JUDGMENT : HIS HONOUR JUDGE PETER COULSON QC: TCC. 25th May 2007

A. Introduction

1. The Claimant, Zurich Insurance Company ('Zurich'), operates a building guarantee scheme pursuant to which participating developers can offer the purchasers of the new properties which they build a guarantee, backed by Zurich, in respect of defects and their prompt remediation. It is similar to the more widely-known scheme run by the NHBC. The defendant, Gearcross Limited ('Gearcross') is registered as a developer under the Zurich scheme.

2. Gearcross built a house at 4 Belmont Hill, London SE13 5BD ('the property'). It was sold to a Mr. Andrew Haskins in January 2002. Mr. Haskins alleged that there were defects in the property. There were a number of delays and difficulties involving both inspection and the carrying out of remedial works at the property. Eventually Zurich paid other contractors, not Gearcross, to carry out further work. It seems that this work was not wholly completed until May 2005.

3. By a claim form issued on 5th February 2007, Zurich commenced proceedings against Gearcross in the sum of £149,093.48. The claim was described as: *"Failure to reimburse Zurich the cost of carrying out the remedial works which is in breach of clause 40 of the Zurich Rules of Registration which states that the cost of carrying out the remedial works is recoverable on demand."*

   By an application under CPR Part 24 dated 16th April 2007, which followed the service of Gearcross's defence, Zurich sought summary judgment against Gearcross in the full amount of that claim. That is the application which I have heard this afternoon.

4. I propose to set out in **section B** below the relevant rules of the scheme and how I believe they were designed to work. At **section C** below I identify what I consider to be the relevant facts. Finally, at **section D** below I set out my conclusions as to whether or not Zurich have made out a case under CPR Part 24. Before doing any of that, I should say that I am extremely grateful to both counsel for their succinct and helpful submissions.

B. The Rules and What They Mean

5. It is admitted that Gearcross were bound by the rules of registration, and that these rules formed the terms of a contract between Zurich and Gearcross. The rules relevant to this application are as follows:

   *"**19. Requirements***

   Builders and developers shall procure that each new home shall be built to the [written] Requirements [of Zurich]...

   21. Contractual Responsibilities

   (a) Subject to sub-rule (b) below if a developer enters an agreement with an original buyer of a new home such developer shall warrant that:

   (i) he is currently registered as a developer;

   (ii) he will fulfil his obligations under the rules;

   (iii) the new home would have been built pursuant to the Requirements and in a workman-like fashion such that it is fit for human habitation ...

   (vii) he will comply with the Developer's Responsibilities which shall be set out in full in such agreement…

   (ix) he will be liable for and will repair any Damage or rectify any Defect which has manifested during the developer's guarantee period including any damage or defect which is the result of his building on adjoining property and any consequential damage to the new home ...

   32. Defective Works

   Where the company [Zurich] considers that a builder or developer has not performed his obligations under a scheme or the rules, then the company may:

   (a) prohibit continuation of work on a new home in relation to which the builder or developer has so failed except for such work as may be specified by the company;

   (b) serve the builder or developer with notice in writing specifying work and timescale which the company is of the opinion is required to remedy the position.

   34. Failure to Comply with Instructions

   If a builder or developer does not carry out any instructions given to him by the company as soon as practicable, the company may instruct another builder to carry them out at the expense of the defaulting builder or developer.

   40. Recovery

   Sums which a builder or developer is liable to pay either to a buyer or to the company pursuant to a scheme may be recovered from the builder or developer on demand and shall carry interest at the rate of 4% per annum above the base rate of the NatWest Bank plc prevailing at that time."

6. There was a debate in the inter-solicitor correspondence as to the meaning of "a demand" in rule 40, and the extent to which that meant that Gearcross were obliged to pay the sums demanded by Zurich without further ado. It seems entirely clear to me that Gearcross were liable to pay the sums demanded by Zurich, always provided of course that such sums were "sums which [Gearcross] were liable to pay ... to ... Zurich pursuant to the scheme ...". Thus, in order to recover the sums demanded, Zurich must show that they were sums which Gearcross were liable to pay under the rules which I have just identified.

