OUTER HOUSE, COURT OF SESSION

[2025] CSOH 56

CA80/24

OPINION OF LORD BRAID

In the cause

GREATER GLASGOW HEALTH BOARD

Pursuer

against

(FIRST) MULTIPLEX CONSTRUCTION EUROPE LIMITED and (SECOND) BPY HOLDINGS LP (a firm) and BPY HOLDINGS GP LIMITED, the general partner thereof

Defenders

And

WSP UK LTD

First Third Party

And

NIGHTINGALE ARCHITECTS LIMITED

Second Third Party

Pursuer: Moynihan KC, J Broome; Morton Fraser MacRoberts LLP
Defenders: MacColl KC, A Mckinlay; Brodies LLP
First Third Party: Barne KC, Blair; CMS Cameron McKenna Nabarro Olswang LLP
Second Third Party: Thomson KC, McAndrew; Womble Bond Dickinson LLP

27 June 2025

Introduction

[1] In December 2009, Greater Glasgow Health Board (GGHB) entered into a building contract with Multiplex Construction (Europe) Ltd (MPX) for the design and construction of Queen Elizabeth University Hospital in Glasgow (QEUH). The contract has given rise to a plethora of claims by GGHB against MPX in which GGHB asserts it is entitled to damages for alleged defects in the hospital, which in turn has spawned a number of "downstream" claims by MPX against various subcontractors and consultants, in which MPX in turn seeks to recover, by one means or another, any sums which it is required to pay to GGHB. On 22 January 2020, a Court of Session summons in cause CA21/21 was served on MPX, alleging various defects in the hospital. That action is defended and is presently sisted pending the outcome of numerous adjudications.

[2] The claim which is the subject of this commercial action, and related downstream litigation, relates to the cladding in the atrium of the adult hospital, not included in cause CA21/21. That atrium is a tall multi-storey structure spanning 13 levels within QEUH. It is the central space of the hospital, providing a concourse for staff, patients and visitors to move through the facility. An estimated 20,000 people pass through it daily. It has four cores and a link bridge between them, connecting the two sides of the building and providing access to wards. Pods are attached to it, used as break-out rooms and offices.

[3] As designed and constructed, the atrium included cladding in the form of aluminium composite material (ACM) panels, some of which had polyethylene cores. Those included: in the cores, a product called Signi; in the link bridge, a product called Alucobond, and in the pods, Alucobond and a product called Etalbond LT. The GGHB case is that the cladding should have met the Euroclass B-s3, d2 standard (Euroclass B for short), and that the foregoing products do not meet that standard. It sues MPX for damages

of £16,325,000, averring breaches of various provisions of the Building Contract. The sum sued for takes account of the sum of £7,128,861.37 paid to GGHB pursuant to an adjudication decision. MPX counterclaims for repayment of that sum of £7,128,861.37 and a further sum of £9,768,022.42 which it has paid following a second adjudication, on the basis that both adjudication decisions were wrong in fact and law. GGHB has also sued Brookfield Europe LP (the second defender), which provided a parent company guarantee, but that is not relevant for present purposes, and I need not refer to it again.

[4] MPX has convened, as third parties, (first) WSP (UK) Ltd (WSP), the fire consultants, and (second) Nightingale Architects Ltd (NA), the architects, seeking from each of them, in the event MPX is found liable to GGHB in damages, a right of contribution pursuant to collateral warranties granted by those third parties in favour of GGHB, in terms of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. MPX has also raised "downstream" actions against each of WSP and NA, in which it alleges (a) that those third parties are themselves in breach of various conditions of their respective contracts with MPX; and (b) that it is entitled to be indemnified by virtue of indemnities in its favour granted by WSP and NA. Finally, MPX has also raised a downstream action against J&D Pierce (Contracts) Ltd (JDP), the subcontractor which supplied the cladding for the pods (the contractor which supplied other non-compliant cladding having gone into liquidation), alleging both breach of contract and an entitlement to be indemnified by virtue of an indemnity granted it its favour by JDP.

[5] All of the allegations of breach of contract, breach of warranty and breach of indemnity, are denied by MPX and, as the case may be, by the downstream parties. However, MPX also defends the action against it by GGHB on the ground that any claim GGHB might have had has prescribed (become extinguished through the passage of time)

through the operation of section 6 of the Prescription and Limitation (Scotland) Act 1973, which, reading short and insofar as applicable to this action, provides that an obligation to which that section applies shall be extinguished if it has subsisted for a continuous period of five years without a "relevant claim" having been made (which for present purposes means without a summons having been served). While the success of that defence would also benefit the downstream parties, they for their part defend the downstream claims on the basis that any claim MPX might have had against each of them has prescribed whether or not the GGHB claim has prescribed.

[6] In each of the actions (including that against JDP), I fixed a preliminary proof before answer on the sole question of whether any of the claims in respect of cladding in the atrium have prescribed. Those proofs, which were all heard together, proceeded on the basis that the averments about breach of contract are to be treated as *pro veritate*; in other words, it is assumed for present purposes only that the presence of products in the atrium which do not meet Euroclass B was a breach of contract, (and further references to non-conforming products, or to a defective design, should be read with that in mind).

[7] It is a matter of agreement that in each case the appropriate prescriptive period is five years from the date when the relevant obligation became enforceable. GGHB accepts that the obligations it seeks to enforce became enforceable more than five years before this action was raised, but relies on section 6(4) of the 1973 Act, set out more fully below, which suspends the running of prescription in certain circumstances. The questions which have to be decided in relation to the principal claim, are:

(i) When did the prescriptive period start to run?

(ii) Does section 6(4) apply, and if so, during what period?

As I discuss in more detail below, that second question involves considering whether MPX induced an error in the mind of GGHB; whether any such error caused GGHB to refrain from court action against MPX; and whether, with reasonable diligence, GGHB might have discovered the error sooner (and if so, by what date). If the period between the date when prescription started to run and 4 March 2022 (the date when the summons in this action was served), discounting any period when prescription was suspended, is more than 5 years, the GGHB claim will have prescribed. Similar questions have to be asked in relation to the downstream claims, with the added complication that in relation to them, MPX argues that the commencement of the prescriptive period was delayed through the operation of section 11(2) or 11(3) of the 1973 Act. While in this opinion I will set out all of the evidence, and findings in fact, regardless of the claim or claims to which they relate, I will issue separate opinions in the downstream actions, dealing with the discrete issues arising in those actions.

The obligations averred to have been breached

[8] In Article 14 of its summons, GGHB avers that MPX breached its contract with GGHB in that its design and construction were inadequate. In particular, the use of PE ACM is said to be disconform to MPX's own FSDS (Fire Safety Design Strategy), which (it is averred) required the cladding to be Euroclass B. Separately, GGHB avers, by adjustment to the summons made only on 22 May 2024, that the failure to install Euroclass B cladding was a breach of a separate contractual obligation to procure that the design and construction were at all times performed "in compliance with all Law and Consents".

The preliminary proofs

[9] I heard evidence over 7 days, followed by written and oral submissions. Evidence as to fact was given by the following witnesses: for GGHB: Mary-Anne Kane, Hazel McIntyre, John (known as Ian) Powrie, William Russell and Tom Steele; for MPX: Alasdair Fernie, James Murray, Nisha Kanna, John Ross Ballingall, Thomas Marke, Douglas Grant Wallace, Geraint Whalley, Callum Tuckett, John Wales, Fergus Shaw and Gavin Burnett; for WSP, Peter Dunbar and Kenny Hamill; for NA, Emma White; and for JDP, Steven Devon, Derek Pierce and Alexander Grant. Expert opinion evidence was given by: William Connolly and Hugh McNamara (for GGHB); Neil Woods (for MPX); and Kenneth Williamson (for NA).

[10] All of the witnesses provided either witness statements or reports (and, in the case of Mr Connolly and Mr Woods also a joint statement) which formed the bulk of their evidence-in- chief; and all, with the exception of Nisha Kanna and Alexander Grant, also gave oral evidence. I found all of the witnesses to be credible and generally reliable. Insofar as there were conflicts in recollection, I deal with these specifically below.

[11] In advance of the proof several of the parties lodged notes of objection to certain evidence which other parties proposed to lead. After hearing submissions at a pre-proof hearing, I allowed all of that evidence to be led under reservation of its relevancy and competency. In the event, some objections were dropped and others have assumed less significance. I deal with the extant objections at paras [110] to [118].

Chronology

[12] All of the following facts derive either from one or other of the joint minutes entered into by some, or all, parties, or from undisputed evidence (except in relation to one or two

discrete matters, highlighted elsewhere, the majority of the factual evidence was not challenged by any party).

The contractual arrangements

[13] The contract between GGHB and MPX comprised *inter alia* (i) an agreement dated 18 December 2009, (ii) the NEC Engineering and Construction Contract, Option C: Target contract with activity schedules June 2005 (as amended by the agreement) (iii) Contract Data Part 1 and (iv) Contract Data Part 2. The Contract Data included *inter alia* the Employer's Requirements. Appendix R of the Employer's Requirements is titled "Fire Strategy".

[14] For present purposes, the material clauses of the NEC contract are: Clause 20.1, which required MPX to Provide the Works; Clause 11.2(13), which defined "Provide the Works" as meaning to do the work necessary to complete the works in accordance with the contract; Clause 11.2(2), which defined Completion as when MPX had done all the work which the Works Information stated it was to do by the Completion Date (31 January 2015); and Clause 21, which required MPX to design the parts of the works which imposed a design obligation on MPX, and provided that MPX was not to proceed with the relevant work until its design had been accepted by the project manager; further, that a reason for not accepting the design was that it did not comply with either the Works Information or the applicable law.

[15] On 17 August 2010, MPX entered into a contract with WSP for the provision by WSP of structural and civil engineering services in relation to the project. The definition of Scope and Services under that contract is set out at Schedule 2, Part 1**.** A Design Consultant Responsibility Matrix is set out at Schedule 2, Part 2. The indemnity given by NA in terms of Clause 80.1 of the contract, was in the following terms:

> "80.1 [NA] indemnifies [MPX] against claims, proceedings, compensation and costs payable arising out of an infringement by [NA] of the rights of Others, except an infringement which arose out of the use by [NA] of things provided by [MPX]."

[16] On 18 June 2010 MPX entered into a contract with NA for the provision by NA of architectural services in relation to the project. The definition of Scope and Services under that contract is set out at Schedule 2, Part 1. A Design Consultant Responsibility Matrix is set out at Schedule 2, Part 2. NA provided an indemnity to MPX in terms of Clause 80.1, in identical terms to that provided by WSP.

[17] Separately, each of WSP and NA granted a collateral warranty in favour of GGHB. The parties to the WSP warranty, executed on 28 January, 7 February and 29 March 2011, were WSP, GGHB and MPX. The parties to the NA warranty, executed on 18 June 2010 and 29 March 2011, were NA, GGHB and MPX. The material terms of each warranty were that WSP and NA respectively warranted and undertook to GGHB that it had complied and would continue to comply with all the terms and obligations incumbent on it under its contract with MPX, and would complete its services in accordance with that contract; that it had exercised and would continue to exercise all the reasonable skill, care and diligence to be expected from a competent and qualified professional designer; and that it had not and would not specify for use in relation to the project any products or materials not in conformity with relevant British or European standards.

[18] On 28 September 2012 MPX entered into a sub-contract with JDP for the design, supply and installation of the pods in the atrium of the adult hospital.

Fire Safety Design Strategy

[19] WSP produced a Fire Safety and Design Strategy ("FSDS") in relation to QEUH.

An Outline FSDS dated 7 August 2009 was included by MPX in its tender bid in relation to the project. Version 11 of the FSDS is dated September 2014. The FSDS provided that the atrium was to be treated as if it were an external space. The final version, version 12, was provided post-handover, but it contained no material changes from version 11. The FSDS provided for cladding materials to be Euroclass B or better (or, at least, that is to be assumed for present purposes).

Progress of the works

[20] The works were carried out in stages. On 16 December 2010, GGHB and MPX agreed that work under the Building Contract should proceed to Stage 3, which related to design and construction of QEUH. On 22 January 2015 MPX issued to GGHB the Building Warrant Schedule (Final Issue). Subject to a schedule of incomplete works, Stage 3 was certified on 29 January 2015 as having been completed on 26 January 2015.

[21] On 14 December 2016 MPX submitted the building warrant completion certificate to Glasgow City Council and it was accepted on 15 December 2016. The Supervisor's Final Defects certificate is dated 15 February 2017.

The JDP works

[22] JDP's design of the pods included the use of Alucbond NaturaAL and Etalbond LT. MPX was aware of the proposed use of the former by 29 October 2012, and of the latter by 18 December 2012 (it being used instead of the product which had originally been proposed, Dibond). Fabrication of the pods was carried out at JDP's premises, with the completed pods being delivered by crane to the QEUH site before the atrium roof was fitted. The work was completed by 22 November 2013, when the final application for payment was made.

On 22 March 2013, JDP granted a certificate of vesting confirming that the property in the goods covered by the certificate had passed to MPX.

Payments

[23] WSP and NA were paid for their services in accordance with their respective contracts. Those payments were made at regular intervals as the works progressed, and were authorised by a combination of signatures, depending on the level of payment being made. JDP issued invoices for its services dated between 17 May 2013 and 17 January 2014. Those invoices were issued after MPX had certified the value of work done to date. MPX issued remittance advices in response to JDP's invoices to confirm that payment had been instructed. Clad (UK) Ltd ("Clad") was appointed as sub-contractor by MPX to undertake construction work in relation the atrium cladding. The subcontractors were paid on a monthly basis, in their case based on the percentage of works completed in comparison to what was being claimed. Clad applied for payment in respect of Signi installed in the cores on 23 November 2012. By December 2012, MPX had certified that around 7% of Clad's works had been completed and that Clad was entitled to payment of £116,350.52 in respect of the Signi. Clad was paid under that certificate on or around 18 January 2013.

[24] MPX itself sought and received payment from GGHB during the course of the works on an approximately monthly basis. When MPX incurred costs to consultants and sub-contractors, including WSP, NA, JDP and Clad, those costs were included in MPX's next payment application to GGHB. Thus, in respect of the payment made to Clad for the Signi in the cores, MPX first sought payment from GGHB in or around December 2012, and received payment in or around January 2013.

[25] MPX submitted an "Assessment of Works" to GGHB dated 5 February 2015. The work for which payment was sought including the cladding in the atrium. The GGHB payment certificate is dated 24 February 2015.

[26] Douglas Grant Wallace of MPX was one of those involved in applying for, and approving, payments. At no time, while authorising payments to any of WSP, NA or JDP did he suspect that any of them were not complying with their obligations under their respective contracts or appointments. He did not expect JDP to apply for something that was incorrect. He trusted that a subcontractor had done what it represented had been done.

