Neutral Citation Number: [2026] EWHC 789 (TCC)

Case No: HT-2022-000295

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01/04/2026

Before:

MR JUSTICE CONSTABLE

- -

Between:

(1) CREST NICHOLSON REGENERATION LIMITED
(2) CREST NICHOLSON (SOUTH) LIMITED
(3) CREST NICHOLSON OPERATIONS LIMITED
(4) CREST NICHOLSON PLC

Claimants

- and -

(1) ARDMORE CONSTRUCTION LIMITED (IN ADMINISTRATION)
(2) DAVID RICHMOND AND PARTNERS LIMITED
(3) YUANDA (UK) CO. LIMITED
(4) ARDMORE CONSTRUCTION GROUP LIMITED
(5) ARDMORE GROUP LIMITED
(6) ARDMORE GROUP HOLDINGS LIMITED
(7) PADDINGTON CONSTRUTION LIMITED
(8) ARDMORE FITOUT LIMITED
(9) CELEBRATION HOMES LIMITED
(10) BYRNE PROPERTIES LIMITED

Defendants

- -
- -

Jonathan Selby KC and Harriet di Francesco (instructed by **Gateley Legal**) for the Claimant
Simon Hughes KC, James Frampton and Connie Trendle (instructed by **Rosenblatt Law**) for the **Fourth to Tenth Defendants**

Hearing dates: 2-4 March 2026

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

This judgment was handed down remotely at 10.30am on 01 April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE CONSTABLE

Mr Justice Constable:

A. Introduction

1. The Claimants, Crest Nicholson Regeneration Ltd and associated group companies ('Crest') bring an application ('the Application') for building liability orders ('BLOs') pursuant to sections 130-131 of the Building Safety Act 2022 ('BSA'). The Application is brought within the proceedings in which Crest alleges that Ardmore Construction Ltd ('ACL'), now in administration, is liable for extensive fire safety and other defects at the Admiralty Quarter development in Portsmouth ('the Crest Proceedings'). The Crest Proceedings were consolidated with proceedings brought against Crest by Portsmouth Naval Base Property Company (Queen Street) Limited and Portsmouth Naval Base Property Trust (together 'PNB') pursuant to the Court's order dated 25 October 2022 ('the PNB Proceedings' and together, 'the Proceedings').

2. The Claimants seek two forms of relief. First, they seek what has been described as an 'anticipatory' BLO against the Fourth to Tenth Defendants ('the BLO Defendants') in respect of any liability that ACL may ultimately be found to owe under section 1 of the Defective Premises Act 1972 ('the DPA') or arising from a 'building safety risk' within the meaning of section 130(6) of the BSA ('the Anticipatory BLO'). The terms of the Anticipatory BLO sought are as follows:

> "Any liability that the First Defendant may have to the Claimants under section 1 of the Defective Premises Act 1972 or as a result of a building safety risk is also the joint and several liability of each of the [BLO Defendants]."

3. Second, they seek an order ('the Adjudication BLO') making the BLO Defendants jointly and severally liable for the sum of c.£14.9m, awarded against ACL in an adjudicator's decision dated 29 August 2025 ('the Adjudicator's Decision').

4. Both limbs of the Application are resisted. The BLO Defendants, who now accept that they are 'associates' of ACL for the purposes of section 131 of the BSA, contend that ordering the Anticipatory BLO would be premature, and that the Court should not determine issues said to be 'just and equitable' without a full trial. They also contend, in any event, that it would not presently be 'just and equitable' to make an Anticipatory BLO. In relation to the Adjudication BLO, they submit that the enforcement of the Adjudicator's Decision is not procedurally before the Court on this Application; that an adjudicator's decision, or the obligation to comply with such a decision, is not a "relevant liability" within section 130(3); that the adjudicator ('the Adjudicator') arguably lacked jurisdiction such that the Adjudicator's Decision is not (summarily) enforceable, and that, if these arguments fail, that it would not in any event be just and equitable to impose the Adjudication BLO.

5. At the heart of this case, therefore, lie the following two questions:

   (1) where a principal contractor has entered administration against the backdrop of allegedly extensive fire safety defects, and where both factual and legal responsibility for any such defects is in dispute, is it nevertheless just and equitable for the Court to

determine in advance of trial that associated companies should stand behind any relevant liability ultimately established?; and

(2) how, if at all, are the provisions for BLOs applicable to liabilities arising out of the decision of an adjudicator, pursuant to statutory or contractual regimes required by the Housing Grants, Construction and Regeneration Act 1996 ('HGCRA')?

6. The BLO regime is novel and has been considered by the Courts only to a limited extent so far. The parties' submissions ranged widely over the statutory scheme, its legislative purpose, the relationship between adjudication and BLOs, and the extent to which factual disputes which undoubtedly remain until trial may preclude a fair determination of whether a BLO is just and equitable at this stage. The Court has been enormously assisted by the lengthy and detailed written submissions, and oral submissions (from, pleasingly, both Leading and Junior Counsel on both sides) over three days.

B. Background

7. The Proceedings relate to 19 residential apartment buildings in a development known as Admiralty Quarter in Portsmouth (the "Development"). The Development comprises 18 buildings (the "Buildings"), and a 21-storey tower (the "Tower"). Thirteen of the 18 Buildings have a top storey which is less than 18m above ground level. Five of the Buildings and the Tower have a top storey which is more than 18m above ground level. The construction of the Development was carried out from 2007 to March 2009.

8. ACL was engaged by the First Claimant, then known as Crest Nicholson Regeneration Limited ('CNR'), by a contract dated 13 December 2005, to carry out the design and construction of the Development (the 'D&B Contract'). The Second Claimant (referred to as 'CNS') is the long leaseholder under the headlease of the Development pursuant to an agreement for lease and lease each dated 31 October 2005 and referred to collectively as 'the Headlease'. There is a factual and legal dispute between the parties as to whether CNR was acting as the agent for the Third Claimant ('CNO') as its undisclosed principal, and/or whether Crest is estopped from asserting that anyone but CNR was the contracting party.

9. The D&B Contract was based on the JCT 1998 Standard Form of Building Contract with Contractor's Design incorporating Amendments 1 to 5 and certain bespoke amendments. It is common ground that the D&B Contract was not validly executed as a deed by ACL, although Crest's case is that there is a common assumption estoppel that the D&B Contract was executed as a deed.

10. Following the tragic fire at Grenfell Tower on 14 June 2017, investigations were carried out by third parties into the external walls of the Development to determine whether it was safe to occupy. Those third-party investigations revealed, Crest claim, that the external wall systems at the Development were defective in a number of ways with the result that they posed a fire safety risk to its occupants and users. The scope and extent of the fire safety defects in the external walls are set out in Section F of the Amended Particulars of Claim. In summary they include (a) widespread use of non-compliant combustible insulation including expanded polystyrene ("EPS") insulation and phenolic foam insulation board, (b) missing and defectively installed cavity and

fire barriers across all buildings and (c) missing fire resistant sheathing board in the brickwork cladding system ("the External Wall Defects").

11. In addition to the External Wall Defects, Crest allege that there are other fire safety defects in the internal areas as particularised in Section G of the Amended Particulars of Claim including: (a) the car park which has been lined using combustible insulation, is not properly separated from residential accommodation or firefighting shafts via ventilated lobbies, and contains movement joints which are either inadequately fire-stopped or not fire-stopped at all, (b) compartment lines in various buildings which are missing putty pads to electrical sockets and switches resulting in those lines providing inadequate fire resistance (c) in communal areas across all buildings where there are widespread defects in compartmentation, firestopping, fire door and service risers/smoke shafts ("the Other Defects").

12. The nature and extent of participation of ACL following the discovery of the alleged defects was set out in unchallenged evidence from Mr Lennon, Partner at Gateley PLC, Solicitors for Crest. As summarised in Mr Selby KC's written submissions, ACL was notified about concerns of fire safety defects in the Tower in early 2018 and was directly involved in the initial investigations into the Tower. In October 2018, ACL (or third-party consultants on its behalf) attended intrusive inspections and took its own samples. There were several rounds of pre-action correspondence in 2019, 2022 and 2023 (with these proceedings being issued and stayed in 2022) within which the Claimants provided ACL with detailed defects and loss schedules and several independent expert reports provided by fire engineers, architects and other third-party consultants. During this time, there were ongoing direct discussions between Crest and ACL in relation to further intrusive inspections including those requested by ACL. ACL in turn engaged its own experts, Dr David Crowder of DCCH Experts, Tom Collison of H+H Fire and Richard Francis of RF Architect Expert Witnesses. The parties' respective experts met on several occasions in 2021 (including to attend intrusive inspections).

