Neutral Citation Number: [2018] EWHC 1494 (TCC)

Case No: HT-2017-000068

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/06/2018

Before :

MRS JUSTICE O'FARRELL

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Between :

OFFICE DEPOT INTERNATIONAL (UK) LIMITED	**Claimant**
- and -	
(1) UBS ASSET MANAGEMENT (UK) LIMITED **(2) AMEC FOSTER WHEELER GROUP LIMITED** **(3) FK FACADES LIMITED** **(4) UBS TRITON GENERAL PARTNER LIMITED**	**Defendants**

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Mark Wonnacott QC & Harriet Holmes (instructed by **Geldards LLP**) for the **Claimant**
Stephen Jourdan QC & Adam Rosenthal (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **First and Fourth Defendants**
Alexander Hickey QC & Thomas Crangle (instructed by **Pinsent Masons LLP**) for the **Second Defendant**
Jessica Stephens (instructed by **Fieldfisher LLP**) for the **Third Defendant**

Hearing dates: 21st March 2018, 22nd March 2018

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Approved Judgment

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

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MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell:

1. The matters before this court are contested applications to amend and strike out pleadings. They raise the issue whether, and in what circumstances, the court should exercise any discretion to grant declaratory relief determining the performance required to satisfy a party's obligations under a commercial agreement.

Background

2. These proceedings concern the design, construction and maintenance of a warehouse at Plot 1000, Ashton Commerce Park, Ashton Moss, Ashton-Under-Lyne, Manchester.

3. On 8 April 2004 the claimant ('OD') entered into an agreement for lease with the first defendant ('UBS Asset') in respect of the warehouse that was to be constructed.

4. By contract dated 23 April 2004, Amec Developments Limited engaged the second defendant ('Amec') to carry out the design and construction of the warehouse.

5. On 28 May 2004 UBS Asset and Amec Developments Limited entered into a sales agreement under which UBS Asset agreed to take a long lease of the warehouse with a term of 999 years on completion of the works.

6. By sub-contract dated 29 June 2004, Amec engaged the third defendant ('FK') as a sub-contractor to carry out the detailed design, supply and installation of roofing and cladding works in respect of the warehouse.

7. On 11 August 2004 Amec executed a deed of collateral warranty for the benefit of OD, including a warranty that it had complied with its obligations under the design and build contract in carrying out the works.

8. The warranties given by Amec were subject to a proviso that:

> "2.7.1 in the event of any breach of this deed … [Amec] shall be liable for the reasonable costs of repair, renewal and/or reinstatement of any part or parts of the Works to the extent that [OD] incurs or is liable (whether directly or by way of financial contribution) for such costs, but [Amec] shall not be liable for other losses incurred by [OD] …
>
> 2.7.2 [Amec] shall owe no greater obligations to [OD] than he owes to the Employer under the Contract.
>
> 2.7.3 [Amec] shall be entitled in any action or proceedings by [OD] to rely on any limitation in the Contract and to raise the equivalent rights in defence of liability as he would have against the Employer thereunder."

9. Sectional completion of that part of the works that included the warehouse roof was achieved on 10 January 2005.

10. Practical completion of the warehouse was achieved on 22 March 2005.

11. On 1 April 2005 FK executed a deed of collateral warranty for the benefit of OD, including a warranty that it had complied with its obligations under the roofing sub-contract. The warranties given by FK were similar, but not identical, to the warranties given by Amec and did not contain the proviso set out above.

12. On 19 April 2005 UBS Asset granted a lease of the warehouse to OD for a term of 20 years, commencing 22 March 2005. The lease contains a tenant's repairing covenant at clause 3.4:

> "to keep the premises in good and substantial repair, maintained and in clean condition…"

13. In May 2010 UBS Asset made a claim against Amec alleging defects in the design and construction of the warehouse, including defects in the roof cladding and structural steel frame. That claim was settled by Amec by the payment of £2.8 million to UBS Asset. The settlement agreement dated 2 November 2011 included the following provision at clause 5:

> "UBS hereby indemnifies AMEC against any costs, liabilities or losses incurred as a result of any action brought by UBS seeking recovery against any other party in relation to the Dispute. AMEC hereby indemnifies UBS against any costs, liabilities or losses incurred as a result of any action brought by AMEC seeking recovery against any other party in relation to the Dispute."

