



Neutral Citation Number: [2025] EWCA Civ 1360

Case No: CA-2025-001477

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
TECHNOLOGY AND CONSTRUCTION COURT (KB)
His Honour Judge Keyser KC
[2025] EWHC 1315 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/10/2025

Before:

LORD JUSTICE COULSON
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE PHILLIPS

Between:

(1) Gareth Owen Wilson
(2) Sheila Margaret Wilson
- and -
HB (SWA) Limited

Appellants

Respondent

Andrew Butler KC and Hugh Rowan (instructed by **Direct Access**) for the **Appellants**
Andrew Singer KC and Jonathan Ward (instructed by **Howard Kennedy LLP**) for the
Respondent

Hearing date: 9 October 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 29 October 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

LORD JUSTICE COULSON:

1.Introduction

1. By a judgment dated 30 May 2025 ([2025] EWHC 1315 (TCC)), His Honour Judge Keyser KC (“the judge”) struck out the Wilsons’ Schedule of Loss. They now seek to appeal that order. Before the judge, Mr Wilson represented himself and Mrs Wilson. Before this court, the Wilsons are represented by Andrew Butler KC and Hugh Rowan. The defendants continue to be represented by Andrew Singer KC and Jonathan Ward.
2. At the end of Mr Butler’s submissions in support of the appeal, the court indicated that, despite his resilient efforts to support a Schedule of Loss in which neither he nor Mr Rowan had had any involvement, we had concluded that the appeal should be dismissed. These are my reasons for joining in with that decision.

2.The Background Facts

3. The underlying dispute concerns the discovery of fire safety and other defects at the Celestia Development in Cardiff (“the building”). The building was constructed between 2004 and 2007. Redrow Homes (South Wales) Limited were the developer and Laing O’Rourke were the design and build contractors. Redrow’s rights and liabilities now vest in the defendant (the respondent to the appeal). I shall call them “the defendant”.
4. The Wilsons are just two of the 41 individual lease holders at the development suing the defendant for damages. The claims are for breach of contract (in this case, breach of what are said to be implied terms in the leases), and/or for breach of the duty owed pursuant to Section 1 of the Defective Premises Act 1972 (“the DPA”).
5. The 42nd claimant (“CMCL”) is the management company in respect of the development. As the judge recorded at [2] of his judgment, the defendant and CMCL have agreed a works license which will permit the defendant to carry out a comprehensive programme of remedial works. A contract in respect of those works has now been concluded. That is of some significance, because it explains why there is now no claim in these proceedings for the cost of the remedial works that will be carried out at the building.

3. The Pleaded Case

6. The Re-Re-Re-Amended Particulars of Claim (“RRRAPOC”) were drafted by Mr David Sawtell of counsel on behalf of all the claimants, including the Wilsons. Paragraph 25 sets out the heads of loss. Paragraph 25.1 is concerned with the losses incurred by CMCL. Paragraph 25.1B identifies the lease holder claimants’ obligation under the leases to contribute by way of service charge to the costs incurred by CMCL in consequence of the defects at the development. Paragraph 25.2 then goes on to set out in general terms the lease holder claimants’ heads of loss:

“Further, the Claimants have suffered (the quantum of which will be confirmed by the service in due course of a schedule of loss in respect of each Claimant):

25.2.1 Diminution in the value of the Flats and will suffer such diminution notwithstanding the remedy of the defective works;
25.2.2 Loss of rental income;
25.2.3 Damage to their health by reason of the development of mould and damp within the Flats;
25.2.4 Inconvenience and distress.
25.2.5 Decanting costs (including the costs of alternative accommodation and storage) if the Claimants have to be decanted from the buildings during the remedial works.”

7. As noted by the judge at [18], the individual Schedules of Loss served by all the other claimants are in accordance with the framework in paragraph 25 of the RRRAPOC. They have not given rise to any issues. However, on any view, the Wilsons’ Schedule of Loss, provided in relation to the two flats at the building that they owned, was not in accordance with that framework. It purports to advance nine different heads of loss. Save for the service charge loss, and the interest loss (which were not the subject of the strike-out application and which are now accepted in principle by the defendants), each of the other seven heads of loss set out in the Schedule of Loss were struck out by the judge.
8. I shall address each of those seven disputed heads of loss when I consider the detail of the appeal. I note that, quite properly, Mr Butler KC did not support the seven heads of loss as formulated in the Wilsons’ Schedule of Loss, and rightly accepted the unnecessary complexity that it introduced.

4. The Wilsons’ Schedule of Loss

9. I acknowledge at the outset that the Schedule of Loss was drafted personally by the Wilsons, and not by counsel. Even though Mr Wilson is a solicitor, the court cannot expect him to produce the same sort of document that a barrister would. That said, I consider that it must have been apparent to Mr Wilson that his Schedule of Loss was over-complicated, unclear, and lacking in even the basic information necessary to identify and support the disputed heads of loss.
10. There is a lengthy preamble, under the heading ‘Introduction’, and ‘The 1st, 2nd and 3rd Claimants and their investment in the Flats’. As part of the narrative in these sections, paragraph 6 notes that, in November 2024, the Wilsons gifted the two flats to their two daughters. No consequences, let alone any loss, are alleged in the Schedule to arise from that event.
11. Paragraphs 12-19 of the Schedule of Loss are concerned with ‘Capital values’. This contains general information about residential property values in the Cardiff Bay area. In paragraph 16, it is averred that the Wilson’s flats became un-mortgageable by early 2016; paragraph 17 avers that the discovery of the 2019 defects had a further negative impact on sale prices; and paragraph 18 asserts that the defects found in 2024 “can only have a further negative impact”. The section refers to the Wilsons’ expert valuer, but nothing is provided from him/her; instead it is said that their “evidence will be updated and served in accordance with the order for directions”. Paragraphs 20 and 21 are concerned with rental values. This identifies the actual rents for the two flats on two dates only: July/October 2014 (the time of the purchases) and November 2024. Paragraph 21 refers to the consistent growth in rental values in Cardiff.