13. Dr Crowder's Fire Risk Appraisal of External Walls dated 27 November 2023 concluded that:

> "In its current condition, it is my opinion that the overall risk associated with fire across the external walls of the Development is high, but [it] should be noted that the risk is not evenly distributed across the entire development.
>
> - The risk is highest in Admiralty Tower, where the render system combined with the timber decked balconies provide both a medium for rapid fire spread and a fuel load capable of sustaining a severe fire, in close proximity to the means of escape. A severe fire involving the render could, in my opinion, compromise the means of escape, though it should be noted that given the performance of the curtain wall system there is no reason to suggest that the flats themselves would be compromised by an external wall fire.
>
> - The C Blocks are the next highest, and in my opinion are mid to high risk. A fire affecting the courtyard elevation

> will lead to a severe fire requiring the evacuation of all flats, but will not directly compromise the means of escape on the opposite elevation…
>
> - Keppel House is the next highest with a medium risk, arising from it having a single stair, being over 11m to the top storey and being affected by the aluminium rainscreen and, to a limited extent, the render system.
>
> - The various blocks connected to the corridors spanning the Queen Street, Admiralty Road and Bonfire Corner elevations are, in my opinion, all tolerable in terms of risk, albeit at the high end of tolerable….
>
> - All of the two storey blocks (including Hanover and Godolphin) are also of tolerable risk, nearing low risk…
>
> The single biggest contributor to the risk posed by the external walls at the Development is the Stotherm Classic render system. This system, in my opinion, is fundamentally unsuitable for use on high rise buildings, though I acknowledge that it was marketed as suitable for such use at the time of construction….
>
> But for the presence of the render system, it is my opinion that the risk posed by the Development would be medium, although still not tolerable. For the Tower to become a tolerable risk it would also be necessary to deal with the potential for the balconies to contribute to fire spread."

14. By March 2025, ACL had dis-instructed its then solicitors, CMS, and its experts, including Dr Crowder.

15. By a notice of adjudication dated 29 May 2025, CNR and CNO commenced an adjudication against ACL in relation to their claims against ACL under the D&B Contract ('the Adjudication'). The Adjudication included ACL's breaches of their duty under section 1 of the DPA and concerned the External Wall Defects only. It is not in dispute that ACL participated fully in the Adjudication (in part through the involvement of personnel of one or more of the BLO Defendants), albeit subject to a jurisdictional challenge and a claim that the Adjudication breached the rules of natural justice. ACL did not admit liability and advanced a positive case in respect of quantum only.

16. The Adjudicator's Decision was issued on 29 August 2025. In summary, the Adjudicator decided that: (1) he had jurisdiction to determine the dispute and the Adjudication did not otherwise breach the rules of natural justice; (2) CNO/CNR's claims for breach of the terms of the D&B Contract were statute barred; (3) the External Wall Defects amounted to a breach of Part B of the Building Regulations and ACL's duties under the DPA; and (4) ACL should pay CNR, alternatively, CNO c. £14,928,320.40.

17. In respect of the External Wall Defects specifically, the Adjudicator found at [50] and [51]:

> "In my view the evidence relied upon by Mr Perry and his identification of noncompliance with the Employer's Requirements and Statutory Requirements is compelling. Although I acknowledge that the extent of non-conformance and remedial works required to address the fire safety defects are in issue, there is no doubt in my mind that the extent of combustible materials installed and the evidence of defective fire barriers/stopping is such to render Ardmore in breach of Contract. I also agree with and accept Mr Perry's evidence that the extent of the fire safety defects in the external walls is such to render certain dwellings unfit for habitation. It therefore also follows that Ardmore is in breach of its duty owed to CNR and/or CNO pursuant to Section 1(1)(a) of the DPA.
>
> **Accordingly, I find that Ardmore is in breach of the Contract and Section 1(1) of the DPA as a result of the fire safety defects in the external walls of the Development.** [*original emphasis*]"

18. The day before the Adjudicator's Decision was issued, ACL went into administration.

C. ACL's Administration

19. Mr Martyn Horne of Ardmore Group Limited ('AGL', the Fifth Defendant), is the Development Director and has day-to-day oversight over the planning, organisation, monitoring and coordination of projects on behalf of Ardmore Construction Group Limited ('ACGL', the Fourth Defendant). Mr Horne's witness statements dealt with, amongst other things, the events leading up to the administration of ACL. He confirms the contents of section 4 of the administrator's report dated 8 October 2025. The information is also certified as true by Cormac Byrne, whose family trust owns 100% of Ardmore Group Holdings Limited ('AGHL', the Sixth Defendant).

20. The report explains that ACL's problems began post the Grenfell Tower tragedy with the resultant BSA, which extended the limitation period from 6 years post completion to 30 years post completion for claims accruing before June 2022. As a result, ACL was faced with potential significant exposure due to the work it has undertaken since incorporation. It points to the fact that the BSA made provision for the Court to allow retrospective liabilities to be claimed against associated companies or individuals to the party responsible for the defective build in the first instance. The report continues:

> "[ACL] has been working towards mitigating the issues arising and has undertaken a significant amount of remedial work to date, spending in excess of £100 million and had agreed with its principal insurers to pay £75million towards these costs. All of these funds have been expended on making good the defects.
>
> In December 2024, the Court issued Judgment in the landmark case of BDW Trading Limited -v- Ardmore Construction

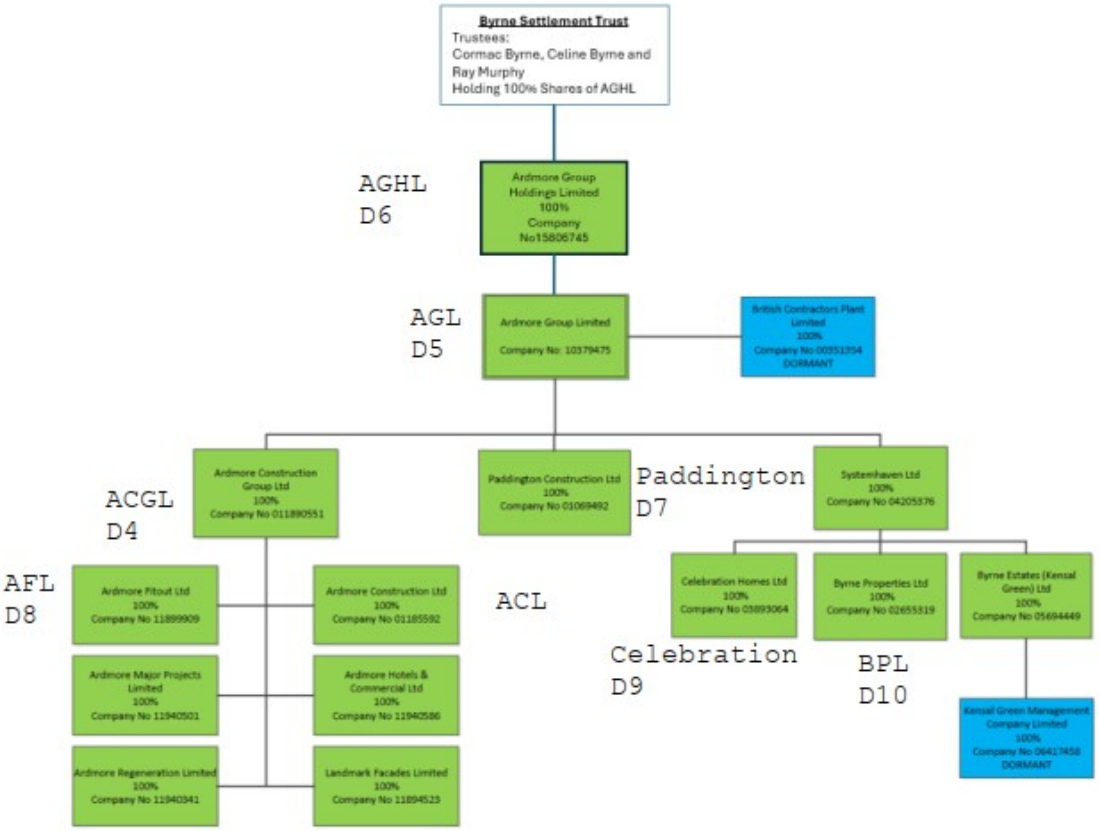
> Limited [2024] EWHC 3235. The case revolved around fire safety defects on a particular development that achieved practical completion between 2003 and 2004. Prior to this Judgment, the Company had received and sought to defend all incoming claims and spent huge sums of money on a variety of lawyers in furtherance of this purpose. In February 2025 alone, the Company spent £687,440.
>
> Into the first quarter of 2025 and as a result of the Judgment, the Director and senior Company employees sought advice from solicitors and restructuring professionals. This resulted initially in advice that the Company should consider a restructuring plan but with the process of administration in reserve. They also concluded that expending further sums on defence of claims under BSA22 in the first instance was no longer commercially viable and took steps to withdraw from further engagement. It continued to defend actions which were believed cost effective to do so to mitigate the potential creditor exposure and had also undertaken some work to pursue recovery claims and opportunities.
>
> The Company sought to maximise realisations in the interim and with significant projects reaching practical completion which would allow the release of bonds being completed and debtor and retention monies to be undisputed, other projects were novated to other companies within the group (in addition to the associated liabilities) and the Company proceeded to wind down operations. A restructuring plan was considered but ultimately aborted.
>
> The Company continued trading for a short time but ultimately was running out of cash to discharge liabilities and with many court deadlines looming, sought to deal with procedural documents in house to save on costs or otherwise which it could no longer engage with. At the same time, the Company was suffering cash depletion and consequently only business critical costs only were being met, with no short term funding or recovery imminent. Ultimately, on 27 August 2025 it was sent a threat of winding up petition by a retention creditor with a deadline of midnight to pay the sums due. The following day, the Director concluded that time had run out and provided instructions to proceed with the appointment of administrators resulting in the Company's entry into Administration on 28 August 2025."

