Neutral Citation Number: [2025] EWHC 344 (Ch)

Claim No: PT-2024-LDS-000029
& Claim No. L80LS080

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Fourth Floor,
West Gate,
6 Grace Street,
Leeds, LS1 2RP.

Date: 21/02/2025

Before:

HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

- -

Between:

TRIDENT HOUSE DEVELOPMENT LIMITED	**Claimant**
- and -	
MOHAMMED YOUSAF	**Defendant**

- -
- -

Jonathan Upton (instructed by **Mishcon de Reya LLP**) for the **Claimant**
Jonathan Ward (instructed by **Blakewater Certus Solicitors**) for the **Defendant**

Hearing dates: 20-24 January 2025

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HH JUDGE KLEIN

HH Judge Klein:

1. Galem House is a nineteenth century former textile warehouse in Bradford which is being developed by the Claimant ("Trident") into seventy seven apartments ("the project"). Trident, a special purpose vehicle, bought Galem House for £580,000 in October 2022, although a financial viability assessment carried out for Trident by Saunders Quantity Surveyors in June 2022 had attributed a value of £29,250 to the property. That may be because Galem House stopped being used in about 2000 and became derelict. As the financial viability assessment explains (and as photographs support):

> "The building comprises a 7 storey structure with the two lower levels forming half basement levels. The external walls are made out of sandstone with feature band courses, stone window heads and cills and the proportion of the openings give the building a vertical emphasis. Galem House was subject to a significant fire which destroyed the middle third of the building through all the floors resulting in the loss of part of the roof through which rain has entered the building for many years."

Galem House abuts Grattan Road to the north and Vincent Street to the west. Its southern elevation is a party wall with Sunbridge Apartments, which, in turn, abut Sunbridge Road. Its eastern elevation is mainly a party wall with Woolston Apartments, which, in turn, abut Tetley Street to the east. South-east of Galem House is an open almost-rectangle of land belonging to the Defendant ("Mr Yousaf") and operated by him as a car park, the entrance to which is adjacent to Sunbridge Apartments on Sunbridge Road. A small section of Galem House's eastern elevation (where it is not a party wall with Woolston Apartments), in the south-east corner, was a wall which abutted the car park. It is this small section of wall ("the Galem House wall") which is the subject of the two claims between the parties which I have had to determine. The Galem House wall abutted a lower level wall in the car park ("the Yousaf wall").

2. It is not apparently disputed (and photographs appear to show) that, to a significant height, the Galem House wall was not built of external bricks. Photographs also suggest that, apart from signage indicating that the car park is being used as such, the car park is an open piece of land – there are no marked car park bays for example – which, where it abuts Sunbridge Road, is defined by a wall which may have been an external wall of a former building. Although no-one has contended that the Galem House wall was a party wall, because of its construction and the photographic evidence to which I have just referred, it may have abutted a former building on the car park.

3. Trident's development of Galem House has a significant place in Bradford's regeneration. West Yorkshire Combined Authority has committed to making a £1.2 million grant, from the Brownfield Housing Fund, to Trident (if certain pre-conditions are met), and the local planning authority, City of Bradford MDC ("Bradford MDC"), has waived any community infrastructure levy and has not required Trident to undertake any planning obligations under a Section 106 agreement. A Project Overview to support the grant says as follows:

> "The project occupies a strategic position within the Goitside conservation Area between the Bradford Learning Quarter (that

houses the Bradford College and Bradford University campuses) and the council's primary city centre regeneration area known as "City Village". The three strategic priority areas of the City village, Goitside and Learning Quarter have the capability of providing some 2,700 new homes out of the current adopted City Centre Area Action Plan's target of 3,500 homes, and the successful delivery of the scheme will contribute to Bradford Council's efforts to achieve this strategically crucial target.

The new homes will make a significant contribution to the Council's strategy of creating affordable and sustainable housing in the city centre in accordance with the adopted City Centre Area Action Plan (AAP), that will also help to address the District's shortage of the right type of housing in the right places to meet Bradford's needs over the next 15-20 years.

…

The scheme outputs and benefits include:

- To restore a priority heritage building comprising of 0.13 acres or 0.053 hectares back into use.

  …

- To provide 77 new homes (apartments) in a key priority urban centre.

  …

- To create nine new building management jobs delivering 13,624 hours of employment per year.

- To deliver 3 apprenticeships in conjunctions with Bradford University.

- To deliver 4 apprenticeships in conjunction with Bradford College.

- To deliver 100 hours per year of events to promote local businesses and a sense of community to the building residents."

4. Bradford MDC initially granted planning permission for the project on 10 May 2023. The permission required development to be carried out in accordance with the approved development plans, which included a plan of the Galem House wall ("the original plan") showing windows formed overlooking the car park. The original plan included provision for four windows in the Yousaf wall, apparently because, at the time planning permission was sought, Trident believed that the Yousaf wall was part of Galem House. When it appreciated that the Yousaf wall is not part of Galem House, it amended the plan ("the amended plan") to exclude windows at low level (at the level of the Yousaf

wall), but the amended plan continues to make provision for windows in the Galem House wall at higher levels. Trident obtained a variation to its planning permission under s.73 of the Town and Country Planning Act 1990 in December 2023. The amended plan was approved as a plan for the purposes of planning permission. It is uncertain, however, whether the varied planning permission permits the removal of the four windows in the Yousaf wall. So, in September 2024, Trident applied for such permission by way of an application for a non-material amendment to its varied planning permission. That application has not been determined yet by Bradford MDC (although the claim for an access order, which is the second of the claims I have to determine, has proceeded on the effectively agreed basis that any work permitted under any access order I make will not include the formation of those four windows, because the parties have agreed that any access order will only be for the purpose of building a new Galem House wall at first floor level and above (not at any lower level where the four windows were to be) and in a way that does not interfere with the Yousaf wall).

5. Mr Yousaf has objected to any windows being formed in the Galem House wall (or any replacement wall overlooking the car park ("the new Galem House wall")). He claims that they will affect his future building plans for the car park. There is no evidence that Mr Yousaf has, or can carry out, any such plans, although there is apparently a lapsed planning permission for a hotel on the car park.

6. Against the background of Mr Yousaf's objections to the windows, relations between the parties broke down. I do not need to determine why that is so or which, if either, party has been at fault.

7. In any event, on 5 June 2023, Bradford MDC served a dangerous building notice relating to Galem House on Trident under s.78 of the Building Act 1984 ("the s.78 notice"). The notice is headed "Emergency Measures to External walls" and recites that it appeared to Bradford MDC that Galem House "is in such a state as to be dangerous and that immediate action is required to remove the danger to all the external walls". It also contains the following advisory note:

> "This Notice advises the owner that the building or structure at Galem House 3-5 Vincent Street Bradford West Yorkshire is deemed to be in such a dangerous state that immediate action is required to remove the danger to the building or the Council may take immediate action to remove the danger…"

The circumstances in which s.78 notice came to be served are disputed, although it has not been suggested that Bradford MDC did not genuinely believe that Galem House's external walls were dangerous or that it had an ulterior motive for serving the notice. In any event, I am satisfied that the Galem House wall was then unsafe and unstable. John Fay, a chartered building surveyor who acts as Trident's party wall surveyor on the project, and who gave evidence for Trident, explained that, by even a year before the s.78 notice was served, he was concerned about the stability of Galem House's external walls, at least at a high level, including of a parapet wall comprised in the Galem House wall, because of the absence of lateral restraint. The photographs support Mr Fay's contention that Galem House's external walls have lost lateral restraint and that the Galem House wall was in a poor state of repair. A technical note, prepared by Clancy Consulting Ltd (structural engineers) for Trident on 2 May 2024, also recorded that:

> "As part of the Galem House re-development, the section of existing wall which runs between Sunbridge Apartments and Woolston Apartments [(that is, Galem House wall)] has been demolished due to its poor and unsafe condition.
>
> …
>
> This section of wall has had to be demolished due to its poor condition and safety concerns."

8. Trident began to deconstruct the Galem House wall on 2 January 2024. Its plan was, at the time, to demolish the wall down to first floor level. Because Mr Yousaf would not permit Trident's contractor, Mersey Engineering Construction Ltd ("MEC"), access to the car park to deconstruct the Galem House wall, the work had to be done internally from Galem House from scaffolding ("the Galem House scaffolding"). The work took some time. Shortly before the deconstruction was complete – as it turns out, there was about two days' work left – on about 25 January 2024, Mr Yousaf arranged for scaffolding to be erected in the car park ("the Yousaf scaffolding") and then for a new wall ("the Yousaf new wall") to be built on top of the Yousaf wall, to obstruct any windows in any new wall erected to replace the Galem House wall.

9. Shortly before trial, Mr Yousaf admitted that:

   i) the Yousaf scaffolding was attached to the Galem House scaffolding;

   ii) the Yousaf scaffolding was attached to what remained of the Galem House wall;

   iii) the Yousaf new wall was tied to what remained of the Galem House wall;

   iv) thereby, Mr Yousaf trespassed on Galem House;

   v) the Yousaf new wall was structurally unsafe and at risk of collapse;

   vi) thereby, the Yousaf new wall was a nuisance.

   (In this judgment, I refer to the admittedly tortious erection and maintenance of the Yousaf scaffolding and Yousaf new wall, as "Mr Yousaf's conduct").

10. It appears not to be disputed that, as a result of Mr Yousaf's conduct, Trident's scaffolder decommissioned the Galem House scaffolding, following which MEC halted the deconstruction of the Galem House wall. Mr Yousaf has admitted that, whilst the Yousaf scaffolding was attached to the Galem House scaffolding, it was reasonable for the Galem House scaffolding to be decommissioned.

11. Whilst the Yousaf new wall was standing, MEC created an exclusion safety zone ("the Exclusion Zone") inside Galem House. The Exclusion Zone ran the whole width of Galem House's southern elevation and had a depth of about a quarter of the site. It included the whole of the area of the Galem House wall, as well as the main access to the site. It also included about half of a stub wall.

12. There is a dispute about whether any work took place in the Exclusion Zone. Mr Yousaf relies on a video taken from the car park showing a person on the Galem House

scaffolding whilst the Exclusion Zone was imposed. Trident's case is that no work took place in the Exclusion Zone, and that the video is of a scaffolder checking the safety of the Galem House scaffolding. In any event, Mr Yousaf has admitted that, whilst the Yousaf new wall was standing, Trident had a reasonable basis to suspend work in the vicinity of the Yousaf new wall.

13. On 8 February 2024, Richard Smith J made a pre-claim mandatory injunction, amongst other orders, for the demolition "forthwith" of the Yousaf new wall.

14. The Yousaf new wall and the Yousaf scaffolding were taken down on about 21 February 2024.

15. On 14 February 2024, Trident had begun a claim in the Shorter Trials Scheme in the Business & Property Courts of England and Wales (which was later transferred to Leeds, and later still taken out of the Shorter Trials Scheme) for permanent injunctions and for damages for the delay to the completion of the project which it contends was a result of Mr Yousaf's conduct. In fact, perhaps because of a consent order made by Leech J on 14 February 2024 by which the orders made by Richard Smith J were continued until "further order of the court", the claim has only proceeded in relation to Trident's claim for damages ("the Damages Claim").

16. Although the deconstruction of the Galem House wall which Trident planned was completed from inside Galem House shortly after the Yousaf new wall and Yousaf scaffolding were taken down, it is agreed by the parties' building experts, and not in dispute, that the new Galem House wall cannot be built safely by MEC without access to the car park, from where some, or all, of the work will need to be carried out.