7. This conclusion addresses, and I hope answers, the contention that was also made in the solicitors' correspondence, and to which Mr. Nicholson QC has referred this afternoon, that in accordance with the reasoning of the Court of Appeal in ***Jervis v Harris*** [1996] Ch 195, the sum claimed was due as a debt and was not a claim for damages

for breach of contract. Leaving aside the fact that it might be said that Zurich's claim was not precisely set out in that way in the claim form, it seems to me that, even if the sum claimed was a debt, it would still only be due on demand if Gearcross were liable to pay it. Thus, the fact that it might be characterisable as a debt, rather than damages, does not somehow relieve Zurich of the obligation of demonstrating that Gearcross were liable under the rules to pay the sum claimed.

8. In my judgment, for Gearcross to be liable to Zurich for the sums claimed, then the following five things need to be established:
   a) That the work originally performed by Gearcross was defective in accordance with rule 32, because Gearcross had not complied with their obligations under rules 19 and 21;
   b) That a notice specifying the remedial work necessary to rectify those defects had been served by Zurich on Gearcross in accordance with rule 32(b);
   c) That Gearcross had not carried out such remedial work "as soon as practicable" in accordance with rule 34;
   d) That as a result of Gearcross's failure, Zurich had instructed another contractor to carry out the work in the notice in accordance with rule 34;
   e) That the sum now claimed by Zurich was in respect of the remedial work which Gearcross refused to carry out and which was therefore carried out by other contractors (rule 40).

9. In his written submissions on behalf of Gearcross, Mr. Webb outlined an argument that Zurich had to show that Gearcross had "unjustifiably refused" to carry out the remedial work in question. In support of this, he relied on clause 2.2 of the policy between Zurich and Mr. Haskins, which provided an indemnity against the cost of rectification "where the developer has unjustifiably refused ... to carry out such repair". I do not myself believe that in this case anything turns on the possible difference between Gearcross not completing the work 'as soon as practicable' and Gearcross 'unjustifiably refusing' to complete that work. The point is academic, because for the reasons set out below I do not consider that this is a case where Gearcross could say that they justifiably refused to carry out work.

C. The Evidence

C.1 General Observations

10. I hope that it is not too unkind to say that the evidence for the Part 24 application was not entirely satisfactory on either side. In particular:
    a) The Gearcross witness statements were light on detail and contained references to very few dates which, in a dispute where the chronology was so important, was unhelpful. Moreover, the exhibits to the statements were plainly just a photocopy of the relevant (unsorted) files, so that they started at the end and worked backwards, and even then were not in any discernible chronology order.
    b) Zurich put in no evidence at all until yesterday, when they served a statement from a Mr. Philip Money which ran to 62 paragraphs. Despite its length, the statement does not suggest that Mr. Money had any involvement in the detailed events at issue between the parties. His exhibits, which fill a lever arch file, largely replicated the documentation which had been attached to the particulars of claim and exhibited to the other statements.

C.2 The Relevant Facts

11. It appears that Mr. Haskins notified Zurich of various defects in the property on the 23rd, the 28th and 30th May and 9th June 2002. A variety of matters were raised including cracking and various patches of dampness. The dampness was obviously the principal matter of complaint, both then and thereafter. Also on 9th June Mr. Haskins made a formal claim under his policy with Zurich.

12. Zurich arranged to have the property inspected. A report dated 28th June was forwarded to them by their surveyor who concluded that many of the items could be dealt with fairly easily, but that the damp and the cracking would have to be the subject of further investigation. It should be noted that, even at this early stage, he rejected Gearcross's claim that the dampness was due to drying out.

13. Zurich sent the report to Gearcross on 2nd July 2002 and sought confirmation that they had contacted Mr. Haskins within 14 days to arrange for investigation/rectification works to begin. Gearcross had apparently already carried out some of the work referred to in the report and they had also made proposals for dealing with other matters such as the damp.

