoteness, which succinctly summarises the position as being that the claimant must establish that the loss and damage were: (a) caused by the relevant breach of duty; (b) there is a sufficient nexus between the damages claimed and the defendant's duty, also known as the scope of the duty which is broken; and (c) that the defendant is legally responsible for the loss, which includes questions of foreseeability, effective cause, and mitigation.
93. She submits that there is no positive pleaded case that, despite the allegedly obviously deficient construction information, Ease refused to build in reliance on that info but did so because Godfrey instructed them as contract administrator to do so.
94. It is right that there is no such specific plea, but Mr Newman drew my attention to the fact that there is, for example, at paragraph 28H an allegation that at a site meeting in October 2012 Ease asked for further detailed specifications regarding the roofs to be sent to him, but Godfrey explained that the plans as provided contained all the relevant details and, after further requests made to him had gone went unanswered, at a meeting in December 2012 Godfrey re-stated his position.
95. Nonetheless, Ms Boon submitted that if Ease's complaint was justified then Ease could and should have refused to build further and/or have advised the Claimant that they were unable to

build the house properly in the absence of further construction information from Godfrey and asked for instructions from her. She accepts that, had Ease done so, it would have been entitled to an extension of time and/or to recover its loss and expense in having to stand down works whilst awaiting sufficient construction information. She submits that in such a case the losses associated with Godfrey's alleged failure to review would be limited to the costs associated with Ease's extension of time and/or loss and expense claim, together with any additional costs the Claimant might have incurred in having adequate design information drawn up at that stage by an alternative designer, if Godfrey was not prepared to do so. She submits, however, that the far more wide-ranging case on causation as actually advanced by the Claimant is simply not maintainable in such circumstances, because of the intervening supervening conduct of Ease.

96. However, as the editors of *Jackson & Powell* state at paragraph 9-209, causation is essentially an issue of fact, to be determined according to the particular circumstances of each case, and "by the common sense of ordinary men rather than the logic of philosophers". In the footnote, they refer to the decision of HHJ Bowsher QC in *Department of National Heritage v Steensen* (1998) 60 Con LR 33 QB at 102, where he stated: "The test is what an informed person in the building industry (not the man in the street) would take to be the cause, without too much microscopic analysis but on a broad view. Where a loss has been occasioned by more than one cause, a claimant must show on the balance of probabilities that the breach complained of caused or materially contributed to the loss complained of".
97. In my judgment it follows that the question as to whether or not in all of the circumstances Godfrey's alleged breach caused or materially contributed to the loss complained of, whether alone or in combination with any breaches by Ease of the JCT MWC, is a question to be determined on the basis of a close examination of the facts at trial. In my judgment it cannot be said at this interlocutory stage that the Claimant has no real prospect of establishing that Godfrey is liable for all of the pleaded consequences of its alleged breaches. In particular, the trial judge would need to assess whether or not, on the basis of a full examination of the facts, it could be said that Ease's conduct was such as to deprive any breach by Godfrey of any causative impact. In my view it is an ambitious submission that: (i) where a domestic builder under a contract without design liability is contracted by a domestic houseowner to build in accordance with specified contract drawings and a contract specification; (ii) where that builder asks the designer / contract administrator for further construction information but is (wrongly) told that it is unnecessary and, on this hypothesis, proceeds to build in accordance with the contract documents even when a reasonably competent contractor would have refused to do so; then (iii) such conduct operates to prevent the employer from recovering any damages at all against the designer / contract administrator and being left to their sole remedy against the contractor who may, for example, be no longer trading and insolvent. The more obvious result, I should have thought, is that the claimant would be entitled to proceed against both professional and contractor and, if she was successful against both, the respective share would be addressed in contribution proceedings. In my judgment this alternative is at least reasonably arguable.
98. Moreover, the question as to the whether or not Ease would, in such circumstances, have been in breach of contract and, if so, whether that breach would have been so significant as to deprive Godfrey's pre-existing breach of all causative impact, is obviously an extremely fact-sensitive matter, best suited for assessment at trial once all the facts are found.

99. In an attempt to overcome the first difficulty, Ms Boon also referred me to paragraph 9-212 of *Jackson & Powell* where, under the heading “Concurrent causes”, the authors say this:

“In tort, if there are competing causes of the claimant’s loss and he is responsible for none of them, he will recover in full if he establishes that the cause for which the construction professional is responsible materially contributed to his loss. In contract, the position is less clear but there is authority for the following propositions:

1. If a breach of contract is one of two causes of a loss, both causes co-operating and of approximately equal efficacy, the claimant can recover his loss in full on the basis that the breach materially contributed to the loss;

2. If one cause of a loss is the defendant’s breach of contract and another cause is the contractual responsibility of the claimant, the claimant will recover if he can establish that the cause for which the defendant is responsible is an effective cause of the loss.”