Statements of design compliance

[27] On 22 January 2015, WSP signed and returned to MPX a document headed "Statement of design compliance for period Jan 2010 to Jan 2015". It provided, *inter alia*, that WSP certified that:

> "exercising the standard of reasonable skill care and diligence required pursuant to its appointment, [its] prepared design fully complies with all the requirements and obligations under its appointment and has been carried out having due regard to the requirements and obligations relevant to the Services [contained in the documents...]"

Those documents were then listed, including relevant statutory legislation, and project-specific approvals, consents, restrictions, standards and guidance.

[28] On 15 January 2015, NA signed and returned to MPX a document headed "Statement of design compliance for period Jan 2011 to Jan 2015". It provided, *inter alia*, that NA certified that the "prepared design fully complies with all requirements and obligations" contained in documents which were then listed as in the WSP statement.

[29] Thus, although not identically worded, and the WSP statement contained a qualification which the NA one did not, these statements confirmed that NA and WSP were satisfied that their designs complied with the requirements of their respective appointments.

[30] On 21 January 2015, JDP signed and returned to MPX a document headed "Statement of construction compliance for the period March 2011 to January 2015" in which it certified that the subcontract works complied with all requirements and obligations contained in the documents listed in the subcontract order.

The Aconex platform

[31] During the project, documents were shared by MPX with its sub-consultants/sub-contractors using an electronic platform called "Aconex". It is an electronic document management system which managed communications and the large amount of information which had to be shared on the project. The MPX controller would typically initiate a workflow review of a document, such that it would go in turn to each of the parties who had to review it. Documents could be assigned either status A, B or C. The Aconex user manual provided that for each design document, status A meant "no comment"; status B meant "proceed subject to comments"; and status C meant "resubmit with amendments"; three pages further on, the manual also provided that for shop drawings, status A meant "Proceed with the works". A drawing would typically be assigned status B or C by different reviewers, then passed back to the originator to address the comments.

The O&M Manual

[32] At or about completion in 2015, MPX issued an operations and maintenance (O&M) manual to GGHB, as it was contractually obliged to do, electronically on a system known as

Zutec. At that time, the manual generally was incomplete (and remained so until 2018, in breach of MPX's contractual obligation). It included, in the section dealing with cleaning instructions, a folder named "Atrium Cladding". The product literature provided therein related to Alucobond, comprising an Alucobond brochure and a BAA certificate for Alucobond. At the material time there were three main Alucobond ACM products available on the market, namely (i) Alucobond, (ii) Alucobond Plus and (iii) Alucobond A2. The same brochure was provided against ACM Panels Bridge, ACM Panels Towers, ACM Panels Café and ACM Panels Core A&B Entrance Door Surround. Some of the documents refer to Alucobond "NaturAL Brush", which is a reference to the type of finish on the outside of the cladding panel. The information was not comprehensive, and was misleading, in that it did not identify which of the Alucobond products had been used in which locations and misrepresented where Alucobond was present. The manual also included drawings showing the use of Signi cladding material, as well as drawings showing the use of Alucobond in the atrium bridge. The information about Signi was incomplete. Etalbond was not mentioned.

CEL 11

[33] CEL (Chief Executive Letter) 11 is a policy document issued by The Scottish Government on 17 March 2011 which contains the fire safety policy for NHS Scotland. As Mr Connolly and Mr Woods agreed, and Ms Kane accepted, it sets out policies and requirements that GGHB is obliged to observe. It is common ground that CEL 11 was issued in part due to previously identified issues with the handover and commissioning of new medical facilities. Thus, paragraphs 8 and 9 of the letter stated:

> "8. Recent experience in the lead up to commissioning and hand over of new hospital facilities has identified a number of significant issues in regard to fire safety management that neither current NHS Scotland Firecode nor the previous Fire Safety Policy for NHS Scotland 2008 [CEL 25 (2008)] addresses adequately.
>
> 9. Subsequently (*sic*), Annexe C of the attached Fire Safety Policy For NHSScotland 2011 identifies the issues that should be considered, or met in full, in order to address the issue of fire safety during the commissioning and lead up to hand over phases of the project. The changes to the fire safety legislative regime are a key driver in regard to the need for these arrangements, as the provisions of the new Act and Regulations are explicitly applicable to buildings at the project phase this proposal is directed towards."

[34] Statement 3 of the policy – which Mr Connolly and Mr Woods, in their joint statement, agreed applied to GGHB – stated:

> "All NHSScotland Bodies commissioning new healthcare buildings for owner occupation, leasing newly constructed buildings from another party or occupying buildings provided under a Public/Private Partnership contract must be satisfied that all design and construction works of such buildings comply with all statutes bearing upon the fire safety of newly constructed buildings."

And statement 5:

> "All NHS premises new or existing, owned, occupied or managed by NHSScotland Bodies must be managed in accordance with the mandatory requirements set out hereafter at Annexe B."

[35] Annexe B para [6] provided:

> "NHSScotland Bodies must ensure that the appointed Nominated Officer (Fire) and Deputies, where appointed, shall:
>
> - ...
> - ensure that suitable and efficient fire safety risk assessments are undertaken in relation to the estate for which they have responsibility;
> - ensure the findings of fire safety risk assessments are appropriately acted upon and followed;
> - ensure fire safety risk assessments are regularly reviewed;
> - monitor all fire safety provisions including the provision and review of local fire evacuation plans, staff training at all levels, the keeping of records in relation to the testing and maintenance of systems and staff training and fire drills;
> - ...
> - liaise with the Fire Safety Adviser in regard to these and any other relevant fire safety matters."

[36] The introduction to Annexe C to the policy also noted that recent experience in the lead-up to hand over of new hospital facilities had identified a number of significant issues in regard to fire safety management that had to be considered during the lead-in period to commissioning, and stated that Annexe C identified the issues that should be considered or met in order to address the issue of fire safety during this critical period. It went on to say that key fire safety management decisions should be made, and relevant fire safety information developed and gathered in regard to installed systems and components, during the lead up to hand over of new health facilities. Paragraph 7 of Annexe C provided:

> "Nominated Officers (fire) and Fire Safety Advisers should ensure that the commissioning process for fire safety installations and other systems such as the fire stopping of compartment walls, certificates of test for building components such as fire doors etc, is carefully monitored and supervised and that the relevant commissioning and test certification documentation, including product installation and use, routine testing requirements and performance information, is kept as a permanent reference record of the installed components. Sight of documentation relating to fire safety installations and systems may subsequently be required by a statutory auditing authority."

And paragraph 10:

> "In view of the progressive and continuously evolving nature of the building during the lead in stage to final hand over, and the Fire and Rescue Service interest in their capacity as the enforcing authority who may conduct a statutory audit at any reasonable time, it is recommended that consultation with them is established at an early stage. This will help to ensure that any fire safety measures being adopted in the lead in phase are consistent with the compliance expectations of that authority, and will also help to ensure that the management processes, policy and procedures, and other measures that will be adopted when the building is fully operational, are consistent with their statutory expectations."

[37] Ms Kane agreed with the view expressed in the joint statement of Mr Connolly and Mr Woods that CEL 11 required GGHB to review the details in the O&M manual. While the interpretation of CEL 11 is a matter for the court, I agree with that interpretation of it: in

order to ensure that accurate records are kept, it is a pre-requisite that the records in the O&M Manual must first be reviewed.

[38] Mr Connolly agreed that the steps required by CEL were the steps reasonably required of the owner of premises. Mr Woods was of the opinion that it would have been reasonable for anyone using due diligence in reading the O&M manual to have identified that there were inconsistencies and inaccurate information between drawings, the maintenance schedule and the material schedule; that was the type of information he would have expected somebody acting for GGHB to have identified as part of the CEL 11 handover checks. Given that when the manual was eventually consulted, that was precisely the conclusion reached, I accept that opinion. However, GGHB did not in fact review the details in the O&M manual relative to the atrium at the time of handover.

[39] Pausing the narrative there, the situation at practical completion was that, as a matter of fact, non-compliant products had been installed in the atrium, but that fact was not appreciated by any individual within either GGHB or MPX.

The post-Grenfell Reviews

The GGHB review

[40] Shortly after the Grenfell Tower fire, in June 2017, the Scottish Government instructed an audit of all external cladding. Ian Powrie was GGHB's Deputy General Manager of Estates from January 2017 to June 2019. His role included dealing with various issues which had arisen in relation to the hospital. He was tasked by David Loudon (then GGHB's Director of Estates and Facilities, who led the review) with assessing the cladding classification of external cladding materials across GGHB's whole estate, including QEUH. The review included assessing the type of external cladding installed, the manufacturer of

that cladding and whether it contained ACM, and reviewing the as-built documentation for external cladding, in order to understand the risk profile of the hospital post-Grenfell. The atrium was not included in the review. As part of the review, Mr Powrie consulted the O&M manual. He does not recall specifically reviewing the information in it about the atrium, but when reviewing the information available he could not decipher exactly what external cladding materials and insulation had been installed, or where exactly it had been installed on the building. He emailed Fergus Shaw of MPX on 11 July 2017, asking for the requisite information. He received an email response from Alasdair Fernie on 17 July 2017, which stated, among other things:

> "Our Fire Engineer WSP undertook a lengthy consultation process to approve the fire strategy for the hospital. This involved both Glasgow City Council Building Control and the Fire Service (a statutory consultee). This was to ensure that the building met the Scottish Building Regulations current at that time. During the construction phase, Glasgow City Council regularly attended the construction project to inspect and verify the works. This included witnessing products used and verifying compartmentation was achieved across each floor slab and vertically between the floors. A final inspection was undertaken at the completion of the Hospital on the 29th January 2015. WSP involvement stopped upon agreement of the fire strategy. Both Structal and Praters, the two trade contractors involved, have confirmed that the various envelope types satisfy the requirements of the agreed fire strategy."

[41] That gave Mr Powrie comfort that the external cladding had been installed in accordance with the relevant building regulations and the building's fire strategy.

A meeting between Mr Powrie and Mr Wales?

[42] Mr Powrie spoke to a meeting with John Wales, MPX/s Quality Assurance Manager in MPX's offices by Glasgow docks. He did not specify when the meeting took place, but by implication, it must have been in 2017. It was not a formal meeting so it was not minuted. Blair Cran of Currie & Brown was also there. Mr Powrie said that he specifically asked

Mr Wales about the cladding in the atrium, because it had occurred to him that it was similar to the external cladding. Mr Wales told him that the atrium cladding panels were not ACM and that they were just aesthetic or decorative panels with fire breaks "as per building standards", going on to say that the atrium cladding panels "didn't have the same build-up" so would not include ACM panels. Mr Powrie said that, as a result of that discussion, he did not believe that there were any issues regarding compliance with the atrium panels, and he took no further steps to investigate them because external cladding was the focus. He told Mr Loudon of his discussion with Mr Wales but Mr Loudon did not ask him to pursue it further. He was adamant that the comment that the panels were only decorative had been made; it was so specific that it had stuck in his mind.

[43] Mr Wales for his part had no recollection of any such meeting, nor indeed of ever talking to Mr Powrie about the atrium at all. He did not recollect meeting Mr Powrie at MPX's Govan office, which he visited infrequently. Had it been an official meeting, he would expect it to have been minuted. He conceded that such a conversation could have taken place, but said that he was not involved in the atrium works and would not have known what materials were installed, so would not have commented on them; he did not have the knowledge to make a comment on the cladding in the atrium. It was put to him that the language attributed to him by Mr Powrie that the panels were merely decorative, was redolent of a phrase to similar effect which appeared in Julie Mayer's email of 19 March 2018, and of what Mr Whalley had said in evidence, but he had no observations to make.

[44] As to whose evidence to accept on this issue, and what significance it has, I found Mr Powrie to be a credible witness who gave truthful evidence. Accordingly, I find that he did meet Mr Wales in 2017, when, in the course of conversation, Mr Wales made an observation to the effect that the panels were decorative. However, since the meeting was

not a formal one; since Mr Wales had no involvement in the construction of the atrium; since the atrium was not in fact under active consideration in the review; since Mr Loudon did not ask for the matter to be pursued further; and since no record was kept of the discussion, I also find that the conversation was not considered to be of any significance insofar as GGHB was concerned, and did not in fact induce any belief (or at any rate, any reasonable belief) in the mind of GGHB that the cladding in the atrium was conform to the contract.

The MPX review

[45] Separately, post-Grenfell, Ross Ballingall, MPX's managing director, initiated a country-wide review of the cladding used across all of MPX's projects, including QEUH, to check that it complied with contractual requirements and regulations. That review focused on where MPX may have used Grenfell-type cladding, and was therefore focused on the external walls at projects which they had carried out. As with the GGHB review, it did not take in the adult atrium. A series of meetings took place between GGHB and MPX about the external cladding, and GGHB went through a process of replacing cladding panels on the external façade of the hospital. Although the FSDS provided that the atrium was to be treated as an external space, it did not occur to anyone within GGHB or MPX that the review of external cladding should include the cladding in the atrium.

[46] In the course of this review, Calum Tuckett, then the MPX chief operating officer for Europe, the Middle East and Canada) sent an email dated 13 July 2017 to MPX's media representative, in the following terms:

> "I have a quick question, do we know why the GGC feel it is necessary to make the following statement.
>
> 'further detailed work is underway to provide further reassurance'

> It appears to show a lack of confidence in the extremely lengthy and thorough approval process that the Building Control and the Fire service etc. go through to assess the appropriateness of the Fire Strategy. We were not aware of any such lack in confidence. We have then confirmed that the installation is compliant with that Fire Strategy, so I don't follow why there is a need to state that further work is underway and that further reassurance is required.
>
> Is there really a need to include this in the statement?"

That email was subsequently forwarded to GGHB's Director of Communications, Ally McLaws and was likely used to inform any statement that GGHB made to the press.

The omission of the atrium from the 2017 reviews

[47] As to why neither review included the atrium, Mr Powrie accepted that the FSDS provided that the atrium was to be treated as an external space, but said that had not been recognised when the 2017 review into the external cladding was being carried out. Mr Steele conceded that, on reflection, it was remiss of GGHB not to have investigated the atrium cladding in 2017, and Mr Whalley also spoke to a discussion he had had with Mr Steele in 2021, when Mr Steele said that the atrium ought to have been included but that GGHB had simply not thought of that at the time. Mr Whalley did not accept that by a parity of reasoning, equally, MPX had been remiss and ought to have included the atrium in its investigations. The fact of the matter is that although the FSDS provided that the atrium was to be treated as an external space, and although 20,000 people pass through it daily, it did not occur to either party that the cladding materials in it should be reviewed post-Grenfell; and, for that, GGHB and MPX must share equal responsibility.