14. Amec passed on the claim to FK and obtained an arbitration award in its favour. On 1 September 2013 Amec and FK entered into a settlement agreement, pursuant to which FK settled its liability to Amec by payment of the sum of £4 million (including costs).

15. On 2 March 2016 the lease was assigned by UBS Asset to the fourth defendant ('UBS Triton').

16. The roof has suffered from water ingress for some years.

17. The parties entered into discussions to try and agree a scheme of remedial works that would be carried out by FK and paid for by UBS Asset or UBS Triton. However, they were unable to agree the terms on which such works would be undertaken, any warranties to be provided in respect of the work and the impact of such works on the repairing covenant in the lease. There are no current proposals or agreement as to the scope of any remedial works, the costs of such works or liability for the same.

Proceedings

18. On 16 March 2017 OD commenced proceedings against the defendants, seeking:

    i) against UBS Asset (and now UBS Triton), declaratory relief as to the works, if any, that OD is required to carry out to put the roof into a lease compliant state; and

    ii) against Amec and FK, a declaration that those works are required as a result of design and/or construction defects which are covered by the collateral

warranties; further, an indemnity in respect of the cost of such works or damages.

19. On 13 December 2017, applications by UBS Asset, UBS Triton and FK to strike out the claim and/or for summary judgment came before the court. Those applications were adjourned to give OD an opportunity to amend its pleading. This is the adjourned hearing of those and other applications.

20. The applications before the court are:

    i) an application by OD to amend its particulars of claim, opposed by all defendants;

    ii) applications by UBS Asset and UBS Triton to strike out the claim and/or for summary judgment;

    iii) applications by FK to strike out the claim and/or for summary judgment;

    iv) an application by UBS Asset and UBS Triton to amend their defence; and

    v) an application by OD for permission to rely on its replies.

Amended pleading

21. The proposed amended Particulars of Claim ("the APOC") pleads the case against the defendants as follows:

    i) UBS Asset was the landlord until 2 March 2016. Since 2 March 2016 UBS Triton has been the landlord [paragraph 3].

    ii) In the past UBS Asset alleged that the warehouse was defective and in disrepair, and that OD was liable to remedy the defects in the roof pursuant to the repairing covenant in the lease [paragraph 6].

    iii) The roof has leaked from the start of the lease [paragraph 8].

    iv) UBS Triton has stated that it believes that the appropriate remedial works required to remedy the defects in the roof and put it into a lease compliant condition are treatment of the end laps with Kemperol. However, UBS Triton has expressly reserved the right to contend later that the works have not produced that result, and that OD must do whatever work might then be necessary in order to put the roof into that condition [paragraph 11A].

    v) OD has the benefit of collateral warranties from Amec and FK in respect of the costs of remedying the consequences of defective design and construction [paragraph 12].

    vi) At paragraph 14 of the proposed APOC, it is pleaded that OD's position is:

        "(1) That it does not admit that any works are required to the roof under its repairing covenant, and it requires the First and Fourth Defendants to prove those works that

are required by reference to the individual defects if they wish to oppose the making of negative declarations binding on them that particular remedial works are not required.

