Neutral Citation Number: [2023] EWHC 1899 (TCC)

Case No: HT-2022-000035

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 24/07/2023

Before :

Mrs Justice O'Farrell DBE

- -

Between :

VINCI CONSTRUCTION UK LIMITED **Claimant**

- and -

(1) EASTWOOD AND PARTNERS (CONSULTING ENGINEERS) LIMITED
(2) SNOWDEN SEAMLESS FLOORS LIMITED

Defendants

- and -

GHW CONSULTING ENGINEERS LIMITED **Third Party**

- -

- -

Katie Lee (instructed by Kennedy's Law LLP) for the **Second Defendant**
Simon Hale (instructed by Reynolds Porter Chamberlain LLP) for the **Third Party**

Hearing date: 14th June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 24th July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. The following applications are before the Court:

    i) an application by the third party ("GHW") for reverse summary judgment against the second defendant ("Snowden") in respect of the Additional Claim on the ground that Snowden has no real prospect of succeeding on the claim because it is statute-barred; and

    ii) an application by GHW to strike out Snowden's claim for contribution pursuant to the Civil Liability (Contribution) Act 1978 on the ground that the Additional Particulars of Claim disclose no valid cause of action against GHW.

2. The applications are opposed by Snowden on the grounds that:

    i) although its claim in contract is time-barred, Snowden has a real prospect of succeeding on the claim in negligence at trial because the claim is not time barred either under section 2 or section 14A of the Limitation Act 1980; and

    ii) the contribution claim is arguable and no limitation issue arises in respect of such claim.

Background facts

3. By a contract dated 26 April 2012, based on the NEC3 Engineering and Construction Contract 2005 (with amendments 2006) Option A and executed as a deed, the claimant ("Vinci") was appointed by Princes Ltd ("Princes"), a manufacturer of bottled drinks, as design and build contractor to carry out work at its warehouse and distribution facility at Weaverthorpe Road, Bradford.

4. By an appointment dated 18 April 2012 and executed as a deed, Vinci engaged the first defendant ("Eastwood") to provide civil and structural engineering services in respect of the works.

5. By a subcontract dated 12 April 2013, executed as a deed and based on the NEC3 Engineering and Construction Subcontract Option A with amendments, Vinci engaged the second defendant, Snowden, to carry out the design, supply and installation of the structural reinforced concrete slabs as part of the works.

6. On 12 April 2013 Snowden engaged GHW to carry out the design, complete with all calculations and drawings, for the in situ reinforced concrete internal floor slabs.

7. The original design intent for the floor in an area of the works referred to as 'the Low Bay Warehouse' was to break out and replace the existing concrete slab. However, during 2012 and 2013, the design was changed to comprise limited replacement of areas of the existing slab and the installation of an unbonded overlay slab on the retained slab.

8. In around May 2013 Vinci issued a 'Compensation Event' notice to Snowden in respect of the design, supply and installation of the Low Bay Warehouse concrete slab works.

9. During May and June 2013 the design for the overlay slab was developed. Installation of the overlay slab commenced on around 2 July 2013 and was completed by 9 July 2013. The works at the Low Bay Warehouse were completed on about 2 August 2013.

10. Vinci's case is that by September 2013 the floor had developed damage and/or defects, including cracks, damage to sawn edges, curling and local crushing of the concrete, leaving holes in the overslab. Various remedial schemes were carried out but ultimately, Princes removed and replaced in its entirety the Low Bay Warehouse floor.

11. In 2019 Princes commenced an adjudication against Vinci, alleging that an overlay slab was not suitable for the Low Bay Warehouse; the existing slab should have been broken out and a new slab constructed. By an adjudication decision dated 2 April 2020, the adjudicator found in favour of Princes that Vinci was liable for breach of contract in respect of defects caused by inadequate design of the Low Bay Warehouse floor.

12. On 10 September 2020 Vinci served a pre-action protocol letter of claim on Snowden, indicating that, to the extent that Prince's adjudication claim against Vinci succeeded, Vinci intended to make a claim under Snowden's contractual indemnity and/or a claim in general damages and/or tort against Snowden by way of compensation for the losses sustained by Princes and/or Vinci.

13. By letter dated 18 January 2021, Snowden issued a preliminary notice of claim against GHW, indicating a potential claim arising out of GHW's appointment as a specialist floor designer in connection with the design of the overlay slab.

14. By a further adjudication decision dated 1 April 2021 (corrected 8 April 2021), the adjudicator awarded Princes damages, including a decision that Vinci was liable to pay Princes for the costs of removing the overlay slab, and for the construction of the new flooring to the Low Bay Warehouse.

15. On 7 May 2021, Snowden and GHW entered into a standstill agreement, suspending time running for the purpose of any limitation defence for a period of six months from the date of the agreement.

16. On 21 October 2021, a further standstill agreement was entered into by Snowden and GHW, extending the suspension of time running for the purpose of any limitation defence for six months, until 21 April 2022.