17. Talal Zabar is a quantity surveyor and acts as Trident's project manager and contract administrator. Mr Zabar prepared a report in May 2024 ("the Car Park Wall report"). In it, he explained that, because Mr Yousaf had not permitted the Galem House wall to be deconstructed from the car park, the original plan for its deconstruction had to be changed. He also explained that, because Mr Yousaf was not permitting MEC access to the car park to build the new Galem House wall, Trident had instructed its design team and MEC to develop a plan to build it from Galem House. He continued:

> "The change in design and construction methodology has impacted the project cost and programme.
>
> Cost and time implications
>
> Due to the poor condition of the building structure, a full façade retention system was designed and installed in the building. The façade retention cost is calculated based on the weekly hire cost of each component of the system which is £11k per week. The façade retention can only be dismantled once the permanent steel frame is fully installed.
>
> The designed steel frame is reliant on fixing into the existing structure to tie in all the building perimeter walls. In simple terms, the steel beams are designed to sit on pad stones that are situated in the premiere walls [(including the Galem House wall,

> according to a structural plan prepared by Clancy Consulting Ltd for Trident)].
>
> The delay in progressing the work on the car park wall means that the steel frame in that corner of the building cannot be completed without having a wall to fix the steel members to, hence the following points summarise the impact on the project:
>
> • Extending the hire of the façade retention system as the removal of it is only permissible when the steel frame is fully erected.
>
> …
>
> • The designed steel frame provides an additional two floors to the building and is fully dependent on the completion of the steel frame within the existing building, this means that the phasing of the works will have to also include the additional top two floors which was not factored into the quote and programme submitted by the steel erectors.
>
> …
>
> Conclusion
>
> Not being able to obtain access through the car park land is impacting the project significantly…The cost of the project is increasing day by day as access to the car park land is unknown. Not being able to gain access and complete the work means that the project could not be completed and all the cost spent to date on the project would be a loss to the Employer. The façade retention system will have to stay in place to keep the building safe as the permanent structure is not sufficient as it stands and therefore the running cost of hiring the façade retention components and the maintenance cost to maintain the structural integrity.
>
> …The project team has exhausted all possible options and they all require access to the car park for minimum safety requirements, the time and cost implications would render the project an unviable development."

Mr Yousaf continues not to permit MEC access to the car park.

18. Before the Car Park Wall report, on 20 February 2024, Trident had begun a Part 8 claim ("the Access Claim") for an access order under the Access to Neighbouring Land Act 1992 ("the 1992 Act").

19. The Access Claim was begun in the County Court at Bradford, but, with my support, the parties applied for a transfer of the claim to Leeds so that the Access Claim could be case managed (to the extent that it had not already been), and heard, at the same time

as the Damages Claim. District Judge Foster transferred the Access Claim to the County Court at Leeds on 25 July 2024. During the trial, at the parties' joint request I made a consent order transferring the Access Claim to the Property, Trusts and Probate List (ChD) in the Business and Property Courts in Leeds.

20. Mr Yousaf objects to any access order being made under the 1992 Act.

21. He accepts that s.1(3) of the 1992 Act is not engaged. In other words, he accepts that an access order would not be so intrusive that it would be unreasonable to make an order. At my direction, the parties have also helpfully agreed the terms of an order (subject to a dispute about how much, if any, consideration should be payable by Trident, pursuant to s.2(5) of the 1992 Act) on the hypothesis that an access order is made. Broadly, the order provides that:

    i) an eight metre by six metre exclusion zone protected by Heras fencing will be created in the car park adjacent to where the Galem House wall was and where the new Galem House wall is intended to be built;

    ii) two mobile elevated works platforms will operate in the exclusion zone from which the new Galem House wall will be built;

    iii) materials will be delivered to, and collected from, one of the platforms in the car park just outside the exclusion zone by a telehandler up to four times a day;

    iv) access to the car park will be required for up to 35 days;

    v) two banksmen will supervise the platform and telehandler movements in the car park.

22. This is the judgment following the trial of part of the Damages Claim and the final hearing of the Access Claim.

Representation

23. Trident has been represented throughout the claim by Jonathan Upton of counsel and, since the first case management conference, Jonathan Ward of counsel has represented Mr Yousaf. I am grateful to them both for their help.

The issues to be determined

24. Because of the admissions Mr Yousaf has made (in particular, of trespass and nuisance), the parties have agreed that the only issues for determination in the Damages Claim are causation and quantum. On the first day of the trial, Trident made an application for permission to rely on documents it had not disclosed in accordance with a disclosure order I made on 27 June 2024. Because the Damages Claim was in the Shorter Trials Scheme at the time, I ordered the parties to serve disclosure lists of the documents on which they relied in support of their case, by 30 August 2024. CPR 31.21 provides that:

> "A party may not rely on any document which he fails to disclose or in respect of which he fails to permit inspection unless the court gives permission."

Trident accepted that its application was for relief from sanctions. For the reasons I gave at the time, I gave Trident partial relief from sanctions, permitting it to rely on the documents on quantum only and I directed that the trial should proceed on the issue of causation only, with any quantum issues being determined at a later date. The parties agreed a form of order which provides as follows:

> "The trial shall proceed on the issue of causation only, namely whether the Defendant's tortious conduct has caused delay to the completion of the Claimant's project to refurbish Galem House and, if so, by how long."

25. As I have already indicated, the two issues I have to determine in the Access Claim are:

    i) whether an access order should be made;

    ii) if an order should be made, whether to make provision for Trident to pay Mr Yousaf consideration for the privilege of entering the car park in pursuance of the order, and, if so, in what amount (see s.2(5) of the 1992 Act).

Trident's case in the Damages Claim in more detail

26. The project is a complex one. As I have said, a derelict warehouse is being turned into seventy seven apartments and, even in 2022 when the financial viability assessment was completed, the project costs were estimated at in excess of £9 million, and it is not disputed that those costs have increased since then. It is also not disputed that the project has not been completed and that, even putting aside Mr Yousaf's conduct, it will now not be completed before November 2025. It is not immediately obvious, therefore, that a delay of about twenty six days in completing the deconstruction of the Galem House wall has caused the completion of the project to be delayed beyond the date when it might otherwise have been completed; particularly when it is borne in mind that (i) as it happens, the deconstruction of the Galem House wall was completed, after the Yousaf new wall and the Yousaf scaffolding were taken down, within about two days and (ii) the new Galem House wall cannot be built, and so the project completed, without an access order, not because of Mr Yousaf's conduct.

27. In the circumstances, so that the Damages Claim could be efficiently case-managed and so that the trial of the Damages Claim could be most fair, it has been very important for Trident to set out clearly and comprehensively the basis for its claim that a temporary halt to the deconstruction (and, as I have said, not the re-building) of the Galem House wall caused the completion of the project to be delayed.

28. Trident's plea of causation in its Amended Particulars of Claim was as follows:

> "For the period from 25 January 2024 to 20 February 2024 the Claimant's contractors were unable to carry out works to part of Galem House using the Claimant's scaffolding or at all. Further, in the same period the Claimant's contractors were unable to carry out works to Galem House because (i) the New Wall was attached to the Claimant's Wall with masonry wall ties; and (ii) the New Wall was in an unsafe condition and/or at risk of

> collapse and/or causing damage to Galem House and injury to persons thereon.
>
> PARTICULARS OF SPECIAL DAMAGE
>
> Loss suffered as a result of disruption and delays to construction works - estimated at around £45,000 per week from 25 January 2024 and continuing until the trespass and nuisance ceased on 20 February 2024."

That plea was not sufficient. Trident did not plead:

i) what work could not be carried out during the period in question;

ii) why the work which could not be carried out delayed the completion of the project, and, in particular, other work which was sequenced to take place later on in the project;

iii) the quantification of its claim for damages fully.

29. In consequence, at the first case management conference, I made the following order:

> "By 4pm on 19 July 2024 the Claimant must file and serve a schedule of loss setting out how the damages claim is quantified, which must include an explanation of how each matter complained of caused or contributed to the loss claimed which itself must be particularised."

30. The schedule of loss was eventually filed on 4 September 2024. Item 37 is the item of highest value on the schedule. It reads:

> "Mega Shore Towers - Rate (weekly): £7,551.21 No. of days [claimed for]: 28…Amount: £30,204.84 Particulars of Damages: Cost of maintaining the mega shore structural component of the façade retention scheme during the period of time that the project was unable to continue. Explanation of how each matter complained of caused or contributed to the loss claimed: Cost of maintaining the Mega Shore component of the façade retention scheme."

31. I am doubtful that the schedule of loss complies with my order. In any event, it is not possible to deduce from an entry such as item 37 what work Trident contends could not be carried out between the dates in issue or why that work delayed the completion of the project.

32. Witness statements were exchanged on 2 October 2024. They shed hardly any more light on Trident's case.

33. On the third day of the trial, after Trident's witnesses had completed their evidence, and having been pressed by me earlier in the trial, Mr Upton clarified Trident's case, much of which had only become evident from evidence elicited by Mr Upton in re-examination of Mr Jerald Solis, UK General Manager of Coverstone Investments Ltd,

a company related to Trident, who has been managing the project on Trident's behalf, and Mr Zabar.

34. In brief, Trident's case is as follows:

    i) because of Mr Yousaf's conduct, the Exclusion Zone had to be imposed between about 25 January 2024 and 20 February 2024;

    ii) during that time, the following work which had been planned in the Exclusion Zone could not be carried out: (i) the deconstruction of the internal structure, (ii) the removal of the stub wall, (iii) padstones (described as Phase 2) could not installed, (iv) a retaining wall could not be built and (v) steelwork foundations could not be laid;

    iii) because the laying of the steelwork foundations, in particular, could not take place, a steel frame could not be erected. The steel frame is what will provide stability to Galem House;

    iv) it is a "matter of logic" (Mr Upton suggested) that, because internal deconstruction was delayed and the stub wall could not be removed, the steelwork foundations could not be laid or the padstones installed, and because the laying of the steelwork foundations, in particular, was delayed, erection of the steel frame has been delayed, so that the completion of the project will inevitably be delayed, by four weeks, because the steel frame is one of the key components of the project.

35. Trident does not rely on any documentary evidence in support of its case. Instead, it relies on the witness evidence of Mr Solis and Mr Zabar. Mr Ward pointed out that many delay claims are supported by documents including some, or all, of the following: programme records, progress records, resource records, costs records and correspondence and administration records (see Appendix B to the Society of Construction Law's Delay and Disruption Protocol (2nd ed)). He also pointed out that Trident does not rely on evidence from MEC, which, on Trident's case, was the party delayed in the performance of its obligations. Mr Ward effectively invited me to draw an adverse inference from the absence of evidence. It is not appropriate to do so. The pre-conditions for drawing an adverse inference from the absence of a witness are not made out (see, for example, most recently *Winch Design Ltd v. Le Souef* [2025] EWHC 120 (Comm) at [45]); in particular, because Mr Yousaf did not adduce evidence that the completion of the project was not delayed. Nor is it appropriate to draw an adverse inference from the absence of documents. It is a matter for Trident how it wishes to prove its case. In the circumstances, whether or not it can prove its case on the balance of probabilities depends on whether or not I accept the evidence of Mr Solis and Mr Zabar.

Documents

36. I have already mentioned most of the documents to which I will make further reference in this judgment. There are three more which I should mention now.

The Delay Notice

37. A delay notice ("the Delay Notice") was prepared by Andy Beckett, MEC's project manager. I understand it forms part of the disclosure given by Trident in the Damages Claim (and so is a document on which, presumably, it had wished to rely in support of its case). The Delay Notice is dated 25 January 2024 (the approximate date when the Yousaf scaffolding and the Yousaf new wall were erected and the date when the deconstruction of the Galem House wall was temporarily halted). Mr Zabar is shown as being on its distribution list. In fact, the notice is addressed to him. Although there is a section for Trident to complete and sign, most likely by Mr Zabar, to respond to the notice, the copy in the hearing bundle does not contain any response. It reads:

> "I am writing to formally notify you of a delay in the construction works…
>
> Details of Delay
>
> The delay relates to the demolition **and** rebuilding of the car park wall…
>
> The demolition work was forced to halt on 24th January 2024 due to the adjoining owner building his wall during the period of the internal demolition, **and the work resumed on 21st February 2024**. This interruption has led to an extension of the construction timeline and **may** affect the agreed completion date.
>
> …
>
> Proposed Actions
>
> **We are currently reassessing the construction program to determine the full impact of this delay on the overall project schedule**. **Any necessary revisions to the program and cost implications will be communicated to you promptly for your review and approval**.
>
> …
>
> Cost Implication: TBD
>
> Time Implication: TBD
>
> …" (emphasis added).