(2) But, to the extent that works are required, that is a consequence of original design and or construction defects, the defects being those which the First Defendant identified and complained about in the draft Particulars of Claim in its threatened action against the Second and Third Defendants that is to say:

(a) Differential movement of the roof panels caused by thermal expansion and contraction …

(b) The roof suffers from excessive deflection under load …

(c) British Standard BS5427 requires (in the absence of detailed analysis) a minimum nominal pitch for through-fixed roof sheeting … of 5.5^0 to allow for a pitch deflection of at least of 4^0. At the Warehouse, the nominal slope is 5^0 …

(d) Many of the existing rooflights have cracked as a result of stress caused by excessive thermal movement …

(e) The side laps of the roof sheets have been laid facing south into the prevailing wind, increasing the risk of water penetration…

(3) And that the existence of those design and construction defects are breaches of the various collateral warranties given to the Claimant by the Second and Third Defendants, and they must indemnify the Claimant against the cost of doing all the works which the court might declare the Claimant is required to do …"

22. The relief claimed in the prayer is:

"(1) Against the First and Fourth Defendants, a declaration as to what works, if any, the claimant is obliged to do to the roof of the premises in order to comply with its repairing covenant;

(1A) Alternatively, declarations as to which (if any) of the following works it is necessary to carry out to the roof, in order to perform and satisfy the Claimant's repairing obligations contained in the Lease:

(a) … applying 300mm Kemperol bandage …

(b) Installation of coated metal steel cappings …

(c) Over-roofing with a metal secret-fixed roof …

(d) Re-roofing with a metal secret-fixed roof…

(2) Against the Second and Third Defendants:

(a) A declaration that those works are required as a result of original design defects and/or construction defects which they warranted against; and

(b) An indemnity for the cost of doing those works, or damages for breach of warranty in the same amount;

(3) Against all the Defendants, further or other relief …"

Current position of the parties

23. OD and UBS Triton agree that it is likely that the defects in the design and/or construction of the roof have caused a state of disrepair in the property such as to engage OD's repairing covenant under the lease. They do not agree the nature or extent of the defects or disrepair so caused.

24. UBS Asset did not use the settlement monies received from Amec to carry out any repairs to the warehouse roof. Its position is that it has been compensated for Amec's breach of warranty in failing to provide the roof as required under its design and build contract. It has no obligation to spend the compensation received on carrying out any repairs and has a duty to its pension fund investors to preserve the value of its funds.

25. OD is aggrieved that the substantial sums paid to UBS Asset in settlement of claims arising out of alleged defects in the design and/or construction of the roof have not been expended on remedial works.

26. UBS Triton does not seek to bring any claim against OD, requiring it to carry out repairs to the roof to satisfy its obligations under the repairing covenant. If it brought such a claim, OD would seek to pass on the costs of the repairs to Amec under its collateral warranty, which would trigger Amec's entitlement to an indemnity under its settlement agreement with UBS Asset. UBS Triton is content for OD, as tenant, to determine what, if any, remedial works are necessary to put the warehouse into a good state of repair so as to comply with its covenants under the lease. However, it reserves its right to make a claim against OD if the remedial works are unsuccessful or, if no repairs are carried out, at the end of the lease.

27. OD wants to know what it is obliged to do under its lease so that it can claim on the warranties whilst they are still enforceable. OD wishes to ensure that it can recover the cost of any repairs, required to satisfy its repairing covenant under the lease, against Amec and FK under their respective collateral warranties. It seeks to bring proceedings against all parties in one set of proceedings so as to avoid the possibility of inconsistent findings. Although UBS Triton has not made any claim for breach of the repairing covenant to date, it has reserved its right to do so if the remedial works fail or are not carried out. If OD waits to make claims against Amec and FK until UBS Triton pursues it under the lease, limitation may well have expired under the collateral warranties,

forcing it to incur the expense of the remedial works without any recourse against the contractors.

28. Amec and FK are aggrieved that they have paid substantial sums in settlement of claims arising out of (alleged or proved) defects in the design and construction of the roof but no remedial works have been carried out and now they face further claims in respect of the same allegations.

29. The issues for the court are whether OD's case that the court should exercise its discretion to grant declaratory relief to determine the performance required by OD to satisfy its obligations under the repairing covenant in the lease, has any realistic prospect of success and whether the claims against the defendants, including the contingent claims for repair costs against Amec and FK, are adequately pleaded.

Test on applications

30. CPR 16.4 provides that the particulars of claim must include a concise statement of the facts on which the claimant relies.