Proceedings

17. On 9 February 2022 Vinci commenced proceedings against Eastwood and Snowden, seeking damages of £2.5 million approximately in respect of the sums paid pursuant to the adjudication decisions and costs of the adjudications. The basis of the claim against the defendants is that the design concept of an unbonded non-structural overlay slab, at a thickness of 100mm and without mirroring the joints in the overlay slab to the joints in the existing slab, was inadequate to support the loading requirements of the Low Bay Warehouse and the heavy trafficking to which it would be subject. It is pleaded that the defective design placed Vinci in breach of its contract with Princes and it became liable for the adjudication awards, fees and costs.

18. On 8 April 2022 Snowden served its defence, denying liability to Vinci.

19. On the same date, Snowden served its Additional Claim on GHW, seeking an indemnity and/or contribution from GHW in respect of the claim by Vinci and/or Eastwood. The allegations set out in the Part 20 Particulars of Claim are that GHW was in breach of contract and/or duty in that it:

    i) adopted the design concept of an unbonded non-structural overlay slab which: (a) did not provide adequate support for loads; (b) was not thick enough; (c) was unsuitable for heavy warehouse traffic; and (d) was not in accordance with industry guidance;

    ii) failed to consider the loading requirements or the performance of the overlay slab, and the preparatory work to the existing slab;

    iii) adopted and constructed a design in which the joints of the existing slab were not mirrored in the overlay slab;

    iv) failed to warn of the 'inherent weaknesses in the design'; and

    v) failed to warn of the potential effects of omitting the 25mm sand layer.

20. On 20 June 2022 GHW served its defence, denying any liability and raising a limitation defence:

> "3. The claims advanced against GHW are time-barred under the Limitation Act 1980 ("the LA") or analogy with the LA and/or are otherwise precluded by the equitable doctrine of laches and/or acquiescence.
>
> 4. GHW was engaged to develop the design of the Overlay Slab in May 2013. GHW carried out its design development in May to July 2013. The Overlay Slab was constructed by Snowden in July 2013. Pursuant to Section 2 and/or section 5 of the LA, the claims against GHW are time-barred because the Claim Form was issued on 8 April [2022] which is more than six years from the date on which the cause of action accrued.
>
> 5. Further and alternatively, in relation to the tortious claims against GHW, Vinci alleges in its Particulars of Claim that it was apparent that the industrial floor in the Low Bay Warehouse had developed damage and/or defects by September 2013. Pending the provision of full and proper disclosure and witness statements, GHW understands that by the aforesaid date or, alternatively by April 2014 at the latest (at the time when GHW and Snowden were asked to comment on appropriate remedial works), Snowden had both the knowledge required for bringing an action for damages and the right to bring such action. In the premises, the starting point referable to section 14A of the LA was September 2013 or alternatively by 1 April 2014, with the three-

year period for bringing a claim expiring in September 2016 or alternatively March 2017. The claims against GHW are thus time-barred under section 14A of the LA.

6. GHW and Snowden entered into a standstill agreement dated 7 May 2021 and a subsequent standstill agreement dated 21 October 2021. The relevant cumulative effect of the said standstill agreements was to suspend time for a "Limitation Defence" from 7 May 2021 to 6 months after the date of the second standstill agreement, namely 21 March 2022. For the avoidance of doubt, the standstill agreements do not affect the fact that the claims against GHW are time-barred because the claims were already time-barred by the time the first standstill agreement was entered into.

7. The remainder of this Defence is provided without prejudice to GHW's right to apply to strike out Snowden's claims and/or for summary judgment thereon as the claims are time-barred. "

21. On 25 July 2022 Snowden served its Reply to GHW's Defence, including a reply to GHW's pleaded case that the claims were time-barred:

"6.2. As for the claim in tort:

6.2.1. It is denied that Snowden had the requisite knowledge in September 2013. As alleged by GHW in paragraph 37 of its Defence, GHW advised in April 2014 that the breakdown of the Overlay Slab was caused by heavy trafficking exceeding the uniform distributed load ("UDL") of 40kN/m^2 and/or the settlement of the Existing Slab and not any alleged defects in the design of the Overlay Slab.

6.2.2. At the very earliest, Snowden did not acquire the knowledge required by section 14A of the 1980 Act until it received a letter from Vinci on 25 May 2018 when, for the first time, Vinci suggested it may make a claim against Snowden on the basis that the design of the Overlay Slab may have caused or contributed to its failure. Accordingly, Snowden had until 25 May 2021 to bring a claim against GHW.

6.2.3. As pleaded in paragraph 6, Snowden and GHW entered into a standstill agreement on 7 May 2021, which suspended the time for a limitation defence from 7 May 2021 until a further standstill agreement was entered into on 21 October 2021, which extended time until 21 April 2022 ("the Standstill Agreements").