100. Ms Boon submitted that here it cannot be said that on the facts any alleged breach by Godfrey was a co-operating cause of equal efficacy. However in my judgment there are three answers to this.

101. The first is that in such circumstances, since the Claimant pleads and would have a reasonably arguable case in tort on the basis of a co-terminous duty of care in negligence, she may well be able to recover on the tortious measure on the basis that Godfrey’s conduct materially contributed to the loss.

102. The second is that whether or not the respective (assumed) breaches of Godfrey and Ease are of approximately equal efficacy is a question of fact to be determined at trial, and that the answer cannot confidently be stated in Godfrey’s favour at this stage.

103. The third is that it may well be that in such a case the approach identified in paragraph 9-214 of the textbook is applicable, namely that “where each of two concurrent causes was sufficient to cause the loss and those causes operated independently of each other, the “but for” test of causation is unhelpful. That test would allow the author of each cause to avoid liability on the basis that the loss would have been suffered in any event, and lead to the absurd conclusion that neither cause was effective. In such cases, the court may depart from the “but for” test and regard the causes as equally efficacious”.

104. Finally, Ms Boon submitted that the pleading was defective because it did not plead that the question as to what Ease would have done in the counter-factual is a question which has to be determined on the basis that the measure of the Claimant’s loss is to be assessed on the basis of the assessment of the loss of the chance that it would have acted as the Claimant has pleaded, i.e. that it could and would have built the works in accordance with the revised (sufficient) design and in accordance with the contract sum (adjusted where appropriate in relation to provisional sums).

105. However, there are two answers to this. The first is that the Claimant has pleaded a case that this is what Ease would had done and has, therefore, in my view pleaded a cause on causation

which has a reasonable prospect of success, especially in that Godfrey has not applied for strike-out / summary judgment on the basis that on the facts this case can be demonstrated to be not reasonably arguable. The second is that if the Defendant was to plead a case that Ease would not have done so, or that the chance that Ease would not have done should be assessed by reference to certain specific factors, then the Claimant would have the opportunity of pleading in response and the question would then be determined at trial. Ms Boon has not referred me to any authority which states in terms that it is incumbent on a claimant to plead that, as a matter of law, damages are to be assessed on the basis of a loss of a chance, when if (as here) the claimant's pleaded case is that this is what would have happened.

106. For all of these reasons, the Defendant's case on this third point is not made out in my judgment.

Duty to Inspect - Causation – no real prospect of success

107. This relates to the allegations pleaded in paragraphs 28AR to 28AV as summarised above. Ms Boon submitted that, since the Claimant's primary case is that (save for some very minor workmanship defects) the vast majority, if not all, of the defects alleged under this head are said to have been caused as a result of Godfrey's failure to provide adequate construction information (and not workmanship), then it cannot credibly be argued that Ease would have rectified the defects (without charge) and would not just have abandoned the project. She submits that it is inconceivable to suggest that as matter of causation, Ease would have rectified over £800,000 worth of works which it is said by the Claimant were not caused as a result of poor workmanship, but rather, a lack of design.

108. Ms Boon refers to the second report of Mr Smart at paragraph 10.4 where he says that: "If Mr Godfrey had instructed the removal of defective work, I consider that Ease would have a good argument that they had constructed what they were instructed to do, as best they could with inadequate information and that payment would be required for any remedial works ..."

109. In my judgment this submission is overstated, because this element of the Claimant's case is expressly pleaded – see paragraph 28AR - on the basis that it is an alternative case to the case previously pleaded, i.e. on the alternative basis that the design, details and specification were prepared non-negligently but that the work undertaken by Ease was defective and not properly executed in accordance with Godfrey's design and specification.

110. However, as stated above in my review of the Amended Particulars of Claim, where this pleaded case is fundamentally flawed is on the basis that the whole of the £800,000 pleaded and itemised in Appendix 4 can be said to have been caused by these limited alternative pleaded case. Moreover, unlike the simple pleading error in relation to the quantification of the claim in relation to the structure and external elements, this error cannot simply be rectified by a simple recalculation based on the removal of the items included in Appendix 4 which do not fall under the structure and external elements of that appendix. It would require a complete re-assessment of Appendix 4 and the provision of further detail as to: (a) which items are directly related to the removal of the defective work; (b) which items are claimed on the basis that the work, although defective, would have to be removed and replaced in order to remedy the defective work; and (c) which items are claimed on the basis that they are consequential upon the defective work (for example, water ingress) and/or consequential upon the Claimant's inability to fund prompt remedial works over the period post termination of the Ease contract.