31. On an application by a party to amend its pleading, where there is no issue of lateness or adverse impact on the trial date, the principles are as follows:

    i) The court has a general discretion to allow an amendment to a statement of case: CPR 17.3.

    ii) When deciding whether to grant permission to amend, the court must exercise its discretion having regard to the overriding objective: *Swain-Mason v Mills & Reeve LLP* [2011] EWCA Civ 14 per Lloyd LJ at paragraphs [68]-[69]; *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609 per Briggs LJ at paragraph [26]; *Qua Su-Ling v Goldman Sachs International* [2015] EWHC 759 per Carr J at paragraphs [36]-[38].

    iii) Although the court will have regard to the desirability of determining the real dispute between the parties, it must also deal with the case justly and at proportionate cost, which includes (amongst other things) saving expense, ensuring that the case is dealt with expeditiously and fairly, and allocating to it no more than a fair share of the court's limited resources.

    iv) An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus, the applicant must have a case which is better than merely arguable: *Qua Su-Ling v Goldman Sachs* (above).

32. CPR 3.4(2) provides that:

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

> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

33. CPR 24.2 provides that:

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

34. In *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37 Hamblen LJ summarised the applicable test on applications concerning strike out and summary judgment at paragraph [27]:

> "(1) The court must consider whether the case of the respondents to the application has a realistic as opposed to fanciful prospect of success – in this context, a realistic claim is one that carries some degree of conviction and is more than merely arguable.
>
> (2) The court must not conduct a mini trial and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by the trial process.
>
> (3) If the application gives rise to a short point of law or construction then, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it."

Claim against the first defendant

35. UBS Asset is no longer the landlord, having assigned its interest in the warehouse to UBS Triton in 2016. During the hearing it became common ground that the claim against UBS Asset should be struck out.

Claim against the fourth defendant

36. The claim against UBS Triton is for a declaration as to what works, if any, OD is obliged to carry out to put the roof into a lease compliant state.

37. In paragraph 14 (1) of the APOC, OD pleads as follows:

i) it does not admit that any works are required;

ii) it requires UBS Triton to prove the works that are required; and

iii) in the absence of proof by UBS Triton, it will seek negative declarations in respect of particular remedial works that are not required.

The relief sought at paragraph (1) of the prayer is a declaration as to what works, if any, OD is obliged to do to the roof to comply with its repairing covenant.

Parties' submissions

38. CPR 40.20 provides that the court may make binding declarations, whether or not any other remedy is claimed.

39. Mr Wonnacott QC, on behalf of OD, submits that it is open to him to seek such declaratory relief in this case:

i) OD is not asking the court to decide whether it has committed a breach of contract. It is seeking a declaration about what it is obliged to do in order to perform its contractual obligations.

ii) OD simply needs to establish that it has a legitimate interest in having the question answered. There does not need to be an extant claim by a third party or a cause of action: CPR 40.20.

iii) It cannot be right that if the landlord refrains from making any claim until the collateral warranties have expired, to avoid triggering the indemnity, there is nothing that the tenant can do but to wait until the claim is made.

40. OD proposes that it will present a neutral expert report, setting out the advantages and disadvantages of each potential scheme. OD will not identify a positive case as to which scheme, if any, will satisfy its repairing covenant. It will invite the court to consider the report and determine which scheme, if any, would satisfy its obligations under the lease.

41. Mr Wonnacott submits that OD is entitled to assume its position of neutrality to avoid the trap of an obligation to carry out substantial works under the lease without the ability to recover such costs under the warranties.

42. Mr Jourdan QC, on behalf of UBS Triton, submits that the claim against UBS Triton should be struck out on the grounds that: (i) the amended particulars of claim do not plead a legally sustainable claim against UBS Triton; (ii) the amended particulars of claim do not plead the facts necessary to enable the court to identify and determine the real issues in that they identify four alternative schemes of work without indicating any preference between them; and (iii) there is insufficient detail in the amended particulars of claim as to the nature of the alternative remedial schemes proposed by OD.