> 6.2.4. The claim form was issued on 8 April 2022 and, therefore, prior to the expiry of the Standstill Agreements.
>
> 6.3. The allegation that the claims are time barred by "analogy with the LA" in paragraph 3 is embarrassingly vague and, in any event, denied. Defences do not arise by analogy with a statute.
>
> 6.4. It is further denied that the claims advanced against GHW or precluded by the equitable doctrine of laches and/or acquiescence. No particulars of the alleged defence are pleaded and it is not alleged that it would be unfair for the court to grant relief to Snowden."

22. On 7 October 2022 a CCMC was held, at which directions were given and the trial was listed to start on 5 February 2024 with an estimate of twelve days, including two judicial reading days.

The application

23. On 6 March 2023, GHW issued an application, seeking:

    i) summary judgment pursuant to CPR 24.2 on the Additional Claim on the grounds that Snowden has no real prospect of succeeding on the claim and there is no other reason why the claim should be disposed of at trial; and

    ii) an order that the claim advanced pursuant to the Civil Liability (Contribution) Act 1978 be struck out pursuant to CPR 3.4(2)(a) on the grounds that the particulars of claim disclose no valid cause of action against GHW.

24. The application is supported by the second witness statement of James McKay, solicitor at RPC acting for GHW, dated 6 March 2023.

25. The application is opposed by Snowden and reliance is placed on the third witness statement of Patrick Snowden, director of Snowden, dated 7 June 2023.

The summary judgment test

26. CPR 24.2 provides that:

> "The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that 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."

27. The principles to be applied on such applications are well-established and can be summarised as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91.

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].

iii) Where the applicant has adduced credible evidence in support of the central issue that is said to justify summary judgment, the respondent comes under an evidential burden to prove that its claim has a reasonable prospect of success: *Sainsbury's Supermarkets Limited v Condek Holdings Limited and Others* [2014] EWHC 2016 (TCC) at [13].

iv) However, in reaching its conclusion the court must not conduct a "mini-trial": *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at [95]; *Okpabi v Royal Dutch Shell* [2021] UKSC 3 at [110].

v) The court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550; *Okpabi* at [127]-[128].

vi) The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63.

vii) If the court is satisfied that it has before it all the evidence necessary for the proper determination of a short point of law or construction and the parties have had an adequate opportunity to address the question in argument, it should grasp the nettle and decide it. It is not enough to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 at [11]-[14]; *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].

Limitation

28. It is agreed that the effect of the standstill agreements is that the Additional Claim Form, issued on 8 April 2022 before expiry of the cumulative standstill period, is to be treated for limitation purposes as if it were issued on 7 May 2021.

29. It is now common ground that any contractual claims by Snowden against GHW were statute-barred by 7 May 2021. Section 5 of the Limitation Act 1980 provides that an action founded on simple contract shall not be brought after the expiration of six years

from the date on which the cause of action accrued. A cause of action for breach of contract accrues on the date of breach. The contract of engagement was entered into on 12 April 2013, the design work was carried out in May and June 2013, the installation of the overlay slab was carried out in July 2013, and the works to the slab were completed by about August 2013. On any view, it is agreed by the parties that any breach must have been more than six years prior to 7 May 2021.

30. The dispute centres on whether any claims in tort by Snowden against GHW were statute-barred by 7 May 2021 pursuant to sections 2 and/or 14A of the Limitation Act 1980.

31. Mr Hale, counsel for GHW, submits that by 7 May 2021, the claims for negligence against GHW were already time-barred under section 2 of the Act. GHW's primary position is that Snowden suffered actionable damage when it relied on GHW's allegedly negligent design, causing it to be exposed to Vinci's claim, in around July 2013. Alternatively, damage to the overlay slab manifested by April 2014 at the very latest and the claim in tort accrued then. On either analysis, the effective date on which the Additional Claim Form was issued was more than 6 years after the date of damage on which any cause of action in negligence accrued.

32. GHW disputes that section 14A of the Act assists Snowden on the facts. Mr Hale submits that Snowden had the relevant knowledge considerably more than three years before the effective date on which it issued its Additional Claim Form (7 May 2021). Dialogue about, and attempts to repair, the damage were ongoing during 2013, 2014 and 2015 and beyond. Snowden was closely involved in the investigation and attempts to repair the damage. Snowden asked GHW to advise on the cause of the problems as early as 2014. Snowden was well aware of a possible claim against GHW from, at the absolute latest, 2016 – but in reality considerably earlier.

33. Ms Lee, counsel for Snowden, submits that this issue is not suitable for summary judgment. Snowden's position is that the date of accrual of the relevant cause of action in tort is the date of physical damage. The court cannot be satisfied on the present evidence that there is no real prospect of Snowden establishing at trial that actionable damage did not occur to the overlay slab until after 7 May 2015. It is accepted that there is evidence of significant cracking by the date of Snowden's e-mail on 24 July 2017, less than six years prior to the effective date of the Additional Claim Form. Without putting the question of when the cracking took place to the experts, it is not possible for the court to safely conclude that there is no real prospect of Snowden demonstrating the cracking was of such a nature to constitute actionable damage as opposed to ordinary behaviour of a concrete floor.