The MPX investigation into the use of ACM cladding in the atrium

[48] MPX did begin an investigation into the use of ACM cladding in the atrium in March 2018. That investigation was led by Julie Mayer of MPX who, on 19 March 2018, asked Fergus Shaw of MPX whether there was ACM in the atrium.

[49] Mr Shaw said in evidence that at that time he used the terms ACM and Alucobond interchangeably (as one might refer to a vacuum cleaner as a hoover). He sent Julie Mayer an email of 20 March 2018 which included the following:

> "The installation internally at the QEUH is across two atria, the Adults and Childrens. The drawings refer to Alucobond, but no particular type named
> The installation internally is of aluminium panels supported off carrier frames/ helping hand brackets – the panels are NOT composite purely a painted aluminium. (all the information I have read on Alucobond strongly suggests it is a composite material)"

[50] On 22 March Julie Mayer asked Mr Shaw to carry out further investigations, and he made further enquiries of Clad UK and JDP. On 23 March 2018, as a result of his investigations, Mr Shaw sent a further email to Julie Mayer of MPX stating:

> "I have taken a further look at the details and information stored on the Zutec platform, Aconex and spoken with the supplier (as the contractor is no longer trading – non-cladding related issues).
> ...
> **Adult Hospital (Cores A-D)**
> The grey material installed is Larson Signi (Alucoil) PE. The height is well in excess of 18m and the area is circa 7,000m2. The datasheet is attached as Signi PE, though the ZUTEC information contradicts, suggesting the 14191 and 4214 are installed. [Those references are, respectively, to the Alucobond brochure and the BBA certificate for Alucobond.]
>
> **Adult Hospital (colours)**
> The coloured material is Etalbond PE. This is installed in minimal locations (but can provide mark ups if necessary). The datasheet is attached as Etalbond PE, though the Zutec information contradicts, suggesting the 14191 and 4214 are installed.
>
> **Adult Hospital (Pods)**
> The material installed is Alucobond. Again defined as Alucobond at the time, prior to the redesignation of the product. It is now defined as Alucobond PE. The height of the installation is well in excess of 18 metres.

The datasheets replicate those noted under the Children's Hospital."

[51] At that time Mr Shaw did not know that "Alucobond" covered three different types of Alucobond. He believed he had investigated which materials had been installed by referring to Zutec. The O&M manual mentioned ACM bud did not describe it as PE. As his email stated, the manual contained inaccurate reference to Alucobond where the material which had been installed was in fact Signi or Etalbond.

[52] A meeting took place on 11 April 2018 between Julie Mayer, and Emma White and David Pitts of NA. It is apparent from the minutes of that meeting that MPX had already notified its insurers of the fact that ACM had been used in the atrium. Later that day, Emma White sent Mr Shaw two emails, the first giving product information about Etalbond, the second giving product information about Signi, in which she said:

> "Signi PE – this appears to be a fire classification of M1, which I think is the French fire test. The UK equivalent has a Class 0 and Class 1….we don't know which of these classifications the Signi PE is and need confirmation so we can get Tenos to review. If it's the Class 1 version then we may have a problem."

Mr Shaw considered that to be very non-committal and would have expected a stronger reply, one way or the other. He did not regard it as part of his function to have considered whether that was a "red flag", his remit merely being to investigate and to report up the line. Also following the meeting of 11 April, Julie Mayer emailed him in the following terms:

> "Three different types of ACM are understood to be installed internally (IWS) to the Atria…It is noted that there appear to be some contradictions between the technical datasheets and O&Ms on the ZUTEC system. For the avoidance of doubt it is required that the project team approach the subcontractors (or others/if no longer trading) to formally confirm the As-Built Condition".

[53] A further meeting took place on 8 May 2018, attended by Ms White, Mr Pitts, Ms Mayer, Mr Shaw and Steve Cooper of Tenos (a fire engineer). Mr Shaw accepted that

what was discussed at that and the earlier meeting suggested at least a potential fire risk at the QEUH. He did not know why that had not been drawn to GGHB's attention. Following that meeting, Mr Shaw was assigned further tasks, one being to ask WSP to review the ACM materials/wall build ups used in the atrium and to confirm the as-built condition; and to ask WSP to provide written records or approvals relating to the cladding materials installed in the atrium. He approached Katrina Spiers-Simpson of WSP to "close out" these actions. In relation to the use of ACM PE in the atrium, Ms Spiers-Simpson simply provided a copy of the Fire Strategy document for the project. Following a further query, she advised that the materials used in the atrium should be "Low Risk (B-S3, d2) as per the Technical Handbook and approved Fire Strategy report" and suggested that MPX speak to the architect and/or subcontractor who had carried out the works.

[54] Gavin Burnett of MPX then contacted Kenny Hamill who had been the lead fire engineer at WSP at the time of design and during most of the construction of the project by email dated 1 August 2018 as follows:

> "Alucobond (Adult Pods) - Data sheet states BS 476 Part 7 – Class 1. This would suggest that these panels are not in line with the CFD model.
>
> Larson Signi PE (Adult Cores) – Data Sheet states fire classification UNE 23727 of M1. Confirmation required if this meets the CFD model requirements?
>
> Etalbond PE (Adult Colours) – Data Sheet included in Zutec is silent on the fire classification. The data sheet downloaded from the website, version July 16, states BS 476 Part 7 – Class O. This would suggest that these panels are in line with the CFD requirements."

That email reflected the concerns shared by Mr Burnett and Mr Shaw at the time that there might be a potential non-compliance with the CFD model, in terms of which the fire load in the atrium could not have any higher than 5 megawatts of fire load. Mr Hamill responded on 2 August 2018 as follows:

> "[d]oesn't look like the panels achieve the surface spread of flame classification as set out in the fire strategy – the performance is lower than B....The fire strategy references the European Standards only although the building regulation guidance also references British Standards. I would note that the National classifications do not automatically equate with the equivalent classifications. Therefore products cannot typically assume a European class, unless they have been tested."

Mr Shaw took from that response that Mr Hamill shared his concerns about the non-compliance of at least some of the cladding panels, because they did not meet the Class 0 classification, which he understood to be the premier standard in the UK. However, he said that he required that to be confirmed to him because it was outwith his area of expertise, and he was wholly reliant on the expertise of the experts engaged by MPX.

[55] It was put to Mr Shaw that throughout 2018 it was suggested that MPX seek the opinion of a fire engineer. He did not give a direct answer to that, but did acknowledge that Julie Mayer's report of June 2018 said that WSP were to be contacted.

Emma White's email of 31 August 2018

[56] Although Mr Hamill had said that there might be a problem, Mr Shaw put WSP's response to NA for it to verify the materials used, because WSP was not the materials verifier. On 29 August 2018 he emailed Emma White of NA the entire email chain involving Ms Spiers-Simpson and Mr Hamill, stating that there was a "strong suggestion that the products do not comply with the CFD". Ms White responded by email on 31 August 2018:

> "We can confirm that the final IBI design package for the Adult and Children's atria included the specification of Alucobond cladding. This was proposed to the following areas;
>
> • Adult Atrium – Cores, FM Link Bridge Pods, first floor Café/Restaurant Pod, first floor Sanctuary and main entrance feature column encasements
> • Children's Atrium – Cores and various coloured feature boxes, walls and window reveals.

> At the time of the design, and in compliance with the Fire Strategy, CFD model and Scottish Building Regulations requirements this product was classified as Class 0 in relation to surface spread of flame; this was evidenced by the attached BBA certificate which is included for your information."

At the time, Mr Shaw understood from that email that NA was satisfied that the design of the atrium was compliant with the contractual requirements, and, despite his own concerns about the material which had been installed, he took comfort from the fact that Ms White did not raise any concerns with the information which he had put to her and he accepted her email as an accurate statement of the position. MPX had employed NA because it was expert in its field. Whilst Ms White did not specifically refer to Signi and Etalbond, Mr Shaw said in his witness statement that he believed from previous emails that she was aware of the presence of both in the atrium and he thought she would have considered the actual as-built condition of the atrium (including each of the three materials specified) as had been done when NA assisted in the review of the external walls. In relation to Ms White's evidence that her email of 31 August 2018 related only to Alucobond and not to Signi or Etalbond, Mr Shaw initially took issue with that as being incorrect, maintaining that it was clear both from his email, and the context in which it was sent, that he had asked for her view on all three products. However, he conceded in cross-examination that on an ordinary reading of her email, she was referring only to the proprietary product known as Alucobond and that she had forwarded material relating only to that product.

The email of 13 September 2018

[57] Mr Shaw concluded the MPX internal investigation by sending an email to various individuals within MPX, including Mr Tuckett, on 13 September 2018, as follows:

> "Hopefully it all makes sense and allows a line to be drawn under the investigation (however I would welcome any comments to ensure that MPX is satisfied with the findings).
> If you review the text below, with the attachments it should (could) all make sense.
> ….
> The mail titled QEUH (first attachment dated 31st July) offers confirmation from WSP that The CFD model is based on the cladding materials within the atria being Low Risk (B-s3, d2) as per the Technical Handbook and approved Fire strategy report. The materials installed in the atria should have complied with this.
>
> The second mail (dated 31st August) offers clarification from [NA] that the classification of the Alucobond at the time of specification and installation complied with the requirements laid out within the documentation noted above.
>
> (It is worthy of note that the classification of the Alucobond changed post installation at QEUH) – a point the client is aware of as the Alucobond is being replaced under instruction on the facade. Also, there are non-specified equivalents of the Alucobond (at the time) installed. There are two alternative products, namely Etalbond – colours applied to the Adult Atrium and Larson Signi PE – applied to the Cores. The alternatives matched the Fire Performance of the Alucobond (at the time)"

[58] On receipt of Mr Shaw's email 13 September 2018, Mr Tuckett assumed that matters had been concluded; he was satisfied that the investigation had been carried out properly, since it had involved consultants from the original project and had been completed based on their advice and input. It appeared that there were no issues requiring attention, in particular that there were no issues in respect of the atrium. In reliance on this email and the underlying investigations, he did not believe that there were any further issues for MPX to pursue. In reaching that conclusion he did not read all of the attachments to the email, and he was unaware of what WSP had said. However, he said that he did not need to know that, because NA was the lead consultant and he looked to what it had said. Emma White's email of 31 August 2018 (which he did read) was attached to Mr Shaw's email: it confirmed that the Alucobond cladding met the necessary requirements. He accepted that what she had said (so far as it went) was factually correct. If any issues had been identified with the cladding in the atrium at that stage, MPX would have raised these with the design

consultants and relevant subcontractors to investigate the matter and would also have notified GGHB of the potential issue.

[59] As spoken to by Hazel McIntyre and Mary Anne Kane, and not disputed by any MPX witness, at none of the meetings concerning the external cladding, and at no other time before 2021, did MPX tell GGHB of its investigation into the atrium cladding, what that investigation had revealed, or that the cladding might not be compliant with the FSDS.

Events 2019 to 2021

[60] Enter Geraint Whalley, evidently someone with an eye for detail, a quantity surveyor who works within the legal department of MPX, providing strategic management of commercial, legal and other business risks, a role he has held since 2017. His first involvement with QEUH was in late 2019 when MPX first received notice of the impending action by GGHB (cause CA21/21, served in January 2020). He was at that time unaware of the review of the cladding carried out by MPX in 2018. He visited QEUH on 12 February 2020, when he first saw the atrium. He asked what material the cladding was made from and was told that it was ACM. At that time, he was unable to establish what grade of ACM had been used. Having a general awareness of ACM, and due to the fact that the atrium was both a public thoroughfare and a fire escape route, he wished to understand what type of ACM had been used. He then became aware of, and looked at, the 2018 review, and noticed that certain statements had been made which had not been verified. In particular, Emma White's emails in 2018 raised a question in his mind over whether the ACM used was compliant with the fire engineered solution for the atrium.

[61] Also in 2020, Kingspan disclosed that the fire test reports of their Kingspan K15 product were wrong. Accreditation of its K15 product was withdrawn, which prompted

MPX to carry out a further, fuller, review, including analysis by an expert, Mr McCracken, who had not been involved in the project before. His advice, received on 21 January 2021, confirmed that, based on what was now known about its properties, the presence of ACM PE at the hospital posed a risk to users of the hospital.

The MPX letter of 9 February 2021

[62] That prompted Mr Whalley, on 9 February 2021, to write a somewhat jejune letter to GGHB, stating that following a review of the cladding installed at the hospital, there were concerns in respect of the suitability of the PE grade ACM cladding in the atrium, and that there was a risk that it "may no longer be considered suitable for installation at the hospital." Mr Whalley did not accept that his letter was misleading; had it been clear that there was a problem at an earlier stage, MPX would have informed GGHB (and raised its own actions) sooner.

GGHB's first awareness of a potential defect in the cladding

[63] Whether the letter of 9 February 2021 could have been more fulsome or not, Mr Steele said that its receipt was the first time he, or anyone within GGHB, became aware of a potential defect in the atrium cladding. Mr Steele's belief until then, arising from the fact that MPX had been collaborating with GGHB following practical completion and had never raised any issue with the atrium cladding, was that the cladding had been installed in accordance with the Building Contract and Fire Strategy. He said that he held this belief due to his awareness of representations made by MPX regarding the overall construction of the hospital, including the cladding installed. However, he had no direct involvement in the dialogue going on between MPX and GGHB at that time. He conceded he had not applied

his mind to the atrium cladding at all, nor had anyone at the Board; he therefore accepted that he had not applied his mind to an assessment of the materials used in the atrium, nor whether the Board's Fire Risk Assessments had been adequate. Following receipt of this letter, Mr Steele went to the atrium to investigate the cladding himself. He concluded that it was not possible by carrying out a visual inspection to determine what type of material had been used, and that intrusive surveys, involving scaffolding, were required. He instructed Hazel McIntyre and Ian Powrie to effect a review of the O&M manuals, the purpose of which was to understand what the records said the hospital had in the atrium space. This was the first time that anyone within GGHB discovered that it was unclear from the manual what materials were on the atrium walls, and that there were inconsistencies in the documentation and the drawings, which would have existed since the O&M manual had first been created.

[64] On 7 April 2021 Hazel McIntyre sent Fergus Shaw an email requesting clarification of the cladding installed in the atrium, relating to the two products, Etalbond and Signi, for which there was no manufacturer's information within the O&M manual. In response she received an email dated 13 April 2021 containing details of the Signi, Etalbond and Alucobond products installed in the atrium. It was in identical terms to the email Mr Shaw had sent to Julie Mayer on 23 March 2018.

What did GGHB know, and when?

[65] Having set out that (mostly) uncontroversial chronology, I now turn to the material evidence adduced by GGHB as to its state of knowledge (or that of its employees) and as to what it (or they) may (or may not) have relied upon.