21. I accept, at least for the purposes of the Application, Mr Horne's evidence that the fact that ACL was placed into administration precisely the day prior to the provision of the Adjudicator's Decision was coincidental. However, it is clear that on Mr Horne's own evidence, the decision to place ACL into administration was driven wholly or in significant part by the fact of its exposure to claims relating to cladding defects following the Grenfell Fire. There is no suggestion that, following its administration,

ACL would have the means to satisfy either the Adjudicator's Decision, which has as a matter of fact gone unpaid, or any judgment at the conclusion of the Proceedings.

D. The Ardmore Group

22. The Ardmore Group is presently structured as follows:



23. As originally structured, ACL was the main trading company. It was also the holding company of 12 UK subsidiaries (direct and non-direct). By September 2016, AGL was incorporated into the group and the property portfolio was split with all residential properties being held by Celebration Homes Limited, all commercial properties being held by Byrne Properties Limited, and all development properties being held by Byrne Estates (Kensal Green) Limited.

24. In October 2016, a restructure was completed following which AGL became the parent company of ACL. ACGL, and the Eighth Defendant, Ardmore Fitout Limited ("AFL"), were incorporated in March 2019 as part of a further restructuring whereupon ACGL and AFL respectively became a parent company and a co-subsidiary of ACL.

25. As emphasised by Mr Selby KC and not disputed by Mr Hughes KC, ACGL was incorporated for the purposes of creating a structure capable of isolating the historic liabilities, reducing insurer and counterparty risk, and enabling distinct trading operations to enter new markets under separate corporate entities, primarily the construction business, which were all valid reasons that were exacerbated by the changing state of the construction industry at that time. Mr Horne explains, and I accept, that the risks associated with the historic liabilities at this point were arising

from 50 years of trading. Whilst they would not, therefore, be limited to cladding or fire safety, liabilities sought to be isolated plainly included liabilities covered by the BSA.

26. A further restructuring took place in 2024 following an agreement between brothers Cormac Byrne and Patrick Byrne that the former would buy out the latter's (and family's) interest in the business. As part of this transaction, the Sixth Defendant, AGHL, was incorporated in June 2024, and it acquired all the shares in AGL. Cormac and Celine Byrne became the shareholders of AGHL. Those shares were subsequently vested in the Byrne Family Trust.

27. Cormac Byrne, along with his brother, ultimately owned and controlled ACL at the time the Development was designed and built. Ultimate control of ACL, and the BLO Defendants, has at all material times and still rests with Cormac Byrne, as confirmed in the AGL consolidated accounts. These propositions were not disputed by Mr Hughes KC.

E. The Relevant Law

E1. The Relevant Section of the BSA

28. Section 130 of the BSA confers the power upon the Court to make a BLO:

> "**130 Building liability orders**
>
> (1) The High Court may make a building liability order if it considers it just and equitable to do so.
>
> (2) A "building liability order" is an order providing that any relevant liability (or any relevant liability of a specified description) of a body corporate ("the original body") relating to a specified building is also—
>
> (a) a liability of a specified body corporate, or
>
> (b) a joint and several liability of two or more specified bodies corporate.
>
> (3) In this section "relevant liability" means a liability (whether arising before or after commencement) that is incurred—
>
> (a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or
>
> (b) as a result of a building safety risk.
>
> (4) A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body.
>
> (5) A building liability order—

> (a) may be made in respect of a liability of a body corporate that has been dissolved (including where dissolution occurred before commencement);
>
> (b) continues to have effect even if the body corporate is dissolved after the making of the order.
>
> (6) In this section—
>
> "associate": see section 131;
>
> "building safety risk", in relation to a building, means a risk to the safety of people in or about the building arising from the spread of fire or structural failure;
>
> "commencement" means the time this section comes into force;
>
> "the relevant period" means the period—
>
> (a) beginning with the beginning of the carrying out of the works in relation to which the relevant liability was incurred, and
>
> (b) ending with the making of the order;
>
> "specified" means specified in the building liability order."

29. There is no longer any dispute that the BLO Defendants are all 'associates' for the purposes of section 130.

30. I accept, as Mr Hughes KC submits, that it is important when considering the various authorities referred to further below, to bear in mind the distinction between remediation orders ('ROs'), pursuant to section 123 of the BSA, and the related remediation contribution orders ('RCOs'), pursuant to section 124 of the BSA, and BLOs.

31. An RO is an order (which can only be made by the First-Tier Tribunal ('FTT')) on the application of an 'interested person' requiring a relevant landlord to remedy specified relevant defects and in a specified relevant building or take specified steps in relation to a specified relevant defect in a specified relevant building.

32. An RCO is an order which the FTT may, on the application of an interested person, make in relation to a relevant building 'if it considers it just and equitable to do so'. The class of applicants for an RCO is limited to 'interested persons', as defined by section 124(5). This includes a person with a legal or equitable interest in the building (such as a leaseholder or, to use Mr Hughes KC's phrase, a 'domestic property owner'). It is an order that can only be made against 'a specified body corporate or partnership', again as defined. This is limited to a landlord under a lease of the relevant building or any part of it; a person who was such a landlord at the qualifying time; a developer in relation to the relevant building, or a person associated with a person within any of the foregoing.

E2. Case Law

33. There are a number of recent cases which provide helpful guidance on the construction and application of the BSA.

34. Chronologically, the first main case is Triathlon Homes LLP v Stratford Village Development Partnership & Ors [2024] UKFTT 26. The dispute was heard before an FTT convened with Edwin Johnson J as President. It concerned the making of RCOs. The first respondent was the developer (within the meaning of section 124(5) of the BSA) of five residential buildings in East Village, Stratford, East London. Long leases in some of the units were owned through subsidiaries of the second respondent ("Get Living"). The long leases in the units provided as social or affordable housing were owned by the applicant ("Triathlon"), a limited liability partnership established to provide affordable housing at East Village. The repair and maintenance of the structure and common parts of the East Village were the responsibility of the third respondent ("EVML") which was jointly owned by Get Living and Triathlon. Serious fire safety defects were discovered in the five blocks, relating to both the design and construction of the various façade systems. A programme of remedial work was devised by EVML and commenced in 2023 and was projected to complete by August 2025. The cost of the remedial work was initially funded by public money from the Building Safety Fund. The total cost of the work was projected to exceed £24.5 million. Triathlon applied to the FTT for RCOs against SVDP and Get Living requiring them to reimburse charges paid to EVML in respect of interim fire safety measures and investigative works, and to reimburse expenditure incurred, or to be incurred, by EVML in remedying the defects, representing Triathlon's share of the total remediation costs.

35. The Tribunal noted at [237] that section 124 gives no guidance on how the FTT is to decide whether it is "just and equitable" in any particular case to make an order. (The same is true for section 130). Edwin Johnson J then observed:

> "Beyond stating the obvious, that the power is discretionary and should therefore be exercised having regard to the purpose of the 2022 Act and all relevant factors, it is not possible to identify a particular approach which should be taken."

36. In considering the purpose of association provisions (in the context of an RCO) the Tribunal stated [at 266]:

> "The obvious purpose behind the association provisions is to ensure that where a development has been carried out by a thinly capitalized or insolvent development company, a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedying the relevant defects by hiding behind the separate personality of the development company. It seems to us that the situation of SVDP, with its relatively precarious financial position and its dependence for financial support upon Get Living, its wealthy parent, constitutes precisely the sort of circumstances at which these association provisions are targeted."

37. Of some relevance in light of the arguments before the Court on this Application is the FTT's consideration of the financial position of Get Living. At [255], the following conclusion was reached:

> "The increase in value of Get Living's investment in East Village is not a matter to which we give great weight, although to the extent that it is relevant at all it is obviously a point in favour of making an order. It is common ground that Get Living has the resources to enable it to comply with any order the tribunal may make, but even if there had been doubt about that we think it would be an unusual case in which the source or extent of a respondent's assets or liabilities will carry much weight when deciding whether it is just and equitable to order it to bear the cost of remediation."