43. Mr Jourdan submits that the pleaded case has no real prospect of success. OD improperly seeks to adopt a position of neutrality in respect of any obligation to carry out remedial works to the roof. The lease demises the premises to OD for a term of 20 years, giving exclusive possession of the premises to OD. The repairing covenant at clause 3.4 of the lease imposes a continuing obligation on OD throughout the term of

the lease. Such a covenant requires the tenant to do, as and when required during the term of the lease, such required repairs as, having regard to the age character and locality of the building, will make the building reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it: *Dowding and Reynolds: Dilapidations* (6th edition) para 9-05. If there is a deterioration in part of the building which means it falls below the required standard, the tenant is obliged to carry out work which will take it up to that standard. The tenant is not entitled to demand that his landlord agrees in advance that a particular scheme of work will achieve that standard. The repairing covenant allocates such risk to the tenant. It is a matter for the tenant to choose what work is required to be done to comply with the terms of the repairing covenant: *Carmel Southend Limited v Strachan & Henshaw Limited* [2007] 3 EGLR 15 per HHJ Coulson QC at paragraph 9. In those circumstances, Mr Jourdan submits, it is not open to OD, as tenant, to ask the court to tell it whether the roof is in a state of disrepair and, if so, what OD should do to fix it.

44. Further, Mr Jourdan submits that OD is not entitled to a declaration that any scope of works will "satisfy" its repairing obligations. There can be no guarantee that any particular scheme of work will satisfy the repairing covenant and, in any event, the obligation is a continuing one throughout the term of the lease. OD is not entitled, by obtaining a declaration from the court, to shift onto the landlord the risk that any scheme of work may not leave the building in the condition required by the repairing covenant. The lease allocates that risk to OD.

45. Finally, Mr Jourdan submits that OD has failed to provide any proper particulars of the four options identified as potential remedial schemes.

Applicable legal principles

46. The court has a wide jurisdiction to grant declaratory relief: *Governor and Company of the Bank of Scotland v A Ltd* [2001] EWCA Civ 52 per Lord Woolf CJ, delivering the judgment of the Court of Appeal:

> "[45] The wide power of the courts to give guidance to trustees is undoubted. However the court's ability to resolve disputes which could give rise to undesirable legal consequences is no longer restricted, if it ever was, to situations involving trusts. In his first Hamlyn lecture given in 1949, "Freedom Under the Law", Sir Alfred Denning, as he then was, identified the challenge facing the court as being to develop "new and up-to-date machinery" (p. 116). The first element of the machinery identified in the lecture was the remedy of declaratory relief. The court's power to make a declaration (or 'declaration of right') was derived from the Court of Chancery and was originally supposed to be restricted to declaratory judgments as to existing private rights (see *Guaranty Trust Company of New York v Hannay* [1915] 1 KB 536, which sets out the early history). Sir Alfred Denning saw the need to develop its scope in order to control the abuse of executive power, and over the half-century which has elapsed since his lecture it has performed a crucial function in the emergence of the modern law of judicial review. The development of declaratory relief has not however been confined

> to judicial review. Doctors and hospitals have increasingly been assisted by the ability of the courts to grant advisory declarations. It was at one time thought, that an interim declaration could have no practical purpose. The developments in other jurisdictions showed this was not the situation. Now the CPR acknowledges that just as interim injunctions can be granted so can interim declarations. Order 15 Rule 16 still remains part of the CPR. Its transitional life is about to come to an end. The Rules Committee has approved a new rule, part 40.20 of the CPR which omits any mention of "rights". It merely states "the court may make binding declarations whether or not any other remedy is claimed.
>
> [46] … The fact that the courts now have these powers, must not, however, be regarded as a substitute for financial institutions taking the decisions which should be their commercial responsibility. The court's powers are discretionary and only to be used where there is a real dilemma which requires their intervention."

47. Declaratory relief will be granted only where there is a real dispute between the parties: *Gouriet v Union of Post Office Workers* [1978] AC 435 per Lord Diplock at p.501:

> "…The only kinds of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event …
>
> … the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."