Mary Anne Kane

[66] Mary Anne Kane was the Nominated Officer (Fire) (NOF) (appointed to that position around 2012) for QEUH. She said that compliance with the fire strategy developed by WSP was something that "would have been" checked by the Board's project team, which was comprised of Board employees. Gilbert Donnelly, the Fire Safety Adviser, (who was not a witness) would have had some involvement. Nobody would have carried out a physical check, particularly in a new building. No issues were flagged at the time regarding the cladding installed in the atrium, so no further investigations were undertaken of the cladding products installed there. She ensured that all necessary fire risk assessments, which were measured against the FSDS, were carried out, both before and after the hospital was handed over. The assessors carried out visual inspections only. The fire risk assessments did not raise any issues regarding the cladding in the atrium. She was aware of the obligations placed on her (and on GGHB) by CEL 11, including Annexe C paragraphs 7 and 10. She was unaware of what went on to Zutec, or what steps had been taken to ensure that the necessary information was uploaded to it. It was not part of her role as NOF, nor did she have the expertise, to assess the cladding materials installed in the atrium against what was detailed in the O&M manual. Mr Donnelly did have such expertise. She relied on the project team to put the appropriate documents on to Zutec. She was not involved in GGHB's assessment, post-Grenfell, of cladding systems installed in the hospital.

Hazel McIntyre

[67] Hazel McIntyre is a project manager employed by GGHB. She was not involved during the construction phase of the contract, and only started working on QEUH related projects in 2017. She had reviewed the relevant documentation from GGHB's computerised

system, and she understood, from the final versions of the Building Warrant application and the fire strategy, that the cladding installed in the atrium should have been compliant with that strategy, and should have been Euroclass B or better. The fact that the atrium cladding was not included in the sectional completion certificate as an outstanding defect "would have led" GGHB to believe that it complied with the fire strategy. The completion certificate submission to Glasgow City Council dated 9 December 2016, signed by MPX, contained a declaration to the effect that the work was carried out in accordance with the building warrant and that the building as constructed complied with the building regulations. Having reviewed payment applications by MPX, it was clear that it was applying for payment on the basis that the atrium cladding had been provided in accordance with the contract, in particular, in February 2015 and again at the end of the defect notification period in February 2017. The payments were triggered by being approved by Currie & Brown. There were no disallowed costs or withheld sums on either occasion. Ms McIntyre was also involved in the instruction of works to remedy the defective external cladding. At no time during that process did MPX suggest that there may also be an issue with the atrium cladding, or that Alucobond PE had been installed in the atrium. She first consulted the O&M manual after receipt of the letter of 9 February 2021. Although drawings showed the use of Signi, it was as not possible to tell what type of Signi was present until lab tests had been carried out in 2023. She did not know whether anyone from the board had reviewed the O&M manuals from a fire-safety perspective.

William Russell

[68] William Russell was a Fire Risk Assessor (FRA) employed by GGHB on a fixed term contract from November 2014 until November 2015. He carried out fire risk assessments

both before and after the building was occupied, although none before handover of the hospital. In particular, he completed a fire risk assessment of the atrium on 2 November 2015. He said that in doing that, he would have relied upon the FSDS as having been implemented correctly; he also assumed that the cladding would have been installed in accordance with the building warrant. He carried out only a visible inspection of the surface finish of the cladding, because that was all the risk assessment required. It was no part of his function as a FRA to carry out intrusive inspections, as would have been required to check whether the materials as installed complied with the FSDS. He did not consider that there was any need for a FRA to consult the O&M manual to check whether the FSDS had been implemented correctly, and he did not do so. Although he accepted that it was important to know not just what the FSDS said, but whether the building, as built, complied with it, he had not himself made any further checks in relation to the cladding. The Board had not provided him with material to assure him that all statutory requirements including building standards had been met. He was a fire risk assessor, not a fire safety adviser, and, as such, there was no duty incumbent upon him to ensure that documents were kept showing what products had been installed.

Tom Steele

[69] Mr Steele has been GGHB's Director of Estates and Facilities since October 2018. He is not a member of the statutory board, but is an executive director who reports to the Chief Executive on a broad range of issues. He was previously employed, in the same role, by NHS National Services Scotland between May 2016 and September 2018. When he joined GGHB in October 2018, there were no detailed handover notes. He became aware of a number of issues with the hospital building, but there were no concerns at that time over the

cladding in the atrium. He gave hearsay evidence about matters which had occurred before his appointment, based on his having reviewed correspondence and placing his own interpretation on it. He had been shown Mr Tuckett's email of 13 July 2018 to Ally McLaws, confirming that the cladding installation was compliant with the fire safety design strategy which "would have been" brought to the Board's attention and the Board "would have assumed, in error" that the cladding installed in the atrium was Class B or better, in accordance with the relevant version of the FSDS; however, he conceded that he had no direct knowledge that these things had happened; he had simply made these assumptions based on his experience; and in any event he had not applied his mind to the matter until 2021. He had some involvement in the review of external cladding post-Grenfell in his NSS role, when he was involved in collecting and collating information from hospitals. At that time, he did not know that there was cladding in the atrium. Decisions rested with David Loudon, who left GGHB in 2018. Because of the number of issues with the hospital, Aecom was appointed to prepare a report, but the scope of their instructions did not include the atrium. The Aecom report disclosed a number of defects, resulting in the 2020 court action being raised against MPX, but did not include the atrium cladding. Had he known there was an issue with that, it would have been included in that action.

[70] Mr Steele agreed that it was essential to have a full set of as-built drawings at completion. The Board had kept documentation, the problem was that the information they had been given and which they kept was erroneous. The manual described what should have been, rather than was, installed. No one had ever said that Alucobond PE was in the atrium.

[71] Mr Steele spoke to a meeting he had with Fergus Shaw in 2021 at the Board's premises. It was not a formal meeting, hence it was not minuted. He was trying to get a

better understanding of how the cladding ended up on the wall. Mr Shaw told him that the issues with the atrium cladding were a "known known" and that an employee of GGHB had been made aware mid-way through the installation that non-compliant cladding had been installed; and that MPX could have replaced the cladding at that time for £100,000. Mr Steele had not seen any documentation vouching that statement. Had GGHB been aware that non-compliant cladding material had been installed in the atrium, it would not have opened the hospital. Mr Steele had told his chief executive of the conversation. He had not made a written report because he had been unable to verify which Board employee Mr Shaw had been talking about. He had asked Mr Shaw who the employee was, but Mr Shaw had smiled and said, "I can't tell you that". There were no records disclosing who it might have been. He was adamant that the figure of £100,000 had been mentioned by Mr Shaw; that was in the context that only some of the material had been fitted at the time being spoken of.

[72] For his part, Mr Shaw did not believe he had made the comments alleged: he would not have known whether the products in the atrium complied with the design or not; MPX would not knowingly have installed non-compliant products; and it was hugely improbable that he would have quoted a figure of only £100,000, which held no credibility whatsoever; nor had he said that the issues with the atrium were a "known known". In cross-examination, he was adamant that he had not made the statement attributed to him.

[73] Whether or not a conversation between Mr Shaw and Mr Steel took place along the lines suggested by Mr Steele, I am unable to find that an employee of GGHB was made aware during the installation that non-compliant cladding had been installed. In the first place, there is no specification of who that employee might have been. Second, if a GGHB employee had been told that non-compliant cladding had been installed, it is unlikely that

that issue would not have been taken further at that time. Third, I accept Mr Shaw's evidence that it is implausible that a figure of £100,000 would have been mentioned as the cost of replacing non-compliant cladding.

What did MPX know and when?

[74] I turn next to the material evidence adduced by MPX as to its state of knowledge (or that of its employees) and as to what it (or they) may (or may not) have relied upon.

Alasdair Fernie

[75] Alasdair Fernie was involved in the construction of the hospital, initially as MPX's Construction Project Manager, latterly as the Project Director from around February 2011 until sectional completion on 26 January 2015. During construction, those who reported to him (including Jim Murray) did not raise any issues in relation to the construction works in the atrium, or in relation to contractual compliance. When the works were completed, he had no reason to believe that there were any issues with the works carried out by the cladding subcontractors, Clad UK, or JDP. Mr Fernie accepted that he was ultimately responsible for the preparation of the O&M manual. He could not remember who had actually prepared the manual for the atrium cladding. He believed that they would have tried to include a comprehensive set of documents in the manual, and he could not explain why there was not. MPX had believed that the cladding was conform to contract when installed. If he had known of the non-conformity of the cladding he would have told GGHB. MPX would have had a list of documents which were in the O&M Manual. The term Alucobond did not mean anything to him in 2017. He did not know anything about Signi,

nor did he know the product details of Etalbond. He did not remember knowing that Etalbond was in the atrium. He would not have known the different gradings of Signi.

[76] His understanding in relation to the atrium was that a design was prepared by NA for the main atrium and each elevation. That was then developed by the specialist subcontractors (Clad UK and JDP) and reviewed by NA and WSP. He understood the statements of design compliance as NA and WSP respectively confirming their designs were in compliance with the contractual requirements. He accepted that MPX's view of the adequacy of the WSP service was not changed as a result of that document. Similarly, JDP signed a Statement of Construction Compliance confirming that it was satisfied that the works carried out by it followed the requirements of its subcontract. The collateral warranties provided by NA and WSP also gave him a sense of comfort that they had each produced their designs in compliance with their contractual obligations. He had no reason to think that Clad UK, JDP, WSP and NA were not doing their works properly. All of those entities were carrying out their works and applying to be, and were, paid monthly. On that basis he would have considered the design and installation of the cladding works in the atrium to be compliant with the requirements of the project. He could not say whether he was aware that the cladding had to be Euroclass B. In relation to an email from Karen Connelly to him of 12 July 2017 asking him to get written assurances from WSP as to the fire integrity, compliance with manufacturers' recommendations and Building Standards regulations, he could not remember whether he asked WSP directly for input. The fact that the building was new was not a factor in his thinking. His thinking at the time was that everyone was satisfied with what had been installed. In relation to his email of 17 July 2017, in which he had stated "WSP involvement stopped upon agreement of the fire strategy.",

that was written in relation to the external elevations which were being investigated at that time. It did not concern WSP involvement in the atrium.

[77] Mr Fernie did not think that his answer to the foregoing question in the July email was his giving the assurance asked for. He probably was not thinking about the atrium at that time, or whether it had similar cladding to the external cladding. He did not accept that anything he had said at a meeting of 26 July 2017 amounted to an assurance to GGHB. If he had known that the O&M manual contained contradictory information, or that the Alucobond, Signi, and Etalbond were not to the required standard, he may well have said something different.

James Murray

[78] James Murray, a Senior Design Manager employed by MPX from January 2011 until April 2015, began work on the QEUH project in January 2011. He was the MPX employee responsible for managing the design process and, from a design perspective, for managing the cladding works in the atrium. He said that NA, as the architect and lead consultant, was responsible for the design of the works in the atrium. It would have collaborated with WSP regarding compliance with the FSDS and how that would interact with the design. MPX relied on the knowledge and skill which NA had, to ensure compliance with the relevant technical standards. He spoke with NA regularly and did not have any concerns about their performance. He referred to a drawing produced by Booth Muirie, who supplied cladding panels to Clad UK, which showed that the cladding panels on Core A in the atrium were to be "Alucobond". The drawing was signed by Booth Murie, Clad UK, NA and by Mr Murray (on behalf of MPX). It was therefore an agreed contract drawing. He understood that NA was happy that Alucobond be used as the panel material for the cores.

He volunteered in cross-examination (although not in his witness statement) that product data sheets for Alucobond were provided along with the drawings (at workshops, rather than via Aconex) and so NA would have seen them too. He assumed that NA was content that Alucobond was compliant with the requirements of the project including the fire strategy produced by WSP. Based on that, he was happy with the material specified for use.

[79] Mr Murray referred to revision D of another drawing (which had been picked out at random for illustrative purposes) also relating to Core A. On the Aconex system it had been given status B by both NA and by MPX. He agreed that Aconex provided for drawings to be targeted so that they went to those who need to look at them; and that there were "document discipline codes" which likewise served to filter who should see particular drawings. Clad UK therefore required to address the comments and resubmit the drawing. The drawing specified the product as 4mm thick Signi (an ACM product). The atrium works were completed in 2013. He had no concerns about the quality of compliance of the works with the contractual requirements.

[80] As regards WSP, while he acknowledged that it had both a structural team and a fire safety team and that all the drawing sign-offs were by the structural team, he refused to accept that it was not involved in specifying, approving or designing the actual cladding.

[81] Mr Murray had some knowledge of Zutec and would have had some input to it. He agreed that Aconex supported the production and compilation of the O&M manual, although not everything on Aconex went to Zutec.

[82] Latterly, Mr Murray's evidence was bedevilled by an inability to answer questions which proceeded on the hypothesis that the ACM supplied by MPX was disconform to the contract, his view which he attempted to justify several times, being that it was compliant.

[83] In relation to the evidence given by Steven Devon and Derek Pierce (see below at [101] to [102]), Mr Murray accepted (in his supplementary witness statement) that he was aware of the change to Etalbond, although not that he was involved in making that decision, nor that the change was driven by cost considerations.

John Ross Ballingall

[84] Ross Ballingall was the managing director of MPX when the project completed in January 2015. At the time of completion, he was not concerned about the works that had been carried out on the project. Specifically, there was no cause for concern surrounding the works in the atrium. Apart from the usual snagging lists, nothing unusual was outstanding. Had any serious issues arisen surrounding the work of any of NA, WSP, Clad, or JDP, Alasdair Fernie would have brought these to his attention. He was still MPX's managing director at the time of the Grenfell tragedy in 2017. By December 2017, MPX was aware that GGHB had decided to replace Alucobond PE on the external walls as a precaution.

[85] He accepted that it was appropriate that the findings (of the internal review, in which he was not directly involved) be reviewed by WSP and an independent fire engineer. He had not seen the email from Julie Mayer to Fergus Shaw dated 23 March 2018. When asked if it raised potential issues about the compliance with all relevant requirements, he tended to prevaricate, (as he did at several junctures in the course of his evidence, often failing to give a direct answer to the question asked). He said, in answer to that question, that it would not have flagged any concerns but it would be fair to suggest that fire engineers be consulted. He did not know whether WSP had provided any assurances. He did not know if notification was given to MPX's insurers of a potential claim, although thought it likely that they would have been notified. He did not know that meetings had

taken place in April and May 2018 which had not involved GGHB. He now saw no reason why they should not have been told. He eventually conceded that it was disappointing that MPX's concerns were not communicated to GGHB until 2021.