14. On 22nd August 2002, Mr. Haskins wrote to Zurich enclosing a report from his new surveyor which apparently indicated that, in respect of the damp, "Further investigations are necessary before a course of remedial action can be decided on." Zurich wrote to Gearcross on 6th September 2002 to say that they were asking their project managers to put together a scope of works report so that Gearcross could arrange for the necessary skill trades to carry out the appropriate work.

15. That promised report was sent by Zurich to Gearcross on 26th September. It appears that it was also prepared on that date. It was principally confined to the damp issue, since that was the most important defect. It attributed the source of the damp to certain defects in construction, although it recommended that various checks be carried out "*on all possible external sources of water penetration into cavity*" and identified the required works in rather vague terms as "*amend, alter or modify or reduce potential for such ingress*". As to the cracking, this was attributed to shrinkage and the eventual movement of the upper floors was not thought to be excessive.

16. The report also commented on many of the items left over from the first surveyor's report of 28th June 2002. From these passages of the later report it is clear that Gearcross had carried out many of the items of work which

could be described as snagging. They were also proposing to do other more extensive works, such as taking down the area of the large ceiling below the bedroom. At this point a number of different problems began to arise.

17. First, Mr. Haskins and his then partner began to grow difficult about allowing access to those representing Gearcross to the property. His correspondence begins to take on a rather overwrought tone, talking of trespass and the like. Mr. Popa, one of the workmen, who attended the site in October, talks in his witness statement about the verbal abuse and disruption he suffered, the hiding of his tools and the way in which further works were continually demanded of him by both Mr. Haskins and his partner.

18. Secondly, and this seems to me a development that was entirely separate from the difficulties being experienced by Mr. Popa, Gearcross chose to make no effective response to either the Zurich letter and report of 26th September or the polite chaser from Zurich on 10th October 2002. Gearcross merely sent what could fairly be described as a holding letter on 14th October. Thereafter there was apparently a telephone conversation, again initiated by Zurich, at the beginning of November relating to the costings of the proposed remedial works. It is apparent from the documents that Gearcross did not do anything further in relation to the notice of 26th September or the chaser of 10th October. Perhaps not unreasonably, this inactivity led Mr. Haskins to instruct a solicitor who wrote a relatively aggressive letter of complaint to Zurich on 5th November 2002.

19. On 1st November, it appears that, during the telephone conversation referred to in paragraph 18 above, Gearcross were promised Zurich's costings for the proposed works. It is not clear that those costings were sent at that time. However, on 7th November 2002 Zurich wrote to Gearcross in these terms:

"I write further to our correspondence dated 1st November 2002 where you agreed to look at our project manager's costings for the necessary remedial works.

During our conversation of today, I specifically asked you if you were able to respond with a positive answer within 3 days of receipt of the costings. You stated that you would like a copy of this sent to your surveyor, Mr. D. Webb. He is currently on annual leave and returns the week commencing 18th November 2002. You advised that you were not in a position to accept any costings until Mr. Webb returns.

As you are aware, this claim has been outstanding since June 2002 and we are no further forward in acquiring an actual start date for works to commence. Another 2 weeks have gone by and you have not asked a contractor to submit any estimates as you promised within our conversation before you went on holiday.

In view of the on-going time delays in resolving this claim we have no option but to instruct our contractor to carry out the works. On completion of these works we will be looking for reimbursement of our outlays from you."

20. Gearcross did not apparently reply to this letter, nor did they challenge the suggestions either that Zurich would engage others to do the work or that Gearcross would be expected to reimburse them for the costs incurred. It should also be noted that, other than a reference to the much later demand of 25th November 2005, this letter of 7th November 2002 is the last document in the chronology on which Zurich rely in their pleaded claim.