48. Declaratory relief will be granted only where the terms of the declaration sought are specified with precision: *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 per Lord Scott at paragraphs [92]-[93].

49. As between the parties to a claim, the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court's power to grant declaratory relief is discretionary. The court has to consider whether, in all the circumstances, it is

appropriate to make such an order: *Financial Services Authority v Rourke* [2001] EWHC 704 per Neuberger J:

> "It seems to me that when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration."

Determination of the applications concerning the Fourth Defendant

50. The difficulty raised by the pleaded case against UBS Triton is that it does not raise any issue that the court can properly determine.

51. Firstly, there is no dispute between the parties as to the nature and scope of OD's repairing obligations under the lease. OD has an ongoing obligation to keep the premises in repair, not by carrying out any specified works but so as to achieve the specified standard of repair. The choice of works required to maintain the warehouse in the required condition is a matter for OD. It is not open to OD, as tenant, to require UBS Triton, as landlord, to identify or agree any particular scheme of works required in order to satisfy OD's repairing covenant. OD does not admit what works are required but no other party is advocating any particular scope of works. UBS Triton's position is that it is a matter for OD to determine what works are required to satisfy its repairing obligations. The APOC does not include any claim for a negative declaration. On the face of the pleadings, there is no dispute as to the scope of remedial works required.

52. Secondly, in the absence of any positive case by OD, there is no basis on which the court can, or should, determine what works, if any, are required to put the roof into a state of repair. Although, in appropriate cases, the court will assist parties in making decisions, such as, a declaration as to the proper distribution of trust funds in a case brought by trustees, or a declaration as to the appropriate treatment in a case brought by a clinician, usually the claimants must identify the particular course of action in respect of which approval is sought. In those cases, the court assumes responsibility for the administration of the trust or decision making for someone without capacity. Absent good reason, such as where there is an issue of capacity or illegality, it would not be appropriate for the court to assume responsibility for, or interfere with, a decision made pursuant to a commercial contract because it would amount to a trespass on the freedom of the parties to contract and act in their own commercial interests. Although Mr Wonnacott drew the court's attention to cases where a claimant adopted a neutral position, they concerned claimants who were faced with conflicting claims. In this case, OD is not facing conflicting claims from other parties. Indeed, UBS Triton's position is that it is a matter for OD to decide on the scope of work necessary.

53. Thirdly, it would not be appropriate for the court to carry out an inquisitorial process to identify the scope of works required. OD proposes to put the neutral expert report before the court, identifying the four alternative schemes, but without any positive case as to the scheme that OD considers is necessary to meet its obligations under the repairing covenant. UBS Triton's position is that it is a matter for OD to determine what works are necessary. The court would be left to interrogate and evaluate the options without the benefit of the adversarial trial process. The likely outcome would be successful

submissions from the defendants that, in those circumstances, the court could not decide which option was appropriate. Mr Wonnacott was unable to identify any authority in which the court has determined what works a tenant is required to carry out under a lease where there is no crystallised dispute with the landlord.

54. Fourthly, it would not be appropriate for the court to grant a declaration, identifying the works necessary to satisfy OD's repairing obligations. The obligation is to ensure a state of repair; it is not an obligation to carry out specific works. The court could determine whether works that had been carried out in fact achieved the requisite state of repair, in the event of a dispute. However, it is not for the court to direct or supervise OD's performance of its covenant. As Mr Jourdan rightly submits, this would transfer the risk of the covenant in the lease from the tenant to the landlord.

55. In summary, the claim for a declaration against UBS Triton is not formulated so that any underlying issue between the parties is sufficiently clearly defined to make it justiciable.

56. For the above reasons, OD has no real prospect of succeeding on that claim. The application to amend the APOC to plead the claim against UBS Triton is refused and UBS Triton is entitled to an order striking out the claim against it.