Callum Tuckett

[86] Callum Tuckett is the current managing director of MPX, having joined it in January 2017 as Chief Operating Officer for Europe, the Middle East and Canada, taking up his current role in 2020. He was not with MPX when QEUH was constructed. He was aware of the business-wide review carried out in 2017. The focus was on the external facades. He was aware of Fergus Shaw's investigations into the internal space, but did not know what instructions were given to him. Although not directly involved in those investigations, he did not recall any issues arising in relation to the atrium. He did not recall the report attached to Julie Mayer's email of June 2018. He did not know whether WSP had been asked to provide the assurances referred to in the meeting of 11 April 2018. MPX first became aware of a potential risk to health and safety arising out of the cladding in the atrium following receipt of a letter from GGHB dated 18 December 2020, requesting confirmation as to whether withdrawn certificates relating to Kingspan K15 had been relied upon by MPX, prompting investigations as to the wider use of cladding at the project. Having taken independent advice, MPX concluded that there was a potential problem with the cladding, prompting it to write to GGHB. Shortly thereafter it raised proceedings against WSP, NA and JDP. Until then MPX had been unaware of any problem with the atrium cladding. If it had been so aware, it would have (a) notified GGHB sooner and (b) raised proceedings earlier than it did.

[87] As regards his email of 13 July 2017 to MPX's media representative, it did not refer to the cladding in the atrium, but to the external cladding. The email was sent because he was asked to review a statement prepared by GGHB in response to the Grenfell tragedy, less than a month before. He did not know why GGHB would have taken from that email that there was no issue with the cladding in the atrium. It was ludicrous to think that MPX could have undertaken a full survey of its entire portfolio within that period.

[88] In cross-examination, Mr Tuckett refused to say whether he was disappointed that GGHB had not been invited to the April 2018 meetings or whether he would have invited them had he been managing director at that time. He maintained the position that MPX had taken the appropriate action as and when they had the relevant information.

John Wales

[89] John Wales worked with MPX from June 2011 until December 2023 as a Quality Manager. He was not involved in the atrium although was vaguely aware of changes in the specification for the cladding work there. He was responsible for sending out Statements of Design Compliance to designers, including NA and WSP; and Statements of Construction Compliance to subcontractors, including JDP. Regarding the latter, his understanding was that MPX was asking subcontractors to confirm that they had taken account of specifications and contract drawings in undertaking their works and that they had constructed their works as obliged to under their subcontract. MPX took comfort from these statements, including the one returned by JDP, as showing that the subcontractors had carried out their works with due diligence. When the statement was sent to JDP for signature, MPX had no concern that the cladding was not compliant.

Fergus Shaw

[90] Fergus Shaw was involved in the original construction of the project as a Section Manager and, as narrated above, was involved in the review of 2018. He explained in his evidence that NA was involved in the review process as it had been the lead designer on the original construction of the project. It worked alongside MPX and the fire engineers to identify if there were any problems with the cladding on QEUH. He remembered his email to Julie Mayer of 23 March 2018 detailing the outcome of his investigation. In carrying out his investigations he had spoken to Emma White of NA. He told her what he had established about the cladding in the atrium. He accepted that his email to Hazel McIntyre dated 13 April 2021 was a "cut and paste" from his email of 23 March 2018, and that that was the first time the information had been imparted to the Board.

[91] As for GGHB's suggestion that it contacted Mr Shaw in July 2017 and asked him about the cladding, the adult atrium cladding was not mentioned at that time. The meetings in 2018 were led by GGHB, and it was open to them to raise the cladding in the atrium if that had been a point they wished to discuss.

[92] Mr Shaw disagreed that an architect was not suitably qualified to comment upon detailed fire testing data: an architect was the product specifier and required to understand the properties of whatever product it specified for its design.

[93] Finally, Mr Shaw disagreed with Mr McNamara's assertion that invasive testing was required to determine what products had been used in the atrium. He had been able to find out what cladding materials had been used by carrying out a desktop review. He had referred to photographs of the manufacturer's protections, from which he could tell what the products were and he had also spoken to the suppliers. Had MPX been asked to confirm the products in the atrium earlier, it could have done so.

Other evidence

Peter Dunbar

[94] Peter Dunbar is WSP's Head of Major Projects for Property & Buildings. He was the Project Director and Lead Structural Engineer for WSP on the QEUH project, working on the structural elements, while Kenny Hamill was the Lead Fire Engineer. WSP's appointment of 17 August 2010, included both civil and structural engineering, and fire engineering services. Although he said that his understanding was that NA were ultimately responsible for the coordination of the design, including the approval of all design drawings, he agreed that the contract was determinative of WSP's contractual duties. He agreed that if WSP proposed not to do what the contract required, it would have told MPX. If a subcontractor proposed a change to the specification, such as substituting a product which achieved the same specification for a lower cost, that change could only be sanctioned by the specifier, which for the cladding was NA. His view as to what the parties' respective responsibilities were was largely founded upon the Design Responsibility Matrix, and his interpretation of that was that it was for the architects to specify particular products. He also sought to draw a distinction between the WSP structural and fire engineering teams, but was constrained to accept that it was the same legal entity which was performing both functions.

[95] As regards the drawings, WSP was reviewing them only from a structural perspective. None of the drawings he had seen appeared to relate to the atrium cladding. In relation to the Aconex system, he accepted that status A meant "proceed with the works", but maintained that if a drawing had no relevance to WSP, it would require to be stamped with status A, which he equiparated with "no comment" so that the drawing could proceed

to the next person in the workflow. However, that appeared to be at odds with a drawing which he was shown, which WSP had stamped, in terms, "no comment".

[96] In Mr Dunbar's view, the certificate signed by WSP on 22 January 2015 related to WSP's Structural Consultancy Services only and certified that exercising the standard of reasonable skill, care and diligence required the design fully complied with all of the requirements and obligations under WSP's appointment.

Kenny Hamill

[97] Kenny Hamill is a fire engineering consultant, employed by WSP from 2007 until 2015. He first became involved in the hospital project in 2009, becoming the fire engineer soon after. WSP's role was that their design should meet the relevant Building Regulations and apply the relevant technical guidance. WSP were the lead for the fire strategy. Whatever was in the fire strategy had to be on the drawings, which was the responsibility of the architect and the other consultants. As fire engineers, WSP's role was high level: they would set out what the design had to achieve for the fire strategy to work, and the performance which materials being used should achieve, but, as fire engineers, they would not specify the materials themselves. That was for the architect or other consultant to do, although he conceded that he had not seen a copy of the contract between NA and MPX, and his evidence came to be that whoever it was that identified a product was the person who was to take responsibility for establishing compliance with the contract. He did not know who in fact had specified the materials. He did not know that the architects had done an outline design, to be completed by specialist subcontractors. In relation to the atrium, the outline design said it was to be treated as an external space, which was to do with smoke removal in the event of a fire. In relation to the walls, the recommendation was that any

materials used should have reaction to fire classification of B-s3, d2 or better when tested under BS EN:13823 and BS EN ISO:11925-2 (Euroclass B). During the project, Building Control raised hundreds of issues. WSP would answer those which related to fire performance issues. If the question was on the specification of a material or what material was being used, that was something for NA to answer. As regards the Design Responsibility Matrix, he would have looked through it to see if there was anything unusual in it, but he did not recollect that there was.

Emma White

[98] Emma White is an architect employed by NA. She was the project lead for NA. She said that NA's appointment provided that it was responsible for the design of the works, architectural packages and the co-ordination of the design of other consultants, subcontractors, suppliers, authorities and other relevant parties/stakeholders into the overall design for the works. In accordance with its appointment, NA specified various products; the products specified within its concept design at the tender stage complied with the relevant fire performance requirements at the time. She was aware that "Alucobond" was sometimes used as a generic term (a la hoover/vacuum cleaner). NA did not assume responsibility for the work of specialist subcontractors (as distinct from coordination of that work). It was under no duty to expressly permit or to prevent the use of the installed ACM PE products. While she gave her own "take" on what NA's contractual obligations were, she accepted that the contract was determinative of those obligations. The fire safety elements were the responsibility of MPX which failing the fire engineer which it was obliged to employ. She did not accept that by assigning a status on the Aconex system to drawings which showed Alucobond products being used, NA had confirmed any acceptance of the

fire performance of any particular product. It was not possible to tell from the drawings whether the ACM specified on them was PE or not, but she accepted that NA did not draw that to MPX's attention at the time.

[99] In relation to her email of 11 April 2018, the point she was making was that an M1 classification could be class O or class 1. She agreed that Alucobond could be class O or class 1 and if it was class 1, there was a problem.

[100] In relation to the email exchange with Fergus Shaw on 29 and 31 August 2018, he had sent her the data sheets for three materials with his email. She had been asked to comment on the design from NA's perspective, and that is what she did. If she had formed the view that any of the materials were non-compliant, she would have pointed that out. Her email of 31 August 2018 related only to Alucobond, not Signi or Etalbond. She thought an earlier email had raised concerns over Signi. There was still uncertainty over some of the products but she agreed that her email of 31 August did not say that. She understood, in the context of the previous discussions they had had, why Fergus Shaw might have read her email of 31 August as referring to all three products.

Steven Devon

[101] Steven Devon is employed by JDP as its Cladding Division Manager. JDP was contracted to construct and install (among other things) the atrium bridge as well as 40 pods for the atrium. They were steel, box shaped frames, which were designed to be constructed off site and attached/suspended, at height, to the atrium bridge. They were designed by NA to form a striking architectural feature, and the colour was very important to GGHB. The bulk of his evidence was directed towards liability (and was doubly irrelevant insofar as he might have been taken to be expressing a view on the duties incumbent on WSP and NA).

However, he explained that the type of cladding originally proposed was Alucobond, but that Jim Murray suggested an alternative, Dibond, as part of MPX's value engineering approach, to achieve a substantial saving. Subsequently, that was changed to Etalbond, a fact which was known to Mr Murray. Calculations were done by consulting engineers on the properties of that product.

Derek Pierce

[102] Derek Pierce is the eponymous managing director of JDP. His evidence was largely aligned with that of Mr Devon. He confirmed that Mr Murray was at all of the meetings where the design of the pods was discussed. Jim Murray was looking to save costs by using an internal grade of façade as part of his value engineering approach. MPX directed JDP to the manufacturer of the products, Booth Muirie. Etalbond was eventually selected instead, due to availability in the requested colours.

The expert evidence

William Connolly

[103] William Connolly is the Principal National Fire Safety Advisor at NHSScotland Assure, a department of National Services Scotland set up 3 years ago with the purpose of assisting all health boards in Scotland. Between 2015 and 2017 he was the National Fire Safety Advisor with Health Facilities Scotland, and before that he worked for the Fire Service for 30 years in a variety of roles. He became involved with QEUH post-Grenfell, following the Scottish Government's directive that investigations be carried out to establish the nature of cladding on hospital buildings.

[104] His evidence consisted largely of an overview of CEL 11 and his interpretation of what it did, and did not, require of Nominated Officers (Fire) and Fire Safety Advisors appointed by individual health boards. In his witness statement, he expressed the view that, given the terms of the fire safety design strategy in place for the QEUH, the information available to GGHB within the O&M manual and the terms of the building documentation and approval process was that it would have been "reasonable and appropriate" for GGHB, and the appointed FSA, to assume that Euroclass B products had been installed in the atrium. It would have been reasonable to assume that the building had been constructed in accordance with the building warrant and relevant standards. He did not agree that the fact that the panels were coloured was, of itself, something which ought to have raised concerns, since panels could come in a variety of different colours. However, as already mentioned, his witness statement must be read alongside his joint statement with Mr Woods, in which he complemented and in some respects modified the views expressed in his witness statement.

[105] In his oral evidence, Mr Connolly accepted that CEL 11 had been issued because of problems having arisen previously with new-build hospitals. He agreed that an NHS Board must satisfy itself that construction works comply with all statutes. He agreed that the FSDS set out what should be done. GGHB should have received an assurance that materials installed were of the correct standard, and should have a signed declaration to that effect. In terms of CEL11, Annexe C, paragraph 7, he agreed that GGHB should receive a record of what had been installed. He agreed that one thing that should have been done in relation to QEUH was a review of the O&M files. A "suitably qualified" NOF was one who had an understanding of fire risk. A "specialist" Fire Safety Adviser was someone who was competent with experience of fire safety. The FSA should ensure that the materials used

were those in the fire strategy. GGHB should have known from the FSDS that the atrium was to be treated as an external space.

Hugh McNamara

[106] Hugh McNamara is a fire safety engineer. He had considered the question of what cladding products were in the atrium, and had reviewed the O&M and as-built documentation. In summary, his opinion was that the atrium cladding information produced by MPX at completion was lacking and of an inadequate quality. As such, MPX had not evidenced how it had met its obligations under Appendix R (Fire Strategy) of GGHB's requirements. As regards Alucobond, he had had to resort to the maintenance section of the O&M manual to establish that it was PE. It was unusual to have to delve that far into the manual to find that out. As regards Signi and Etalbond, which made up about 78% of the atrium cladding, no product information had been produced. Signi was mentioned only on drawings (which were in the "as-built" folder but which were not stamped "as-built", and which therefore had to be treated with caution) and Etalbond was mentioned nowhere. He was unable to ascertain the reaction to fire classification from direct discussions with the manufacturers. Accordingly he had ultimately required to conduct more detailed investigations, by retrieving product samples from site for laboratory testing, in order to establish the likely reaction to fire performance of those products, and their (non)compliance with the WSP Fire Strategy. None of Signi, Etalbond or Standard Alucobond were considered to meet Euroclass B. He conceded that, contrary to what he had stated in his report of 31 October 2024 at paragraph 3.3.13, the Alucobond brochure did contain the European Standards reaction to fire classification, but said that it was still preferable to have a classification certificate rather than what happened to be in a

manufacturer's brochure. He agreed that anyone wishing to find out the classification of the products could have carried out the same enquiries he had made, albeit those enquiries had lasted from September 2022 until Easter 2023.

Neil Woods

[107] Neil Woods, a Fire Risk Assessment manager, prepared two reports dated 14 August 2024 and 10 January 2025 in which he expressed an opinion on the duties incumbent on GGHB by virtue of CEL 11. He adopted the terms of those reports, and spoke to the Joint Statement of himself and Mr Connolly. The substance of his opinion was that, having regard to the duties imposed by CEL 11, he would have expected a reasonably competent Fire Safety Adviser to have looked at the drawings and reviewed the information therein; and thereby to have identified that there were inaccuracies in, and omissions from, the O&M manual, the "red flags" including the reference on a drawing to Signi and the uncertainty over which Alucobond product had been installed. It was incumbent on GGHB, by virtue of CEL 11, to ensure that it had got what it had contracted for; and also to keep a permanent record of what had been built. He would also have expected a fire risk assessor to have investigated the nature of the material installed. It was not enough in either case to assume that the atrium as built corresponded to the FSDS. Reliance on regulatory approval was insufficient. A purely visual inspection by a Fire Risk Assessor was also insufficient. A Fire Risk Assessor walking into the atrium would know that it was a fire-engineered space and would want to know that the FSDS had been complied with, which would require an understanding of the materials installed.