12. Paragraph 22 of the Schedule of Loss is concerned with ‘Tax impacts’. This suggests that the sale of these flats at an earlier date would have enabled the Wilsons “to gift the proceeds to their children to buy a home”. It also suggests that “gifts at an earlier point would have lessened the risk that those gifts would be subject to IHT (Inheritance Tax)”.
13. There are then a lengthy series of definitions. Amongst those relevant to Disputed Head 1 (by far the biggest single head of loss) are the following:
 - “23. ‘2016 Capital Losses’ means the difference between the 2016 Defective Market Value the 2016 Clear Market Value.
 24. ‘2016 Clear Market Value’ means the estimated market value of the Flats on the 2016 Loss Date on the assumption the Flats did not have the 2016 Defects (or other defects) and on the basis the Flats were suitable security for secured lending.
 25. ‘2016 Defects’ means defects identified by [surveyor] and/or referred to in Parkman’s information packs as provided to prospective sellers/purchasers from [date] 2016.
 26. ‘2016 Defective Market Value’ means the net market value of the Flats on the 2016 Loss Date with the 2016 Defects on the assumption that the Flats were not suitable security for secured lending and after deduction of exceptional sale costs including the extra costs incurred at auction sales.
 27. ‘2016 loss date’ means the date from which the Managing Agents of Celestia, William Parkman and Daughters Limited started to issue information packs referring to the 2016 Defects -[March] 2016.
 28. ‘2019 Capital Losses’ means losses additional to the 2016 Losses, being the difference between the 2019 Clear Market Value and the 2019 Defective Market Value.
 29. ‘2019 Clear Market Value’ means the assumed value of the Flats on the 2019 Loss Date on the assumption that they were not suitable security for secured lending and suffered from the 2016 Defects only.
 30. ‘2019 Defects’ means all fire defects referred to in Enforcement Notices issued by SWFRS in 2019.
 31. ‘2019 Defective Market Value’ means the net market value of the Flats on the 2019 Loss Date with the 2016 Defects and the 2019 Defects on the assumption that they were not suitable security for secured lending and after deduction of exceptional sale costs including the extra costs incurred at auction sales.
 32. ‘2019 loss date’ means the Date on which compartmentation and other fire defects were identified at Celestia.

33. ‘2024 Capital Losses’ means losses additional to the 2016 Losses and the 2019 Losses, being the difference between the 2024 Clear Market Value and the 2024 Defective Market Value.

34. ‘2024 Clear Market Value’ means the assumed value of the Flats on the 2024 Loss Date on the assumption that they were not suitable security for secured lending and suffered from the 2016 Defects and 2019 Defects only.

35. ‘2024 Defects’ means the defects in the soil pipe system as referred to in paragraph xx of the AAAPOC.

36. ‘2024 Defective Market Value’ means the net market value of the Flats on the 2024 Loss Date with the 2016 Defects, the 2019 Defects, and the 2024 Defects on the assumption that they were not suitable security for secured lending and after deduction of exceptional sale costs including the extra costs incurred at auction sales.

37. ‘2024 loss date’ means [date] being the date of intrusive investigations into the soil stacks in Celestia revealing systemic defects as referred to in paragraph xx of the AAAPOC.”

14. After further definitions, the Schedule of Loss has a heading ‘Losses Claimed’. That is in the following form:

“51. By reason of the Defects and the discovery of each of the Defects at different times, the Wilsons have suffered or may suffer Losses in respect of each of the Flats estimated as set out in the following table:

Loss Claimed	339 Vega House	354 Vega House
Total Capital Losses	£118,000	£199,000
Investment Loss	£51,400	£87,000
Re-investment Loss	£29,700	£50,300
Service Charge Loss	£8,989.11	£14,032.05
Total	£208,089.11	£350,062.05
Rental Income Loss	To be confirmed following service of expert evidence.	

Secured Borrowing Loss	Based on raising a 50% mortgage, and re-investing the capital in further property with a 50% mortgage, the Wilsons would have increased their capital gain by 100%.
Interest Loss	Interest as referred to in Paragraph 26 of the Re-Re-Re-Amended Particulars of Claim.
Indemnity	Following the decision in Coastal Housing Group Ltd v Mitchell & Anor (2024) EWHC 2831 (Ch), there is a real risk that tenants (Contract Holders) who have rented the Flats from the Wilsons will be entitled to reclaim rent paid at least since 1 December 2022, when the Renting Homes (Wales) Act 2016 came into force as a result of the Flats being unfit for habitation
Taxation/IHT	CGT liability - TBC Cost of IHT insurance premium

15. None of the figures for the first four heads of loss in the table are broken down or explained in any way. They are just bald figures. The last five heads of loss do not identify any claim figure at all.