111. Finally, there would have to be a separate (and alternative) pleaded case which set out a case as to which defective items were wrongly included within the valuation of interim certificates and in what amount, so that this alternative claim could also be quantified.
112. Given that the claim as pleaded cannot succeed, and there has been no attempt to justify or to further amend to quantify these two claims, in my judgment this element of the claim has no reasonable prospect of success and should be struck out on that basis.

Issue 2 and Issue 3 – Amendment and strike-out for breach of unless order and relief from sanctions in respect of such breach

113. It is convenient to address these submissions together on the basis that they raise similar (although not identical) questions, including questions of assessment and discretion.
114. At the beginning of her oral submissions Ms Boon submitted that it was for the Claimant to satisfy the court that the Amended Particulars of Claim satisfied the criteria for permitting an amendment, including the need to demonstrate that the claim as proposed to be included was either not statute-barred or fell within the scope of CPR paragraph 17.4 (i.e. that if its effect was to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings).
115. Mr Newman objected that this was not a point which had been raised in the strike-out / summary judgment application or in Ms Boon's skeleton argument for this (or the previous hearing) and that neither he nor his client had come prepared to meet it. That seemed to me to be a fair point so that if it was allowed to be pursued it might well require an adjournment which would be, putting it neutrally, most regrettable, and have costs consequences. On consideration Ms Boon confirmed that the Defendant was not contending that permission should not be granted on this basis and, accordingly, it is not necessary for me to address it in this judgment.
116. As to other discretionary factors, I bear in mind all of the points so ably urged on me by Ms Boon, including the prejudice due to the Claimant's extended failure properly to plead its case and to the (possible) impact on the ability to call Mr Godfrey as a witness with a reasonable recollection of events, especially given his advancing age.
117. However, I must assess these submissions against the backdrop that - save for the need for the Amended Particulars of Claim to be amended, first by recalculating the claim for loss in relation to the structure and external elements (which is essentially purely mathematical) and, second, by removing the alternative claim in paragraphs 28R to 28AV - the Claimant has finally pleaded a case which meets the criteria specified in the previous orders, both in form and in substance, and thus allows the Defendant to plead a case in response and for the case to proceed to trial.
118. In the circumstances, whilst the background of delay and previous failure to do so and to comply is extremely unsatisfactory and, in particular in relation to the second non-compliance, worthy of strong condemnation, in my judgment it is plain that on an application of the

overriding objective the amendments ought to be allowed so that the case can be determined on the merits at trial.

119. It is worth noting, as Mr Newman has emphasised, that the case is heavily documented in terms of contemporaneous documentation and, thus, there is relatively little scope for heavily contested evidence on key issues which cannot fairly be determined by reference to such documentation and to the expert evidence, which has already been obtained by both parties in relation to the key issue of liability and where there are contemporaneous reports in relation to the nature, extent and valuation of the work done and the remaining and remedial works alleged by the Claimant.
120. The more difficult question in my judgment is that of strike-out for breach of unless order and relief from sanctions in respect of such breach.
121. The starting point is clear, which is that under paragraph 1 of the order of 11/10/24 it was stated in terms that unless the replacement Amended Particulars of Claim complies with the requirements of sub-paragraphs 1.1 to 1.4 then the consequence was that her claim should be struck out. The order did not say, as it might have done, that *unless and to the extent that* the replacement Amended Particulars of Claim complies with the requirements of sub-paragraphs 1.1 to 1.4 then the consequence was that her claim *or the relevant part of it* should be struck out. Ms Boon is entitled to submit that there is no reason to consider that this was an unintended consequence, against the chronology of previous failures, especially when compared with the terms of the previous order that “in default of compliance with [the information in the attached schedule] the Defendant shall be entitled to apply for an order striking out the claim to the extent that it remains inadequately particularised”. In short, Ms Boon is entitled to submit that this was the Claimant’s last chance and, if the amended pleading did not comply in any material respect, then the consequence to her would indeed be draconian, but that was clearly and justifiably the case. This is a factor which, I accept, is of significant weight.
122. Nonetheless, without needing to repeat myself, the Amended Particulars of Claim in its current form is now compliant save as to the pleading of the alternative duty to inspect claim, which is fundamentally non-compliant, and is to be struck out. It is non-compliant because it does not set out a positive case as to what the consequences were of such breach in terms of what Ease would have done and at what cost and the basis on which that is alleged and the details of the cost difference alleged. Nor does it set out or explain her positive case as to what loss and damage she has suffered as a result.
123. For reasons which I have explained, the bare allegation in paragraph 28V, whilst notionally setting out a positive case on causation and loss, cannot be regarded as substantial compliance with the order because it plainly does not explain the basis how it can be said that the pleaded breaches of inspection and certification could have caused all of the remedial works and costs identified in Appendix 4.
124. I thus have to proceed on the basis that the unless sanction ought to come into effect unless the Claimant is entitled to seek and to obtain an order for relief from sanctions.
125. Before turning to address this fundamental point I should make clear that I regard the minor question of mathematical recalculation in a different category. It is not a non-compliance,