[108] In cross-examination, Mr Woods conceded that he had been asked to proceed on two hypotheses, namely, that the information in the O&M manual was inadequate and that the

ACM material which had been installed was disconform to the contract. He did not accept that he had reached his conclusions by applying hindsight and that he had not properly applied his mind to what an FSA ought to have done in 2015, but he adhered to his position that he had considered the approach which ought to have been taken by a reasonable FSA. He conceded that when he considered the matter, he already knew that the reference to Alucobond PE was to be found in the maintenance section of the manual. However, it was reasonable to expect someone reading the manual with due diligence to have picked up on the inconsistencies and inaccurate information. He agreed with a hypothetical scenario put to him that if someone in 2018 had known that the O&M manual was inaccurate and that that had potential implications for fire safety, it would have been reasonable to have told GGHB; likewise if someone had expressed the opinion that there was a possibility that the Signi was non-compliant. He also substantially agreed with a proposition put to him that there were three opportunities for GGHB to have ascertained the true nature of the materials installed: the pre-hand over compliance checks pursuant to CEL 11; the review of the O&M manual; and during the first or subsequent fire risk assessments.

Kenneth Williamson

[109] Kenneth Williamson, architect, adopted his report of 12 December 2024, in which he expressed an opinion on various matters, including the duties incumbent on NA, what could be taken from (a) the Design Compliance Certificate signed by NA and (b) the email of 31 August 2018, and whether MPX could have discovered the "error" in the cladding materials sooner than it did. He accepted in cross-examination that insofar as he expressed views on what the contract or other documents meant, that was simply his "take" and that ultimately construction of documents was a question for the court. He also accepted that he

was expressing a view as an architect, not as a builder and that his comments about what MPX should or should not have done should be viewed in that light.

Objections to evidence

[110] The following objections to evidence remained extant at the conclusion of the proof, and now require to be dealt with.

William Connolly and Neil Woods

[111] I will deal with these objections together, as Mr Connolly's evidence was led by GGHB largely to combat the evidence of Mr Woods, and, as MPX submits, their evidence turned out to be aligned on many issues. GGHB objects to the evidence of Mr Woods. The basis of that objection is that the criteria in *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59 are not satisfied, principally because, it is said, Mr Woods' evidence does not assist the court: the questions asked of him in preparing his report were said to be loaded, and invited him to usurp the function of the court by expressing an opinion on matters of law; the court could read CEL 11 for itself and did not require evidence to assist it in that task; and insofar as Mr Woods had no experience of any Scottish NHS projects he was not appropriately qualified to give evidence in this case.

[112] Although MPX has dropped its objection to Mr Connolly's evidence, WSP adopted that objection, in which it insists. The grounds of the objection broadly mirrored GGHB's objections to Mr Woods' evidence, with the additional objection that Mr Connolly, being employed by NHSScotland as its Principal National Fire Safety Advisor, is not truly independent and as such is not a person entitled to offer opinion evidence to the court.

[113] In allowing the evidence of both Mr Woods and Mr Connolly to be led under reservation, I expressed the view that both appeared to have the necessary knowledge and experience to qualify them to give opinion evidence, and that fire safety and fire engineering appeared to be a discernible area of expertise; and that it could not be said in advance of the proof that their evidence would not assist the court. Many if not all of the objections advanced by GGHB were matters which could properly be explored in cross-examination (as indeed they were) and went to weight rather than admissibility. I have no reason to modify those views having heard the evidence in question, which I did find to be of some assistance, albeit the meaning of CEL 11 is ultimately a matter for the court. Accordingly, I now repel GGHB's objection to Mr Woods' evidence, and that part of WSP's objection to Mr Connolly. As far as Mr Connolly's impartiality and independence are concerned, I also expressed the view at the objections hearing that it would be better to allow that to be explored in cross-examination and in submissions after all the evidence had been heard. While not exactly in point, cases such as *Field* v *Leeds City Council* (2000) 32 HLR 618 and *Somerville* v *McGuire* [2020] CSOH 70 support the proposition that the opinion evidence of a witness employed by a party is not necessarily inadmissible. In the event, much of the cross-examination of Mr Connolly was indeed directed at challenging his status as an expert, and in particular whether he could truly be regarded as independent and impartial. He said that although GGHB fell under the auspices of the NHS, he was independent of it. He had initially been a factual witness (when preparing his witness statement) but had become an expert one. Before the joint note was finalised, he had sent it to a colleague to check it, as part of NHSScotland Assure's quality assurance protocol. He had also sent a copy to the Board's solicitors. He became defensive when asked if the statements attributed to him in the joint statement superseded his witness statement in the event of any inconsistency,

insisting that both be read together. While the concept of a factual witness somehow metamorphosing into an expert is an unfamiliar one, and it is not ideal that Mr Connolly's statement was sent to a colleague for checking, I am satisfied that he was doing his best to assist the court and that he gave his evidence in a non-partisan manner, not least since on many issues his evidence turned out not to be of assistance to GGHB. I therefore repel the objection to his evidence. To the extent any criticism of his evidence is justified, it goes to weight rather than admissibility.

Tom Steele and Hazel McIntyre

[114] MPX objects to the evidence of Tom Steele and Hazel McIntyre on the basis that both purported to give evidence about matters in which they had no direct involvement. To the extent that neither sought to speak to what GGHB thought or did in relation to the matters in question, MPX acknowledges that these objections have little practical significance. NA also objects to Ms McIntyre's evidence where she referenced a delay by MPX in the provision of information to GGHB about the products installed in the atrium. To the extent that the evidence given by Mr Steele and Ms McIntyre was hearsay evidence, it is admissible, and the objections raise matters which go to weight rather than admissibility. I therefore formally repel the MPX objection. As regards the delay in the provision of information, that is relevant to the issues of error and reasonable diligence, and I repel that objection (I have ignored, as irrelevant, Ms McIntyre's expressions of shock and disappointment regarding the delay).

Mary Anne Kane

[115] NA objects to part of Ms Kane's evidence where she said what GGHB would have done, and what Gilbert Donnelly *would have* discussed, which is not evidence based on her own direct knowledge. Whether that evidence is strictly admissible or not is immaterial, since I attach no weight to it: it amounts to no more than speculation on her part.

Emma White and Kenneth Williamson

[116] MPX and WSP object to the evidence of Emma White and Kenneth Williamson insofar as directed towards the scope of NA's contractual obligations (which in the case of Mr Williamson, is the entirety of his evidence), which, it is said, relates to the question of liability, which is beyond the scope of the present proof. NA counter that by submitting that the purpose of the evidence is not to challenge MPX's case on liability, but to assist the court in determining the merits of MPX's reliance on section 6(4) of the Prescription and Limitation (Scotland) Act 1973; since MPX avers that it was induced into error by, *inter alia,* NA's having sought payment for the provision of its design services, by a collateral warranty warranting compliance with NA's contractual obligations and by a letter certifying compliance with its prepared design, it was necessary to place these purported sources of error in their proper contractual context; that would assist the court in determining whether MPX had in fact relied on NA's words or conduct, and/or whether MPX erred as a result of its own misunderstanding of NA's obligations. NA also points out that many of MPX's witnesses themselves express a view on NA's design or reviewing functions; and so, if Ms White's and Mr Williamson's evidence were to be disallowed, the evidence of those witnesses, to that extent, would also be inadmissible.

[117] While any findings on liability would be beyond the scope of the present proof, I consider that there is some merit in NA's submissions. Particularly in the context where MPX witnesses say that they were led into error by certain things that NA did, it is relevant to have regard to evidence which may lead to a contrary finding. I therefore repel the objections to the evidence of Ms White and Mr Williamson.

Kenny Hamill and Peter Dunbar

[118] MPX object to the evidence of Kenny Hamill, Peter Dunbar and Kenneth Williamson insofar as directed towards whether or not WSP complied with its contractual obligations. I repel that objection for the same reason as in relation to the evidence of Ms White and Mr Williamson.

Prescription – the applicable legal principles

[119] As senior counsel for MPX put it at an earlier hearing, the prescription path has been well trodden by the courts in recent years, with the result that the principles are relatively straightforward to state, if less easy to apply.

[120] By virtue of section 6(1) of the 1973 Act, read with section 6(3) and para 1(d) of schedule 1, an obligation to make reparation is extinguished if, after the appropriate date, it has subsisted for a continuous period of 5 years without any relevant claim having been made in relation to it (or a relevant acknowledgement having been made, but no question of that arises in the present litigation). Section 11(1), insofar as material, provides that any obligation to make reparation (whether arising in delict, or by reason of any breach of contract) shall be regarded as having become enforceable on the date when the loss, injury

or damage occurred. That is the date when there is concurrence of *injuria* and *damnum*: *Dunlop* v *McGowans* 1980 (SC) HL 73.

[121] The ticking of the prescriptive clock may be postponed or suspended. The version of section 11(3) which applies to this action (it has subsequently been amended) operates so as to postpone the commencement of the prescriptive period. It provides that where, on the date when the loss, injury or damage occurred (that is, when there was concurrence of *injuria* and *damnum*), the creditor was not aware, and could not with reasonable diligence have been aware, that loss had occurred, prescription does not start running until the date when the creditor first became, or could with reasonable diligence have become, so aware. That does not mean that prescription does not start running until the creditor knows or ought to know that something has gone wrong or that he has suffered detriment, let alone that any such detriment was caused by an actionable wrong; all that is required is that the creditor is aware of the objective facts that constitutes loss, injury or damage caused by the wrongful act or omission*: David T Morrison & Co Ltd* v *ICL Plastics* 2014 SC (UKSC) 222*; Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287*; Midlothian Council* v *Raeburn Drilling and Geotechnical Ltd* 2019 SLT 1327*; WPH Developments Ltd* v *Young & Gault LLP* 2022 SC 28*; Tilbury Douglas Construction Ltd* v *Ove Arup and Partners Scotland Ltd* 2024 SC 383.

[122] Section 11(2) also operates to delay the commencement of prescription. As it applies to this action, it provides that where as a result of a continuing act, neglect or default, loss, injury or damage has occurred before the cessation of that act, neglect or default, the loss injury or damage is deemed to have occurred on the date when the act, neglect or default ceased.

[123] Section 11(2) or (3), where one of them applies, thus delays the date when prescription starts to run. Where prescription has started to run, it may be suspended – the metaphorical prescriptive clock may stop ticking – where section 6(4) applies. It provides:

> "In the computation of a prescriptive period in relation to any obligation for the purposes of this section -
>
> (a) any period during which by reason of
>
> (i) fraud on the part of the debtor or any person acting on his behalf, or
>
> (ii) error induced by words or conduct of the debtor or any person acting on his behalf
>
> the creditor was induced to refrain from making a relevant claim in relation to the obligation...
>
> shall not be reckoned as part of the prescriptive period:
>
> Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph."

[124] A liberal approach should be taken to what constitutes "conduct" for the purposes of subsection (4), and the conduct need only contribute to any error on the part of the creditor in the obligation, rather than be its sole cause: *Heather Capital Ltd (In Liquidation)* v *Levy & McRae* 2017 SLT 376, paras [63] and [64]. For the creditor to be able to take advantage of the provision, he need not show that the induced error caused him to take a conscious decision not to press the claim; an error as to the existence of the obligation will suffice: *BP Exploration Co Ltd* v *Chevron* 2022 SC (HL) 19, Lord Hope of Craighead at para [33]. The error must, however, relate to the creditor's rights and remedies: *Tilbury Douglas Construction Ltd* v *Ove Arup & Partners Scotland Ltd* 2024 SC 383. In that case, assurances given by a subcontractor that its design remained valid (when it did not) were held not to have induced the sort of mental state envisaged by section 6(4): *ibid*, para [62].

[125] As the proviso to section 6(4) makes clear, the pausing of the prescriptive period will end when the creditor could with reasonable diligence have discovered the error. The onus

is on the creditor to aver, and prove, circumstances capable of bringing the case within the ambit of section 6(4); but if it does so, the onus of proof in relation to the proviso is on the debtor: *Highlands and Islands Enterprise* v *Galliford Try Infrastructure Ltd* 2023 SLT 1077, Lord Sandison at para 17.

[126] For a creditor to be able to rely on section 6(4), it must prove (1) that there was a period when it laboured under an error as to the scope of its remedies; (2) that the debtor caused or induced that error by words or conduct; (3) that the error so induced was the reason the creditor did not make a claim; and (4) when the period of error began and ended (or should, through the exercise of reasonable diligence, have ended): *Tilbury Douglas*, above, para 50; *Adams* v *Thorntons WS* 2005 1 SC 30, para 66. On that last point, it is important to note that prescription will begin to run from the date when the creditor had actual or constructive knowledge of the true position, the creditor then having the prescriptive period (or what remains of it) to "get their ducks in a row": whether he is in possession of all the material facts with which to establish a *prima facie* case is immaterial: *Glasgow City Council* v *VFS Financial Services Ltd* [2022] SC 133, paras [52] and [53].

Decision

The principal claim

When did prescription begin to run?

[127] The competing dates for the concurrence of *injuria* and *damnum* are (a) no later than January 2013 (the date contended for by MPX) and (b) 26 January 2015, the date contended for by GGHB. The earlier date is approximately when GGHB first paid MPX for non-compliant cladding, viz, Signi installed in the cores; the latter date is the date of sectional (ie practical) completion.

[128] GGHB argues, under reference to *Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Ltd* [2017] CSOH 57, Lord Doherty at para [55], and Johnston, *Prescription and Limitation (2nd Ed)*, paras 4.08 and 4.14, that in a building contract, the contractor's liability for not completing works in accordance with the contract will normally arise not on the date when the defective work was carried out, but on the date of completion. Senior counsel for GGHB referred to those provisions of the contract which required MPX to complete the works in accordance with the Works Information, which were the provisions said to have been breached; until sectional completion, any disconformity could have been rectified and was not necessarily a breach. MPX retorts that neither *Huntaven* nor Johnston lays down a rule of universal application and that one must have regard to the terms of the contract itself; in the present case, MPX was under an obligation not only to complete the works but to design them, Articles 13 and 14 of the summons made clear that it was the design obligation which MPX was alleged to have breached; the matter could be tested by asking if MPX could have been sued for their defective design at any time after January 2013, the answer to which was clearly yes.

[129] As is clear from both Johnston and from Lord Doherty's approach in *Huntaven*, the date when an obligation became enforceable must be ascertained by construing the contract in question. It is true, also, that in Articles 13 and 14 of the summons, GGHB complains of the atrium cladding as designed and constructed by MPX. That said, in Article 14, GGHB avers that "[t]he use of the PE ACM is disconform to [MPX]'s own FSDS" which is not an averment of breach of design, but of a failure to comply with the design.