38. RCOs were made against SVDP and Get Living. The judgment was upheld on appeal ([2026] 1 All ER 574). Amongst other things, the Court of Appeal rejected the argument that the applicant's motive would be relevant to the exercise of discretion justly and equitably: Nugee LJ observed at [78]:

> "the FTT were right that it was not necessary for them to resolve any issues as to Triathlon's motivation. In general parties who have legal rights or remedies are entitled to pursue them without having to explain why they have decided to do so, and a litigant's subjective reasons for litigating (save in the unusual case where a litigant is acting out of malice or the like) are usually irrelevant to the merits of its claim. What may be relevant is whether an applicant has a legitimate interest in pursuing an application, but here I do not think there is any difficulty."

39. Nugee LJ also made observations about the statutory purposes of the Act in the context of the argument then advanced that no RCOs were needed as the works were being adequately funded and were being carried out at [87]:

> "this is I think to take too narrow a view of the statutory purposes of the Act. I accept that one of those purposes is to ensure that works that are required are actually done. But another purpose is to deal with the 'who pays' question, and as set out above, the Act provides a complex set of answers to this question with a number of facets."

40. Albeit in the (not directly analogous) context of concluding that the FTT had expressed themselves rather more widely than necessary in saying that it was difficult to see how it could 'ever' be just and equitable for 'a party falling within the terms of section 124(3) and well able to fund the relevant works' to be able to claim that the works should instead be funded by the public purse, Nugee LJ considered that there may be circumstances in which it may not be just and equitable to order an RCO. He observed at [65]:

> "Those who can be required to contribute by means of an RCO include (by section 124(3)(d)) associates of the developer (or of a landlord), and the effect of section 121(5)(a) is that a body corporate is associated with another body corporate if at any time in the relevant period (the 5 years before the qualifying time of 14 February 2022) a person was a director of both of them. Suppose a case where a director of a landlord was also a director of other companies which have no other connection with the landlord or its group; such companies might have had nothing to do with the development and be engaged in entirely different businesses, or might include a charitable company to which the director had given his time voluntarily. It is not obvious that it would always be just and equitable to make RCOs against such associated companies even if the effect of refusing to do so was to leave the costs to be borne by the public. …"

41. Mr Hughes KC, unsurprisingly, does not contend that such tenuous association applies to the basis upon which the BLO Defendants are 'associates' of ACL. The passage was instead relied upon by Mr Hughes KC to demonstrate the breadth of possible circumstances which can potentially impact the exercise of discretion justly and equitably. However, the passage does serve to illustrate how far away the present case is from the sort of exceptional types of association that might well militate against the making of an order, at least where costs would otherwise be borne by the public purse.

42. In passages highlighted by Nugee LJ at [61], the purpose of the BSA was considered by the Supreme Court in BDW Trading Limited v URS Corporation Ltd [2025] UKSC 21; [2025] 2 WLR 1095. The case related to the application of the retrospective 30-year limitation period. Lords Hamblen and Burrows considered that:

> "104. A central purpose and policy of the BSA in general, and section 135 in particular, was to hold those responsible for building safety defects accountable. As was stated in the Secretary of State's written submissions, at para 15:
>
> > 'The BSA makes a number of important changes to the law including, at Part 5, several mechanisms that achieve the central aims of the BSA in relation to historical building safety defects. These mechanisms are designed to ensure that . . . those responsible for defects can be held to account . . .'
>
> 105. This purpose and policy are borne out by various of the Explanatory Notes to the BSA. […]
>
> 106. These passages show that ensuring that those directly responsible for building safety defects are held to account was central to the BSA and various of its provisions…"

43. Lords Hamblen and Burrows also emphasised the retrospectivity of Part 5 of the BSA, including section 130, in order to provide "*effective routes to redress against those responsible for historical building safety defects that have only recently come to light,*

whatever level of the supply chain they operated at" (see [87]). At [108], in adopting the written submissions of the Secretary of State, their Lordships considered that the effect of the appellant's argument (in respect of the proper application of limitation periods) would be that contractors causatively responsible for historical building safety defects would be able to avoid liability in claims (e.g. negligence or contribution claims) brought against them by developers. "*This outcome would undermine the legislative purpose of the BSA in ensuring those who caused historical building safety defects should pay for their remediation.*"

44. At [274], Lord Leggatt in his concurring judgment echoed this:

> "A central goal of the legislation is to seek to ensure that safety risks in multi-occupied residential buildings resulting from historical building defects are remedied by those who were responsible for the defects in the first place, and without the leaseholders having to bear the (potentially very large) costs. To achieve that goal, Parliament has decided to enable claims to be brought against property developers, contractors and others responsible for the construction of unsafe residential buildings even when the construction work was completed many years ago."

45. At [280], reference was also made to the purpose of the Civil Liability (Contribution) Act 1978 ('the Contribution Act') and the purpose of the BSA together "*in seeking to ensure that the cost of compensation is ultimately borne by those who were responsible for the damage*".

46. In another decision concerning an RCO, Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Others CAM/26UH/HYI/2023/0003 (27 January 2025), Edwin Johnson J, as President of an Upper Tribunal, declined an invitation to provide any particular tramlines which could be applied to the test of 'just and equitable' in every case:

> "In his oral submissions in reply Mr Warwick invited me to provide some guidance, whatever the outcome of the Appeal, as to how the FTT should approach the just and equitable question. The invitation was extended in good faith, but I do not think that it is one to which I can or should accede. I do not think that it is either possible or sensible to seek to catalogue the factors upon which the FTT may rely in determining, in any particular case, whether it is just and equitable to make the order sought against any particular respondent. I say this essentially for two reasons. First, the breadth of the discretion conferred upon the FTT, namely whether the FTT "considers it just and equitable" to make the order sought, is very wide. The factors which may be taken into account in any particular case are not limited by the terms of Section 124(1) and are not, in my view, capable of exhaustive classification. Second, and if I was to attempt this task, it seems to me that I would be at risk of committing the basic error of attempting to re-write Section 124(1). In Section 124(1) Parliament has chosen not to list or limit the factors which can be taken into account in the exercise

> of the just and equitable discretion. In these circumstances it is not appropriate for me to attempt to do so."

47. Edwin Johnson J also rejected, in that case, the submission that in order to make an RCO, there had to be a clear or rational nexus between the relevant body corporate and the imposition of an RCO to deal with relevant defects, principally because the question of what is just and equitable is left at large. Decisions, it was noted, on what is just and equitable are very fact-sensitive. It was also decided, in any event, that if such a nexus was required, it was met through the FTT's determination that as members of the same wider corporate structure, the relevant respondents should jointly shoulder the burden of remedying the relevant defects. In this context, he observed that:

> "A primary purpose of the jurisdiction in Section 124 is to ensure that a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedying the relevant defects by hiding behind the separate personality of the development company."

48. The only reported case where a BLO has so far been made is the decision of Jefford J in 381 Southwark Park Road RTM Company Ltd v Click St Andrews Ltd [2024] EWHC 3569 (TCC). At paragraphs 10 and 11 of her judgment, Jefford J adopted the judgment of the FTT in Triathlon at first instance quoted above. Parallels were drawn between the '*thinly capitalised or insolvent development company*' referred to in Triathlon and the situation in Click St Andrews, where the company to whom the relevant liability attached was described as a special purpose vehicle whose sole existence was to acquire the freehold of the property, in due course to develop the top floor of the property, and then to divest itself of the freehold. The difference was, however, the absence of the '*wealthy parent*', in circumstances where there remained considerable doubt about the financial standing of the Click Holdings Group. Jefford J agreed on the facts of that case that in considering whether it was just and equitable to make a BLO against Click Holdings Group, the emphasis should be on the financial position of the first defendant rather than on the parent company. This echoed the limited weight placed on the financial position of Get Living as determined at [255] of Triathlon, referred to above.

49. It is of further note in the context of arguments in this case that, in Click St Andrews, Jefford J ordered the BLO at a point at which the relevant liabilities had yet to be quantified. She concluded at [29]:

> "I cannot, however, see anything that requires me to quantify the liability in respect of the relevant liabilities as set out in my judgment at the point of making the Building Liability Order. That is particularly relevant here because of the potential issues in identifying what losses, beyond the cost of remedial works, flow from the relevant liability and not the water ingress. It may in future often be the case that such a Building Liability Order will be made in terms of liability for an amount, particularly if, as here, the order is being made following a trial

> which has identified the extent of the liability in monetary terms. But it does not seem to me that I am required to do that and to make an order in an amount. At present, there are no figures before me which would enable me to do so, or at least to do so without considerable further interrogation of the spreadsheets that have been produced for the purposes of this hearing. That is not a reason not to make the order in terms that reflect the wording of section 130."