technical or substantial, but rather a simple error which was not the subject of submission or complaint in the correspondence following service of the Amended Particulars of Claim and only became apparent during the course of questions from me during the hearing. If, however, it does amount to a technical or substantial breach, then in my judgment this would be a clear case for granting relief from sanctions on an application of the principles discussed below.

126. Returning to the more substantial question, the first point to make is that neither party made submissions in relation to the effect of non-compliance as to part on the whole of the claim in their evidence or skeleton arguments, save for Ms Boon's general submission, recorded above, that the Claimant had complied with the form but not the substance of the unless order. In particular, the Defendant did not, either in its application or through Ms Boon's skeleton argument, set out an analysis of the lack of a pleaded causative link between the pleaded breaches and the pleaded losses equivalent to that conducted during the hearing itself, initially, as a result of my raising the point with Mr Newman, nor submit that by reason of this lack of pleaded linkage and without more the Claimant was in breach of the unless order. Nor has the Defendant made an application for an order that the claim has been or should be struck out, as provided for by paragraph 1 of the order made 11/10/24.
127. It was only during the hearing that I raised the specific point as to whether or not the consequence of non-compliance in relation to the duty to inspect case was such that the whole of the claim should be struck out and, if such was the case, whether I could consider and decide whether or not the Claimant should have relief from sanctions without the need for a formal application supported by evidence. Mr Newman submitted that I could and I should and that it would be perverse to strike-out the whole claim on this basis. Ms Boon did not submit that I should not decide the question without an application or evidence in support. Instead, she submitted that what had happened here showed that the Claimant was "beyond the last chance saloon" and that the court should not give the Claimant another opportunity even in relation to the compliant sections of the Amended Particulars of Claim.
128. Ms Boon was right not to take the procedural objection, since there is Court of Appeal authority (*Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463) that the court has jurisdiction to grant relief from sanctions without an application having been made, although "the jurisdiction is one which is likely to be exercised only rarely because it will usually be necessary for evidence to be placed before the court to enable it to consider the various matters to which rule 3.9 refers" (paragraph 33).
129. I am satisfied that it is in the interests of justice to consider and decide the question of relief from sanctions in this judgment on the basis of the material before me, albeit without speculating in the Claimant's favour as to what she might have said had she made a formal application or addressed this point in evidence.
130. Applying the well-known three stage test set out in *Denton v TH White Ltd* [2014] EWCA Civ 906, it is plain that the breach is, in the context of the history of this case, both serious and significant.
131. It is also plain that there is no good reason for the breach. I should remind myself that I gave the Claimant a very generous extension of time in which to serve both the first and the second Amended Particulars of Claim because I recognised that it would be necessary for the Claimant

and her legal and professional advisers to spend a significant amount of time in ensuring that the legal, factual and expert opinion basis for pleading the claim was marshalled.