5. The Judgment

16. At [5]-[7] the judge addressed the law relating to strike out and, in particular, CPR rule 3.4 and Practice Direction 3A. As the judge correctly noted at [7], the focus must be on the facts as pleaded although, as he said, if the court thought that the failure of the statement of case to set out necessary facts could be remedied by amendment, and that to permit an amendment was a more proportionate response than an order to strike out, the court had a discretion to permit an amendment.
17. At [8]-[10], the judge summarised the principles in relation to summary judgment. He cited a number of cases and then, with commendable efficiency, summarised the relevant principles at [10] in the following terms:

“10. I have regard to what was said in these cases but do not need to set out the relevant dicta here. The following summary will suffice. Summary judgment will be given against a claimant on a claim or issue only if the court is satisfied that the claim or issue has no real, as opposed to fanciful, prospect of success; a claim or issue that is merely arguable but carries no degree of conviction will not have a real prospect of success. The court will not conduct a mini-trial and, where necessary, will bear in mind that full disclosure has not yet taken place and that there might be more evidence to

come. Accordingly, where there are disputed questions of fact, it will not generally attempt to determine where the probabilities lie. However, the court ought to carry out a critical examination of the available material and is not bound to accept the mere say-so of anybody; where it is clear that a factual case is self-contradictory or inherently incredible or where it is contradicted by the contemporaneous documents, the court, after careful consideration of the evidence that is currently before it and having regard to the nature of such further evidence as might reasonably be expected to be available at trial, is entitled to reject that case even on a summary basis. The court will not be dissuaded from giving judgment by mere Micawberism—the unsubstantiated hope that “something might turn up”. Importantly, where the claim turns on a point of law that can properly be determined on the available evidence, the court is entitled to go ahead and determine it. The complexity of litigation is not itself a reason for refusing summary judgment: the circumstances may be such that determination of the case is impossible without a trial; on the other hand, it might be possible to analyse the case sufficiently at an early stage and thereby avoid the unnecessary time and expense of the continuation of litigation until trial. In all cases, r. 24.2(b) falls to be considered in principle.”

18. The judge noted at [20] that the defendant’s argument was that the heads of claim “were either for clearly unrecoverable or purely speculative or imaginary losses or advanced so vaguely and unclearly that they could not support an amendment even if (as is not the case) an amendment were sought”. This is a point touched on again in the body of the judgment. So for example, in relation to the claim for rental income loss, at [28], the judge reiterated that that claim was in principle a valid head of claim “but, if the Wilsons wish to pursue it, they must particularise an actual loss and seek permission to amend.”
19. At [11]-[16], the judge dealt with the type of damages recoverable in this situation. He spent some time considering whether damages for breach of contract would be the same as damages recoverable for breach of the DPA. He did not think there was any significant difference between the two. The judge then went on to set out the pleadings before, at [21], dealing with each of the disputed heads of loss.
20. I deal first with the applicable principles, then go on to address each of the disputed heads of loss below.

6. The Applicable Principles

21. As to the approach to be taken to applications of this sort, I consider that the judge’s summary at [7] and [10] is a useful distillation of the relevant authorities. Save for one point, I did not understand Mr Butler to disagree with the judge’s summary.
22. The exception was the judge’s approach to defects in the pleading which might be capable of being cured by way of amendment. Mr Butler referred to *Kim v Park* [2011] EWHC 1781 (QB) where Tugendhat J said:

“40. However, where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect,

provided that there is reason to believe that he will be in a position to put the defect right. In para 19 of his Judgment the Master recorded that the Claimant had informed him that he already had witnesses. On 17 January 2011 the Claimant demonstrated that that was not wishful thinking, or a bluff, by submitting the statements that he did submit.”

23. It was Mr Butler’s submission that, certainly in respect of certain heads of loss (identified below) the judge should have given the Wilsons another chance to get it right by way of amendment. The difficulty with that argument was that neither before the judge, nor before this court, were any proposed amendments actually provided. In a case of this sort, it is very difficult for the court to conclude (in Tugendhat J’s words) that ‘there is a reason to believe that the claimant would be in a position to put the defect right’ if there is no proposed amendment which seeks to do just that. In *Kim v Park*, the claimant had sought to remedy the relevant omission. That has not happened here. In my view, therefore, the judge’s approach was not wrong in principle.
24. As to the potential difference between losses recoverable for breach of contract, and losses recoverable for breach of the DPA, it was not suggested on either side that the judge was wrong, to say that in the circumstances of this case there is unlikely to be any or any significant difference between the two. I note that neither *Harrison and others v Shepherd Homes Ltd* [2012] EWCA Civ 904, or *Bayoumi v Protim Services Ltd* (1996) 30 H.L.R. 785 (two of the very few appellate authorities concerned with the DPA) suggest otherwise. Moreover, at first instance in *Harrison*, Ramsey J expressly found that there was no distinction to be drawn: see [2011] EWHC 1811 (TCC) at [208]-[212].
25. As to damages for defective work generally, I consider that the position is as follows:
 - (a) Where there is defective or incomplete construction work, a claimant is entitled to claim the amount by which the work is worth less by reason of the defects: see *Hoenig v Isaacs* [1952] 2 All ER 176. That is a traditional diminution in value claim.
 - (b) Over the last 60 years or so the courts have recognised that such diminution in value is usually best measured by reference to the reasonable cost of reinstatement works: see *East Ham Borough Council v Bernard Sunley & Sons Ltd* [1966] A.C. 406; *Dodd Properties v Canterbury City Council* [1980] 1 W.L.R. 433 at 456 and *Darlington BC v Wiltshier Northern Ltd* [1995] 1 WLR 68 at 79. But a traditional diminution in value claim may still be appropriate, such as where the building cannot be economically repaired (see *Applegate v Moss* [1971] 1 QB 406); or where any remedial works would be disproportionate (see *Ruxley Electronics v Forsyth* [1996] A.C. 344 HL, although on the facts of that case, there was no diminution in value either).
 - (c) A claim for the reasonable cost of remedial work accrues whether or not the asset in question is subsequently sold or destroyed. In *The London Corporation* [1935] P 70, a steamship was damaged by the defendant’s vessel. The Court of Appeal upheld Bateson J’s conclusion that the diminution in value, represented by the cost of repairs, was recoverable by the claimant, despite the fact that the steamship was in fact sold to be broken up. In similar vein, a defendant cannot take advantage of the impecuniosity of owners who could not afford to carry out the remedial works and claim that they had suffered no loss: see *Manchikalapati v Zurich Insurance PLC* [2019] EWCA Civ 2163 at [83] – [89] and [96] – [111]. Both may be regarded as an “accidental circumstance