50. In Willmott Dixon Construction Limited v Prater and others [2024] EWHC 1190 (TCC), the claimant, Willmott Dixon, was the design and build contractor. The first defendant, Prater, was a specialist design and build envelope subcontractor. The second defendant, Lindner, guaranteed Prater's services. Prater and Lindner were part of the same corporate group as the third party, LPL, and the fourth to sixth parties (referred to as the German Parties). Aecom was the building services engineer, who also provided fire engineering services, including the preparation of fire strategy reports. Willmott Dixon's claim related to the use of external wall materials, which were alleged to be unsuitable or defective from a fire safety perspective. There were contribution claims amongst the defendants, including a claim for contribution by Aecom against Prater and Lindner. An additional claim was made by Aecom against LPL and the German Parties for a BLO, which would arise in the context of a finding that Prater and Lindner were liable in contribution to Aecom. The German Parties, supported by LPL, sought a stay of the additional claim until after judgment in the main claim, because it argued that the application for a BLO was wholly contingent on the court findings of liability in the main claim.

51. Jefford J refused the stay and directed at [31] the additional claim for a BLO to proceed with the intention that it be heard at the same time as the main claim. At [17] Jefford J observed as follows:

> *"*17. As a matter of principle, it seems to me that the legislation does not require a party against whom a Building Liability Order is sought to be made a party to what I would call the main claim or to participate in those proceedings. That is because, for example, the company against whom the order is sought may be one that does not even exist at the time of the proceedings, or because the circumstances in which the order is sought are not even in contemplation at the time of those proceedings. However, if the making of an application for a Building Liability Order is contemplated, it will generally be sensible and efficient for the company against whom that order is going to be sought to be made a party to the litigation and for that application to be heard together with the main claim, although, as I indicated during the course of this hearing, that does not and would not in any way bind a judge to determine that application as part of the main claim and leave it open to the judge as a matter of case management to direct a further hearing in that respect.*"*

52. Jefford J then gave a number of reasons why it would generally be sensible and efficient for matters to progress with the main claim and additional claim being heard together. The first was that the associated company might wish to argue that the circumstances in which that liability was established meant that it was not just and equitable to make a BLO, which issue is avoided if the associated company is party to the proceedings (e.g. in that a point of defence was not sufficiently advanced by the original body). The second was the main claim may not make the relevant findings such that the answer to the question of whether there is a 'relevant liability' was simply a matter of law or one that followed inexorably from the judgment. The court would either then have to make further determinations on the basis of the evidence already covered or hear further evidence, neither of which would be satisfactory. Neither of these factors are relevant in the present case in circumstances where (irrespective of when, if at all, a BLO is ordered against the BLO Defendants), they will be taking, or will have taken, part in the determination of any relevant liability of ACL.

53. Third, Jefford J considered that an associate company facing a contingent BLO, "*may wish to make submissions or cross-examine or whatever it may be in relation to issues that may arise as to whether there is a relevant liability or whether it is just and equitable to make a Building Liability Order*" and that it was far more sensible and efficient that they do so in the context of the main claim and not in a subsequent and separate hearing. It is implicit in this point that, at least in some cases, it may be envisaged that the nature of the investigation at trial on liability may overlap substantively with issues which a party subject to an application for a BLO may consider relevant to the question of whether the imposition of such an order was just and equitable. In such a case, a determination of what is just and equitable in advance of that factual investigation and determination may not be appropriate. Jefford J's point is an obviously fair one. However, I reject the broader gloss sought to be placed on this judgment by Mr Hughes KC when submitting that, on the basis of the authorities (and in particular the decision of Jefford J in Prater), it would 'generally' be sensible and efficient for the application for a BLO to be determined at the same time as the underlying relevant liability. At paragraph [17] of her judgment, Jefford J was explicit in pointing out that whilst it would be sensible for the main claim and the BLO application to be heard together, in the sense that one should not be stayed pending the outcome of the other, her comments were not intended in any way to bind a judge to determine the BLO application as part of the main claim. When the BLO application is heard remains always open to the judge as a matter of case management.

54. Jefford J's two decisions were the subject of comment in BDW Trading Ltd v Ardmore Construction Ltd [2025] 1.W.L.R. 3101, a case concerning an application for a building information order under section 132. His Honour Judge Keyser KC (sitting as a Judge of the High Court) made the following observations about BLOs at [13] and [14]:

> "13. Certain features of a building liability order may be noted. First, it concerns a relevant liability 'relating to a specified building': section 130(2). A building liability order cannot make associated companies liable for the entire liability of the original body to the applicant across a number of developments. The court can, of course, make any number of individual building liability orders in respect of the relevant

liabilities of one original body, but each such order will be discrete. Second, the precise and in that sense carefully confined definition of 'associate' is nevertheless relatively extensive on account of the definition of 'the relevant period'.

14. Third, I can see nothing in section 130 that makes it a precondition to the making of a building liability order that the relevant liability of the original body shall already have been established. Recent decisions of Jefford J illustrate that applications for such orders may be made before the trial of the original body's liability, that such applications may proceed in tandem with the litigation against the original body, and that it may in a given case be convenient to defer consideration of an application for a building liability order until after the trial against the original body; see Willmott Dixon Construction Ltd v Prater [2024] EWHC 1190 (TCC), 214 ConLR 164; 381 Southwark Park Road RTM Company Limited v Click St. Andrews Limited [2024] EWHC 3179 (TCC). However, I do not read any of the Judge's observations in those cases, made in specific factual contexts, as meaning that a building liability order cannot be made before the existence of a liability of the original body is established. If they did have such a meaning, I would respectfully be of a different opinion, for the following reasons. (1) There are many simple and obvious ways in which such a condition could have been expressed, but it was not. (2) It is unnecessary to imply such a condition. (3) It makes perfectly good sense to allow a building liability order to function as what might be termed an indemnity ('If this original body has any relevant liability in respect of this specified building, this associate shall also have that liability'). In a given case, it may be very convenient to know in advance that an associate will be liable, if the original body's liability is subsequently established, so that the associate knows where it stands when it seeks to defend the substantive allegations. (4) The use of the word "any" in section 130(2), rather than merely "a", suggests that an indemnity is permissible. Especially in view of the definition of "relevant liability", "a" would have done very well to refer to an established liability. (5) The use of the word "is" ("…specified building is also… "), rather than "shall also be", is not a significant contraindication, in view of (a) the use of "any", (b) the fact that a liability may be said to be extant though it is (falsely) disputed and not yet established by judicial determination, and (c) the next reason. (6) Subsection (5) makes clear that a building liability order can be made even if the original body has been dissolved. This clearly envisages that the original body does not have to be restored to the register if it were restored, mention of its dissolution would be pointless. There is nothing to suggest that the original body must have had liability established against it before its dissolution, and in view of the circumstances in which the Act was passed (the appreciation, after Grenfell, that many buildings had serious but hitherto latent safety issues) and the

> extended limitation periods provided for in section 135 of the Act (15 or 30 years), section 130 is clearly designed to catch the situation where the original body has passed into history and either could not be restored to the register or, if it were restored, would be a mere empty shell. (7) The example of a building liability order in the Explanatory Notes supports this construction. For reasons mentioned below, any reliance on such an example can only be cautious, because the example of an information order is badly flawed. But in this case the example is consistent both with the wording of section 130 and with good sense. Of course, the construction here advanced does not at all mean that a building liability order cannot be made after liability has been established against the original body, only that it is not available only in such circumstances."

55. Mr Hughes KC submitted that this passage should be treated with some caution, because (a) it formed no part of the ratio of the decision; (b) it is not clear to what extent the issues were ventilated in argument; and (c) the judge relied upon the Explanatory Notes without recognising that they post-dated the BSA and so had no formal status. Mr Hughes KC did not, however, suggest that anything in the wording of the statute meant that a BLO cannot be made before the existence of a liability of the original body is established. This was the question at which most of HHJ Keyser's points were directed, and I agree with his analysis. The only additional point of substance going beyond the conclusion that the Court has jurisdiction to make an anticipatory BLO is that expressed by HHJ Keyser KC at point (3), echoed in his use of the phrase 'good sense' at point (7), namely that, in a given case, it may be very convenient to know in advance that an associate will be liable, if the original body's liability is subsequently established, so that the associate knows where it stands when it seeks to defend the substantive claim. To this may be added, of course, convenience to the party prosecuting the claim against the original body, who will benefit from knowing whether the litigation is worth the candle. I respectfully agree with HHJ Keyser KC. That does not, of course, mean that such good sense is determinative of what is, in any particular case, just and equitable.