21. Gearcross engaged their own surveyor, Mr. Webb, who explains in his witness statements the particular difficulties that he had in trying to gain access to the property merely to undertake an inspection. The relevant paragraphs of his statement are paragraphs 3 and 4. In those paragraphs he identifies what he calls the obstructive and abusive behaviour of Mr. Haskins' then partner, which he said was so bad he seriously considered reporting her to the police for assault. He also says that he was never properly allowed to inspect the property before Zurich instructed their builder to carry out remedial works. He says this: *"…it seemed to me that the work that was reported to Gearcross Limited initially was much narrower in scope than the amount of work that they have now done. I was allowed into the property initially to inspect a small list of defects within the ground floor and part of the first floor, but was not allowed access to some of the areas I needed to see before being abused and physically pushed out of the building by Miss Faude. We were never allowed back into the property."*

22. However, it is important to note that Mr. Webb's role was not to advise about what, if any, further remedial work was to be carried out by Gearcross. As he himself pointed out in his own letter of 21st November 2002, Gearcross accepted a responsibility to Zurich to pay for appropriate remedial work. The decision to employ another contractor had not only already been taken by Zurich but had been communicated to Gearcross in the letter of 7th November, referred to above. Furthermore, if there were any doubt about it, Zurich had reiterated their position in their letter of 10th December 2002 in which they said to Mr. Webb: *"We are well aware of the protocols involved in arranging remedial works and will revert to you once a full costing and a scope of works is made available to us. We are satisfied that our contractor will carry out any works necessary including specialist works, if they are necessary, without him charging whatever 'he feels he should charge'. We have a longstanding relationship with this company and are content to rely on their recommendations, specialist or not. Had the property been constructed adequately in the first place we would not have found ourselves in this situation. We appreciate your clients' intentions and we will continue to communicate to ensure that your client is kept informed and the costs are contained. We too have a vested interest to ensure this happens."*

23. In the first few months of 2003 the correspondence and the other evidence demonstrates the following:
    a) Continual difficulties were placed the way of Mr. Webb who was unable to make a proper inspection. He referred to these difficulties in his various letters of 10th February 2003 and 17th February 2003.
    b) Mr. Haskins and/or his surveyors identified further alleged defects which they said required to be rectified.
    c) Further investigations were apparently carried out which did not involve Gearcross or Mr. Webb in any way.

24. On 16th April 2003 Mr. Webb discovered that remedial work was being carried out at the property to rectify alleged defects which he had not seen. He expressed his surprise at this, particularly as the promised full costings had not been sent to him. He complained that this was a matter of concern, particularly as Zurich had provided assurances that such information would be provided. He said that he thought that, even though the matter was beyond his control, he believed that he could insist that the remedial work ceased. However, he appreciated that the matter had to be resolved and he trusted that only the work in relation to the damp proofing was being carried out.

25. Zurich responded on 21st May 2003 disputing the comments and suggesting that Gearcross had been apprised of developments throughout. They indicated that Gearcross had been invited to attend inspections and had been provided with copies of the relevant specification of proposed work. They accepted that precise costings were not yet available. The letter also reiterated that, in Zurich's view, Gearcross had been given every opportunity to deal with the repairs. They said that they only intervened when they were forced to; that, in this case, they had had no option under the terms of the policy. They reiterated that Gearcross had known from the outset that, as they were unable to carry out repairs, Zurich would be looking to them for reimbursement of their outlay.

26. It appears that, thereafter, works were carried out by other contractors and paid for by Zurich. Over a year later, on 28th July 2004, Zurich wrote to Gearcross enclosing copies of the invoices which they said: *"…relates to the rectification of items you are responsible for under the developer's guarantee period and would request you forward a cheque in the sum of £36,538.64 to cover our expenditure following the works."*

27. Mr. Webb replied in some detail on 31st August setting out a variety of disputes and concluding that he did not consider that Gearcross "are liable for the full amount shown". He alleged that Zurich had not kept Gearcross informed as they said they would "and a number of additional items have also been incorporated".