As the reference to work having resumed on 21 February 2024 suggests, the Delay Notice was not actually produced on 25 January 2024. Mr Yousaf's solicitor interrogated the document properties of the electronic version of the document, which revealed that the document was created at 2:43 pm on 29 August 2024. Disclosure had been due to be given the next day, although I believe that, in fact, there was a short delay, which the parties may have agreed some time beforehand.

38. Mr Zabar was cross-examined about the Delay Notice. He explained that he had requested MEC to prepare a delay notice, but he said that that request had nothing to

do with any litigation. He also explained that "TBD" means "to be discussed" and that the sections of the notice so marked were for completion by MEC.

7 December 2023 Programme of Works

39. Mr Zabar prepared programmes of works. Their purpose was to report the progress of the project to Trident.

40. The first programme of works in the bundle is dated 7 December 2023 ("the December Programme of Works"), before the Yousaf scaffolding and Yousaf new wall were erected, which contains the following information:

    i) the Galem House wall was to be deconstructed and the new Galem House wall was to be built between 20 December 2023 and 29 February 2024;

    ii) no work later in the sequence of the project is (or is shown as being) dependent on that work;

    iii) the deconstruction of the internal structure was due to take place between 18 December 2023 and 16 February 2024;

    iv) the removal of the stub wall was due to take place between 1 April 2024 and 23 April 2024;

    v) no work is (or is shown as) being dependent on the removal of the stub wall;

    vi) phase 2 of the padstones installation was due to take place between 4 March 2024 and 1 April 2024;

    vii) the steelwork foundations were due to be laid between 19 January 2024 and 8 March 2024;

    viii) the installation of the steel frame was dependent on the steelwork foundations being laid;

    ix) the steel frame was due to be installed between 11 March 2024 and 31 May 2024;

    x) the installation of the retaining wall was indirectly dependent on the installation of the steel frame and was due to take place between 8 July 2024 and 2 August 2024.

22 May 2024 Programme of Works

41. The second programme of works in the bundle is dated 22 May 2024 ("the May Programme of Works"), two months after the Yousaf scaffolding and Yousaf new wall were taken down, and records the following:

    i) the dates for the deconstruction of the internal structure remain as in the December Programme of Works, although a variance of fourteen days is also shown;

ii) the removal of the stub wall (on which other work is still not shown as being dependent) began on the date shown in the December Programme of Works (which is more than a month after the Yousaf scaffolding and Yousaf new wall were taken down);

iii) phase 2 of the padstones installation began on the date shown in the December Programme of Works (which was about two weeks after the Yousaf scaffolding and Yousaf new wall were taken down);

iv) the steelwork foundations began to be laid on the date shown in the December Programme of Works but the work was not now programmed to be completed until 31 May 2024;

v) a new item of work was programmed; namely "steel frame design". This item of work is not shown as being dependent on any work earlier in the project sequence but the installation of the steel frame is shown as being dependent on the steel frame design. The steel frame design is shown as being programmed from 24 May 2024 to 26 June 2024;

vi) the installation of the steel frame was due to take place between 27 June 2024 and 23 December 2024;

vii) the installation of the retaining wall continues to be shown as being indirectly dependent on the installation of the steel frame and is shown as taking place between 28 January 2025 and 24 February 2025.

Witness evidence

42. Before reaching any decision, I considered all the witness evidence, as I did all the documents to which I was referred and all of counsel's submissions. However, I only set out in this judgment the witness evidence (and refer to documents and submissions) to the extent I need to in order to explain to the parties the reasons for my decisions.

43. For Trident, I heard from Mr Solis, Mr Zabar and Mr Fay and from Mr Clive Beer, a valuation expert. For Mr Yousaf, I heard from Mr Yousaf himself and from Mr Ruaraidh Adams-Cairns, a valuation expert. The building experts in the Access Claim were in agreement on all key relevant matters and the parties elected not to call them to give oral evidence. Because of Mr Yousaf's admissions, the building experts did not give evidence in the Damages Claim, although I had earlier given permission for them to do so.

44. I have already set out a little of the evidence. I now need to set out some more.

Mr Solis

45. Mr Solis made one trial witness statement in the Damages Claim and five witness statements in the Access Claim.

46. In his oral evidence, he explained that, initially, Trident intended that the project would retain all of Galem House's external walls and that the Galem House wall would not be demolished and rebuilt, and that, had Trident's structural engineers not warned that the Galem House wall was dangerous, Trident would have formed windows in it. He also

explained that the steel frame will "pervade" Galem House and will provide structural support and be the "new skeleton for the building".

47. He explained that, based on what was reported to him by Trident's scaffolders, MEC and Trident's engineers, it was clear to him, at the time, that Galem House was at risk of collapse because of the erection of the Yousaf scaffolding, and that the Yousaf new wall was at risk of collapse into Galem House. As a result, Trident imposed the Exclusion Zone. He explained the consequences of the imposition of the Exclusion Zone as follows:

> "The exclusion zone inside Galem House had to be located where there had been the sole means of access and egress for machinery to the site. As a result, the Claimant was unable to continue with its works to the Car Park side of Galem House until a new access point could be created.
>
> The Claimant instead was forced to turn its attention to carry out works to the external façade of the building on Vincent Street while two further access sites were created into the building to allow some works to persist. The access sites were limited to contractors only rather than machinery, as these access points were at high levels and meant that the works that could continue to the internal site were very limited in nature.
>
> Further, as the internal areas of Galem House were still in the process of deconstruction, a large part of the wall had timber beams that could not be removed such that the works of deconstruction were out of sequence and would have involved significant additional costs to continue."

48. He said, in cross examination, that the imposition of the Exclusion Zone delayed the removal of the stub wall and the laying of foundations, which in turn delayed the erection of the steel frame. In re-examination, he said that the amount of work that could be carried out outside the Exclusion Zone which did not depend on sequencing was not sufficient to wholly eliminate the four week delay to the completion of the project which Trident contends has been caused by Mr Yousaf's conduct. He said that, whilst the Exclusion Zone was imposed, the stub wall could not be demolished, the retaining wall could not be built and the "pad foundation" for the steel frame could not be laid. He said that the "pad foundation" would have been located in front of the stub wall and that, because it could not be laid, the steel frame could not be erected and the project was pushed "back and back again". He could not say, however, when the work to the stub wall or the "pad foundation" started.

49. For reasons I gave at the time, I permitted Mr Ward to cross examine Mr Solis a second time and for Mr Upton to re-examine Mr Solis for a second time. In Mr Solis' second cross examination, Mr Ward pointed out to him that the December Programme of Works showed that the removal of the stub wall was not due to begin until April 2024 (after Mr Yousaf's conduct had come to an end). Mr Solis said that, even though the work to the stub wall had apparently begun on time, had Mr Yousaf's conduct not occurred, examination of what lay behind the stub wall could have taken place earlier, so that the work to the stub wall could have been completed earlier than programmed.

In his second re-examination, he said that the retaining wall was to be built before foundations were laid. He said that he did not know when the removal of the stub wall, the building of the retaining wall, or the laying of foundations was due to start.

50. He said in his written evidence that:

> "The project is not expected to achieve any profit on completion. The Claimant and Coverstone Investments Limited had undertaken the project to form part of a long-term rental portfolio."

He also said:

> "The Claimant is developing Galem House without any expectation of profit…"

However, in cross-examination he said that Trident intends to retain Galem House for its long-term rental portfolio and has never intended to sell on completion of the project, that it did expect a "payback", because the project is a build to rent proposition, and that it will take twenty to twenty six years for the development to break even. He continued by explaining that "of course" Trident contemplated a financial return over time. In answer to a question from me, he then explained that Trident expected to make a return on its money in ten to fifteen years once the grant from the Brownfield Housing Fund is taken into account, and that someone in Trident has quantified that return.

51. He explained why Trident decided to submit an amended plan for planning permission, as follows:

> "…The change was to omit four windows in the wall on the ground and lower ground floors in response to the Defendant's vehement opposition to the inclusion of windows (although the wall will still contain windows on the upper floors). Having windows on the ground and lower ground floors would serve no useful purpose as they would look directly onto the immediately adjacent car park wall, and their inclusion has led to a misunderstanding that the Claimant is seeking to insert windows into the Defendant's wall, which is not the case."

He accepted, in answer to a question from me, that, in fact, the four windows in issue were omitted from the amended plan because, originally, they were shown as being created in the Yousaf wall, and that the dispute between Trident and Mr Yousaf about other windows being formed in the new Galem House wall was a separate matter.

52. In a witness statement made on 3 May 2024, he explained the importance to Trident of an access order, as follows:

> "…The Claimant's contractors have been able to carry out the demolition of the Wall without access through the Car Park. They are however unable to rebuild the Wall without access and as a result the Project will soon grind to a halt unless access is obtained. Without access the steel frame in the corner of Galem

> House that adjoins the Car Park cannot be completed as there will be no wall to which the steel members can be affixed."

He explained, in cross examination, that the project has not ground to a halt since May 2024, because the steel frame has been re-designed so that it does not need to be supported by the new Galem House wall. He also explained that a re-design of the steel frame was being considered on 3 May 2024 but that the design work had not been completed (which is consistent with the inclusion of the new item of work (steel frame design) in the May Programme of Works). In his second cross examination, he confirmed that the steel frame was re-designed because Mr Yousaf will not permit access to the car park and that, because of the re-design, the installation of the steel frame will take twice as long as was originally programmed.

53. He thought that, if the project cannot be completed, Trident would be lucky to get back what it had paid for Galem House, and he explained that Trident has spent £6 million on the project to date.

54. He said that, if an access order is made now, the project is likely to be completed in December 2025 but that, if the Yousaf new wall had not been built, with an access order the project would have been completed in November 2025. He explained that he made that assessment because the Yousaf new wall was standing for a month and November 2025 is a month before December 2025.

55. He said that the estimated cost of building the new Galem House wall under an access order is £63,000 plus the cost of the two proposed mobile elevated works platforms.

56. He suggested that an access order would have little impact on the car park's use because, when the Yousaf new wall was being built, he observed the car park being used even though the area where the wall was being built was not protected by Heras fencing.

Mr Zabar

57. Mr Zabar explained in his first witness statement in the Damages Claim the impact on the project of Mr Yousaf's refusal to allow MEC access to the car park:

> "Negotiations with Mr Yousaf for an access licence to carry out the works by accessing the Car Park became protracted and so we considered alternative ways to demolish the wall of Galem House that abutted the Car Park (the "Galem House Wall") in order to remove the danger, as required by the Notice.
>
> The **initial demolition method** had assumed that we would be able to obtain access through the Car Park. We did not anticipate that we would encounter any issues in agreeing the terms of access as Trident was willing to pay a generous sum for the access.
>
> The design involved erecting scaffolding in the Car Park directly underneath the Galem House Wall, creating an exclusion zone and taking down the wall brick-by-brick and transferring the

> bricks to a skip situated close by within the Car Park by using a chute attached to the scaffold. In order to execute this method, an exclusion zone would have been required to cordon off an area of the Car Park to ensure that no car park users or members of the public would be harmed in the process.
>
> Once it became obvious that an access licence with Mr Yousaf would not be agreed, Trident's design team **revised the methodology** so that the Galem House Wall could be demolished from within Galem House. The redesigned methodology involved installation of scaffolding within Galem House all the way to the top of the Wall and removing the Wall brick-by-brick. This was not the preferred **method** due to the ` would take to dismantle the wall and dispose of the bricks since it would no longer be possible to position the skip within Galem House or transfer the bricks using a chute due to the limited amount of space" (emphasis added).