34. Snowden's alternative case is that pursuant to section 14A(4)(b) of the Limitation Act, the first date on which Snowden had the relevant knowledge required for bringing an action in damages in respect of the relevant damage was the date of Vinci's letter dated 25 May 2018. It was only on receipt of this letter that Snowden was notified that the physical damage to the slab was sufficiently serious to justify proceedings, such damage was potentially due to matters for which Snowden and GHW were potentially responsible and the necessary remedial works would be at substantial cost to Vinci.

Limitation period under Section 2 of the Limitation Act 1980

35. Section 2 of the Limitation Act 1980 provides that an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

36. There is a sharp division between the parties as to the characterisation of the relevant damage necessary for the accrual of a cause of action in tort in this case.

37. GHW's case is that the relevant damage for the purposes of the Additional Claim is the economic loss consisting of Snowden's exposure to a claim by Vinci in respect of defects in the overlay slab; it is not the physical damage caused to the overlay slab itself and there is no suggestion that the slab caused damage to other property.

38. Mr Hale submits that in the Part 7 proceedings, Vinci claims an indemnity, damages or contribution in respect of the costs which Vinci was found liable, by two adjudication decisions, to pay Princes for the replacement of the defective overlay slab and associated losses. Thus it is a claim for economic loss, rather than a claim based on physical damage. Vinci's claim against Snowden and Eastwood is that each of them caused it to suffer that economic loss by having conceived, adopted and/or approved a flawed design of (and in Snowden's case, also installing) the overlay slab. In turn, Snowden makes a further claim against GHW in the additional proceedings by alleging that GHW's negligent design caused Snowden to be exposed to Vinci's claim. That too is a claim for economic loss consisting of Snowden's alleged liability to Vinci. The cause of action accrued when relevant damage was suffered, when the allegedly defective design was incorporated into the slab: *Forster v Outred* [1982] 1 WLR 86; *Nykredit v Edward Erdman (No.2)* [1997] 1 WLR 1627; *Co-Operative Group Limited v Birse Developments Limited* [2014] EWHC 530 (TCC).

39. Snowden's case is that the relevant damage for the purpose of section 2 of the Limitation Act is its liability to Vinci caused by cracking to the slab. The damage is financial loss but it is financial loss arising out of physical damage to the slab. It is different to the damage suffered in other non-construction, professional negligence cases.

40. Ms Lee relies on the decision of the House of Lords in *Pirelli General Cable Works Limited v Oscar Faber & Partners* [1983] 2 AC 1 (HL) in which the House of Lords decided that a building owner's cause of action against his consulting engineer for negligent design accrued for limitation purposes when physical damage to the building first occurred. Ms Lee submits that *Pirelli* remains good law and has been re-affirmed by the House of Lords in *Ketteman v Hansel Properties Limited* [1987] AC 189 (HL) and by the Court of Appeal in *Abbott v Will Gannon and Smith Limited* [2005] EWCA Civ 198 (CA).

41. I am very grateful to both counsel for their careful and comprehensive submissions on this issue, which were argued forcefully and persuasively on both sides. However, shortly after the hearing of this application, the Court of Appeal handed down judgment in *URS Corporation Limited v BDW Trading Limited* [2023] EWCA Civ 772 (CA). One of the issues before the court in that case was the date of the accrual of a cause of action in tort against designers of a defective building, in circumstances where the defect caused no immediate physical damage. The question was whether the cause of action accrued when the building was completed to the defective design, or when the developers discovered that the building was structurally defective. The court upheld the

judgment of Fraser J, concluding that he was right to find that the cause of action accrued, at the latest, on practical completion.

42. In delivering the leading judgment in that case, with which the whole court agreed, Coulson LJ carried out a thorough review of all the material authorities, providing a clear and authoritative analysis of the law as to the date of accrual of a cause of action in tort. From the analysis in *URS v BDW* (above), the legal principles that are applicable in this case can be summarised as follows:

i) A claim in tort based on negligence is incomplete without proof of damage. There are two kinds of loss which are recognised as actionable damage for the tort of negligence, namely, physical damage and economic loss: *Rothwell v Chemical & Insulating Co Limited* [2007] UKHL 39 per Lord Hoffmann at [7]; *Co-Op v Birse* (above) per Stuart-Smith J at [17]; *URS v BDW* at [68].

ii) In a case where there is physical damage, the current state of the law is that the claimant's cause of action accrues when that physical damage occurs, regardless of the claimant's knowledge of the physical damage or its discoverability: *Cartledge v Joplin* [1963] AC 758; *Pirelli* (above) per Lord Fraser at pp.16F-18G; *Ketteman* (above) per Lord Keith at p.205G; *Abbott* (above) per Tuckey LJ at [19]-[20]; *URS v BDW* at [83].