28. Rather oddly, Zurich made no reference to the demand of July 2004 either in the statement of claim or in any other document, until Mr. Money's statement where points were made in response to Gearcross's apparent reliance on that demand. Mr. Nicholson QC helpfully told me that, at this point, Zurich believed that everything had been done at the property. The only evidence I have as to the situation after July 2004 are the later invoices, which are expressed in very general terms, and the somewhat blithe assertion from Mr. Money that "as appears from the documents ... further remedial works had to be carried out after 28th July 2004".

29. In fact, Gearcross did not hear again from Zurich until 25th November 2005. It was at that point that Zurich's solicitors wrote a letter of claim, in which the sum claimed was the much larger amount of £171,593.48. Thereafter, Zurich recovered the sum of £22,500 pursuant to a bank guarantee, reducing their claim to the sum sought this afternoon, namely £149,093.48.

D. Analysis of the CPR Part 24 Application

30. I now analyse the Part 24 application. I do so by reference to the five steps identified in paragraph 8 above.

D1. Was the work defective?

31. I consider that the report of 26th September 2002 (paragraph 15 above) made clear that there were defects in the property that had to be rectified. No other interpretation of the report is possible. There is, however, no other evidence of defects before me: the defects which were asserted at the time were confined to that report. Thus, the only defects to which I can have regard for the purposes of this application are those identified in the report of 26th September 2002, although, for the reasons which I have already explained, that does incorporate the earlier report of June 2002. So, although Mr. Haskins suggested in his numerous letters thereafter that there were a whole range of other problems with the property, it does not appear that those matters were ever referred by Zurich to Gearcross as being defects in their work. As I have already pointed out, the only pleaded notifications arose prior to 7th November 2002.

32. As to the issue as to whether the work was defective, Mr. Webb (Gearcross' counsel rather than their surveyor) argued that Zurich's written requirements, as referred to in the rules, were not before the court, so it was impossible for the court to conclude that there were defects or failures to comply with those requirements. That submission effectively assumes that we are at the starting point of an investigation into these problems, rather than being a long way down the investigative road. As at 21st November 2002, as I have pointed out, Mr. Webb, the surveyor, said expressly that his client, namely Gearcross, accepted responsibility. It was clear at that point, therefore, that there were defects for which Gearcross were liable and for which Gearcross accepted liability. I therefore find for the purposes of Part 24 that there were defects in the work which amounted to breaches of the requirements of the Zurich. For the reasons I have already given, those must be limited to the matters set out in the report of 26th September.

D2. Was the required remedial work the subject of a notice?

33. I consider that the required remedial work was the subject of a notice under rule 32(b). The notice was given by way of the letter of 26th September which enclosed the report. It was also the subject of the follow-up letter of 10th October. Again, of course, that limits the relevant remedial work notified to Gearcross to the remedial work set out in the report. There was apparently no further notice in which different or more extensive remedial work was required by Zurich, and none is relied on in Zurich's statement of case.

D3. Did Gearcross carry out the work as soon as practicable?

34. In my judgment, the answer to this question is clear. Gearcross simply did not carry out the work required in the letters of 26th September 2002 and 10th October 2002, whether as soon as practicable or at all. The crucial

period for this purpose was between the end of September 2002, once notice of the defects and necessary remedial work had been given, and 7th November 2002. That was the period in which Gearcross were being asked to sort out the situation at the property, and that was the period in which, according to the evidence, they took no steps to do so. Indeed, the evidence strongly suggests that, certainly by early November 2002, Gearcross had accepted that a certain amount of remedial work would be done by other contractors and that they would be liable to pay for it. That explains Zurich's promise to send them costings of the work in early November. It also, of course, explains Mr. Webb's reference in his letter of 21st November 2002 to the acceptance of responsibility on the part of Gearcross.

35. Thus, it follows from my findings that the work which Gearcross had failed to carry out as soon as practicable was the work that was the subject of 26th September report and notice. There was never any subsequent notice identifying other or more extensive remedial work to be carried out by Gearcross, so there could not be any failure on their part to carry out such subsequent work as soon as practicable or at all. It had simply never been notified to them.

D4. As a result of Gearcross's failure, did Zurich instruct another contractor to carry out the work?