58. He also explained in his first witness statement that the imposition of the Exclusion Zone "meant that no works could be carried out to the Galem House Wall until [the Yousaf new wall] had been taken down". He continued:

> "Part of my role as Project manager for the redevelopment of Galem House is to monitor and record the costs, both estimated and incurred, and report these to Trident as the designated contract administrator.
>
> …Once the New Wall had been taken down, I was able to calculate the overall delay on the Project, including the delay caused by the building of the New Wall as well as the delays caused by the lack of access through the car park to rebuilding the Galem House Wall.
>
> …
>
> Demolition of the Galem House Wall stopped on 24 January 2024…and works to the wall did not recommence until 21 February 2024. The works to demolish the Galem House Wall were estimated to take around four weeks to complete. As the demolition had to stop and the exclusion zone had to be erected within Galem House for safety reasons, no works could continue to be carried out to the Galem House Wall at all. Other works to the remainder of Galem House were carried out during this period but no works could be carried out to the Galem House Wall whatsoever during this period.
>
> Due to the amount of time that the works to the Galem House Wall would take and the different methodology that had to be used to demolish the wall, it was not possible for this additional delay to be absorbed in the remainder of the Project.

> Consequently, this additional time must be added to the end of the Project delaying completion…"

He was cross-examined about his statement that, because of "the amount of time that the works to the Galem House Wall would take and the different methodology that had to be used to demolish the wall, it was not possible for this additional delay to be absorbed in the remainder of the Project". He said that, by this statement, he meant that, because of the delay in completing the deconstruction of the Galem House wall because of Mr Yousaf's conduct, it was not possible to make up the delay.

59. In his second witness statement in the Damages Claim, he said:

> "…No work could be carried out in the exclusion zone and no personnel or machinery was permitted to enter or pass through the exclusion zone."

60. He gave the following further oral evidence.

61. A delay in completing the sub-structure work, which includes the installation of the retaining wall, came about because of a strategy which had to be adopted (a hit and miss strategy) to guard against any instability at Galem House. The adoption of that strategy was not as a result of conduct of Mr Yousaf.

62. He accepted that, by the Delay Notice, MEC was asserting no more than that, in August 2024, Mr Yousaf's conduct may affect the completion date. He continued that, at that date, MEC did not know what impact any delay in the deconstruction of the Galem House wall or the building of the new Galem House wall would have on the completion of the project.

63. He said that, if the effect of the delay caused by Mr Yousaf's conduct was ongoing at the time he wrote the Car Park Wall report, reference to that would have been expected in the report. He resiled somewhat from this in re-examination, saying that the purpose of the report was to demonstrate to Trident the cost and time implications of building the new Galem House wall.

64. He explained that the purpose of the programmes of works was to report to Trident on the progress of the project and he said that, although they might show that all the delays in the completion of the project were not related to Mr Yousaf's conduct, in fact that conduct has caused delays. In answer to a question from me, he explained that a reader of the May Programme of Works who understood it would conclude that no other work in the project was dependent on the deconstruction of the Galem House wall or the building of the new Galem House wall.

65. In re-examination, he said that the removal of the stub wall (and other work) began later than programmed, but he then said that the stub wall began to be removed on 26 February 2024 (which is earlier than the date shown on the December Programme of Works). He then added that the items of work which were delayed by Mr Yousaf's conduct were the sub-structure works, which are items in the programmes of works which, save for the installation of the retaining wall, Trident does not contend have, in turn, delayed completion of the project.

Mr Fay

66. Mr Fay explained that Bradford MDC in fact served the s.78 notice because Clancy Consulting Ltd was concerned about the stability of Galem House's external walls.

67. He supported Mr Solis' evidence that, originally, Trident intended to form windows in the Galem House wall, and he continued that, had the wall been stable, that would have been the easiest and most cost-effective solution.

Mr Yousaf

68. Many of the dealings with Trident on behalf of Mr Yousaf were overseen by Dr Ayub, Mr Yousaf's brother, rather than by Mr Yousaf himself. As a result, Mr Yousaf did not give any evidence to which I need to refer in this judgment, other than that he accepted that the Galem House wall was in a poor condition. Dr Ayub made a witness statement in the Damages Claim, but he did not attend trial to give oral evidence.

Valuation experts

69. District Judge Anderson gave permission in the Access Claim for expert evidence on the issue of "what, if any, consideration should be payable under s.2(5) and 2(6) of the [1992] Act". Those sub-sections provide as follows, so far as relevant in this case:

> "(5) An access order may include provision requiring the applicant to pay the respondent such sum by way of consideration for the privilege of entering the servient land in pursuance of the order as appears to the court to be fair and reasonable having regard to all the circumstances of the case, including, in particular -
>
> (a) the likely financial advantage of the order to the applicant and any persons connected with him; and
>
> (b) the degree of inconvenience likely to be caused to the respondent or any other person by the entry…
>
> (6) For the purposes of subsection (5)(a) above, the likely financial advantage of an access order to the applicant and any persons connected with him shall in all cases be taken to be a sum of money equal to…the amount (if any) by which so much of any likely increase in the value of the dominant land,…as may reasonably be regarded as attributable to the carrying out of the specified works exceeds the likely cost of carrying out those works with the benefit of the access order…"

The two key matters on which the valuation experts could give helpful evidence have, in practice, therefore been:

i) the net amount, if any, by which Galem House is likely to go up in value by virtue of the new Galem Wall being built under an access order, the cost of such work having been deducted;

ii) because it is reasonable to suppose that the car park has been run to provide Mr Yousaf with an income stream, what, if any, income is Mr Yousaf likely to lose whilst the work permitted under an access order is being carried out and, if it is different, what, if any, sum properly reflects any inconvenience Mr Yousaf is likely to suffer during that work.

70. In the former respect, in particular, neither Mr Beer nor Mr Adams-Cairns were helpful. Mr Beer ultimately effectively said that, because Galem House is such a difficult site, any financial advantage Trident might enjoy by being permitted access to do work from the car park cannot be quantified, or, if it could, the result would be no more than speculative. Mr Adams-Cairns said, in terms, that he had not carried out the quantification exercise at all, because whilst the exercise can be done, it is not helpful or useful in the real world. When I put it to Mr Upton that the evidence of neither expert was of much assistance, he did not demur, and when I put the same point to Mr Ward, he said that he intended to make little reference to the expert valuation evidence in his closing submissions.

71. In the circumstances, it serves no purpose to set out the expert evidence in detail in this judgment. Nor does it serve any purpose for me to decide, save to a very limited extent, the evidence of which expert I preferred. Nevertheless, some of the experts' evidence is helpful, and, to that extent, I set it out now.

Mr Beer

72. Mr Beer suggested that the inconvenience Mr Yousaf is likely to suffer because of an access order can be quantified by (i) calculating the daily rate for four fully-utilised car park spaces (even though the evidence indicates that the car park is not, or not frequently, full), which is £18, (ii) adding to that daily rate, a sum, based on comparable evidence of access licences actually granted, to reflect the size of the proposed exclusion zone, of £18.24, and (iii) multiplying the total by the number of days (thirty five) during which the work in issue is proposed be carried out. This equates to £1,268.40. Mr Beer said that he adopted this approach out of an abundance of caution, so that Mr Yousaf was not under-compensated.

73. Mr Adams-Cairns suggested that the work would require somewhat more of the car park to be left unused and available to MEC (although he seems to have accepted, in a document appended to his report, that the proposed exclusion zone will be no bigger than four car park spaces).

74. Having considered the uncontroverted evidence, and the terms of the agreed draft access order, on this point I prefer Mr Beer's evidence.

Mr Adams-Cairns

75. Mr Adams-Cairns explained that Galem House retains a significant value even if the new Galem House wall cannot be built, because, when making an offer, a prospective purchaser would take into account that alternative development, which does not require the new Galem House wall to be built, may be possible on the site. He accepted that such alternative development is hypothetical and, because it is uncertain whether it is achievable, the prospective purchaser would reflect that in their offer, by way of a discount, although, he added, they would factor in that, under the alternative

development, the new Galem House wall would not need to be built and an access order would not need to be obtained. In his report, in particular at para.7.1.29, he effectively suggested that following his contemplated alternative development, Galem House would command almost the same price on sale as on completion of the project.

76. He said that a £63,000 cost for building the new Galem House wall is "neither here nor there" in terms of the project.

77. He also said that the consideration payable under s.2(5) of the 1992 Act should take into account:

i) the cost to Mr Yousaf of employing a security guard during the proposed work, at a daily rate of £145;

ii) the professional costs which Mr Yousaf might have incurred if an access licence (rather than an access order) was agreed, in the total sum of £15,000.

Expert evidence

78. In simple terms, the evidence which Mr Solis and Mr Zabar gave was made up of the following propositions, which are also a summary of Trident's case:

i) MEC had sequenced certain items of work to take place during the period of Mr Yousaf's conduct;

ii) some of those items of work were due to take place in the Exclusion Zone;

iii) they could not be carried out whilst the Exclusion Zone was imposed;

iv) they were sequenced to take place before other items of work, which were dependent on them, were sequenced to begin;

v) because those dependent items of work were sequenced to follow on after the items of work within the Exclusion Zone were delayed, they too were delayed;

vi) the completion of the project "on time" required those dependent items of work to be begun on time, but, because they were delayed, completion of the project has been delayed.

Where a development project is complex, as it is in this case, to give helpful evidence, a witness ought to have some knowledge of building operations, including in relation to sequencing and dependencies.

79. A requirement that, to give helpful evidence, the witness ought to have specialist knowledge means that such evidence is expert evidence. Lord Hodge explained, in *Griffiths v. TUI UK Ltd* [2023] UKSC 48 at [36]:

> "It is trite law that the role of an expert is to assist the court in relation to matters of scientific, technical or other specialised knowledge which are outside the judge's expertise by giving evidence of fact or opinion…"

In the earlier case of *Kennedy v. Cordia (Services) LLP* [2016] UKSC 6, Lord Hodge (together with Lord Reed) had explained, to similar effect, at [50]:

> "The skilled witness must demonstrate to the court that he or she has relevant knowledge and experience **to give either factual evidence, which is not based exclusively on personal observation or sensation**, or opinion evidence. Where the skilled witness establishes such knowledge and experience, he or she can draw on the general body of knowledge and understanding of the relevant expertise" (emphasis added).

Because such evidence is expert evidence, there is force in the argument that it ought to be regulated by, and subject to, CPR Part 35 (see *Declan Colgan Music Ltd v. UMG Recordings Inc* [2023] EWHC 4 (Ch) at [94]).