iii) In a case where there is economic loss, the claimant's cause of action accrues when the claimant relies on negligent advice or services to its detriment, including incurring a liability (unless such liability is purely contingent, in which case it is not actionable damage until there is measurable loss): *Forster v Outred* (above) per Dunn LJ at p.99F; *Knapp v Ecclesiastical Insurance Group plc* [1998] PNLR 172 (CA); *Law Society v Sephton* [2006] UKHL 22; *Axa Insurance Limited v Akther & Derby* [2009] EWCA Civ 1166 per Arden LJ at [30]-[33]; *Co-Op v Birse* (above) per Stuart-Smith J at [43]-[55]; *URS v BDW* at [102].

iv) In a case where the claimant relies on negligent advice or services and, as a result, the structure contains an inherent design defect which does not immediately cause physical damage, the claimant's cause of action accrues at the latest on completion of the structure, at which point the claimant has a defective asset and suffers economic loss, regardless of its knowledge of the latent damage: *Murphy v Brentwood District Council* [1991] 1 AC 398 per Lord Keith at p.466E-F; Lord Bridge at p.475; *New Islington and Hackney Housing Association Ltd v Pollard Thomas & Edwards Ltd* [2001] PNLR 20 per Dyson J at [38]-[43]; *URS v BDW* at [88].

v) *Pirelli* remains good law in cases concerning physical damage but, in the light of the above authorities that an inherent design defect in a structure can give rise to pure economic loss, it may require careful consideration: *URS v BDW* at [114-116].

43. Thus, on the current state of the law, the date of accrual of a cause of action in this case turns on the proper characterisation of the loss; if characterised as a physical damage case, the cause of action would accrue on the date of damage; if characterised as an economic loss case, the cause of action would accrue by the date of completion. If this

were a decisive issue in the case, the proper course of action would be to allow the matter to be determined on full evidence at a trial. However, as set out below on the facts of this case, it does not affect the outcome. For that reason, I did not invite counsel in this case to provide further submissions following the Court of Appeal judgment in *URS v BDW*.

44. Despite Ms Lee's valiant attempt to persuade me that the date of damage should await further expert evidence, it is clear from the documents before the court that physical damage occurred to the Low Bay Warehouse floor more than six years prior to the material date of 7 May 2021.

45. GHW relies on Vinci's pleaded case that as early as September 2013 the overlay slab had developed defects including cracks, damage to sawn edges, curling and local crushing of the concrete leaving holes in the overlay slab. However, I consider that it is arguable on the contemporaneous documents that damage had not occurred at that stage. Vinci's email dated 6 September 2013 to Snowden and Eastwood referred to the internal slab curling at the edges of the overlay slab where it met the external yard slab but the ensuing email discussion did not refer to significant cracking or breaking up of the slab. Rather, it suggested that the issue could be a temporary condition during the drying process or snagging items that did not amount to damage.

46. GHW relies on documents that raised concerns about the slab's condition in 2014. I consider that it is arguable that as at April 2014, although a defect in the performance of the over slab had been identified, causing movement, it had not yet become manifest as damage, as set out in an email dated 1 April 2014 sent from Andy Worship, director of GHW, to Mr Snowden and to Vinci:

> "Further to our meeting on site yesterday I would comment as follows.
>
> The overlay slab to the low bay area was bouncing at the sawn induced joints under loading from forklift trucks crossing the joint. We understand that this has happened to a number of joints and that a large number of these have already been pressure injected with resin which has currently cured the situation.
>
> The concern is that for that to occur then settlement of the sub slab which has been overlaid must have taken place. The sawn induced joints are then deflecting to meet the sub slab under load but remain elastic so they return back to their original position after the load is removed. If left untreated the impact of the load will increase the settlement of the sub slab which will eventually result in a breakdown of the overlay slab. Constructing a thinner overlay slab on a layer of sand would not have prevented this.
>
> The remaining affected joints are therefore to be pressure injected as already undertaken.
>
> The long term concern is if the sub slab continues to settle…"

47. However, later documents provide ample evidence from which the only sensible conclusion the court can reach is that damage occurred prior to 7 May 2015.

48. In an email dated 27 March 2015 from Vinci to Mr Snowden and Mr Worship, reference was made to cracking and breaking up of the external/internal floor slabs, together with damage to the induction joints and expansion joints. Mr Worship's comments, inserted by his response to the e-mail and forwarded by Mr Snowden to Vinci, did not take issue with such descriptions.

49. Following a site visit, by letter dated 29 April 2015, Mr Worship of GHW sent a report to Snowden and Vinci, including the following:

> "…1.6 We are aware that sections of the overlay slab subject to heavy trafficking have shown signs of settlement of the existing sub slab at joint locations. This can be noted by the apparent 'bouncing slab' effect. Low viscosity grout has been injected at these locations to plug the void but in certain locations the problem has returned. This indicates an ongoing settlement problem of the supporting sub slab and not a failure of the grout injection.
>
> 1.7 In the areas of floor that you are intending to break out and replace the slab has suffered significant cracking despite the close location of sawn induced joints. This indicates that there is a failure of the existing sub slab."

50. The report contained photographs of cracks and holes in the overlay floor slab in respect of which joint repairs were proposed. The photographs show very clearly significant cracking and holes in the floor slab. The nature and extent of the cracking and holes to the floor evident in the photographs could not sensibly be described as anything other than damage.