36. On 7th November 2002, as reiterated in Zurich's letter of 10th December 2002, Zurich made plain that they were instructing other contractors to carry out the work which Gearcross had failed to do. It appears from the documents that another contractor under Zurich's project managers then carried out that work. Whilst it also appears that that contractor or contractors carried out other works at the property between early 2003 and May 2005, those other works cannot form part of the claim against Gearcross because there was no notification to Gearcross that they were required to do such work as soon as practicable or at all. This is a point to which I return below.

D5. Does the sum demanded by Zurich refer to and relate to the work that Gearcross refused to carry out?

37. In my judgment, this is where Zurich's claim for the full sum of £149,000 odd under CPR Part 24 runs into difficulties. As I have said, it is clear that a large amount of work has been carried out at the property which was not identified in the report of 26th September and which was, therefore, not the subject of Zurich's notices of 26th September and 10th October. No further notices in respect of this further work were served on Gearcross or are relied on by Zurich in their pleaded case. Thus, Gearcross had no liability in respect of such work, because the procedure prescribed by the rules had not been followed.

38. On the evidence, therefore, I find that:
    a) Some of the work that was carried out by other contractors between early 2003 and May 2005 and paid for by Zurich was the work required by the report of 26th September 2002.
    b) The remainder of that work was not in the report of 26th September and was never therefore the subject of Zurich's notices to Gearcross. In respect of that work, it cannot be said that Gearcross did not carry it out as soon as practicable. They never knew that such work was required of them.

39. Further and in any event, it is plain that, after January 2003, there were major difficulties in Gearcross (through Mr. Webb, their surveyor) finding out what was going on at the property. In my judgment, therefore, it would be unjust now to make Gearcross liable for the cost of remedying defects of which they had not been given notice and which they were not even able to inspect, either before or during any remedial works.

40. The solution to these difficulties is, in my judgment, also plain on the evidence. Zurich's original demand for these works was put at £36,538.64 (paragraphs 26 to 28 above). Although Mr. Webb did not consider it was all immediately payable, his response did not dispute that the bulk of it was due and owing. Furthermore, he did not identify any particular sums which were not payable, or give any specific reasons why they were not. Not only did he fail to identify such parts of this original demand that were not payable at the time, but he also failed to do so in his recent witness statement with which I have been provided. I find on all the evidence, therefore, that the £36,538.64 related to work that was the subject of the report of 26th September 2002, and was therefore the subject of proper notification. It was, therefore, a sum due under the rules. I accept that the demand of July 2004 was a valid demand and should have been paid by Gearcross.

41. By the same token, I reject the suggestion that, on the evidence before me, a claim under CPR Part 24 has been made out in respect of any larger sum. I note that paragraph 61 of Mr. Money's statement admits that extensive further work was carried out after July 2004. He does not begin to demonstrate that such work was referred to in, or required by, the notice of 26th September 2002. His generalised assertion was that that might be the case, but such a statement is of no real weight, given the fact that he was not involved in the detail and he has not attempted to make good his assertion by reference to any of the key documents.

42. Indeed, I would go further and say that, on all the evidence before me, it is a little fanciful to suggest that the extensive work carried out after July 2004 was in some way expressly required by the report of September 2002. The whole point of getting other contractors in to do the work in 2002 was because the matter was urgent and because, possibly understandably, Mr. Haskins was becoming extremely ill-tempered about the on-going problems with his property. It is inconceivable that the work done after July 2004 had somehow been requested in the notice of September 2002. For these reasons, I conclude that the post-July 2004 work was not the subject of the notices relied on by Zurich. It cannot, therefore, be said that the evidence gives rise to an unarguable claim that the post-July 2004 costs were due and owing. Thus, for the avoidance of doubt, I consider that the demand of 25th November 2005 (paragraph 29 above) was not a valid demand in accordance with the rules.