E3. Other material

56. Mr Hughes KC relied upon a number of statements from the Commons and Lords' Hansard Records of the debates on the Building Safety Bill. He acknowledged that the quotes relied upon predated the introduction of the amendments in January 2022 which established the BLO provisions, but said they nevertheless gave an insight into what he described as the mischief the amendments were intended to remedy. Each of the statements focussed on the use of special purpose vehicles ('SPVs'). It is clear from the statements that there was a clear awareness that a long limitation period of itself would be ineffective in providing redress if all the building works had been carried out by SPVs which were wound up following the completion of the development. Amongst the quotations relied upon is one dated 20 April 2022, from

Stuart Andrew MP, the Housing Minister who steered the legislation through parliament, who said:

> *"*We are also introducing an ambitious toolkit of measures to allow those directly responsible for defective work to be pursued. Those measures include … provisions removing the protections afforded by special purpose vehicles and shell companies…*"*

57. Both sides also referred the Court to the Explanatory Notes published in July 2022 (as referred to by HHJ Keyser KC in BDW v Ardmore). These explanatory notes post-date the enactment of the BSA 2022, therefore they do not have a special status. However, they can still have persuasive bearing on the meaning and purpose of the BSA in the same way as an academic article (see Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point [2025] EWCA Civ 856; [2026] 1 All E.R. 514). Mr Hughes KC referred to that part of the Explanatory Notes for section 130 which also referred to what was, in effect, the SPV issue which had been referred to in the debates. At paragraphs 1072 to 1073, the Notes say:

> *"*…A practice used in property development is where a subsidiary company (which may be thinly capitalised) is set up to own and manage a development on behalf of the corporate group it is a part of. The subsidiary is often wound up once the development has been completed …
>
> Building liability orders have been designed to address the consequence described above …*"*

58. Mr Hughes KC fairly accepted in oral submissions that it would be an overstatement to contend (as his written submissions had done) that '*the primary policy intention*' underlying section 130 BSA was to avoid SPVs being created to carry out building works and dissolved shortly thereafter to avoid liability. He accepted that the policy intention was better described, as indeed the quotation from Mr Andrew suggests, as one to allow those directly responsible for defective work to be pursued, with the BLO being a tool introduced by the BSA to further that policy.

59. The Explanatory Notes also provide an 'example' of section 130 in action. The example is clearly describing an anticipatory BLO:

> "The freeholder applies to the High Court for a building liability order to be applied to the parent company. The freeholder must show that the parent company is associated with the development company. The High Court must consider whether it is just and equitable to grant the building liability order, for example whether the parent company can receive a fair trial. In this example, the request for a building liability order is granted. The freeholder can now make a claim under the Defective Premises Act against the parent company. The court proceedings would then proceed as normal."

60. In circumstances where there is no debate about whether it is, as a matter of jurisdiction, open to the Court to make an anticipatory BLO, this example is of no relevance to whether, in this case, it is just and equitable to do so. However, it perhaps serves to underline that the authors no doubt also considered that there was 'good sense', to coin HHJ Keyser's phrase, in a scheme the purpose of which is to provide effective measures to allow those directly responsible for defective work to be pursued, in allowing a party pursuing a thinly capitalised company to obtain a BLO prior to the substantive pursuit of proceedings.

61. I distil the authorities and other material referred to the Court, insofar as relevant to the matters before me, as follows:

(1) the assessment of whether it is just and equitable to grant a BLO is a broad test and necessarily fact specific;

(2) the power is discretionary and should therefore be exercised having regard to the purpose of the BSA and all relevant factors;

(3) the power includes the ability to make an anticipatory BLO, that is a BLO which is ordered before a finding of any relevant liability;

(4) the purpose of section 130 of the BSA is to provide the Court with powers to allow those directly responsible for defective work which gives rise to a relevant liability for the purposes of the statute to be pursued through their associates. Whilst those powers may have the effect of removing the protections afforded by special purpose vehicles and shell companies, the purpose of the BSA should not be defined as in any way limited to being directed at special purpose vehicles and shell companies;

(5) the Court should not seek to limit or circumscribe the statutory test by setting out an exhaustive list of factors;

(6) it will generally be sensible for an application for a BLO to be case managed within the same proceedings as the main action which will determine the liability which is claimed to be the relevant liability for the purposes of the BLO;

(7) whether an application for a BLO should be determined in advance of, as part of, or indeed after, the liability hearing in the main claim will be a matter of case management. Ultimately, whenever the application is heard, it may only be acceded to where the Court concludes that, at the point it is making the BLO, it is just and equitable to do so.

F. Prematurity

62. The BLO Defendants' primary position is that it is premature to decide whether to grant a BLO upon this Application. The central submission advanced by Mr Hughes KC is that, given there is an extremely broad range of factors which a tribunal may and indeed ought to consider when applying the 'just and equitable' test, the decision can only be made after full investigation and examination at trial. He submits that the

Court is not in any position to reach a concluded view on relevant factors, whether individually or taken together, which would influence the outcome if the Application was made following trial.

63. By analogy, Mr Hughes KC referred to the approach of the Courts to:

(1) Part 8 claims. The Court will only resolve disputes on a Part 8 basis which are "*unlikely to involve a substantial dispute of fact*": CPR 8.1(2);

(2) Summary judgment. On a summary judgment application (Easyair Limited v Opal Telecom Limited [2009] EWHC 339 (Ch) at [15]) the Court can only dispose of one party's factual assertions on a summary judgment basis if there is no real prospect of its evidence on that issue being accepted.

(3) Preliminary issues. The TCC Guide states at §8.2.2:

> *"The court would ordinarily expect that, if issues are to be dealt with by way of a PI hearing, there would be either no or relatively limited oral evidence. If extensive oral evidence was required on any proposed PI, then it may not be suitable for a PI hearing."*

64. Although these analogies illuminate the approach the Court may adopt on this Application, the ultimate question remains the just and equitable exercise of discretion at the point in time the application is determined. As a matter of principle, and as Mr Selby KC accepted, it is plainly relevant for the Court to consider, by reference to the evidence available at the hearing, the likelihood that, after disclosure, witness evidence and expert evidence at trial, the Court would make a different order assuming a finding of a relevant liability against ACL. Given the overarching focus on what is just and equitable, and the stricture against formulating tests or criteria that might operate to fetter that discretion, both counsel sensibly cautioned against articulating any precise "test" (whether by reference to principles applicable to summary judgment or otherwise) that an applicant for an anticipatory BLO must satisfy. That said, it may safely be recognised, as both counsel agreed, that the greater the Court's confidence that the same order would be made following a trial, the more inclined it will be to grant an anticipatory BLO.

65. It is for this reason that, contrary to the manner in which Mr Hughes KC structured his submissions, it is inappropriate to consider the question of prematurity separately and in advance of the question of whether it is just and equitable to make a BLO. Instead, it is more appropriate to consider each factor said by each party to weigh in the balance, considering not just the relevance and weight to be given to any particular factor, but the extent to which the Court considers, in relation to that factor, that it is in a position to determine the matter now, or whether the picture may be materially different at the end of the liability trial.

G. Anticipatory BLO: Is it Just and Equitable?

G1. Crest's case

66. Mr Selby KC relies upon the following 'key facts' to underpin his application: (1) ACL is in administration and does not have the means to satisfy any judgment against

it; (2) ACL specifically entered administration because of its exposure to claims in relation to defects following the Grenfell Tower fire; (3) ACL is part of the Ardmore Group, which includes the BLO Defendants; (4) the Ardmore Group has been specifically restructured to ringfence ACL's liabilities from those of other companies within the group; (5) 'all roads lead to Cormac Byrne and/or the Byrne Family Trust'; (6) there can be no real dispute that the Development contains building safety risks within the meaning of section 131(6) of the BSA; (7) there can be no real doubt that ACL will be liable for those building safety risks; (8) ACL has been alive to both Crest's claim and third party claims for a long time; (9) there can be no real doubt that Cormac Byrne, and therefore the BLO Defendants, know all about Crest's claims and have known for some time; (10) the BLO Defendants were sent formal pre-action protocol letters of claim almost a year ago, and they showed little interest in engaging; (11) Cormac Byrne remains remarkably silent in this Application; (12) there is an Adjudicator's Decision for c.£14.9m relating to the External Wall Defects that has gone unpaid.

67. Facts (1) to (5) are, I find, established for the purposes of this Application by reference to the matters dealt with in Sections C and D above.

68. I am also satisfied, to a high degree of confidence, that facts (6) and (7) are made out on the evidence before the Court. Whilst of course the extent of defects, and the nature and cost of the appropriate remedial scheme, remain in dispute such that there must be a trial of the pleaded issues before the nature and extent of liability and quantum can be finally determined, Mr Hughes KC did not dispute either of these propositions. These facts are clear from the evidence placed before the Adjudicator, and the fact that no positive case on breach was advanced before him. Similarly, the Defence in the litigation largely puts Crest to proof of the alleged defects, and describes them, and the claimed remedial works, as 'overstated': whilst this may go to the extent of liability it is very unlikely to negate it. There is no positive case denying fitness for habitation. Notwithstanding the time that has passed since his dis-instruction, there is no evidence before the Court to undermine the conclusions of ACL's own erstwhile expert, Dr Crowder, that there exist defects in the external walls which create an intolerable safety risk (ranging from low-medium to high in different parts of the Development). ACL had full design and construction responsibilities. The BLO Defendants admit that ACL owed a duty under section 1 of the DPA to CNR (although that duty is denied in relation to CNO).