51. In the technical experts' joint statement dated 19 May 2023, Mr Erwee, GHW's expert, referred to the cracking agreed by the experts as the type of damage recorded as being present in Waterman's 12 month defect survey report dated November 2014 prepared for Princes. Although not conclusive, Mr Ridge, Snowden's expert, did not take issue with those comments and Snowden did not provide evidence from Mr Ridge for this hearing in which he expressed an opinion as to any later date on which damage is said to have occurred.

52. The above evidence demonstrates that the overlay slab suffered material damage by March/April 2015 at the latest. Having regard to the photographic evidence and contemporaneous documents before the court, there is no real prospect of Snowden establishing any later date of material physical damage. Therefore, regardless whether the court adopts the date of completion of the Low Bay Warehouse floor or the date of physical damage as the date of accrual of any cause of action in negligence, any such cause of action accrued prior to May 2015.

53. It follows that, subject to the operation of section 14A of the Limitation Act, Snowden's claim in negligence against GHW is statute-barred.

Limitation period under section 14A of the Limitation Act 1980

54. Section 14A of the Limitation Act provides as follows:

> "(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.
>
> (2) Section 2 of this Act shall not apply to an action to which this section applies.
>
> (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.
>
> (4) That period is either—
>
> (a) six years from the date on which the cause of action accrued; or
>
> (b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.
>
> (5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.
>
> (6) In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—
>
> (a) of the material facts about the damage in respect of which damages are claimed; and
>
> (b) of the other facts relevant to the current action mentioned in subsection (8) below.
>
> (7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
>
> (8) The other facts referred to in subsection (6)(b) above are—

> (a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
>
> (b) the identity of the defendant; and
>
> (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.
>
> (9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.
>
> (10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—
>
> (a) from facts observable or ascertainable by him; or
>
> (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;
>
> but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

55. Where section 14A of the Limitation Act 1980 applies, it displaces section 2 and provides for a potentially longer limitation period, namely, six years from the date on which the cause of action accrued, or if later, three years from (i) the date of the knowledge required for bringing an action for damages in respect of the relevant damage, together with (ii) a right to bring such action.

56. For the purposes of this case, the relevant knowledge required is:

    i) such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify instituting proceedings; and

    ii) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence.

57. Under section 14A the onus is on a claimant to plead and prove that it first had the knowledge required for bringing its action within a period of three years prior to the issue of its claim: *Nash v Eli Lilly* [1993] 4 All ER 383 per Purchas LJ at p.396.

58. For the reasons set out above when considering limitation for the purpose of section 2, I find that the parties, including Snowden, were aware that sufficiently serious damage had occurred by March/April 2015. Therefore, the issue for this court is whether Snowden has a real prospect of success on the question of attribution.

59. The degree of knowledge of attribution required under section 14A was summarised in *Haward v Fawcetts* [2006] 1 WLR 682 (HL) per Lord Nicholls:

> "[9] Thus, as to the degree of certainty required, Lord Donaldson of Lymington MR gave valuable guidance in *Halford v Brookes* [1991] 1 WLR 428, 443. He noted that knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence: "Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice." In other words, the claimant must know enough for it to be reasonable to begin to investigate further.
>
> [10] … it is not necessary for the claimant to have knowledge sufficient to enable his legal advisers to draft a fully and comprehensively particularised statement of claim … what was required was knowledge of the essence of the act or omission to which the injury was attributable: *Nash v Eli Lilly & Co* [1993] 1 WLR 782, 799 …
>
> [11] … The statutory provisions do not require merely knowledge of the acts or omissions alleged to constitute negligence. They require knowledge that the damage was "attributable" in whole or in part to those acts or omissions. Consistently with the underlying statutory purpose, "attributable" has been interpreted by the courts to mean a real possibility, and not a fanciful one, a possible cause of the damage as opposed to a probable one: see *Nash v Eli Lilly & Co* [1993] 1 WLR 782, 797-798. Thus, paraphrasing, time does not begin to run against a claimant until he knows there is a real possibility his damage was caused by the act or omission in question."

60. The court should adopt a broad common sense approach when considering the date on which relevant knowledge was, or could have been, acquired: *Spencer-Ward v Humberts* [1995] 1 EGLR 123, Lord Bingham LJ at p.126M.

61. As set out above, the correspondence between the parties in 2013 and 2014 identified potential issues concerning performance of the slab but it is arguable that there was no sufficiently serious damage to the floor at that stage. In his email dated 1 April 2014, Mr Worship identified settlement of the sub-slab as a potential cause of the 'bouncing' of the slab under trafficking. At the time, that theory was not dismissed as implausible by any of the parties.

62. As part of the discussions concerning the flooring defects, on 27 March 2015 Mr Worship sent his comments by email to Vinci and Snowden, including:

> "The low bay slab was constructed as an overlay slab only. The sub slab was in poor condition and we understand that this is continuing to settle.