Claims against Amec and FK

57. OD's pleaded case against Amec and FK can be summarised as follows:

    i) in paragraph 14 (1), it is not admitted that any works are required to repair the roof;

    ii) in paragraph 14(2), it is pleaded that to the extent that any works are required, that is a consequence of design and construction defects set out in sub-paragraphs (a) to (e);

    iii) in paragraph 14(3), it is pleaded that the design and construction defects are breaches of the collateral warranties given by Amec and FK;

    iv) the alleged breaches against Amec are set out in sub-paragraphs (A)(i)-(vi);

    v) the alleged breaches against FK are set out in sub-paragraphs (B)(i)-(viii).

58. The relief sought at paragraph (2) of the prayer is:

    i) a declaration that any works determined by the court to fall within OD's repairing covenant under the lease are required as a result of original design defects and/or construction defects which Amec and FK warranted against; and

    ii) an indemnity for the cost of doing those works, or damages for breach of warranty in the same amount.

Parties' submissions

59. Amec objects to OD's application to amend the POC on the grounds that: (i) there is no assertion by OD that it has an obligation to carry out any repairs and, therefore, it has

no basis on which to make a claim against Amec; and (ii) the allegations are insufficiently particularised.

60. Mr Hickey QC, on behalf of Amec, submits that the relevant warranty given by Amec contains a proviso that its liability for the reasonable costs of repair, renewal and or reinstatement is limited to such costs as are incurred by OD or for which OD is liable. OD has not incurred remedial costs. Therefore, Amec's liability is contingent on whether any remedial works are required to be carried out by OD under its repairing covenant. In the APOC, OD does not positively assert that it is liable under its lease to carry out any works to the warehouse roof. It follows that OD has no claim against Amec.

61. Mr Hickey further submits that OD's draft APOC remain deficient, in that:

i) they fail to particularise the alleged breach of any contractual term in sufficient detail to allow Amec to understand the case it has to meet or prepare its defence;

ii) they fail to particularise why any alleged breach by Amec is said to have caused those defects alleged;

iii) they fail to identify the cause of any defects to which reference is intended or identify the extent to which they are alleged to be defects of design and workmanship;

iv) they fail to identify what if any works are presently required to be carried out by OD under its repairing covenant or set out in what respect such works are said to be necessary to rectify defects existing at the time OD signed its lease and which are those for which Amec may be alleged to be responsible;

v) they fail to address the position articulated by UBS Triton that it does not require OD to carry out any works under the repairing covenant to repair any defects in the roof existing at the time OD signed its lease;

vi) the prayer for relief does not identify the terms of any declaration it seeks, nor does it advance any positive case as to 1) whether any remedial works are required to the roof at all; or 2) which if any of the works described by it are necessary in order for OD to comply with its repairing obligations under the lease.

62. Ms Stephens, on behalf of FK, objects to OD's application to amend the particulars of claim and seeks to strike out the claim against it on the same grounds as relied on by Amec and adopts Mr Hickey's submissions.

63. Ms Stephens accepts that, contrary to the claim against Amec, any claim against FK under its warranty is not based on OD's liability under the lease. However, she submits that any claim against FK (save for nominal damages) is contingent on OD incurring, or having liability for, the costs of remedial works. OD's pleaded position is that it does not admit that any works are required to the roof under its repairing covenant. It does not admit any liability under the repairing covenant in the lease and therefore, has suffered no loss. In those circumstances, its claim against FK is fundamentally flawed and cannot succeed.

64. Ms Stephens submits, correctly, that FK's warranty is in respect of its obligations to Amec under the roofing sub-contract; it does not guarantee OD's repairing covenant under the lease. OD assumed the risk that there might be a terminal dilapidations claim brought by the landlord that it could not pass on to contractors under the collateral warranties.

65. Further, Ms Stephens complains that, although separate breaches have been pleaded against Amec and FK in paragraph 14(3)(A) and (B) respectively, the declaration and other relief sought in respect of remedial works are claimed in identical terms against both Amec and FK. She submits that it is too late to afford to OD another opportunity to put its pleading in order and the claim should be struck out.