80. Trident did not have permission for either Mr Solis or Mr Zabar to give expert evidence.

81. On the question of the admissibility of Mr Zabar's evidence, Mr Upton submitted that this did not matter, because he has the necessary expertise, and he also submitted that particular weight should be given to Mr Zabar's evidence because of his expertise and because, as the contract administrator for the project, he has professional duties, including to act fairly. In support of these submissions, Mr Upton relied on the following from Jackson J's judgment, at first instance, in *Multiplex Constructions (UK) Ltd v. Cleveland Bridge UK Ltd* [2008] EWHC 2220 (TCC) at [667]-[672]:

> "The question then arises as to whether Mr Taylor is confined to giving evidence of fact, without including his expert opinion on matters. Alternatively, can he include statements of professional opinion bearing upon facts within his personal knowledge?
>
> This question arises in many fields of litigation, for example professional negligence actions where the defendant is a witness of fact but also wishes to justify his actions by drawing upon his professional experience. This question arises with particular frequency in litigation in the Technology and Construction Court. Most factual witnesses called are possessed of technical knowledge and expertise. In relation to major engineering projects (such as Wembley Stadium or the M6 Toll Road) those factual witnesses are likely to have very considerable expertise. Otherwise they would not have been engaged upon such projects in positions of responsibility.
>
> Despite the diligent researches of counsel, there is relatively little authority on the extent to which witnesses, who are possessed of special expertise, can gloss their factual evidence with expert comment.
>
> In *Lusty v. Finsbury Securities Ltd* (1991) 58 BLR 66 the Court of Appeal held that an architect suing for fees could give opinion evidence as to the value of his work. In *DN v. LB Greenwich* [2004] EWCA Civ 1659 the Court of Appeal dismissed an

appeal against the trial judge's finding that an educational psychologist had been negligent. One of the issues in the appeal concerned the admissibility of opinion evidence given by the psychologist. Brooke LJ said this:

> "25. It very often happens in professional negligence cases that a defendant will give evidence to a judge which constitutes the reason why he considers that his conduct did not fall below the standard of care reasonably to be expected of him. He may do this by reference to the professional literature that was reasonably available to him as a busy practitioner or be reference to reasonable limits of his professional experience; or he may seek to rebut, as one professional man against another, the criticisms made of him by the claimant's expert(s). Such evidence is common, and it is certainly admissible. Mr Phillips, who appeared for the claimant at the trial, did not believe he had told the judge that Mr Moreland's evidence on matters of this kind was inadmissible, and neither of the very experienced leading counsel who appeared in this counsel who appeared in this court was willing to support the judge's view of the matter.
>
> Of course a defendant's evidence on matters of this kind may lack the objectivity to be accorded to the evidence of an independent expert, but this consideration goes to the cogency of the evidence, not to its admissibility. That such evidence was in principle admissible should have been reasonably apparent from the judgments in this court in *ES v. Chesterfield and North Derbyshire Royal Hospital NHS Trust* [2003] EWCA Civ 1284 at [24], [31]-[32] and [41], [2004] Lloyd's Rep Med 90."

As a matter of practice in the TCC, technical and expert opinions are frequently expressed by factual witnesses in the course of their narrative evidence without objection being taken. Such opinion evidence does not have the same standing as the evidence of independent experts who are called pursuant to CPR rule 35. However, such evidence is usually valuable and it often leads to considerable saving of costs.

Having regard to the guidance of the Court of Appeal and the established practice in TCC cases, I conclude that in construction litigation an engineer who is giving factual evidence may also proffer (a) statements of opinion which are reasonably related to the facts within his knowledge and (b) relevant comments based upon his own experience. For example, an engineer after describing the foundation system which he designed may (and in practice frequently does) go on to explain why he believes that this was appropriate to the known ground conditions. Or an engineer brought in by a claimant to design remedial works (which are subsequently challenged as excessive) may refer to

> his experience of rectifying comparable building failures in the past. For example, such evidence may be given in cases about concrete failure through ASR (a world-wide problem)."

Mr Upton did not make similar submissions in relation to Mr Solis' evidence.

82. As it happens, I do not need to decide on the admissibility of Mr Solis' or Mr Zabar's evidence. Not having heard detailed submissions to the contrary, I also accept that Jackson J's conclusions are correct. Most favourably to Trident, I proceed on the basis that Mr Solis', and Mr Zabar's, evidence is admissible and, when assessing the weight to be given to Mr Zabar's evidence, I will take into account, in Trident's favour, the fact that he has expertise in building operations and has professional duties as the contract administrator in this case.

Discussion – the Damages Claim

83. I have repeatedly noted that the project is a complex one, the object of which is to turn a nineteenth century derelict former warehouse into seventy seven twenty first century apartments. Mr Upton's submission, that, as "a matter of logic", one particular building operation follows, and is dependent on, another earlier building operation, needs to be considered cautiously, as Mr Ward effectively submitted in closing. Although this is a conclusion I have reached without reference to authority (because it is a conclusion based on "logic"), as it happens Akenhead J illustrated the point well in *Cleveland Bridge UK Ltd. v. Severfield-Rowen Structures Ltd* [2012] EWHC 3652 (TCC) at [121]:

> "The science or art of delay analysis is one which is based in logic, albeit in a construction context. Thus, on a simple house construction, a delay in the provision of the foundations will, generally and obviously, cause delay to all the following trades so that for instance the brickwork and blockwork which may rest on the foundations in question cannot commence and the windows and the roof cannot go on until the brickwork and blockwork are done; that is logical and to be expected. However, the position becomes much more complex when one is looking at a building like the Shard. Certain it is that at least some steelwork has to be in place before follow on trades, such as concrete flooring and glazing or curtain walling, can be commenced; it is not the case that all the steelwork needs to be in place before such follow on trades can commence. Thus, the fact that the steel work is finished late does not, necessarily, mean that the overall project would be late."

84. I am unable to give more than limited weight to Mr Solis' evidence for the following reasons.

85. Aside from the fact that Mr Upton did not hold out Mr Solis as an expert, I am not satisfied that Mr Solis has sufficient knowledge and expertise in relation to the sequencing and dependencies in the project to give evidence of significant weight on those matters.

86. Mr Solis did not give evidence about a background which would establish such expertise and, in any event, when giving oral evidence, he appeared to lack building expertise.

87. In cross examination, he deferred to Mr Zabar more than once on questions about aspects of the project, for example about when particular building operations started or were due to start (which, I have recorded, he did not know).

88. He also repeatedly referred to "pad foundations". The project contemplates the installation of padstones and also of steelwork foundations. That is what the programmes of work show, and that is how Trident presented the project when its case was being put by Mr Upton. Only Mr Solis has suggested that the project contemplated pad foundations. It is most likely that, when he referred to pad foundations, he had in mind the proposed padstones. They are not foundations. Rather they are wall stones on which the steel frame will rest, as the Car Park Wall report and the Clancy Consulting Ltd structural plan to which I have referred make clear.

89. As it happens, as I have indicated, the steel frame has been re-designed so that it does not need to rest on padstones in the vicinity of the new Galem House wall (although nothing actually turns on this if I have misunderstood the effect of the re-design).

90. Mr Solis also suggested that the retaining wall was to be built before foundations were laid but, as the December Programme of Works illustrates for example, the retaining wall was sequenced to be installed after not only the steelwork foundations had been laid but also the steel frame had been installed.

91. I am also doubtful that, in three instances, Mr Solis' initial evidence was the whole truth.

92. First, the overall impression his written evidence created was that Trident would not make any profit from the project. That is not the whole truth, as the oral evidence revealed. It was only in answer to a question from me that the position became clear that Trident expects to make a return on its money in ten to fifteen years. Even in cross-examination, Mr Solis' evidence on this question was not clearly the whole truth.

93. Secondly, as Mr Solis accepted, in his written evidence he wrongly suggested that the reason the four windows (that were initially to be formed in the Yousaf wall) were omitted from the amended plan was because Mr Yousaf objected to windows in the new Galem House wall, rather than because they were intended to be formed in the Yousaf wall.

94. Thirdly, his evidence, in May 2024, that the project would, rather than was likely to, or might, soon grind to a halt if an access order was not made, was not the whole truth in circumstances when, on his own evidence, at the time a re-design of the steel frame was being considered, and when, within a matter of a couple of weeks, the May Programme of Works was showing that a re-design of the steel frame was about to start, and when too, as it has turned out, the project has not ground to a halt. It may be said, in this instance in particular (but also in the other two instances, although to a lesser extent), that, in taking this matter into account, I have expected a level of precision from Mr Solis which is both unfair and unreal, because he is not a lawyer who can be expected to be careful with words. In response, it can be pointed out that Mr Solis made three

further witness statements in the Access Claim when he could have, but did not, referred to his earlier evidence about the progress of the project and then provide an update.

95. I need to make it clear that I do not suggest, and have not concluded, that Mr Solis had in mind to give misleading evidence. The conclusion I have reached, however, is that I cannot be confident that Mr Solis' evidence is accurate.

96. In any event, it is not clear to me that some, at least, of Mr Solis' evidence is not merely of matters reported to him, rather than, in those instances, of matters he personally observed. To the extent that matters were reported to him by Mr Zabar, I cannot give those matters any more weight than I give to Mr Zabar's own witness evidence. To the extent that matters were reported to him by MEC staff and contractors, little weight can be attached to Mr Solis' evidence when there is apparently no reason why those staff and contractors could not give evidence themselves.

97. Finally, Mr Solis' justification for his claim that completion of the project has been delayed by a month, from November 2025 to December 2025, because of the Yousaf new wall may be no more than this: that, because the Exclusion Zone was imposed for a month, the completion of the project must have been delayed by a month; so that, in contending that completion of the project has been delayed until December 2025, he may well have done no more than discover that the project was otherwise due to be completed in November 2025 and then added a month to that completion date. It is not clear to me that he has given any independent thought to whether any delay in completing building operations because of the imposition of the Exclusion Zone has actually delayed the completion of work dependent on those building operations.

98. I have also only been able to give limited weight to Mr Zabar's evidence.

99. The tenor of his first witness statement is that the work which was delayed by Mr Yousaf's conduct was the deconstruction of the Galem House wall. That is not now Trident's case, as I have explained. Only in his second witness statement, prepared shortly before trial, did he suggest that building operations generally which were due to take place within the Exclusion Zone could not be completed whilst it was imposed, which is a change in the tenor of his evidence.

100. The admission of Mr Zabar's second witness statement came about in the following way. Trident applied for permission to rely, at trial, on a supplemental witness statement from Mr Zabar. I dismissed the application, for reasons I gave at the time, noting, amongst other points, the change in the tenor of Mr Zabar's evidence. Mr Yousaf had previously agreed that parts of the proposed supplemental witness statement could be adduced in evidence. As a result, by consent I permitted Trident to file a second witness statement containing that agreed material. The agreement extended to Mr Zabar's claim that no work could be carried out in the Exclusion Zone whilst it was imposed.

101. The tenor of Mr Zabar's first witness statement, in particular his evidence about "the different methodology that had to be used to demolish" the Galem House wall, is also that, because the method by which the Galem House wall was to be deconstructed had to change because Mr Yousaf would not permit MEC access to the car park, the completion of the project has been delayed.

102. In everyday use of language, the "methodology" (or "method") by which something is done refers to the way in which it is done, rather than to the time it takes to do the thing. Indeed, this is how Mr Zabar used the term "method" earlier in the witness statement, when he elaborated on the "initial demolition method" for the deconstruction of the Galem House wall and the "revised…methodology" for its deconstruction. In the Car Park Wall report, Mr Zabar also used the word "methodology" (for example, when he wrote of "the change in design and construction methodology") to explain the way in which the new Galem House wall is to be built rather than the time it will take to build it.

103. The evidence in Mr Zabar's first witness statement about "the different methodology that had to be used to demolish" the Galem House wall, interpreted as referring to the way in which the Galem House wall was to be deconstructed, would not assist Trident's case.

104. The interpretation of the evidence Mr Zabar offered in cross examination was markedly different. As I have recorded, he said that, by the evidence, he meant that the time it took to deconstruct the Galem House wall because of Mr Yousaf's conduct has delayed completion of the project.

105. I reject that interpretation of the evidence. It is clear to me, from his other use of the words "methodology" and "method", that, in his first witness statement, Mr Zabar was using those words in their everyday sense, to refer to the way in which the Galem House wall was to be deconstructed, not to the time it took to deconstruct the wall. It is most likely that, by his oral evidence, Mr Zabar was doing no more than trying to explain away his written evidence so that it appeared to fit to Trident's case.

106. Mr Zabar's oral evidence about when the stub wall was removed was not consistent. At one point in re-examination, he said that the stub wall began to be removed later than the programmed date. He then said that the stub wall began to be removed on 26 February 2024, which is before the programmed date.

107. His oral evidence was also inconsistent about whether or not sub-structure work was delayed as a result of Mr Yousaf's conduct.

108. I am also troubled by the circumstances in which the Delay Notice came to be prepared. I am not satisfied that there was a good reason for Mr Zabar to request MEC to prepare a delay notice in August 2024 when, according to his first witness statement, he had already calculated the overall delay to the project arising from Mr Yousaf's conduct apparently in about February 2024. It is reasonable to suppose that any such delay he calculated would also have been reported to Trident well before August 2024. Nor, if the reason Mr Zabar requested MEC to prepare a delay notice in August 2024 was because a delay notice was a formality, although an apparently unnecessary one, does there appear to be a satisfactory explanation for why, if Mr Zabar had already calculated the consequences of Mr Yousaf's conduct as his witness evidence suggests, he did not apparently complete Trident's section of the Delay Notice. It is also somewhat surprising that MEC did not know what impact the delay in the deconstruction of the Galem House wall or the building of the new Galem House wall would have on the project, as Mr Zabar suggested, when he apparently did know by August 2024.