which ought not to be taken into account in the way of diminution of damages”: see Greer LJ in *The London Corporation* at p.78.

(d) In a case where it has been agreed that the original contractor can return to carry out the remedial works, the owners cannot claim the cost of those remedial works as damages: they will never incur the cost of such works, or a liability for those costs, so they cannot recover damages by reference to them.

(e) But that does not mean that the owner will not suffer a residual diminution in value, even after the remedial works have been completed. It is common to find that, for example, flats in a block which has been the subject of extensive remedial work are worth less on the open market than flats in a block which has not been the subject of such work. This is commonly known as “blight”. Residual diminution in value is a proper head of loss in such circumstances: see *Thomas v TA Phillips (Builders) Ltd* (1985) 9 ConLR 72; *George Fischer Holding Ltd v Multi Design Consultants Ltd* (1994) 61 ConLR at [198]-[199]; and *Strange and Others v Westbury Homes (Holdings) Ltd* [2009] EWCA Civ 1247 at [12]-[18]. I note that Mr Sawtell’s framework at paragraph 25.2.1 of the RRRAPOC expressly includes this potential head of loss.

(f) In addition, a claimant will normally be able to recover (subject to proof) loss of any rental income and any other special damages which are not too remote and which can be properly identified as flowing from the breaches. Special damages claims for loss of use of the property, based on the capital value of the property, have been unsuccessful: see *Calabar Properties Ltd v Sticher* [1984] 1 W.L.R. 287 and *Bella Casa Ltd v Vinestone* [2005] EWHC 2807 (TCC). A claim for loss of use of money was successful in the particular circumstances in *Earl Terrace Properties Ltd v Nilsson Design Ltd* [2004] B.L.R. 273 at 290.

7. The Seven Disputed Heads of Loss: General

26. Seven heads of loss were struck out by the judge. They were:

- 1 Total Capital Losses;
- 2 Investment Loss;
- 3 Re-investment Loss;
- 4 Rental Income Loss;
- 5 Secured borrowing Loss;
- 6 Indemnity;
- 7 Taxation/IHT.

27. On the face of it, save for Disputed Head 4 (Rental Income Loss) and subject to one of the arguments that arises under Disputed Head 1, the seven disputed heads of loss were outside the pleaded framework in paragraph 25.2 of the RRRAPOC. To that extent, therefore, they were unpleaded claims: claims made for the first time in the Schedule of Loss which have not been set up in the parent pleading. That is an important point. It is impermissible for damages to be claimed in a schedule of loss where the basis of

the claim is not explained or even referred to in the statement of claim. It is at the very least a recipe for muddle and confusion if two parts of the same party's case are inconsistent; it can lead to unfairness and prejudice to the defendants if the basis for the damages claim being advanced is unclear.

28. I now turn to deal with each of the disputed heads of loss in turn.

8. Disputed Head 1: Total Capital Losses

8.1 The Pleaded Claim

29. This is the largest head of loss, amounting to about £317,000 in total for the two flats owned by the Wilsons. Paragraph 50 of the Schedule of Loss defines the 'Total Capital Losses' as meaning the accumulation of what are called the 2016 losses, the 2019 losses and the 2024 losses. As the judge noted at [21] of his judgment, to understand what that means one has to refer to that series of further definitions in the Schedule which I have set out at paragraph 13 above.

30. Mr Butler was, with respect, quite right to say that the Schedule of Loss over-complicates matters; in my view, Disputed Head 1 is the epitome of that problem.

8.2 The Judgment

31. The judge dealt with Disputed Head 1 succinctly:

“22. Mr Wilson submitted that this head of claim falls within paragraph 25.2.1 of the POC. I do not agree. Whereas there are claims that leaseholders can properly advance under paragraph 25.2.1, this is not one of them. In my judgment, the Capital Losses are spurious. Mr and Mrs Wilson are seeking to claim damages representing alleged diminutions in value of the flats at specific past dates on the basis of defects identified at those dates, despite the fact that they retained the flats thereafter. The flats were not sold on these dates or, indeed, at all. The alleged losses were not sustained. This head of claim will be struck out.”

8.3 The Argument Advanced Now

32. In his skeleton argument at paragraphs 36-39 the principal point taken by Mr Butler was that the judge was wrong to say that the Wilsons were not entitled to recover these losses because they did not sell the flats on the dates when the defects manifested themselves. He made the point that, in law, a claim for diminution in value accrues whether or not the asset in question is sold or repaired (as noted in *The London Corporation*).