43. I identified during argument what I considered was the mismatch between Zurich's notice of 26th September 2002, and the totality of the works for which a claim is now made in the larger sum of £149,000, and that this mismatch can be demonstrated in various ways. In view of the constraints of time, I merely identify some examples:

    a) There is a claim for relocating spot lights. Mr. Webb of counsel demonstrated to my satisfaction that that was not an item that was referred to in the notice of 26th September 2002.

    b) There is a claim for work to the roof terrace and balcony, although the defects themselves are not detailed in the invoices. There is nothing about such defects in the report of 26th September or the subsequent notices. There is no mention in the report even of damp in those areas. The reference to the balcony in the report is to a suggestion by Mr Haskins of possible structural problems, on which the surveyor expressly accepts that he could express no opinion.

    c) There is a claim for plumbing works, including new WCs and systems. No particulars of the defects or the remedial work are provided. Again, this aspect of the property does not appear to be something that gets any mention at all in the report of 26th September. Although there is a reference to an historical complaint about leaks in the shower, it seems from the report that that had been dealt with by 26th September.

    d) Mr. Webb of counsel points out that it appears to be accepted by Zurich that notification of all relevant defects has not been provided. In paragraph 22 of the particulars of claim, Zurich admit that some of the later claims are in respect of defects "which only became apparent once the remedial works were underway". Such remedial works were carried out long after September/November 2002, and there is no pleaded notice in respect of such defects.

44. More generally I should also say that it is far from insignificant that, whilst as at the end of July 2004, Zurich thought that all the difficulties had been rectified, in fact the vast bulk of this claim was in respect of remedial work that had yet to be carried out. That means that the bulk of this claim is, on Zurich's own case, in respect of work which they never expected to carry out. That plainly raises questions as to the specification and/or performance of the first set of remedial works which could not be Gearcross's responsibility. I accept, as Mr. Nicholson QC put it, that this may simply demonstrate how intractable damp problems can be. But I am not sure that this answers the principal question, which is whether there is a realistic prospect of Gearcross successfully defending the post-July 2004 claims, in circumstances when the second and more extensive set of remedial work, which was carried out after July 2004, was performed and completed without any reference to Gearcross at all. Moreover, as he fairly accepted, even on Zurich's case, the later work was necessitated by other defects which had not been previously identified and therefore not previously notified to Gearcross. For those reasons I consider it would be unjust at this stage to enter summary judgment against Gearcross in respect of that element of the claim.

45. Thus, both generally and on the detail, despite Mr. Nicholson QC's careful submissions to the contrary, I am bound to conclude that the remedial works that were carried out after July 2004 were not the subject of proper notices to Gearcross and therefore did not create a liability on their part.

46. It may be that Zurich have operated on the basis that their one notice in September 2002 allowed them to claim for any subsequent remedial works, no matter what created the need for such works (provided possibly that they could be related back to some sort of damp problem), or possibly they thought that the documents of September/November 2002 somehow gave them a prima facie entitlement to the cost of all work carried out, switching the burden of proof to Gearcross to show why a particular element of claim was not in fact due. To the extent that either of those considerations informed Zurich's approach to the claim and the Part 24 application, I am afraid that I consider that, on the proper operation of the rules, they are both erroneous. I consider that it was always for Zurich to demonstrate their entitlement to the sum claimed and the burden was not switched to Gearcross or displaced by reference to a notice which does not, on closer analysis, require the carrying out of the post-July 2004 remedial work.

47. In all those circumstance, I consider that, on the evidence, the maximum sum due from Gearcross to Zurich was £36,538.64. My understanding is that £22,500 of that has already been recovered by way of a bank guarantee. If that understanding is right, then that would leave a net balance due of £14,038.64. Subject to any further argument on that point, that would be the sum for which I would propose to give judgment under CPR Part 24. I will give unconditional leave to defend in respect of the balance of the claim. I will also deal separately with all outstanding questions of interest and costs.

MR. J. NICHOLSON QC (instructed by Messrs. Berryman Lace & Mawer) for the Claimant.
MR. W. WEBB (instructed by Messrs. Mischon de Reya) for the Defendant.