132. What has clearly happened is that after 11/10/24 the Claimant and her team have spent that time in marshalling and pleading a coherent case in relation to breach of duty to review but have failed to do likewise in relation to breach of duty to inspect and certify. The Claimant clearly took the opportunity to instruct Mr Smart in relation to the issues raised in Ms Boon's skeleton argument for the previous hearing, which included the issue raised in relation to the duty to inspect argument, but his report does not address this issue specifically nor consider the causal consequences of the alleged breach, save in the limited respect identified by Ms Boon as noted above. In the absence of any proper pleaded or evidential basis for this the Claimant and/or her advisers appears to have believed that this alternative claim could be maintained on the basis that the consequences of the failure to inspect could be equated with the consequences of the failure to review, when that is plainly not the case in the absence of a proper pleaded or evidential basis. The Claimant, properly advised, could not reasonably have believed that this was acceptable and, as I have said, did not accept the point when asked the pertinent question by the Defendant's solicitors in correspondence.
133. I thus have to consider all of the circumstances of the case, including the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders.
134. Point (a) clearly goes against the Claimant here. The best point in mitigation for her is that she has done the hard lifting necessary to get the primary duty to review claim into proper pleaded order and that the claim can now go forward on the basis of that claim alone (as well as the separate freestanding interim certificate case, as to which no objection has been taken). Insofar as the Defendant seeks to rely on the further delay from the adjourned hearing of 3/2/25, it may be said that this was at least as much the consequence of the Defendant's decision to seek to have the whole claim struck out or made the subject of summary judgment than this discrete point.
135. Point (b) also clearly goes against the Claimant here, given her previous failing to plead the case properly from the outset and to comply with my first order to rectify the defects in her pleaded case. Again, the best points in mitigation are as made above in relation to point (a).
136. As the guidance in *Denton* makes clear, the court should consider whether the sanction imposed is proportionate to the breach in question. In my judgment this is the strongest point in the Claimant's favour. The non-compliance can, and will be, sanctioned, without the need for any further application by the Defendant or any further delay through the already-determined consequence of striking out the offending claim. The Claimant will not therefore have a further chance to re-plead this claim; she has irretrievably lost that opportunity as a direct result of her non-compliance. The more substantial element of the claim, i.e. the duty to review claim, can, however, go forward as anticipated by the order of 11/10/24 without the need for any further action, save only to correct the mathematical error.
137. In my judgment it would in all the circumstances be disproportionate to strike out a claim, which has now been properly pleaded and which has survived a heavily contested strike-out / summary judgment application, only because the Claimant also pleaded a non-compliant claim

which is now the subject of strike out. I accept that the Claimant may count herself lucky in this respect. However, I am entitled and do have regard to the fact that the Claimant is a private individual in poor health and of modest means who, if she is right, has suffered badly due to the breach of Godfrey, as the construction professional on whom she placed reliance. Whilst I must also counter-balance Mr Godfrey's own age, he is not the subject of any direct claim which will, if valid, be met by insurers alone. It must also be noted that the Architects Registration Board did conduct an investigation into the Claimant's complaints against Mr Godfrey and, in a detailed decision made on 9 June 2020, concluded that there was a case to answer in relation to many of them, including those relevant to this claim. As I understand it, the only reason these disciplinary proceedings did not proceed further was due to Mr Godfrey's retirement from practice.

138. Although the Claimant may be criticised for not having made an application for relief from sanctions, this factor is in my judgment offset by the fact that this point has, as I have said, assumed far greater importance in the course of the hearing than it did before, especially in the absence of any application for an order for judgment pursuant to the unless order from the Defendant and, perhaps more substantially, the absence of this as a specified standalone basis for saying that the unless order has come into effect regardless of the other matters relied upon. It may also be observed that where there is a contested hearing in a case such as this, where the complainant is applying for separate relief as well as alleging that the defaulting party is in breach of an unless order for unparticularised reasons, it is rather difficult for the defaulting party to do any more than make an application saying that if and to the extent that they are in breach they seek relief from sanctions.
139. I should also bear in mind that the Claimant has already been penalised in costs for the previous pleading failures and, pursuant to paragraph 2 of the order made 11/10/24, the costs of and occasioned by the amendments are already to be paid by the Claimant in any event.
140. Insofar as justified, the Defendant will also have the opportunity to seek recovery of its costs to the extent that the Claimant has obtained the indulgence of the court in securing relief from sanctions.
141. Taking all these factors into the balance, overall, in my judgment the appropriate course is to grant relief from sanctions and thus to allow the claim to proceed on the basis specified in the directions order of 23/1/24.
142. The Claimant should of course be under no illusion as to the consequences of any further significant non-compliance for the future.
143. In summary, however, my decision is that the Claimant should have a reasonable period of time, no more than 14 days from the making of the order following this judgment, to file and serve a final Amended Particulars of Claim which amends paragraph 28AJ(d) and deletes paragraphs 28AR to 28AV, following which the transfer to the Bristol TCC should take effect and, following a suitable pause for a mediation, the directions in paragraphs 10.3 onwards to have effect and a revised PTR and trial dates should be set by reference to that timetable.