> Cracks in this slab could be repaired but if the sub slab is continuing to settle then these cracks will continue to open…
>
> The slabs should be replaced with a piled slab."

63. Those comments prompted the following response from Mr Geraghty of Vinci to Mr Snowden by email on 30 March 2015:

> "I don't want to cause unnecessary problems for any of us but the answers that have been provided are of extreme concern and more anecdotal than factual. Andy had an opportunity to inspect the existing Low bay slabs prior to confirmation of his design, making these points now is not helpful and would appear to [sic] have to little fact or consideration. Why were these points not raised before works started?"

64. Mr Geraghty's email was critical of Mr Worship's comments but it is arguable that it did not intimate that the damage to the slab was considered to be GHW's responsibility.

65. On 16 June 2015 Mr Summers of Vinci sent an email to Mr Stewart of Snowden, asking for details of costs incurred as part of the remedial works scope, stating: *"We can then review and look to apportion liability."* GHW relies on this as an indication that Snowden must be 'in the frame' as potentially liable for the damage and remedial costs. Certainly that is one interpretation of this e-mail but without further context, the court is unable to dismiss Mr Snowden's explanation in his witness statement, namely, that Snowden was paid for the repairs by Vinci but agreed to bear some of those costs as a gesture of goodwill.

66. During 2016 and 2017 the contemporaneous documents indicate that the parties continued to carry out investigations into the cause of the cracking and to explore potential remedial schemes. During that period, GHW reiterated its view that the damage was caused by settlement of the sub-slab and raised an additional factor, namely, lack of maintenance. By email dated 16 June 2016 Mr Worship stated:

> "The bigger problem here is that these repairs will fail again as the sub slab is failing so any ongoing maintenance is going to be frequent and costly.
>
> I would again strongly advise that investigation is carried out on the sub slab and ground beneath so that the client is fully aware of why his slab is failing and his expectations on repair life and future maintenance.
>
> As it currently stands no guarantee or design liability can be given to any repair carried out…"

67. Mr Summers of Vinci responded:

> "Without prejudice:
>
> GHW appear to be misunderstanding what we are asking of you.

> We need a considered design for the emergency repairs in terms of dowel positions, rebar, method and type of repair. The overlay slab is your design hence we are asking for your input with the repairs…
>
> We can only assume that the sub slab is capable of taking the loads imposed, to the same extent as was assumed at the time of design and construction. We are not trying to place blame here, we are trying to get documentation together to describe more definitively the works we plan to carry out…
>
> This phase of the repairs is not about trying to cater for the underlying issues, but it is about maintaining joint positions, filling joints appropriately with a flexible yet hard material, it's about making a robust and well considered repair using suitable materials. We have waited long enough for this information and are now becoming embarrassed at the situation in which we find ourselves."

68. GHW relies on Vinci's use of the term "without prejudice" in its response as indicating the potential liability of the parties for the defective slab but the content of the email concerned the requirement for a design for the emergency repairs and expressly stated that it was not concerned with the underlying cause of the damage.

69. It is common ground that Snowden had the required knowledge for the purposes of section 14A by 25 May 2018, when Vinci wrote to Snowden in the following terms:

> "As you are aware the overlay slab (overlay of an existing concrete slab) has exhibited much cracking and in places has broken up. You have carried out various resin repairs and concrete repairs to this slab over the past few years …
>
> You carried out the construction of this overlay slab under a design and build subcontract. An outline design was provided by our consultant (Eastwood and Partners), but the design was modified by your consultant (GHW) to inter alia, omit the sand layer between the existing slab and the new slab, change the joints type and layout and to change the type and location of the mesh reinforcement. The mesh was specified by Eastwood and partners as A193 top mesh but was modified by GHW to an A142 bottom mesh…
>
> We were called to a meeting with the Employer which was also attended by a consultant, Tony Hullett of Face Consultants, engaged by the Employer… He made a verbal presentation that the overlay slab has 'curled' leaving the slab effectively as a series of dished sections, the corners of which break when they are trafficked by forklift trucks which operate in the warehouse. In his opinion concrete slabs always 'curl' as the top dries out quicker than the bottom and if the slabs had been laid on top of a sub base they could have sunk into the sub base slightly and

> the corners would be less likely to break or crack. As the new slab is overlaid on top of an existing slab, a slight void between the new slab and the existing slab will exist where the corners of the new slab have 'curled up'. The pattern of cracking around the intersection of four slab panels supports the curling theory. When forklift trucks traffic over the new slab it breaks or cracks against the existing slab. In his opinion this is a known problem when overlaying existing slabs and is a reason why such a method of construction is rarely used and Mr Hullett discredited the very idea of overlaying an existing slab. The worst cracking occurs along the routes taken by the forklift trucks.
>
> Settlement of the ground below the existing slabs was mentioned in the meeting but Mr Hullett dismissed it as a cause of slab cracking….
>
> It was his further opinion that it is impossible to repair the cracked slab, and replacing the cracked slab with another concrete slab was described as futile as the same problem would occur again. Indeed the area of severe damage which we removed and replaced with concrete had cracked again and further repairs had been necessary…
>
> The Employer holds us responsible for the failure of the slab…
>
> This work will come at substantial cost and as you have designed and constructed the slab we may seek reimbursement from you if these costs are claimed from us by the Employer or incurred by us in the first instance.
>
> We suggest that we meet to discuss these matters and that you provide your comments on Mr Hullett's findings as set out in this letter. We would also suggest that you involve your consultant GHW as they were involved in the design on your behalf…"