109. In his oral evidence, Mr Zabar also called into question the accuracy of the programmes of works. He prepared the programmes of works. By calling their accuracy into question, he was thereby calling into question his own accuracy.

110. The programmes of works are the best evidence about whether completion of the project has been delayed by Mr Yousaf's conduct, because they are contemporaneous documents, and because their preparation is unlikely to have been influenced by the litigation. The December Programme of Works is particularly relevant for fixing the programmed dates for items of work because it pre-dates Mr Yousaf's conduct, by about six weeks.

111. The programmes of works do not show that there was a delay to the beginning of the removal of the stub wall. They both show 1 April 2024 as the programmed date for that building operation to begin. That date is more than a month after the Yousaf scaffolding and the Yousaf new wall were taken down. I cannot see how, therefore, Mr Yousaf's conduct might have delayed the removal of the stub wall. As it turns out, the stub wall began to be removed on 26 February 2024, earlier than the programmed date, and, again, after the Yousaf scaffolding and Yousaf new wall had been taken down, which undermines Trident's case. It is most likely that Trident's complaint is, in truth, the one suggested by Mr Solis; that, because of Mr Yousaf's conduct, the removal of the stub wall could not begin even earlier than the programmed date than it did. The fact that a building operation begins earlier than a programmed date, but not even earlier than it might otherwise have done but for a particular event, does not mean that there has been a delay in the completion of a project.

112. In any event, neither programme of works shows that other work is, or has been, dependent on the removal of the stub wall.

113. Phase 2 of the padstones installation is shown as having begun on the programmed date, which was also after the Yousaf scaffolding and the Yousaf new wall were taken down. As a basis of Trident's claim, this item of work is susceptible to similar criticisms to the ones I have just made in relation to the stub wall.

114. As it happens, the reason why there are no padstones in the new Galem House wall yet (if the re-designed steel frame is, in fact, reliant on padstones, contrary to what I have said above)) is not because of Mr Yousaf's conduct but because the new Galem House wall has not been built yet. This may explain why Mr Zabar did not contend that Phase 2 of the padstones installation was delayed by Mr Yousaf's conduct.

115. The installation of the retaining wall is shown, on the programmes of works, as being indirectly dependent on the installation of the steel frame. It follows that, if Trident has not established that Mr Yousaf's conduct caused the installation of the steel frame to be delayed, it will also not have established that the installation of the retaining wall was delayed by that conduct. I must also bear in mind that, in cross examination, Mr Zabar effectively suggested that the installation of the retaining wall was not delayed because of Mr Yousaf's conduct.

116. As Mr Solis suggested, when he said that the delay in the erection of the steel frame has pushed the project "back and back again", what is likely to have delayed the completion of the project is the delay in the erection of the steel frame. It is "a matter of logic" that the steel frame is a key component in the project, providing, as it will, stability to Galem

House, so that, if its installation is delayed, the completion of the project is likely to be delayed.

117. Mr Solis confirmed that the steel frame was not re-designed because of Mr Yousaf's conduct, but because he refused to permit access to the car park.

118. The re-design of the steel frame was programmed to begin on 24 May 2024 and to take about 32 days.

119. It is reasonable to suppose that any delay caused by the 26 days when the Yousaf scaffolding and Yousaf new wall were in place is likely to have been accommodated by the 32 days programmed for this new item of work (the re-design of the steel frame).

120. More significantly, there is no evidence that the date programmed for the steel frame re-design to begin was fixed by reference to Mr Yousaf's conduct or that, but for Mr Yousaf's conduct, the re-design would have been programmed to begin earlier (or have been programmed for a shorter period of time). Indeed, the May Programme of Works suggests that Mr Yousaf's conduct had no impact on the timing of the re-design, because that item of work is not shown as being dependent on any earlier item of work. The programmes of works do not support the claim therefore that the installation of the steel frame, which was dependent on the re-design, was delayed because of Mr Yousaf's conduct. To the contrary, when taken with Mr Solis' evidence about why the steel frame was re-designed and the coincidence of the date of the Car Park Wall report to the programmed dates for the re-design, together with the contents of the report, it is more likely that the delay in the installation of the steel frame can be traced ultimately to Mr Yousaf's refusal to allow access to the car park, rather than to his conduct.

121. The May Programme of Works may also indicate that the completion of the laying of the steelwork foundations was dependent on the re-design of the steel frame, because the laying of the steelwork foundations is shown as being programmed to complete after the steel frame re-design had begun.

122. Further, it is likely that, if Mr Yousaf's conduct had delayed completion of the project, some reference to that conduct (in particular, some mention of the Yousaf scaffolding and the Yousaf new wall) would have been made in the Car Park Wall report - because its focus was on time and cost implications arising from the deconstruction of the Galem House wall and the building of the new Galem House wall - and I prefer Mr Zabar's cross examination evidence to this effect, rather than his re-examination evidence. That there is no mention of Mr Yousaf's conduct in the Car Park Wall report undermines Trident's case.

123. To the extent that it can be given any weight, the Delay Notice either does not support, or it also undermines, Trident's case.

124. If Mr Yousaf's conduct has delayed the completion of the project, that is likely to have been apparent to MEC in August 2024, when the Delay Notice was prepared, some six months after the Yousaf scaffolding and the Yousaf new wall were taken down. Yet, the Delay Notice suggests that, in August 2024, MEC was unable to confirm that there will be any delay to the completion of the project because of Mr Yousaf's conduct (as Mr Zabar acknowledged). That MEC was apparently unable then to confirm that there will be any such delay tends to suggest that it is not likely that there will be.

125. MEC said in the Delay Notice that "any necessary revisions to the programme and cost implications will be communicated to [Trident or Mr Zabar] promptly". There is no evidence that MEC has ever communicated any such revisions since August 2024, which supports the conclusion that, even now, MEC is unable to confirm that Mr Yousaf's conduct has caused, or will cause, any delay to the completion of the project.

126. Mr Upton referred me to McGregor on Damages (22nd ed), at para.9-003:

> "Section 1. - Causation
>
> - The "but for" test of necessary contribution
>
> The test for whether a defendant's wrongful conduct is a cause in fact of the damage to a claimant, which has almost universal acceptance, is the so-called "but for" test or test of "necessary contribution". The defendant's wrongful conduct is a cause of the claimant's harm if such harm would not have occurred without it; "but for" it. In other words, the defendant's conduct was necessary for the claimant's harm to have occurred. … Since the test is concerned with the necessity of the factual event for the factual outcome it is commonly referred to as "factual causation" although strictly the test itself is not factual or physical but metaphysical. It involves asking the "counterfactual" question of what would have happened but for the wrongdoing. Satisfying the cause in fact test is in the vast multitude of cases an essential condition for the imposition of liability."

127. Because of what I have already said, I am not satisfied, and Trident has not established, that the completion of the project would have happened earlier but for Mr Yousaf's conduct. To put it another way, I am not satisfied, and Trident has not established, that Mr Yousaf's conduct has caused delay to the completion of the project. Trident has therefore failed to prove causation.

The 1992 Act

128. I need to preface a discussion of the Access Claim by setting out the questions I need to answer to determine the claim. They are derived from the 1992 Act. The exercise of formulating those questions has required me to consider the proper construction of the 1992 Act. This section of the judgment sets out the questions I need to answer and how I have resolved the construction issues I have faced.

129. I begin, however, with *R (O) v. Secretary of State for the Home Department* [2023] AC 255, where Lord Hodge (with whom Lord Briggs, Lord Stephens and Lady Rose agreed) explained, at [29]-[32], how legislation should be construed:

> "The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated:

> "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."

(*R v. Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p.397:

> "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."

External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para.11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity....

Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme*, p.396, in an important passage stated:

> "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand

> reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House…Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."

> In their written case the appellants sought to support their contention that a child's acquisition of substantial ties with the UK by spending time in the UK in the first ten years of his or her life created a complete entitlement to citizenship by referring to statements by a Government minister, Timothy Raison, to the Standing Committee which considered an amendment which became section 1(4) to the 1981 Act. Such references are not a legitimate aid to statutory interpretation unless the three conditions set out by Lord Browne-Wilkinson in *Pepper v. Hart* [1993] AC 593, 640 are met. The three conditions are (i) that the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity; (ii) that the material must be or include one or more statements by a minister or other promoter of the Bill; and (iii) the statement must be clear and unequivocal on the point of interpretation which the court is considering…"

130. Mr Upton also referred me to the judgment of Nugee LJ in *Dolphin Drilling Ltd v. HMRC* [2024] Ch 255 at [41], where the Judge said:

> "…Where ordinary words are used in legislation it is well recognised that seeking to provide definitions of them can be a dangerous exercise, as glossing the statutory language by using other words runs the risk of those (non-statutory) words being treated as a substitute for the statutory words when they may not have quite the same meaning. Most English words have nuances of meaning and shades of usage that are not precisely captured by substituting other words. So one should be wary of trying to lay down a definition of ordinary words; the meaning of an ordinary word is to be found not so much in a dictionary but in how it is in fact ordinarily used, and I think it is generally more helpful to tease out the meaning of ordinary words by providing illustrative examples of how they are used in everyday contexts."

131. In this passage of his judgment, the Judge was not suggesting that the established approach to statutory construction should be refined in some way. That the Judge approached the case before him by reference to that established approach is clear from an earlier part of his judgment, at [35].

132. Nor do I think that the Judge was suggesting that it is impermissible for a court to explain, by reference to other words, what they understand a particular word to mean. If it was otherwise, and in circumstances where most words have nuances of meaning and shade of usage, no judge would be able to explain how a statutory provision operates. Rather, the Judge was sounding a warning that, when considering legislation, one should give primacy to the words actually used over those words a court has used in a judgment to explain what the actual statutory language means. The Judge was also making the point that the meaning of an ordinary word is to be found, principally at least, in how it is ordinarily used.

133. The first question I need to answer is: *Is the work proposed to be done under an access order (that is, the building of the new Galem House wall (to be clear, from the first floor level and above), following the earlier deconstruction of the Galem House wall) ("the Work"), work of maintenance, repair or renewal?* (see s.1(4)(a) of the 1992 Act). Such work is defined in the 1992 Act as "basic preservation works".

134. If the answer to the first question is "no", I will need to ask whether the Work is, nevertheless, for the preservation of the whole or any part of Galem House (see s.1(2) of the 1992 Act). Although s.1(2) refers to the dominant "land", by Sch.1 to the Interpretation Act 1978, "land" includes buildings on land. I will not need to consider, for the purpose of s.1(2), whether the Work cannot be carried out, or would be substantially more difficult to carry out, without entry onto the car park, because it is not disputed in this case that that is so, in the light of the agreed expert evidence.

135. If the answer to either of those questions is "yes", the second question I need to answer is: *Is the Work reasonably necessary (where it is basic preservation work), or (in the alternative scenario that the work is not basic preservation work) is the Work reasonably necessary for preservation of any part of Galem House?* The 1992 Act's requirement that the issue of the reasonable necessity of proposed work is considered gives effect to the purpose of the Act which, by the preamble, is to "enable persons who desire to carry out works to any land…for the **preservation** of that land to obtain access to neighbouring land in order to do so" (emphasis added) and reflects the fact that permitted works are necessarily limited by being confined to "preservation".

136. If the answer to the second question is also "yes", subject to positive answers to two further subsidiary questions (the third and fourth questions) to which I refer below, I must make an access order (see the use of the word "shall" in s.1(2) in particular), Mr Yousaf not contending that s.1(3) of the 1992 Act applies in this case. Had it applied, no access order could be made.