33. However, during the course of his oral submissions, when answering questions from all three members of the court, that point of principle became almost entirely academic. That was because the essential elements of what Mr Butler said was the Wilsons' case on Disputed Head 1 were wholly different to those set out in the Schedule of Loss. That new, unpleaded case went something like this:

- (a) The Wilsons gifted the flats to their daughters in November 2024.
- (b) At that time, although it looked as if the defendant may well carry out remedial works, there was no binding agreement in place to that effect, and the flats remained defective.
- (c) The Wilsons suffered a loss because they gifted flats to their daughters which were not worth what they would have been if there had been no defects.
- (d) The Wilsons should be treated in the same way as claimants who had sold their flats before the remedial works were carried out, and at a lesser value. They should not be penalised because they gifted the flats to their daughters rather than selling them.
- (e) Although not entirely clear, there also appeared to be a separate element of the Wilsons' new claim to the effect that the defendant had unreasonably delayed in agreeing to carry out the works.

8.4 Discussion and Conclusion

- 34. Mr Butler was plainly right to say that, as a matter of general principle, whether or not the flats were actually sold or retained is *prima facie* irrelevant to the existence of a traditional diminution in value claim: see paragraph 25(c) above. But, on analysis, that point is of no assistance to Mr Butler when considering whether or not the judge was right to strike out Disputed Head 1. On the contrary, in my view, the judge was right to strike it out. There are a number of reasons for that.
- 35. First, I consider that paragraph 25.2.1 of the RRRAPOC (paragraph 6 above) was doing nothing more than asserting what I have called a 'blight' claim. The words of the pleading indicate that: it is a claim for diminution "notwithstanding the remedy of the defective works" (ie residual diminution). That is certainly how the defendant interpreted the plea, because paragraph 29(a) denies that the claimant "will suffer diminution in the value of the flats notwithstanding the remedy of any defective work"
- 36. Furthermore, the argument that the diminution in value claim in paragraph 25.2.1 was more than a blight claim is contradicted by the RRRAPOC as a whole. As I have said, diminution in value in this sort of case is conventionally measured by the cost of remedial works. No claim for remedial costs is advanced, nor could it be. The only reference to remedial costs is in the context of the service charge claim at paragraph 25.2.1 Accordingly, even if the 'Total Capital Losses' claim can somehow be taken as a conventional diminution in value claim, it is contrary to the RRRAPOC and therefore illegitimate. There would have to be a proposal to amend the RRRAPOC, and no such application has been made.
- 37. Secondly, none of the essentials of the Wilsons' new claim, as advanced at the appeal hearing by Mr Butler and summarised in paragraph 33 above, are pleaded in the Schedule of Loss. The date of November 2024, as the date the flats were gifted to their daughters, is pleaded in passing in the introductory preamble. It is not otherwise said to have any relevance to the Schedule of Loss. No losses of any kind are identified by reference to that date or that event. On the contrary, the losses are identified by reference to the three earlier dates when defects in the building became known. That is an entirely different case which Mr Butler did not seek to support. So another complete

answer to Mr Butler's new case on diminution in value is that it is not pleaded in the Schedule of Loss either.

38. Moreover, in whatever form they took, any amendments would essentially involve the deletion of what is presently pleaded and the setting up of a new and different claim. The existing claim, by reference to the three irrelevant dates, would have to be deleted in its entirety (because they are not now said to trigger a loss) before any consideration could be given to the new claim based on the November 2024 gifting.
39. Thirdly, the pleading of that new claim (that the Wilsons suffered loss when they gifted these flats to their daughters, notwithstanding what we know to be an imminent and comprehensive package of remedial works), is a novel claim in law. *The London Corporation* and *Zurich* were examples of cases where the wrongdoer was seeking to take advantage of other coincidental events to avoid paying for the damage it had done. But in the present case the defendant is emphatically not doing that; instead it is carrying out the remedial works at no cost to the owners. I am aware of no authority, and Mr Butler was unable to point to one, in which it had been agreed that a contractor would carry out extensive remedial works free of charge, but was also liable for a conventional diminution in value claim as if that remedial work had not been (and was never going to be) carried out.
40. Accordingly, not only is the new claim not pleaded anywhere, but its formulation is not a straightforward exercise. What is the loss that was suffered by the Wilsons when they gifted the flats to their daughters? How is that to be assessed if they were gifted for nothing? How could the defendant be liable to the Wilsons and/or their daughters under the DPA for the necessary remedial work to put the flats right, and also be liable to the Wilsons for the diminution in value calculated on the basis that the flats were defective when they gifted them? How is that the same as if the Wilsons had sold the flats at a loss in November 2024, when any purchasers at a lower figure may be regarded as having already been compensated for the defects (because they had paid less than they would otherwise have done for the flats), so would not necessarily be entitled to have the works to their flats done free of charge? Does it give rise to the defendant being in double jeopardy? What is the basis for any claim based on unreasonable delay in the defendant's agreement to carry out the works?
41. Those are all questions which any pleader would have to have in mind when they tackled the putative new claim outlined at the appeal hearing by Mr Butler. In the absence of a proposed pleading, and applying the words of Tugendhat J in *Kim v Park*, the complexity of the new case and the unhappy history of the Wilsons' claims so far, mean that there is currently no reason to believe that the Wilsons would be in a position to plead their putative new claim convincingly. A court could only reach a concluded view on that issue when it saw any proposed amendment.
42. Moreover, none of this should be taken to suggest that, if they produced a convincing pleading, the Wilsons would then obtain permission to amend. The trial is due in March next year, with detailed steps, such as the exchange of witness statements and experts' reports, due to take place imminently. The potential effect on the timetable of any proposed amendment would be front and centre of any court's consideration of that application.