[130] The core obligation on MPX was to provide the works, as required by Clause 20.1 of the NEC Contract (above, para [14]). That included both a design and a construction, element, but it is significant that MPX was not to proceed with work until its design had

been accepted by the project manager; and that a reason for not accepting the design was that it did not comply with the Works Information. Thus, I do not accept MPX's submission that it would have been open to GGHB to sue MPX in respect of a defective design before the date of sectional completion; but even if that is wrong, MPX remained under an obligation to provide the works, as contracted for, at practical completion. In any event, the averment that the cladding was disconform to the design is a complaint about the construction, rather than the design.

[131] For these reasons, on this point I prefer GGHB's submissions. Accordingly I find that the earliest date on which prescription began to run is 26 January 2015 (subject to any postponement of that date through the operation of section 11(3) of the 1973 Act, to which I now turn).

Section 11(3)

[132] In their written and oral submissions, counsel for GGHB launched a belated attempt to rely upon section 11(3), apparently in the hope, whether forlorn or not remains to be seen, that the by now well-established approach laid down by the Supreme Court in the line of authorities ending in *Gordon's Trustees*, above, might be revisited by that court in *Tilbury Douglas*, above, following its granting of permission to appeal in that case.

[133] The short answer to the argument, as senior counsel for MPX observed, is that GGHB has not pled a section 11(3) case. A slightly longer answer is that anticipated by counsel for GGHB, namely, that GGHB was objectively aware of the facts which constituted its loss by 26 January 2015 – that it had taken possession of a hospital which was (taking GGHB's averments *pro veritate*) disconform to contract – and that, as the law currently stands, it cannot pray in aid section 11(3). Finally, even if the section might have been of assistance to

GGHB, it would founder on the "reasonable diligence" aspect of the test, for the same reasons as I give below in relation to section 6(4).

[134] For these various reasons, I find that GGHB cannot rely on section 11(3) in order to delay the commencement of prescription beyond 26 January 2015. That being some 7 years, one month and 7 days before the action was served, for its claim to survive GGHB must show that prescription was suspended for at least 2 years, one month and 7 days by the operation of section 6(4), to which I now turn.

Section 6(4)(a)(ii)

[135] As set out above, the key elements of section 6(4) are that the creditor must have been induced into error by the debtor which in turn induced the creditor to refrain from making a claim. That requires a representation of some sort by the debtor which led the creditor to fall into error as to the existence of a claim or a remedy.

[136] The leading authority on the construction of section 6(4) is the House of Lords case of *BP Exploration Co Ltd* v *Chevron* 2002 SC (HL) 19, where what was under consideration was the meaning of "refrain", it being held that there is no requirement that there be a conscious decision by the creditor not to make a claim, but that section 6(4) could apply where the creditor was unaware of the obligation because its existence was concealed from him by the debtor's fraud: Lord Hope at [31].

[137] Since *BP Exploration*, the type of conduct which is required on the part of the debtor in order to engage section 6(4) has been the subject of discussion in several Inner House cases. In *Dryburgh* v *Scotts Media Tax Ltd* 2014 SC 651 Lord Drummond Young, in delivering the opinion of the court, and under reference both to the report of the Scottish Law Commission, *Reform of the Law Relating to Prescription and Limitation of Actions*, and to

Caledonian Railway v *Chisolm* (1886) 13 R 773, said, at paras [18] to [20], that a purposive approach should be taken to the construction of section 6(4), the purpose of which was to ensure that as a matter of basic fairness a creditor should not be prejudiced by delay caused by the debtor. In *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Stream Ltd* [2011] CSIH 26 the conduct relied upon was the repeated issuing of charge notices by Scottish Water for services which had not in fact been supplied, the Inner House holding that the pursuers were entitled to seek to establish that they had been induced to refrain from pursuing a claim by that conduct; and that the implicit representation contained in each notice not only induced payment but also induced error (para [18]).

[138] Most recently, in *Tilbury Douglas*, above, the Inner House expressed the *obiter* view at para [61] that it is doubtful that section 6(4) is aimed at conduct as everyday as providing services and accepting payment therefor, or, for that matter expressing confidence in one's work (para [62]). Lord Malcolm observed at para [61] that if merely sending an invoice in respect of what turns out to be defective work is sufficient for the purposes of section 6(4), not many prescriptive periods will commence. That reasoning was reinforced in the Statement of Reasons issued on 20 September 2024 in refusing permission to appeal to the Supreme Court, Lord Malcolm this time stating at para [5] that it cannot have been Parliament's intention that section 6(4) would operate in circumstances where a defender has merely made an assertion to the effect that he has performed his obligations or has not been negligent.

[139] In *Tilbury Douglas*, at [61], the Inner House dismissed *Rowan Timber Supplies* as being a very different kind of case. Counsel for GGHB took issue with that description of it, but the facts in that case were on any view unusual and anyway each case must ultimately turn on its own facts. As counsel for NA submitted, the conduct relied on for the purposes of

section 6(4) must be viewed objectively (*Heather Capital*, above, para [64]), from which it follows that the conduct founded on must have been sufficient to induce an objective reasonable person into error. It is perhaps this requirement which explains why normal everyday conduct is insufficient to engage section 6(4), since such conduct will not generally, viewed objectively, be sufficient to induce error.

[140] Further, *Tilbury* makes clear, at paras [53] to [60], that a creditor who seeks to rely on section 6(4) must lead evidence in order to establish that the debtor caused an error on its part which induced it to refrain from making a claim. At para [56] the Inner House expressly eschewed any notion that *BP Exploration* was authority for the proposition that an erroneous state of mind need not be established. *Dryburgh* v *Scotts Media Tax*, above, paras [21] to [24] dealt with how the state of mind of a corporate body (which GGHB is) might be established: namely, either through the state of mind of a particular individual or group of individuals that forms the directing mind and will of the body; or, applying the law of agency, where responsibility for the particular area in question falls on particular officers or employees, through the state of mind of those persons.

[141] In the present case, GGHB did not lead evidence from any Board member, nor did it lead any evidence as to what the Board's state of mind actually was, (as opposed to what it "would have been", which several witnesses purported to speak to). It now seeks to argue that the witnesses who did give evidence were officers or employees of the company who were acting as its agents. There are at least two difficulties with that approach. First, it is not foreshadowed to any extent in the pleadings. Second, none of the witnesses gave evidence that they were in fact induced into error, at the time, by any of the things now relied upon by GGHB as having induced error on its part. That is essentially fatal to GGHB's claim that prescription was suspended through the operation of section 6(4). The

submission for GGHB is that its error lay in not knowing (a) that the cladding panels were of the ACM type, (b) that the panels had a polyethylene core and (c) that they did not meet the Euroclass B standard. There is no doubt that none of the witnesses led on behalf of GGHB knew any of those things, but that in itself is not sufficient to bring section 6(4) into play. Ignorance of a state of affairs is not necessarily the same as labouring under an error as to that state of affairs. If I venture outside without an umbrella, not knowing whether it is raining or not, I cannot to be said to have been in error as to the weather conditions. On the other hand, if I am told that it is sunny, when in fact it is raining, then I will have ventured out under error. For this reason, it does not avail GGHB for Mr Steele to say, as he did, that had GGHB known of the issue with the atrium cladding, that issue would have been included in the 2020 action. That is no doubt true, but GGHB must go further than simply showing it was unaware of the issue.

[142] Considering GGHB's argument in more detail, it relies on both active and passive representations by MPX which it argues induced error on its part. These representations, which GGHB argues should be viewed as a continuum over a period of time, are:

a. The submission by MPX on 5 February 2015 of an assessment of its work, seeking payment for work including the cladding, which GGHB submits implicitly represented that the cladding work had been done in accordance with the contract.

b. The submission of a building warrant completion certificate by MPX on 15 December 2016, which preceded the final defects certificate on 15 February 2017 following which MPX again sought payment, and was paid. GGHB argues that these acts amounted to further representations to GGHB, since the application for a completion certificate carried a representation that the work

had been done in accordance with the building warrant, and therefore in accordance with the FSDS, which referred to Euroclass B. Neither this, nor the applications for payment, could be regarded as routine in a contract of this complexity.

c. The provision of misleading information in the O&M manual.

d. The provision of a copy of the final version of the FSDS on 31 August 2016, thus representing that the fire safety design strategy met GGHB's fire safety performance standards.

e. Mr Tuckett's email of 13 July 2017. GGHB argues that this was an important email because, although sent in the context of a review into the external cladding, it was unequivocal, unqualified in that it was not limited to the external cladding and the cladding that was on the external façade included Alucobond PE which was the very same product that was part of the cladding in the atrium.

f. Mr Powrie's conversation with Mr Wales.

g. The failures by MPX to tell GGHB what it knew. Two dates are identified by GGHB as the possible starting point for error induced by MPX's silence: 16 June 2017, when the Scottish Government issued a request for information relating to the use of ACM products on NHS Scotland buildings, marking the beginning of the investigation into the presence of ACM products in hospitals; and 19 March 2018, said to be the date on which MPX knew that ACM panels were installed in the atrium.

[143] MPX argues that none of these is capable of engaging 6(4) for the following because, in relation to the application for payment, and the application for a building warrant, these

were simply everyday routine matters which were not out of the ordinary, and in any event none of the circumstances prayed in aid were in fact spoken to as having been relied upon by any of those witnesses who gave evidence.

[144] Dealing with each of the circumstances in turn:

The application for payment/completion certificate application

[145] I do not accept the submission of GGHB that the complexity of the contractual arrangements is relevant in assessing whether an action or step is routine or everyday. The question rather is whether it was routine in the context of the particular contract under consideration. I consider that both the application for payment and the submission of the completion certificate application were, in the context of the contract, routine acts which were, viewed objectively, not such as to induce error in the mind of GGHB. Were it not so, echoing Lord Malcolm's obervation in *Tilbury Douglas*, no prescriptive period could have started to run in respect of *any* breach of contract by MPX, which can hardly have been the intention of the legislature. In any event, there was no evidence that either step led any individual within GGHB into error, far less GGHB as a corporate body. On the contrary, the application for payment was assessed by GGHB's agent, Currie & Brown, which negates any suggestion that any representation which was made by MPX was relied upon by GGHB, which was, rather, reliant upon Currie & Brown.

O&M manual

[146] The manual undoubtedly provided misleading information in that it did not specify which type of Alucobond was present in the atrium, misrepresented where Alucobond was present, gave inadequate information about Signi and did not specify Etalbond at all.

However, since there is no evidence that anyone from GGHB consulted it until 2021, when Mr Steele instructed Hazel McIntyre and Ian Powrie to do so, and it was only then that the inadequacy of the manual was discovered, its inadequacy in 2015 does not assist GGHB in suspending prescription. GGHB cannot have been induced into error by something of which it was unaware. Counsel for GGHB set much store on the fact that MPX was under a contractual obligation to populate the O&M manual on Zutec, which it was, and the fact that no explanation was provided in the evidence as to why that obligation had not been complied with, which is also true. Nonetheless, breach of that obligation, while potentially giving rise to a separate claim for breach of contract, does not avail GGHB under section 6(4). GGHB may have assumed that MPX would have complied with its contractual obligations – indeed, the GGHB employees who gave evidence did make that assumption – but any error in that regard related to the quality of the manual, rather than to the nature of the cladding products installed in the atrium.

The FSDS

[147] There was no reliable evidence that anyone within GGHB was induced into error by the provision of the FSDS on 31 August 2016. The individual responsible for reviewing the FSDS during the construction and handover phase was Gilbert Donnelly, but he was not led as a witness. What he would have done is no more than speculation.

Mr Tuckett's email of 13 July 2018

[148] There are several reasons why I am not prepared to find that Mr Tuckett's email of 13 July 2018 induced error on the part of GGHB. First, it was an internal email, clearly written in an attempt to influence what GGHB did, or did not, say to the press. Second, it

appears to be recording statements which had previously been made, rather than purporting to make a fresh representation about what had been installed. Third, it was written in the context of a review into the external cladding, not the cladding in the atrium. Finally, consistently with the purpose for which it was written, it was sent to GGHB's media representative, Ally McLaws. There was no evidence that anyone from GGHB, other than him, saw it at the time, let alone relied upon it. Mr Steele's evidence as to what "would have" happened is an insufficient basis to hold that the email induced any error on the part of GGHB.

The conversation between Mr Powrie and Mr Wales

[149] I have dealt with this conversation at paras [42] to [44]. In short, I do not consider that it can be imbued with the significance now sought to be attributed to it by GGHB. Mr Powrie said that he mentioned it to David Loudon, but he was not a witness. There was no evidence that the conversation played any part in Mr Loudon's thinking. The conversation took place in the context of a review into the external cladding. Mr Powrie has attributed more significance to the conversation with hindsight than he did at the time.

MPX's silence

[150] As regards MPX's silence, the first date identified by GGHB as a possible starting point for error induced by that can quickly be discounted since GGHB was as able as MPX to know that the FSDS treated the atrium as an external space which ought to have been investigated (see para [47]). The second date, however, merits more discussion as it is undoubtedly the case that MPX was aware of a possible issue with regard to the atrium which it did not disclose to GGHB for almost three years. In reliance on *Stag Line Ltd* v *Tyne*

Ship Repair Group Ltd [1984] 2 Lloyd's Rep 211 at 218, senior counsel for GGHB submitted that the potential fire risk posed by the installation of PE ACM panels in the atrium imposed a duty on MPX to disclose its 2018 findings to GGHB at the time. The facts of *Stag Line* were not wholly dissimilar to those of the present case, inasmuch as ship repairers, in executing a repair to the ship's stern tube, had used a material which was disconform to the contract, and which had not been approved for use by Lloyd's Register. Staughton J held that in the circumstances, bearing in mind the unlikelihood of the stern tube being examined and the possible danger to life at sea as well as to very valuable property, the ship repairers had been under a duty (arising from an implied term in the contract) to inform the owners that the wrong material had been used. Several comments may be made about that. First, Staughton J reached that conclusion after observing, I suggest correctly, that it was a "novel concept" that a contractor who has broken his contract may be under a duty to inform the other party, and that no authority to that effect had been cited. The examples he gave of a car manufacturer recalling cars of a particular model for some modification, or of a builder of a block of flats who learns of a serious error in construction being "well-advised" to tell his employer do not in themselves justify the implication of an implied term; in those examples, should the car manufacturer or builder not take positive action, and serious injury or death were to result from a car malfunction, or a building collapse, they may be liable on grounds other than breach of contract. Second, even if this court were to follow the same approach as in *Stag Line*, by implying a term into the contract that MPX ought to have informed GGHB of the possible problem in the atrium, it does not follow that its failure to do so led to induced error, the more so since GGHB was unaware of the fact that MPX was even investigating the cladding in the atrium. Its belief, to the extent that it held a belief, was therefore the same before and after the investigation. Any failure to comply with an

implied term would simply be a breach of contract, giving rise to a potential new claim, as distinct from interrupting the running of prescription on an existing one. Third, to the extent that Staughton J relied upon the unlikelihood of the breach coming to light, if that is relevant to it as a feature which is not present in this case given the requirement on GGHB to carry out regular fire risk assessments. Fourth, as senior counsel for MPX submitted, if GGHB's argument were correct, virtually every section 6(4) case would become self-proving. Finally, it is one thing to say that MPX might have been well-advised to have alerted GGHB to the potential difficulty in 2018, quite another to say that their failure to do so gave rise to any cause of action against them, let alone that it induced error such as to interrupt prescription. I find that there is no principle of Scots law which requires a party to a contract to act against its own interest; even if there was such a principle which could arise in certain special circumstances, it has no bearing on the operation of prescription; and MPX's silence in March 2018 (or, for that matter, throughout the whole of the prescriptive period) was not such as to trigger the operation of section 6(4).