137. The effect of an access order is set out in s.3(1) of the 1992 Act:

> "An access order requires the respondent, so far as he has power to do so, to permit the applicant or any of his associates to do anything which the applicant or associate is authorised or required to do under or by virtue of the order or this section."

138. The terms "repair" and "renewal" are not defined in the 1992 Act. I therefore need to construe "renewal" at least. S.1(5) of the 1992 Act is relevant to the proper construction of "repair" and "renewal", and s.1(4) of the 1992 Act needs to be read with the sub-section, which, so far as is relevant in this case, provides:

> "If the court considers it fair and reasonable in all the circumstances of the case, works may be regarded for the purposes of this Act as being reasonably necessary for the preservation of any land (or, for the purposes of subsection (4) above, as being basic preservation works which it is reasonably necessary to carry out to any land) notwithstanding that the works **incidentally** involve -
>
> (a) the making of some alteration, adjustment or improvement to the land…" (emphasis added).

139. In ordinary use, "renewal", which is an ordinary word, means to replace with something else which is equivalent in all respects where that is possible. Indeed, that is very much a dictionary definition of the word too. So, for example, when a traveller renews their passport, or a viewer renews their television licence, they are replacing one authorisation with the same authorisation but with new validity dates, or, when a tenant renews their lease, at a basic level they are effectively retaining the same rights and obligations as they currently have, but for an extended period.

140. In ordinary use, "repair" tends to mean something less than "renewal". It tends not to mean the replacement of the whole of a thing with another new, but equivalent, one, but does cover replacing a part of the thing with a different part which is the same in every material respect except that it is functioning. When one thinks of the repair of a watch which is not running for example, the repairer may repair it by simply adjusting a part (a movement, for example) which is out of alignment or they may repair it by replacing a broken part.

141. Because Parliament refers to both concepts in s.1(4) of the 1992 Act, it is reasonable to suppose that it intended that the renewal of part of a building does mean something greater, or more intrusive, than the repair of part of a building.

142. Landlord and tenant law (where concepts of repair and renewal are most commonly in issue, and so is capable of acting as a useful check that my construction of the words is commonplace) provides further support for my conclusions.

143. In *Credit Suisse v. Beegas Nominees Ltd* [1994] 1 EGLR 76, Lindsay J explained at p.90:

> "…Thus if the word "renew", in a context plainly going beyond repair, can properly extend, as I believe it can, **as far as a total replacement of the subject-matter to which it relates**, then I see no good reason why it should not…do so [in the case before the Judge]" (emphasis added).

144. In the earlier case of *Lurcott v. Wakeley* [1911] 1 KB 905, the Court of Appeal had to consider the following circumstances, as the headnote of the report explains:

> "A lease of a house in London contained a covenant by the lessee to substantially repair and keep in thorough repair and good condition the demised premises and at the end or sooner determination of the term to deliver up the same to the lessors so

> repaired and kept. Subsequently the reversion expectant on the lease was assigned to the plaintiff and the lease to the defendants. Shortly before the expiration of the term the London County Council served a notice on the owner and occupiers requiring them to take down the front external wall of the house to the level of the ground floor as being a dangerous structure, and the plaintiff called upon the defendants to comply with this notice, which they failed to do. After the expiration of the term, the plaintiff, in compliance with a demolition order of a police magistrate, took down the wall to the level of the ground floor, and then, in compliance with a further notice of the London County Council, took down, the remainder of the wall and rebuilt it in accordance with modern requirements. The house was very old and the condition of the wall was caused by old age, and the wall could not have been repaired without rebuilding it"

The court held that the former tenant was liable to reimburse the former landlord, for the latter's costs of deconstructing the old wall and building the new one, under the former's repairing covenant in their former lease.

145. In that case, Fletcher Moulton LJ said, at p.919:

> "…For my own part, when the word "repair" is applied to a complex matter like a house, I have no doubt that the repair includes the replacement of parts. Of course, if a house had tumbled down, or was down, the word "repair" could not be used to cover rebuilding. It would not be apt to describe such an operation. But, so long as the house exists as a structure, the question whether repair means replacement, or, to use the phrase so common in marine cases, substituting new for old, does not seem to me to be at all material. Many, and in fact most, repairs imply that some portion of the total fabric is renewed, that new is put in place of old. Therefore you have from time to time as things need repair to put new for old. If you properly repair as you go along the consequence will be that you will always get a house which will be in repair and usable as a house, but you will not get a house that does not suffer from age, nor a house which when old is the same as when it was new. I cannot think that there is any case which lays down that if a person has undertaken throughout a term to repair a house he can ever say that he has no longer any duties because, although he has properly repaired, the house no longer exists…"

Buckley LJ said, at pp.923-924:

> ""Repair" and "renew" are not words expressive of a clear contrast. Repair always involves renewal; renewal of a part; of a subordinate part. A skylight leaks; repair is effected by hacking out the putties, putting in new ones, and renewing the paint. A roof falls out of repair; the necessary work is to replace the decayed timbers by sound wood; to substitute sound tiles or

> slates for those which are cracked, broken, or missing; to make good the flashings, and the like. Part of a garden wall tumbles down; repair is effected by building it up again with new mortar, and, so far as necessary, new bricks or stone. Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion…"

146. As landlord and tenant law also illustrates, consideration of concepts such as repair and renewal is complicated by the fact that, as building technology and regulation advance and as building practices change, the replacement of one complex building component with another one which is equivalent in all possible respects becomes less and less practical. As *Lurcott* shows, courts have met the challenge, sometimes, by giving words such as "repair" an expansive meaning. By s.1(5) of the 1992 Act, the Act addresses the challenge, and the further challenge, which is capable of being in tension, that there is a limit to work permitted under an access order, by permitting work which alters, adjusts, or improves the applicant's land so long as (i) the alteration, adjustment, or improvement is incidental to, say, the proposed renewal work and (ii) the court concludes that it is fair and reasonable, in all the circumstances of the case, to treat the proposed work as a whole as remaining, in that case, renewal work.

147. There is no issue between the parties that building the new Galem House wall with, for example, new, better quality bricks than made up the Galem House wall, or by using different, up to date methods to those used in the building of the Galem House wall is an alteration, adjustment, or improvement to Galem House which is permitted under the 1992 Act. There is, however, a significant practical dispute between the parties about whether or not the new Galem House wall should have windows, as I have said, which translates, in the present context, to a significant dispute between the parties about whether the formation of windows in the new Galem House wall is, or is not, an incidental alteration, adjustment, or improvement to Galem House and to the wall which separates it from the car park in particular.

148. What "incidental" means in this context has proved a particularly difficult issue to determine. Counsel did not suggest that there is any authority on the point and, despite their researches, they could only find one authority, *Dolphin*, which might assist in the resolution of the issue.

149. In *Dolphin*, the court had to decide "what is it for one use of an asset to be incidental to another?" (per Nugee LJ, at [41]). In answering that question, the Judge said, at [42]-[44]:

> "The risk of substituting other words is neatly illustrated by the statement of the FTT at para.170 that something is incidental to another matter "if it is subordinate, or secondary, to it". It is no doubt generally true that if use A is incidental to use B, then use A will be of lesser or secondary importance to use B. But that does not mean that being subordinate or secondary is what incidental means, and by expressing it in this way there is a danger of substituting a test of whether use A is secondary or

> subordinate to use B for the test of whether use A is incidental to use B…
>
> [Counsel's] submission was that use A is only incidental to use B if there is some link between them, or if use A is tied in to use B, and that this is not the case if use A is an unconnected and independent purpose in itself. He gave the example of a barrister using a laptop to write a shopping list (use A) when it is primarily used to write opinions (use B). In such a case, he said, the use of it to write a shopping list is not incidental to the use of it to write opinions. Using the laptop to write a shopping list is no doubt of minor or secondary importance compared to using it to write opinions, but there is no connection between the two (other than that they happen to be uses of the same asset).
>
> I think this submission is well-founded. It seems to me to reflect the ordinary use of language. If I can express it in my own words, one would normally say that use A is incidental to use B if it arises out of use B, something that is done because of use B, or in connection with use B, or as a by-product of use B. Using a laptop to write a shopping list does not arise out of using it to write opinions it is an independent end in itself, unconnected with the writing of opinions, albeit no doubt very much a subordinate or secondary or lesser one."

The Judge added, at [47]-[48] (perhaps qualifying slightly what he had said earlier):

> "…Suppose for an example a boat is used to ferry supplies somewhere and some of the crew take the opportunity to fish over the side of the boat. I would accept that the use of the boat for fishing might be said to be incidental to its use to ferry supplies, even though fishing could scarcely be said to further the ferrying of supplies. This would be more a case of what I have referred to as use A being a by-product of use B.
>
> But on the other hand I agree that it is difficult to regard use A as merely incidental to use B if it serves an independent purpose of its own, unconnected with use B, at any rate if that purpose is of some significance and not trivial or casual."

150. Bearing in mind that "incidental" (or, strictly, "incidentally") is an ordinary word and that the Judge explained how ordinary words should be construed, and bearing in mind too that the purpose of the 1992 Act is to permit preservation work, so that the preservation work, rather than any unrelated alteration, adjustment, or improvement, should be the court's focus, I accept that the Judge's construction of the word in *Dolphin* applies equally to the construction of the word in the 1992 Act.

151. I recognise that the word can have different meanings, or nuances. I am doubtful, however, that I can have regard to the Hansard record of the debate, in the House of Lords, on the second reading of the 1992 Act when it was a bill, because the record is unlikely to satisfy Lord Browne-Wilkinson's third condition in *Pepper v. Hart*. The

statements to which I have been referred are not unequivocal on the point of interpretation I am now considering. However, if I can have regard to them, they tend to support the conclusion I have reached. In the debate, Lord Murton of Lindisfarne, who moved the bill, said:

> "The temporary right of access should be specifically for "preservation work" - that is to say, work intended to protect and maintain existing land which of course includes things on, in or above the land, as indicated in Clause 1(4) of the Bill. Such work must be reasonably necessary and, in regard to buildings and other structures, may include inspection, repair, maintenance, improvement, decoration, alteration, adjustment, renewal or demolition. **Improvements and alterations contemplated for their own sake** are not to count as preservation work and are outside the scope of the Bill: but improvements and alterations which are incidental to preservation work are not so excluded so long as they could not be construed as development.
>
> …
>
> If one carries out a repair one is authorised to do a minor improvement. For instance, if one's wooden window frame is falling to pieces, it would be quite in order to put in a better frame, perhaps double-glazing. It is only intentional improvement which is not allowed. Work which is incidental to preservation is all right so long as it cannot be construed as development**. If alterations and improvements are contemplated for their own sake, that does not count as preservation work**…" (emphasis added).

Lord Murton appears to have had in mind that the following work was not intended to be allowed under the 1992 Act; that is, an alteration which is not made because other permitted work is being done, or, to put in another way, an alteration which is not a by-product of that other permitted work. He appears to have focused on the timing of the alteration in relation to other permitted work and the relationship between the alteration and that other permitted work. This is consistent with what Nugee LJ said in *Dolphin*.

152. I have borne in mind that s.1(6) of the 1992 Act speaks of work being "incidental to" or "consequential on" other work, which indicates that, in the Act, "incidental to" means something other than "consequential on". This does not cause me to depart from the conclusion I have reached, because, it seems to me, that work which is, for example, a by-product of other work being done is not necessarily work which is consequential on that other work.

153. It follows therefore that the third question (albeit subsidiary to the first question) I need to answer (at the same time as I answer the first and second questions) is: *Is the formation of windows in the new Galem House wall say "a by-product" of doing the Work (in the sense Nugee LJ explained "incidental" in Dolphin)?*

154. The fourth question I need to answer (also at the same time as I answer the first and second questions), if the answer to the third question is "yes", (albeit also subsidiary to

the first question) is: *Is it fair and reasonable in all the circumstances to regard the Work as reasonably necessary renewal, in particular, notwithstanding the proposal to form windows in the new Galem House wall?*

155. As I have said, if the answer to this fourth question is also "yes", I must make an access order.

156. If I make an access order, in the circumstances of this case I need next to consider the question of "consideration [payable by Trident] for the privilege of entering [the car park] in pursuance of [the access order]" (see s.2(5) of the 1992 Act), Mr Yousaf not contending that compensation is payable under s.2(4) of the 1992 Act.