43. In my view, although the judgment at [22] is perhaps a little too succinct for its own good, the point that the judge was making was, on analysis, entirely right. He was not saying that, as a matter of general principle, the flats would have had to have been sold before there could be a diminution in value claim. Instead he was simply responding to the dates pleaded by the Wilsons (being dates when defects were identified), and explaining that, in the absence of any crystallisation of loss on those dates, they were irrelevant to any assessment of damage in circumstances where remedial works are now going to be carried out by the defendant. Although he did not spell it out, it is tolerably clear that the judge thought that the Wilsons might have had at least an argument that they had suffered damage if they had sold the flats at a loss on any of those dates (ie before the remedial works were agreed), but since they did not, and the remedial works are now going to be carried out, the claim *as pleaded* in the Schedule of Loss could not succeed. Mr Butler’s articulation of the putative new case accepts that the three pleaded dates as to discovery of defects were irrelevant to any valid claim. So the judge has been proved right, not wrong, by the further consideration of Disputed Head 1 by both Mr Butler and this court.
44. For completeness, I should repeat that all the claimants in this case, including the Wilsons, were entitled in principle to claim residual diminution in value (blight). But that is not what is being asserted here: as Mr Butler accepted, this claim has nothing to do with the residual consequences of the remedial works that will be carried out.
45. Accordingly, for those reasons, I consider that the judge was right to strike out Disputed Head 1.

9. Disputed Head 2: Investment Loss

9.1 The Pleadings Claim

46. Paragraph 44 of the Schedule of Loss claims an alleged Investment Loss, said to be “the difference in value between the dates of acquisition and the dates of disposal of the flats as an investment compared with an average return on an investment in residential property classed as suitable for secured lending on ordinary market terms in the Cardiff area”.

9.2 The Judgment

47. The judge struck out this claim for the following reasons:

“24. In my judgment, this head of claim is clearly unrecoverable. First, although analytically different, it represents a duplicative claim of that for Total Capital Losses. (I accept that this need necessarily not be determinative. Mr Wilson made clear that he accepted the possibility of double recovery and did not seek to recover more than once for the same loss. He said that the trial judge could ensure that there was no double recovery and suggested that the two heads of claim might be treated as alternatives.) Second, the head of claim is wrong in principle, because it seeks damages based on a return that might have been made on a different investment. To put the matter broadly: if the leaseholders have valid claims resulting from previously unknown defects in the flats, they are entitled to damages reflecting the consequences of the defects; this will typically be

diminution in value, and it may also include loss of use value and something to represent the disturbance resulting from the defects and any remedial works. Thus, a claim for diminution in value is permissible, but the claim for Investment Loss is not.”

9.3 The Argument Advanced Now

48. No separate argument was identified in respect of Disputed Head 2. Mr Butler submitted that it was a facet of any diminution in value claim and that the matters that it identifies might be relevant to an assessment of that claim.

9.4 Conclusion

49. I do not consider that any discernible error has been identified in the judge’s reasoning at [24]. What was happening in the Cardiff property market generally does not tell you anything about the alleged investment loss in respect of these particular flats. Mr Butler conceded that this was not a separate head of loss in any event and, in my view, it was not enough for him to say that Disputed Head 2 was, in some way, simply a facet of the diminution in value claim that he had outlined. Such a claim has not been pleaded and suffers from all the deficiencies noted in Section 8.4 above. In addition, investment loss claims of this kind may also fall foul of the approach taken in *Calabar* and *Bella Casa* (to which we were referred), whilst this case seems some way from *Earl Terrace* (which was not relied on on appeal). In short, there were numerous reasons why Disputed Head 2 was properly struck out.

10. Disputed Head 3: Re-Investment Loss

10.1 The Pleaded Claim

50. The pleaded claim, at paragraph 45 of the Schedule of Loss, contains a similar definition to that of Investment Loss, except that it takes as a comparable “an investment in residential property costs as suitable for secured lending on ordinary market terms within the Greater London area”.

10.2 The Judgment

51. The judge concluded as [26] that this item was, again, unrecoverable as a head of loss. He said that that was for the reasons he had already given. He went on to say:

“26 ...All manner of investments might perhaps have produced better rates of return than did flats in the Development. Mr and Mrs Wilson chose to buy the flats. They are in principle entitled to claim for the losses resulting from the defects but not to claim for the possible profits from a road not taken.”

10.3 The Argument Advanced Now

52. Again, Mr Butler argued that Disputed Head 3 was another facet of the diminution in value claim. He submitted that this was just one aspect of market value. He did not seek to suggest that the judge’s analysis of the claim as pleaded was in any way incorrect.

10.4 Conclusion

53. The same points apply to Disputed Head 3 as are noted in Sections 8.4 and 9.4 above. Indeed, I consider that, by referring without explanation to the London property market, this head of loss is even more fanciful than its predecessors. I consider that the judge was right to strike it out as being wholly unarguable.

11. Disputed Head 4: Rental Income Loss

11.1 The Pledged Case

54. Paragraph 47 of the Schedule of Loss contains a definition, in convoluted terms, as to the meaning of the expression ‘Rental Income Loss’. It contains no figures, instead promising particulars via the production of expert evidence at a later date.