70. Snowden's case is that it did not have the knowledge required by section 14A until Vinci's letter of 25 May 2018. Prior to that date, GHW's consistent advice to Snowden was that the cause of the cracking in the floor was settlement of the sub slab, unconnected with GHW's design, and there was no assertion made by anyone that Snowden and GHW were responsible for the damage.

71. GHW's position is that Snowden's case on attributability has no real prospect of succeeding at trial. Snowden had actual, or constructive, knowledge that the defects in the overlay slab were attributable to GHW significantly in advance of the letter of 25 May 2018.

72. It is not sufficient for GHW to show that material damage occurred more than three years prior to 7 May 2021; it has to show that Snowden was aware, or should have been aware, that the damage was attributable, in whole or in part, to defective design, the essence of the complaint now pleaded against it by Vinci and which Snowden seeks to pass on to GHW. The court is not in a position to reach a concluded view on this matter

without conducting a mini trial on the documents. That approach would be contrary to the principles applicable on an application for summary judgment as set out in *Three Rivers* and *Okpabi* above. Mr Hale has identified a number of points that call out for explanation or rebuttal by Snowden but the documents do not disclose a clear picture on this issue in the absence of full factual and expert evidence. The proper time for scrutiny and testing of such evidence is at trial.

73. For those reasons, without determining the matter, I conclude that Snowden has a real (as opposed to fanciful) prospect of succeeding on the claim in negligence and reject GHW's application for summary judgment.

Contribution claim

74. GHW seeks to strike out Snowden's claim for contribution pursuant to the Civil Liability (Contribution) Act 1978 on the ground that the Additional Particulars of Claim disclose no valid cause of action against it.

75. 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 …"

76. The principles to be applied are as follows:

i) If the pleaded facts do not disclose any legally recognisable claim against a defendant, it is liable to be struck out. However, the application must assume that the facts alleged in the pleaded case are true.

ii) It is not appropriate to strike out a claim in an area of developing jurisprudence, since in such areas, decisions as to novel points of law should be based on actual findings of fact: *Barratt v Enfield BC* [2001] 2 AC 550 per Lord Browne-Wilkinson at p.557; *Philipp v Barclays Bank UK plc* [2022] EWCA Civ 318 per Birss LJ at [20].

iii) The court must be certain that the claim is bound to fail; unless it is certain, the case is inappropriate for striking out: *Hamida Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 per Coulson LJ at [22]-[24]; *Rushbond v JS Design Partnership* [2021] EWCA Civ 1889 per Coulson LJ at [41]-[42].

77. Ms Lee submits that the Additional Claim Form, to which the Part 20 Particulars were attached, expressly states that a contribution claim is being made. The Part 20 Particulars identify the factual matters which constitute that claim. All the relevant particulars are therefore present to disclose a valid cause of action. A more appropriate course would have been for GHW to request further information in respect of the contribution claim rather than applying to strike it out.

78. The Additional Claim Form expressly includes a claim for an indemnity and/or contribution from GHW pursuant to the Civil Liability (Contribution) Act 1978. The Part 20 Particulars seek declaratory relief but do not in terms plead a claim for contribution under the 1978 Act. However, as Ms Lee noted, the Part 20 Particulars were attached to the Additional Claim Form; therefore, it does not indicate that there was any intention to abandon such claim. Indeed, reading both documents together, it is reasonably clear that a claim is made against GHW in negligence and under the 1978 Act. On that basis, there are no grounds on which that claim should be struck out.

79. Mr Hale indicated that GHW would wish to rely on a defence that a claim for contribution under the 1978 Act would fail on the basis that Snowden and GHW would not be liable for the same damage. However, such defence has not been pleaded or identified in the application and therefore it would not be appropriate for the court to consider that issue at this stage.

80. However, it would be appropriate for the court to give both parties an opportunity to plead out in full their respective cases on contribution/indemnity, so that the scope of the dispute is clarified. As Mr Hale fairly accepted, there is no limitation issue in respect of the claim for contribution under the 1978 Act that would preclude new or revised allegations.

Conclusion

81. For the reasons set out above:

    i) The claim by Snowden against GHW for breach of contract is bound to fail because it is statute-barred and must be struck out.

    ii) The remaining part of GHW's application for summary judgment and/or strike out is dismissed.

    iii) The parties should be given an opportunity to plead their respective cases on the contribution claim so that the scope of the issues can be defined.

82. The court will hear the parties on the appropriate terms of the orders and all other consequential matters arising out of this judgment on a date to be fixed following hand down.