157. In this context, the fifth question I need to answer is: *What is the likely financial advantage, if any, to Trident of being permitted to do the Work under an access order?* (see s.2(5)(a) of the Act). In the circumstances of this case, any such financial advantage is to be determined by me answering the following question: *What is the amount (if any) by which the likely increase, if any, in the value of Galem House as may reasonably be regarded as attributable to the Work exceeds the likely cost of the Work?* (see s.2(6)(a) of the 1992 Act).

158. The sixth question I need to answer is: *What is the degree of inconvenience likely to be caused to Mr Yousaf by the proposed access order?*

159. The seventh question I need to answer, which answer will be informed by the answer to the fifth and sixth questions is: *What is a fair and reasonable sum, if any, in all the circumstances, for Trident to pay Mr Yousaf as consideration ("privilege consideration") for the privilege of entering the car park under an access order?* (see s.2(5) of the 1992 Act).

160. Mr Ward argued that, in calculating what, if any, privilege consideration is payable, I should only take into account the interests of the parties, because an access order is a statutory authorisation of what would otherwise be a trespass, so that its effect is to adjust the relationship between the parties themselves. I disagree. As I have just indicated, by the formulation of the seventh question, the language of s.2(5) of the 1992 Act is clear in this respect. I am not bound to take into account only the interests of the parties. Rather, I am required to determine the amount of any privilege consideration:

    i) by having regard to all the circumstances (not just the interests of the parties); and,

    ii) when doing so and as part of that exercise, by having regard to the effects of the access order on the parties - by considering the likely advantage to Trident, and degree of inconvenience to Mr Yousaf, of an access order; but,

    iii) ultimately, by determining what is fair and reasonable, which, having regard to all the circumstances, may require me to give weight to the interests of others.

161. The eighth, and final, question I need to answer is: *Ought I to exercise my discretion to order privilege consideration in this case?* (see the reference, in s.2(5) of the 1992 Act, to the phrase: "an access order **may** include provision" (emphasis added)).

Conclusions – the Access Claim

Ought the proposed access order to be made?

162. I have decided that the proposed access order ought to be made, even taking account of the fact that the new Galem House wall will have windows, for the reasons I now give.

163. The building of the new Galem House wall needs to be considered not in isolation, but as part of a building operation which began with the deconstruction of the Galem House wall, as Mr Ward acknowledged in his closing submissions. The building operation relates only to a section of Galem House's eastern elevation which I have already found was unsafe and unstable. Putting aside the proposal to form windows in the new Galem House wall, the building operation, in particular the building of the new Galem House wall, is clearly renewal work (if nothing else), by which a materially equivalent new wall is being substituted for an old wall. The building operation is also reasonably necessary because the Galem House wall was unsafe and unstable and, if the work is not done, Galem House will be at risk of not being wind, or water-tight and its structural integrity may be at risk.

164. The building of a new wall in place of the Galem House wall affords Trident the opportunity to have windows in the new wall. The formation of windows in the new wall is being proposed because a new wall is going to be built, and the formation of new windows can be said to be a by-product of the building of that wall. The principal purpose of the building operation, I am satisfied on the evidence, nevertheless is, and remains, renewal; to replace one wall with another materially equivalent wall, because the former was unsafe and unstable. As Mr Solis explained, and as Mr Fay corroborated, the Galem House wall would have been retained but for advice that it was dangerous. I accept this evidence, including Mr Solis' evidence, because it has been corroborated by Mr Fay.

165. There is no evidence that the formation of windows in the new Galem House wall will have any impact on Mr Yousaf, or the car park or its value. The car park is an open piece of land and, as I have said, there is no evidence that Mr Yousaf has any plans to, or can (or, indeed, might be able to), develop the car park. Nor, in fact, is there any evidence that any development plan for the car park which anyone might have in the future might be affected in any way by the windows. I do not regard the formation of windows in the new Galem House wall as significant, therefore, from Mr Yousaf's perspective.

166. For all these reasons, I have concluded that the formation of windows in the new Galem House wall would be an incidental alteration, adjustment, or improvement within the meaning of s.1(4) of the 1992 Act, being a by-product of the building of the new Galem House wall.

167. Notwithstanding the proposal to form windows in the new Galem House wall, it is fair and reasonable to regard the Work as reasonably necessary, for the following reasons. As I have already explained, the Galem House wall was unsafe and unstable. The new Galem House wall supports the aim of making Galem House wind and water-tight and may support Galem House's structural integrity. Even with windows formed in the new Galem House wall, there is no evidence that Mr Yousaf will be negatively impacted. The project has a significant place in Bradford's regeneration and is supported by a

large public-sector grant. The formation of windows in the new Galem House wall has been approved by Bradford MDC as the local planning authority, which will have had regard to the public interest, and the project cannot be completed, as matters stand, without windows being formed in the new Galem House wall. To do otherwise, would be a breach of the planning permission. Although Mr Adams-Cairns has suggested that Galem House could be developed in a different way, there is no evidence that any alternative project is more than speculative. It is to the benefit of Mr Yousaf and the owners, and occupiers, of neighbouring properties, therefore, that Galem House is re-developed in accordance with the project (which includes the formation of windows in the new Galem House wall) and made wind and water-tight, and that they do not have a derelict warehouse beside them.

What, if any, privilege consideration should be paid by Trident to Mr Yousaf?

168. Mr Upton was right to submit that, in determining the financial advantage, if any, to Trident of being permitted to do the Work, my focus should be on the Work itself (rather than on the development of Galem House more generally). However, as I have explained, the evidence of neither expert has been helpful and there is no evidence going directly to the question of Trident's financial advantage derived from the Work.

169. I do know that Trident paid £580,000 for Galem House in October 2022, when it was a derelict site. The financial viability assessment suggested, in June 2022, that the development might be sold on completion for about £8.5 million, but Mr Adams-Cairns pointed out (in para.7.1.6 of his report (see also para.7.1.9 of his report)) that that assessment assumed higher selling prices than were then being achieved in Bradford. The value of the completed development now is speculative therefore, but, for illustrative purposes, and most favourably to Mr Yousaf, I will assume (without deciding) that the completed development would be worth £8.5 million today.

170. On these figures, it can be said that the project will, on completion, have increased the value of Galem House by about £8 million.

171. Part of that increase in value is likely to be attributable to the Work, but perhaps all that can really be said with any confidence is that between something just above 0% and 100% of that increase in value can be attributed to the Work.

172. There is some support for the conclusion that any increase in the value of Galem House attributable to the Work is at the lowest end of that 0-100% scale.

173. First, as Mr Upton pointed out, the cost of the Work is estimated at about £60,000, which is only a very small fraction of the overall project costs. That, in financial terms, that cost is insignificant was supported by Mr Adams-Cairns when he described the cost as "neither here nor there".

174. Secondly, it is a matter of common sense that the increase in the value of Galem House on completion of the project is likely to be largely attributable to the fact that it has been turned from a derelict nineteenth century warehouse into a seventy seven twenty first century apartments, with all that change represents, rather than to be attributable to one building operation. It may also be said that, often, the cost of doing remedial work to a property is not fully reflected in any increase in the value of that property.

175. Thirdly, Mr Adams-Cairns also effectively suggested that alternative development schemes, which did not require the Work to be done, would command almost the same price on sale as Trident's development is likely to do.

176. On the other hand, the cost of a particular building operation does not necessarily reflect its importance, and so its impact on the value of a property. The building of the new Galem House wall, which will make Galem House wind and water-tight, and will provide a structure to the apartments in which the wall will be incorporated, is a more important building operation, than say the installation of £60,000 worth of bathroom and kitchen fittings in apartments proposed for Galem House.

177. Ultimately, because of the lack of evidence, I cannot actually determine the likely financial advantage, if any, to Trident of being permitted to do the Work, but, in the circumstances of this case, I do not think it is imperative I do so, for two reasons.

178. First, the likely cost of the Work (about £60,000) will need to be deducted from any increase in the value of Galem House attributable to the Work.

179. Secondly, although I have to have regard to the financial advantage in question, what, if any, weight I give it depends on what is fair and reasonable in all the circumstances of the case. Weighing in the balance third party interests and the public interest (as to which, see further below), I have concluded that any financial advantage to Trident by being permitted to do the Work should be given no more than very limited weight when determining what is a fair and reasonable sum for Trident to pay as privilege consideration.

180. There may well be inconvenience to Mr Yousaf during the Work, because a small number of car parking spaces will be in the proposed exclusion zone and building operations will be taking place in the car park. As I have said, there is no evidence that Mr Yousaf will, or is likely to, be inconvenienced beyond that. As I understand Trident's position (see paras.70 and 74 of Mr Upton's skeleton argument), it accepts that I should proceed on the basis that Mr Yousaf will be inconvenienced during the Work because a small number of car park spaces will be in the proposed exclusion zone and building operations will be taking place in the car park. I am prepared to proceed on this basis, although I must record that Mr Yousaf has adduced no evidence that significant use is being made of the car park by customers, or that his business has ever been profitable.

181. As I have indicated, I accept Mr Beer's evidence on this issue, which values Mr Yousaf's inconvenience at £1,268.40. In this case, the value of Mr Yousaf's inconvenience should be given significant weight in determining any privilege consideration payable, because an access order will impose a state of affairs on him against his will, which, on the basis on which I am proceeding, will temporarily affect the revenue from his business.

182. What is fair and reasonable privilege consideration must take into account not only the parties' interests, as I have explained, but also, in this case, third party interests and the public interest. I have already considered what is fair and reasonable when considering whether the Work is reasonably necessary. Points I made in that context are just as relevant in the present context. The project has a significant place in Bradford's regeneration. Bradford MDC, as the local planning authority, has, at least substantially,

given planning permission for the Work. When doing so, it will have had regard to the public interest. The Work will benefit Mr Yousaf and his neighbours, who will no longer have an insecure, derelict building on neighbouring land. Instead, the Work will contribute to a development which may well enhance the value of their own properties.

183. I can deal briefly with Mr Adams-Cairns' proposals that I should order Trident to pay Mr Yousaf for employing a security guard and an additional amount for professional costs Mr Yousaf might have incurred if an access licence had been agreed.

184. It is neither fair nor reasonable to provide for any sum (as part of the privilege consideration which might be payable) for a security guard. The provision of a security guard is unnecessary. The parties have agreed that Trident will allocate two banksmen to supervise the Work.

185. The claim for professional costs is misconceived. No access licence has been agreed. That is why Trident has brought the Access Claim. There is no basis (or justification) for ordering a sum of money to be paid as privilege consideration for a hypothetical which will never become a reality.

186. Necessarily, because of the limited valuation evidence available, in determining the amount of privilege consideration, I have to apply the "broad axe" Lord Reed referred to in *One Step (Support) Ltd v. Morris-Garner* [2019] AC 649, at [37].

187. Doing the best I can, and applying that broad axe, I have concluded that the amount of privilege consideration which it would be fair and reasonable for Trident to pay Mr Yousaf is £3,500.

188. Finally, I have concluded that it is appropriate for me to order privilege consideration to be paid by Trident in that amount in this case, not only because that is a fair and reasonable amount, but also because the parties are commercial parties and, ultimately, Trident is developing Galem House for its own financial advantage.

Disposal

189. The Damages Claim has failed on causation. Inevitably, the claim must be dismissed.

190. I make an access order in the Access Claim in the terms of the agreed draft order, and I order Trident to pay Mr Yousaf £3,500 as consideration for the privilege of entering the car park in pursuance of the access order.

191. I will hear further from counsel on all costs and consequential matters.