11.2 The Judgment

55. The judge at [28] characterised the absence of any quantification of Disputed Head 4 as “a give-away”. He went on to say that, in principle, actual loss of rental income was capable of being a recoverable head of loss. But he said that the actual receipt of lower rent was primarily a matter of fact and that there was no positive averment that, by reason of the defects, the Wilsons have been unable to obtain higher rents that would otherwise have been available.
56. Having identified the generic way in which the claim was put, the judge went on to say this:

“28...The trouble with this is that it advances a claim on a hypothetical basis, by reference to what rent could have been sought in differing factual situations. However, the starting point for a claim for lost rental income must be a factual case: that the owner was unable to let the flat at all or was able only to let it at a reduced rent. No such case is advanced. An expert can do no more than opine as to whether or not higher rents could have been obtained. The position on the averred facts is that the Wilsons did not actually seek higher rents or receive advice that they could not seek them; they simply decided to request rents below those indicated by the market. I repeat that loss of rental income is in principle a valid head of claim. But, if the Wilsons wish to pursue it, they must particularise an actual loss and seek permission to amend.”

11.3 The Argument Advanced Now

57. First, Mr Butler made the point that the claim for loss of rent was covered by paragraph 25.2.2 of the RRRAPOC, so that the pleading point that affected all the other disputed heads of loss did not arise here. Secondly, he said that the Schedule of Loss identified the rent charged for the flats in 2014 and November 2024 (when the Schedule was produced) and went on to provide general information as to the growth of rents in the Cardiff area since 2016. But he agreed that Disputed Head 4 could have been more fully particularised and accepted that particulars could helpfully have been given as to what rent the tenants had been charged at all stages, and what rents could have been charged but for the defects.

58. His real point of substance was that Disputed Head 4 was capable of being salvaged by amendment and the judge should have adopted that course, rather than striking it out.

11.4 Discussion and Conclusion

59. Ultimately, it seems to me that this debate came down to a matter of case management. That is because it is now common ground that:
- (a) This head of claim was set out in the RRRAPOC at paragraph 25.2.2.
 - (b) The Schedule of Loss wholly failed to set out a proper claim for lost rent. It did not identify the actual rent charged throughout the period; the rent that could have been obtained but for the defects; and the difference between the two. It does not even provide an estimated figure for the lost rent, let alone a properly calculated figure.
 - (c) If Disputed Head 4 is to be advanced, a proper pleading was and is required.
60. In those circumstances, what to do about the Wilsons' errors and omissions becomes a question of case management. One option open to the judge was to indicate that the current pleading was inadequate and that particulars needed to be provided by a specified date. Another option was to strike out the obviously deficient pleading and wait for a proper substitute.
61. The judge took the latter course. That was a case management decision that was plainly open to him. It is not for this court to interfere and to suggest that he could have done it in a slightly different way. In any event, given that the Schedule of Loss was so riddled with deficiencies, the judge's decision not to keep alive one small part of it in the hope of something better in the future was entirely justified.

12. Disputed Head 5: Secured Borrowing Loss

12.1 The Pleaded Claim

62. Paragraph 48 of the Schedule of Loss suggests that these were the losses resulting from the Wilsons' inability to raise capital by way of secured borrowing on the flats for re-investment. As the judge noted at [29] of his judgment, some of the preamble in the Schedule of Loss was relevant to this item as follows:

“9. The Wilsons bought both the Flats for cash. At the time of the purchases, the Flats would have been mortgageable because the Defects were substantially unknown. The Wilsons' expectation was that this situation would continue, and that mortgage finance could be raised at a later date, particularly when they required cash.

...

11. The Wilsons' rationale for their investment in the Flats was:

11.1. An investment in residential property (as opposed to a different investment) would provide a natural hedge against their children's future need for a property to live in.

11.2. Cardiff (as opposed to other locations) was a place they knew; it was convenient, and forecasts for the future growth of property prices in Cardiff were good.

11.3. They would be able easily to realise the value in the Flats (by sale or remortgage) to provide finance to their children to purchase (rather than rent) property to live in once their children were established in secure employment.”

12.2 The Judgment

63. The judge found six separate reasons why this claim must be struck out. They are set out in [30] in the following terms:

“30. Several points can be made about this head of claim. First, it is not pleaded. Second, there is no averment of fact in the POC that would support it. Third, no averment of fact is made, even in the Schedule of Loss, that would support the existence of such a loss as a matter of fact. It is not said that the Wilsons attempted to raise finance, or wanted to do so, but were unable to do so. Fourth, the actual averments made are that Mr and Mrs Wilson purchased the first of their flats in 2012 and that in 2019 they intended to transfer one of the flats to their company, the third claimant, but decided against doing so when the defects were discovered. Fifth, the alleged loss, as defined in paragraph 48, is inconsistent with the stated intention in paragraph 11. I regard Redrow as correct to characterise the head of claim as "opportunistic" and as "rel[ying] entirely on the benefit of hindsight." Sixth, in the circumstances, the alleged loss is clearly too remote. It is no part of the Wilsons' case that they made anyone aware of any reinvestment plans.”

12.3 The Argument Advanced Now

64. At the appeal hearing, no specific arguments were addressed as to how or why any of these six separate reasons for striking out the claim might be wrong. Mr Butler suggested that, at most, Disputed Head 5 was again a facet of the diminution in value claim; at one point this was characterised by the Court as “a reminder to a valuer” a phrase which Mr Butler later borrowed. One general submission that was made was that the judge should have waited for the trial to decide whether or not this head of loss was too remote.