69. A high degree of confidence in these facts is relevant because it means that the Court is much more than likely, in due course, to be asked to make a (non-Anticipatory) BLO. This is relevant to whether such an order should be made now, providing that considering all the other factors it is just and equitable to do so.

70. Facts (8), (9) and (10) are also established on the basis of the evidence in Mr Lennon's witness statement. Again, Mr Hughes KC did not seek to dispute the propositions advanced. Their relevance goes, first, to providing support for facts (6) and (7): ACL (prior to its administration) and/or the BLO Defendants have had a proper opportunity to put forward a positive case on the existence of defects and fitness for habitation, but have not done so. It is also relevant, therefore, to the potential justness of an Anticipatory BLO. There may be cases in which an associate has had no involvement in, or opportunity to investigate, the facts and matters which underlie the basis upon which a BLO is sought against them, as at the date the application is made. In such cases the number of imponderables may be significantly

greater than they are in this case, which may mean that it is not just and equitable to make an Anticipatory BLO. Facts (8), (9) and (10) mean that this is not such a case.

71. Fact (11) is principally relevant to what the Court should make of the evidence of the BLO Defendants' financial standing and is considered further below in the context of the relevant aspects of argument. It is a matter of record that Mr Byrne did not submit any evidence on the application in support of the BLO Defendants' position that it would not be just and equitable presently to make either of the sought BLOs. It is also true, as Mr Hughes KC points out, that it is Mr Byrne who has signed a statement of truth on the Amended Defence, and the propositions advanced in that document (which include reasons why it is said that it is not just and equitable to make an order) can therefore be attributed to him on this Application.

72. Fact 12 is uncontroversial (and is principally relevant to the Adjudication BLO).

73. Mr Selby KC says, on the basis of these facts, that the Anticipatory BLO meets the purpose of the BSA, in requiring the BLO Defendants to stand behind ACL so as to create an effective route of redress against those responsible for the historical building safety defects. Emphasis is particularly placed on fact (5). Whilst it would not be correct to describe the BLO Defendants as 'a fluid, disorganised and blurred network or structure' (as in Edgewater), it is plain that the Ardmore Group is in effect a web of companies all with ultimate control by, and for the benefit of, Cormac Byrne and/or his Family Trust. Moreover, whilst it is fair for Mr Hughes KC to make the point that ACL was never an SPV within a structure designed from the outset to enable the parent to benefit from, but not be liable for defects within, a Development, facts (2) and (4) are clearly matters which weigh in favour of the exercise of discretion. ACL was placed into administration, for the benefit of the wider group, with the specific purpose of avoiding (amongst other things) the very specific liabilities that Parliament has purposefully targeted within section 130 of the BSA. There is no suggestion that doing so was not a legitimate and lawful business practice. However, whilst Mr Hughes KC emphasises the fact that the Ardmore Group did not operate with thinly-capitalised SPVs to avoid its liabilities from the outset, it is plainly of weight that, when those liabilities arose, the Group has restructured and placed ACL in administration, with, at least from that point onwards, the same effect. There is no basis upon which this picture will change between now and the conclusion of a trial against ACL, and the Court is as able to weigh these facts in the exercise of its discretion as it would be in due course.

74. I now deal with each of the points raised by Mr Hughes KC by which he contends it would not be just and equitable to make an Anticipatory BLO. There is inevitable overlap between issues of prematurity and issues relied upon substantively to resist the making of the Anticipatory BLO. Mr Hughes KC's written submissions made 12 points under the heading of 'prematurity', and 15 points made under the general issue of 'just and equitable'. I group points together sensibly in the sections below. (I identify in square brackets the relevant section numbering taken from those submissions).

G2. The purpose of the BLO remedy [H(i)]

75. In his written submissions, Mr Hughes KC characterised the primary policy intention underpinning section 130 as "*to avoid SPVs being created to carry out building works or developments and dissolved shortly after the works are completed to avoid liability, thus preventing domestic property owners from having their properties rectified*". He pointed out that ACL was not an SPV or thinly capitalised, and that the BLO is not required to facilitate the remedial works which are already being funded. This has been considered in part at paragraphs 58, and 61(4) above. I consider this to be too narrow a characterisation of the purpose of the BSA. Particularly in the context of section 130, the emphasis placed on domestic property holders and a nexus with facilitating the actual carrying out of works is misplaced. These are undoubtedly very important facets of the overall scheme, but if that were the limit of the purpose of the BSA, it would substantially, if not wholly, be met by the scheme for ROs and RCOs. Sections 123 and 124 are focussed in terms of (a) who may bring an RO/RCO: a limited list albeit one which specifically includes, in effect, 'the domestic property owner' and (b) against whom an RCO can be brought: a landlord (current or at the qualifying time) or the developer, and a person (i.e. a separate legal entity) associated with one of these. In broad terms, it is the section 123/124 regime, with disputes dealt with by the FTT which provides swifter resolution than complex multi-party determination in the High Court, which enables domestic property owners to obtain orders requiring works to remediate building safety risks at their property, and orders which enable those works to be funded notwithstanding the dissolution or impecuniosity of the development SPV.

76. Yet, even through the more focussed lens of sections 123 and 124, Nugee LJ rejected as too narrow the argument that, considering the purpose of the powers, no RCOs were needed where the works were already being carried out and were adequately funded. The purpose of section 130 is wider: it enables broader justice to be done, reflecting (in the words of Lords Hamblen and Burrows) "*the legislative purpose of the BSA in ensuring those who caused historical building safety defects should pay for their remediation*". Whilst therefore it is correct that in the present case the BLO is not required in order to facilitate the remedial works to be carried out, this is of little weight in the exercise of discretion.

77. I conclude that a BLO sought by Crest following a finding of liability against ACL would undoubtedly meet the broad purpose of the BSA and section 130 in particular, in ensuring those who caused historical building safety defects to pay for their remediation. This will not change. It is nevertheless necessary to consider the related point made by Mr Hughes KC that, even if a BLO may meet the purpose of the BSA in due course, an Anticipatory BLO does not.

G3. No Good Reason [G(i)]

78. There is no dispute that the progress and funding of the remedial works do not depend upon the making of a BLO. That the BLO will not be needed to fund the works is, of course, *a fortiori* the case in the context of an Anticipatory BLO in circumstances where it is envisaged that it will not become effective (in the sense that the BLO Defendants would be liable to make payment to Crest) unless and until any quantified liability that ACL may have to Crest under section 1 of the DPA or as a result of a building safety risk is established at trial. It will also regularly be the case in the context of BLOs more generally, because the remedial works will often already have been or are in the course of being carried out – and if not voluntarily, then mandated and financially facilitated by the prior use of ROs and RCOs against the landlord or

developer, or their associates. This has been considered to some extent in the context of the 'purpose' of the BSA. The purpose is broader than simply the immediate facilitation of remedial works.

79. Nevertheless, Mr Hughes KC submits that if the purpose is to provide ultimate and effective redress against the responsible party, that purpose is met equally well by a BLO at the end of trial as by an Order now. In these circumstances, there is no good reason for a BLO now, and the absence of good reason weighs against the exercise of discretion, particularly if to make it now may prejudice the BLO Defendants.

80. First, the extent to which the Court might look at the 'reason' or motivation (good or otherwise) for a party is seeking to exercise a statutory right when judging whether it would be just and equitable is itself questionable: see Nugee LJ in Triathalon at [78] (above).

81. In any event, and contrary to Mr Hughes KC's submission, I concur with the view given by HHJ Keyser KC in BDW that a good reason plainly lies in allowing a BLO to function as what might be termed an indemnity. Whilst Mr Hughes KC describes this as an entirely one-sided benefit to Crest (such an order is of obvious benefit to Crest in that an anticipatory BLO enables it to know whether the cost and expense of pursuing litigation against ACL will be worth the candle), it is to be noted that HHJ Keyser KC's remarks in BDW focused on the 'convenience' to the *associate* (i.e. in this case the BLO Defendants) in knowing in advance whether they will stand to be liable for the original body's liabilities, and therefore whether to defend the substantive allegations. This point has force: were the BLO Defendants to establish as they seek to do on this Application, on the basis of matters which would not change between now and the end of trial, that it is not just and equitable to grant a BLO, they would no doubt decide not to resource the defence and allow judgment to be entered against ACL knowing that there could be no effective monetary enforcement by Crest against them. The benefit of an anticipatory BLO is not, therefore, one-sided.