66. In their draft defences, Amec and FK also rely on limitation defences and OD's alleged unreasonable behaviour in refusing the offer by the first and fourth defendants to pay for the Kemperol remedial works. However, those are substantive defences. They are disputed by OD and in my judgment they are properly triable.

67. Mr Wonnacott submits that the claim against Amec and FK is not a contingent claim merely because the quantum is uncertain. The proposed APOC provides the requisite particularity in respect of the alleged breaches of the warranties. The prayer identifies the specific remedial works that might or might not be required, subject to the court's determination of OD's obligations under the repairing covenant in the lease.

Determination of the applications concerning Amec and FK

68. For the reasons set out in respect of the claim against UBS Triton, the current pleaded claim against Amec and FK is misconceived and flawed. I reject Mr Wonnacott's submission that the proposed APOC does not plead a contingent claim against Amec and FK. The allegations of breach are predicated on a determination by the court that a scheme of works falls within OD's repairing covenant. Their objections to paragraph 14(1) are justified.

69. However, it would be possible for OD to plead a straightforward claim against Amec and FK for breach of the collateral warranties. The proposed APOC identifies the alleged defects in the design and construction of the roof and identifies the breaches alleged against each defendant. Although Mr Wonnacott has assumed a position of neutrality in the pleading, he accepts that it is likely that the roof is in a state of disrepair so as to engage the repairing covenant in the lease. That is not surprising; the roof leaks. It is incumbent on OD to plead a proper case against each defendant to identify the remedial scheme required to remedy each of the defects alleged. If OD wishes to pursue the claim against Amec and/or FK, it must plead a positive case as to the remedial works and loss relied on.

70. I have considered whether the court should exercise its discretion to give OD a further opportunity to put its pleaded case in order. Ms Stephens makes a persuasive argument that OD has already had a number of chances to rectify the claim and these proceedings need to stop. This is not a proper or efficient use of the court's resources and it is not fair to put the defendants to the costs of having to defend the claim.

71. The following matters must be weighed up. There must be finality in litigation. The injustice to the defendants in letting the proceedings continue is that they have an

unknown claim hanging over them. They are entitled to know the nature and quantum of the claims against them and should not have the uncertainty of waiting for a case to evolve. The parties are entitled to a fair and expeditious determination of the dispute. The injustice to OD in not giving it an opportunity to rectify its claim, is that (probably) it will be deprived of any recourse against Amec and FK by reason of limitation. Although the defendants will no doubt submit that it has brought that difficulty on itself, it is clear that OD has been placed in a difficult position by reason of the settlements made by the other parties.

72. In those circumstances, I have concluded that OD should be given a further opportunity to plead a proper case against Amec and FK and seek permission to amend. Amec has indicated that it may seek to bring the first and/or fourth defendants back into the proceedings by way of contribution claims. A further hearing will be fixed to determine those, and any other applications, and for a CMC. The court will be pro-active in managing this case so that it is dealt with justly and at proportionate cost.

Claimant's replies

73. The replies served by OD were late but the delay was insubstantial and no prejudice was caused to the other parties. Therefore, permission is granted to serve the replies.

Summary

74. For the reasons set out above, the court will make the following orders:

i) The claim against the first defendant is struck out.

ii) The claim against the fourth defendant is struck out.

iii) The application by the claimant to amend its particulars of claim against the second and third defendants is adjourned to Friday 20 July 2018, to be heard with a CMC in these proceedings, with a time estimate of 1 day.

iv) The claimant shall file and serve any draft amended particulars of claim by 4pm on 22 June 2018. In the absence of any such draft, the claims against the second and third defendants shall be struck out.

v) Any further applications that the parties wish the court to consider at the adjourned hearing should be filed and served by 12 noon on 6 July 2018.

vi) The claimant shall pay the first and fourth defendants' costs of the claim, such costs to be assessed on the standard basis if not agreed.

vii) The claimant shall pay the second and third defendants' costs of the application to amend, including the costs of the hearing on 21 and 22 March 2018, and the third defendant's application to strike out the claim / for summary judgment, such costs to be assessed on the standard basis if not agreed.