12. 4 Conclusion

65. In my view, the Wilsons have not shown that the judge was wrong to strike out this claim for the reasons that he gave. Robust case management requires a judge to weed out heads of loss which, on the face of the pleaded material, are hopeless. It is wrong in principle for claims which appear to be obviously too remote to be allowed to limp on to trial in the hope that something may come along to save them. Disputed Head 5 was such a claim. No arguments have been addressed to this court which would justify its reinstatement.

66. In any event, to the extent that Disputed Head 5 was put forward as yet another facet of a diminution in value claim, it suffers from all the same deficiencies noted in Sections 8.4, 9.4, and 10.4 above, with the added disadvantage that it does not even identify a claim figure. A ‘reminder to a valuer’ is not a distinct and separate head of loss. Disputed Head 5 was therefore rightly struck out.

13. Disputed Head 6: Indemnity

67. It is unnecessary to consider Disputed Head 6 in any detail because, at the appeal hearing, Mr Butler accepted that, as a result of a judgment handed down by the Divisional Court at the beginning of October in *Beacon Cymru Group Ltd v Mitchell* [2025] EWHC 2477 (Ch), concerning the proper interpretation of provisions in the Renting Homes (Wales) Act 2016, this head of claim was no longer pursued.

14. Disputed Head 7: Taxation/ IHT

14.1 The Pleadings Claim

68. Paragraph 22, in the preamble part of the Schedule of Loss, provides the only background for Disputed Head 7:

“22. The sale of the Flats at an earlier date would have enabled the Wilsons to gift the proceeds to their children to buy a home. Rises in value of those homes would not have been subject to VAT. In addition, the Wilsons are now 68 and 63 respectively and gifts at an earlier point would have lessened the risk that those gifts would be subject to IHT on the death of the Wilsons. Insurance is available to cover such risk”.

The claim itself is wholly unparticularised and unquantified, simply saying:

“CGT liability-TBC

Cost of Insurance Premium”

14.2 The Judgment

69. The judge expressed some puzzlement about the passage at [22] and concluded that Disputed Head 7 should be struck out. His views were as follows:

“34. The first and second sentences of paragraph 22 are not (at least, for me) easy to understand. I am not sure that I understand the case being advanced in them much better after the hearing. It appears to be contended that an early transfer of the flats to the children would have brought greater financial benefit to the children. That may or may not be so. But the children are not parties to the claim. Further, any claim ought to have been quantified. Further still, the head of claim is not pleaded.

35. The second and third sentences of paragraph 22 are contending, I think, that the defects in the Development meant that the Wilsons could not realise the value of the flats by selling them and were thus prevented from

minimising the values of their estates at an earlier date, and that they have thereby incurred the risk of an increased inheritance tax liability on the estates. The quantum of the loss is said to be the cost of buying an insurance policy in respect of that risk. In my judgment, this is not a recoverable head of loss. First, it is not pleaded. Second, it is plainly too remote. There is no reason at all why a developer should be liable in respect of the consequences of a purchaser's tax planning. (I note, incidentally, that this head of claim is, at the very least, in tension with the basic measure of damages, be that expressed in terms of diminution of value or cost of remedial works. So far as financial losses are concerned, the basic measure of damages seeks to correct the fact that the purchaser has too little by way of monetary value. This head of claim, by contrast, is premised on the purchaser having too much.) Third, the head of claim seems to me to make no sense on its own terms. If the Wilsons were concerned about the inheritance tax position, they could have transferred the flats earlier. I appreciate that they are saying that, were it not for the defects, they could have sold the flats and given the proceeds to the children. But this supposes that the Wilsons did not need to keep the flats or the proceeds for themselves. So a decision to retain the flats until recently was simply a choice they made and has nothing to do with being prevented from divesting themselves of value."

14.3 The Argument Advanced Now

70. Towards the end of his oral submissions, Mr Butler indicated that the essence of Disputed Head 7 was that, because of the defects, the Wilsons gifted the flats to their daughters later than they would have otherwise done. That in turn incurred a greater risk of an inheritance tax liability which would not otherwise have arisen.

14.4 Conclusion

71. As Mr Butler rightly conceded, the kernel of Disputed Head 7 as now advanced was the Wilsons' averment that they delayed in divesting themselves of these flats because of the existence of the defects. But he was also bound to accept that the crucial trigger for such a claim is not pleaded anywhere in the Schedule of Loss. It is not entirely clear that it has even been suggested before. On any view, therefore, the pleading of Disputed Head 7 is fundamentally deficient because it does not contain a clear statement of the way in which the Wilsons want to put this head of loss now. In addition, as with so many of these later heads of loss, no figure is provided by way of damages. I consider both of these to be fatal defects.
72. I make no comment on the other potential difficulties facing Disputed Head 7 as articulated by Mr Butler, such as remoteness and foreseeability. It is unnecessary to do so, in the light of the more fundamental deficiencies already noted. But for the reasons set out above, as well as the reasons noted by the judge, I consider that, as pleaded, Disputed Head 7 was unarguable. I therefore consider that it was rightly struck out.

15. Conclusion

73. For these reasons, I agreed that this appeal should be dismissed.

LORD JUSTICE POPPLEWELL

74. I agree.

LORD JUSTICE PHILLIPS

75. I also agreed that the appeal be dismissed for the reasons now given by Coulson LJ.