[151] In summary, I find that GGHB has not brought itself within section 6(4)(a)(ii) of the 1973 Act. The consequence of that is that the claim in respect of the atrium cladding has prescribed, and MPX is entitled to decree of absolvitor. Likewise the downstream parties are entitled to decree of absolvitor in respect of the third party notices served on them.

Reasonable diligence

[152] However, lest I am wrong in reaching that conclusion, I now turn to consider whether or not the evidence established that, in the words of the proviso to section 6(4), there was a time when GGHB could with reasonable diligence have discovered the error. If so, the period after that time is not excluded from the computation of the prescriptive

period, in other words, the prescriptive clock, having initially (hypothetically) been suspended due to induced error, would resume ticking once more. Depending on when GGHB was induced into error, and when it could have discovered its error, that might have been sufficient to rescue the claim. (As an aside, although the parties differed as to where the onus of proof lay in relation to the proviso, it is immaterial which is correct since I have reached my decision by having regard to all of the evidence which was led, rather than by deciding that one party or the other has failed to discharge an onus on it.)

[153] As noted above, the error GGHB claims to have been operating under was its not knowing that the cladding panels were of the ACM type which had a polyethylene core, and that they did not meet Euroclass B standard. The issue is whether those things, with the exercise of reasonable diligence, could have been discovered by GGHB sooner than the actual date of discovery, 9 February 2021, and if so, by what date?

[154] Reasonable diligence involves doing what an ordinarily prudent person in the position of GGHB would do having regard to all the circumstances; in other words, what was reasonable for GGHB in the particular circumstances of the case (*Heather Captital*, paras [72] and [73]).

[155] The argument is centred on CEL 11, and in particular, on the extent to which it required GGHB to carry out its own investigations into the as-built condition of the atrium. MPX and the downstream parties maintain that had GGHB fulfilled the duties imposed on it by CEL 11, it could have discovered its error – in other words, ascertained what products had actually been installed in the atrium, and their fire classification – either by the date of practical completion, or failing that, by November 2015 when the first fire risk assessment post-completion was carried out. GGHB responds that the difficulty the experts later had in identifying that the products installed did not conform to Euroclass B demonstrates that it

could not reasonably be expected to have discovered that same information sooner than it did; further, that it is hypocritical of MPX to expect more of GGHB than it itself achieved in 2018. The nub of the issue between the parties is whether GGHB has proved its averments that CEL 11 did not require it to go behind the information provided by MPX, and that it was entitled to rely on the O&M manual at handover and did so. In fact, three questions must be considered. Did GGHB comply with CEL 11? If not, was that a failure to exercise reasonable diligence within the meaning of the proviso? And, had it done more, what could it reasonably have discovered (and when)?

[156] As regards the first of these, GGHB's position is undermined by the terms of CEL 11 itself and by the evidence of the experts Mr Connolly and Mr Woods, and of Ms Kane. Paragraphs 8 and 9 of the letter, statements 3 and 5 of the policy, the introduction to Annexe C and paragraph 9 of that annexe all make clear that GGHB should not have assumed that the as-built condition of the atrium complied with the FSDS. GGHB's own witnesses, Ms Kane, Mr Steele and Mr Connolly, all accepted that the Board needed to know what was in the building and that the checks to be undertaken at the point of handover would have included review of the O&M files. Further, as CEL 11 also makes clear, a proper reference record of all installed materials requires to be kept. GGHB argues that it complied with this latter requirement in that it did keep a record in the form of the O&M manual, but it is implicit in CEL 11 that the record which is kept requires to be complete and accurate. As it was, the information in the O&M manual regarding the atrium was deficient in the manners recorded above. I have already made the point that, on the evidence, no-one from GGHB consulted the O&M manual until 2021, nor was there any evidence showing what steps GGHB took to ensure that MPX complied with its contractual obligation to upload the necessary information to Zutec. Rather, there was an assumption that the manual "would

have been" checked by someone. That runs entirely counter to the whole ethos of CEL 11 and I conclude that in failing to check the O&M manual, GGHB did fail to comply with that guidance.

[157] Separately, CEL 11 Annexe B para 6 required GGHB to ensure that the NOF ensured that suitable and efficient fire risk assessments were carried out. Mr Woods was of the view that a pre-handover assessment should have been done, but in the event the first fire risk assessment was that carried out by William Russell on 2 November 2015. GGHB explains that as being down to the fact that the retail spaces in the atrium were not operational until then, meaning that an assessment before then would have been futile. For present purposes I am prepared to accept that. However, the pervasive assumption within GGHB that the FSDS had been complied with extended to Mr Russell, whose evidence was that he would have taken the FSDS as read, based upon it having been through the building control process and upon his visual inspection of the atrium seeking to identify higher-risk areas such as heavily painted or flock wallpaper surfaces. He could not say if he had consulted the O&M manual or not. Several sources of evidence point to that fire risk assessment being inadequate. First, Mr Woods was of the view that a visual assessment was not sufficient and that reliance on the building control process was inappropriate. His evidence was that a fire risk assessor carrying out an FRA in a fire-engineered space such as the atrium would check what materials had been installed. Second, others within GGHB, such as Mr Steele, clearly were of the expectation that the fire risk assessor would be completing a review of the O&M manual so that the fire risk was assessed on what had actually been installed. Third, the joint statement of the experts was to the effect that GGHB's fire risk assessor should have received an assurance from the board that a check had been undertaken that all statutory

requirements including building standards had been met and that the building was constructed in accordance with the FSDS.

[158] Accordingly, in the foregoing respects, GGHB did not comply with CEL 11. That leads to the question whether that was a failure to exercise reasonable diligence within the meaning of section 6(4). In other words, what would the reasonably competent Board, in the position of GGHB have done? Putting that another way, did CEL 11 impose a higher standard on the Board in the interests of public safety, than that imposed by section 6(4) for the purposes of prescription? Any argument which might have been open to GGHB along those lines was effectively shut down by Mr Connolly's acceptance that the steps required by CEL 11 were the steps reasonably required of the owner of premises – in other words, CEL 11 does not impose any higher standard on an owner than required by section 6(4).

[159] Turning to the third question, what could GGHB have discovered if it had exercised reasonable diligence by complying with the duties incumbent on it by virtue of CEL 11? GGHB argues that it was not possible to tell from the manual what products had in fact been installed, and since such information as did exist was tucked away in a section about cleaning instructions, it could not reasonably have been expected to identify from the manual what products had been installed, let alone that some of those products did not comply with Euroclass B (particularly when some of the Alucobond which had been installed did comply). It also points to the length of time it took Mr McNamara, once instructed, to identify the products which had been installed, and their classification. However, it is best to analyse what could have happened on a stage by stage basis. According to Mr Woods, anybody using due diligence in reading the manual would have identified the deficiencies in it – as in fact happened when Ms McIntyre and Mr Powrie were eventually tasked with consulting the manual to identify what products were installed in the

atrium. That would have led to inquiries being made as to what products had been installed, the obvious route being to ask the cladding contractors what products had been installed. Mr Shaw said that if MPX had been asked to confirm, shortly after handover, what products were present in the atrium, it would have done so (as he did in 2018 when tasked with the investigation).

[160] Obviously, there is a degree of uncertainty in trying to determine when the actual information would have been discovered. However, giving, GGHB the benefit of the doubt, and assuming that it would have taken, say, 6 months from November 2015 to establish the as-built condition, prescription would then have resumed running from May 2016. Even if that was also the start date for the running of prescription – in other words, assuming that any error under which GGHB was labouring was operative from 26 January 2015 – that is still more than 5 years before the action was served, and so GGHB's claim would still have prescribed.

[161] Thus, even had I found that GGHB had been induced into error by MPX, I would have found that, by virtue of the proviso to section 6(4) the claim had in any event prescribed.

[162] There are several further matters to deal with for completeness. The first is to consider what the position would be if I were wrong in holding that MPX's silence from 2018 to 2021 was incapable of inducing error in the mind of GGHB. Senior counsel for GGHB submitted that even if I were to find that, with reasonable diligence, GGHB could have discovered its error in 2015/16, the non-disclosure, in 2017 and 2018, of the outcome of the MPX investigation, was a fresh inducement of error which would have suspended prescription of new. MPX and the downstream parties argue that if reasonable diligence had been exercised, the error would have been discovered for all purposes going forward,

and in any event that there was no evidence of a fresh error having been induced by the silence of 2017 and 2018.

[163] On this matter I prefer the submissions of the MPX and the downstream parties. The GGHB position does not withstand any scrutiny. If, as must be assumed for present purposes, GGHB had discovered the true nature and classification of the materials installed in the atrium before 2017, then it cannot possibly have been induced into error by a subsequent omission on the part of MPX to inform GGHB of the outcome of an investigation in 2018 of which it knew nothing in the first place; and so the separate inducement argument simply does not get off the ground.

[164] The second matter to deal with is the additional claim introduced by adjustment in May 2024. The averment in question is one which states that the failure of MPX to install atrium cladding meeting Euroclass B is a breach of MPX's obligation under section 2.2.10 of the Employer's Requirements to procure that its design and construction were at all times performed in compliance with all Law and Consents. Senior counsel for GGHB submitted that all that the adjustment did was to make specific what was already there. The summons already contained a reference to a separate provision of the contract – 5.1.4.1 – which also referred to the requirement to comply with all Law and Consents. The pursuer was simply referring to the same failure in a different context.

[165] I reject this submission for the reason submitted by senior counsel for MPX, namely, that in considering prescription, one must look at the obligation which was breached rather than the conduct which led to that breach. The averment introduced by adjustment does make reference to a distinct obligation which GGHB had not previously contended had been breached. In calculating the prescriptive period for breach of that particular obligation, the relevant claim was therefore not made until 22 May 2024. That makes no difference to my

decision, given the view reached on other matters, although it would mean that even had I been with GGHB on everything else, I would not have allowed the averment in question to be admitted to probation.

[166] The final matter to mention is that both GGHB and MPX made submissions under reference to *SSE Generation Ltd* v *Hochtief Solutions AG* 2018 SLT 579; each party inviting me to draw an inference in its favour because of the failure of the other to lead a material witness. (What the Lord President (Carloway) actually said in that case (at para [275]) was that where the party upon whom the onus lies, does not lead his protagonist, the court can draw an inference adverse to that party's interests, and could thereby hold that the other party's case was thus made out.) Insofar as GGHB's evidence is concerned, I have not found it necessary to draw any inference adverse to its interest, arising from evidence which it did not lead; rather, on the evidence which it did lead, it has simply failed to prove that it was induced into error by MPX. There is no question of it having failed to lead a protagonist, in the sense spoken of by Lord Carloway, perhaps save in relation to whether or not the O&M manual had been consulted by Mr Donnelly, where I have found as a fact that he did not do so (which I think, anyway, can be inferred from the fact that had he consulted it, he would have identified its deficiencies).

[167] In relation to MPX's evidence, the position is more nuanced, senior counsel for GGHB inviting me to draw inferences from MPX's failure to lead the person(s) who compiled the O&M manual; in particular, that MPX considered that the manual reflected the materials installed; and that if enquiries had been made of MPX in 2015, GGHB would have received the same response it did in 2017, namely, that all materials were compliant and so it would not have discovered its error at that time. In my view, that is stretching what was said in *Hochtief Solutions* too far, but even if I would have been entitled to draw such an

inference, I would not have been prepared to do so, standing the evidence which I have referred to in para [159].

The contribution claims

[168] Although the downstream parties are entitled to decree of absolvitor in view of my decision on the principal claim, I shall briefly consider the downstream contribution claims on their merits, lest that decision is held to be wrong. (Insofar as the MPX claims for breach of contract and indemnity are concerned, I deal with them in the related opinions issued in the actions against WSP and NA respectively.)

[169] The claims for contribution against the downstream parties are founded on section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. It provides that a person who has been found liable to pay damages shall be entitled to recover such contribution as is just from any other person who, if sued, might also have been found liable in respect of the loss or damage. Any claim that GGHB might have had against either WSP or NA would require to have been one advanced pursuant to the collateral warranties granted by those parties. However, as at the date GGHB raised proceedings against MPX, any claim that GGHB would have had against WSP or NA would have prescribed, more than five years having elapsed since practical completion. It is not suggested that in a question between GGHB and WSP/NA respectively, GGHB would have been entitled to rely on section 6(4) (or, for that matter section 11(2) or (3)) so as to suspend the running of prescription. Thus, neither WSP nor NA is a person who, if sued by GGHB, might have been found liable. Thus, had I not found that the claim against MPX had prescribed, I would nonetheless have assoilzied the downstream parties from the third party notices.

Disposal

[170] I will sustain the thirteenth and fourteenth pleas-in-law for MPX, repel the eighth plea-in-law for GGHB and grant decree of absolvitor in the principal action in favour of MPX (and the second defender). I will also sustain the fourth plea-in-law for WSP and assoilzie it from the terms of the third party notice (its other pleas-in-law regarding prescription, which are directed towards any claim for breach of the WSP contract, appear to belong more appropriately in the WSP downstream action). For a similar reason, I will sustain only the seventh plea-in-law for NA and assoilzie it from the terms of the third party notice against it. I will reserve all questions of expenses. As regards the counterclaim, it will likely fall to be granted since GGHB has received sums in respect of an obligation which has prescribed, but since the counterclaim technically did not fall to be dealt with in the preliminary proof, the more cautious approach, which I will adopt, is to accede to the suggestion by senior counsel for GGHB to put the case out by order to discuss whether any further procedure is necessary in relation to it.