82. Moreover, even if the ultimate purpose of the BSA is served equally well whether the BLO is granted now or at the end of trial, this is not a reason not to grant a BLO in circumstances where the Court clearly has the power to do so, providing it is otherwise just and equitable to do so. Turning the submission on its head, it cannot be said that the purpose of the BSA is *not* served by granting an Anticipatory BLO.

83. Mr Hughes KC makes a number of other or related points about the absence of good reason in his written submissions. For completeness, I deal with them below. Mr Hughes KC's submissions were that:

(1) Crest's point is circular. It is said that the risk of losing a point (i.e. whether a BLO should be granted at the end of the liability trial), is not a reason why it should be determined now, and that Crest's position is no different to many claimants where a particular issue may result in its claim failing. Mr Hughes KC goes further, submitting that inherent within the Application is that Crest currently does not know if it will succeed in establishing an entitlement to a BLO at the end of trial, and that given that doubt, it cannot be right for it to be determined summarily. However, the determinative nature of a particular point in a practical sense is often a good reason to have an early determination. Assume Crest had the benefit of a parent company guarantee, the proper construction or validity of which was in dispute. Determining that question

prior to incurring the expense of the main claim against ACL would make obvious (and analogous) sense. Whilst Mr Hughes KC coupled these submissions with the contention that the question of what is just and equitable is not susceptible to early, black-and-white legal analysis, the latter is of course a different point. It is obviously correct that if the Court is not in fact in a position to determine presently whether it is just and equitable to grant an Anticipatory BLO, it should not do so.

(2) Crest's upstream liability has not been settled or determined, so there is a risk of a windfall. This is not right: on any view there is no windfall associated with the Anticipatory BLO in circumstances where its execution is contingent on the establishment of a quantified relevant liability on the part of ACL.

(3) The parties' and Court's time and cost would not, in any event, be wasted if a BLO is not granted now, but refused at trial, where (a) the PNB Proceedings remain extant, (b) Crest's claim against Yuanda, the Third Defendant in the Crest Proceedings (who was the specialist subcontractor engaged by ACL to design and construct external wall systems to the Tower) remains extant and/or (c) Crest has sent or is sending letters of claim under the Pre-Action Protocol to Sto (who manufactured and supplied the render system) and Tweeds (the Employer's Agent for the Development). The relevance of other potential claims is considered further below, but in the context of 'good reason', this submission is also unpersuasive: on any view significant costs and expense – on the part of both Crest and (to the extent they continue to fund a substantive defence against ACL's liability) the BLO Defendants, and indeed the Court's, time would be wasted if ultimately the BLO Defendants have no liability to stand behind ACL pursuant to section 130 of the BSA, irrespective of any other extant claims. If that question can be determined justly and equitably at this stage, it makes obvious sense to do so from a case management perspective.

(4) Even if a BLO is granted, Crest could still lose this claim and the Court cannot presume to the contrary. For the reasons set out above, the Court has a high degree of confidence that the Development contains building safety risks within the meaning of section 131(6) of the BSA and that ACL will be liable to Crest for those building safety risks. However, the Court does not, and does not have to, presume a finding of liability. If ultimately ACL is not liable to Crest, the BLO would be writ in water as there would be no relevant liability triggering an obligation on the BLO Defendants to pay anything. The point goes nowhere.

(5) Crest can offset any legal costs it incurs against its tax liability. This is not relevant (nor does it meet the point that fruitless litigation is a waste of the Court's resources).

(6) Granting a BLO now, as opposed to doing so at trial, would not result in material savings in the time and cost of the Proceedings. It is said that even if a BLO is granted, there would still need to be full evidence and argument on the extent and amount of the relevant liability, as well as the claims by both Crest and the BLO Defendants against other parties. This is undoubtedly correct if the Proceedings continue through to trial, but it does not detract from the existence of good sense in granting an Anticipatory BLO in an appropriate

case, or meet the point that the granting of an Anticipatory BLO may increase the prospect that the Proceedings may be subject to commercial settlement.

(7) the Court would need to 'revisit' the question of a BLO in respect of the BLO Defendants' contribution claim against Sto. However, the Court would not be 'revisiting' anything; it would be 'visiting'. Different considerations may apply to whether it is just and equitable for a BLO to be ordered against Sto's associates. The fact that the BLO Defendants may in due course seek a BLO against Sto in a separate application does not weigh materially against granting a BLO in favour of Crest on this Application.

84. Mr Selby KC advanced a further argument as to why, on the specific facts of this case, there is a good reason for granting a BLO now: this is what he referred to in argument as the crystallisation of liability but might more accurately be described as the crystallisation of the BLO Defendants' contingent liability. The unchallenged evidence before the Court is in the administration of ACL, the claim by Crest (an unsecured creditor) against ACL was valued (in a document signed by Cormac Byrne) at (just) £1. Mr Horne, for the BLO Defendants, confirmed in evidence that the current provision for liabilities within the AGL consolidated accounts does not include provision for the present claim by Crest for a BLO. The 'good reason' advanced by Mr Selby KC is that granting a BLO now, rather than at the conclusion of trial, would require the BLO Defendants to reconsider its accounting provisions and cashflow forecasts and the like in the knowledge that it is going to have to meet ACL's historic liabilities insofar as they are caught by the BSA. Mr Selby KC's submission went as far as to contend that, on the evidence before me, the Court can conclude that without a BLO there is a real risk that there will be nothing within AGL to meet ACL's liabilities in two years' time. If that were the case, there would not be effective redress against the party responsible for the defective building, and the purpose of the BSA would be defeated.

85. I do not consider that on the evidence on this Application I can conclude that the real risk identified by Mr Selby exists, not least because its existence (advanced principally in reply submissions) was not pleaded or evidenced as a 'good reason' for granting the BLO and not dealt with, at least directly, by the BLO Defendants in evidence. That said, in general terms, the benefit to both sides of the making of appropriate accounting provisions may be a collateral advantage of an Anticipatory BLO. It is of itself unlikely to be of significant weight if it were not otherwise just and equitable to make such an Order in advance of a finding of liability.

G4. Crest is a commercial developer [H(ii)]

86. Mr Hughes KC argues that Crest is an established commercial developer, who has made and makes substantial profits from property development. Crest is not an individual leaseholder, an impecunious management company, a charity or a social housing provider etc., and as such is not the sort of entity in whose favour it is just and equitable to grant a BLO. He submits that in circumstances where Crest developed the Development to make profit, and knowingly took the risk that there may be issues with the Development and it may face claims, there is no injustice for Crest facing that risk.

87. At least on the facts of this case, that Crest is a commercial developer does not weigh against the making of a BLO. Because of the twin regimes – the RO/RCO, and the BLO – it is regularly going to be a (commercial) landlord or developer who has, either itself or through an associate, funded the remedial work and who will seek redress from the contractors, designers or others who caused building safety defects. As discussed at paragraphs 75-76 above, this reflects the purpose of the BSA, and it is in meeting this purpose where the justice lies.

88. There is obviously no issue of prematurity in respect of this factor.

G5. Comparative Profits [H(iv), H(v)]

89. Mr Hughes KC contends an important factor in whether to grant a BLO should be the extent to which an entity has made profits, both in respect of the Development and overall.

90. As to the Development, he contends that ACL's gross margin out of the Development was only c.£1.92m, and that, on the evidence of Mr Horne, accounting for overhead contribution of c.£3.9m, ACL overall made a net loss of £1.94m on the Development such that no profits would have gone to the BLO Defendants from the Development. Mr Hughes KC contends that in contrast, on Crest's figures insofar as they had information, Crest made gross profits of £15.9m from the Development, £7.2m net profit and £5.1m after corporation tax. He points out that Crest also still owns the value of the headlease of the Development, and that after the remedial works are completed, Crest will have the benefit of a Development with new external walls which comply with current Building Regulations, increasing the value of the Development and Crest's interests in the same and/or decreasing its maintenance costs. This characterisation is disputed by Crest. Nevertheless, assuming Mr Hughes KC is correct factually, the submission is that where Crest has made substantial profit on the Development, ACL made a loss and the BLO Defendants did not make a profit, it is not just and equitable to maintain Crest's profit line while increasing Ardmore's losses.

91. As for the position overall, Mr Hughes KC argues that Crest has made significantly more profit than the BLO Defendants since the date of the D&B Contract. He says that since 2006, CNO has made profits of £1.229bn (EBIT) since 2006. CN PLC has filed accounts consolidated on a group basis showing profits of £1,081bn (EBIT). In contrast, since 2006, ACL and AGL have made profits (generally) of only £60.05m (EBIT) and £53.85m (EBIT). He puts it in terms that Crest has the "*deepest pockets*" compared to the BLO Defendants.

92. In the context of this case, where both Crest and Ardmore are substantial and sophisticated corporations, even if of different relative size, little weight should be afforded to these points. Were it otherwise, at least generally, it would lead to the bizarre outcome that commercially unsuccessful builders were able to avoid the application of the BSA, whilst commercially successful ones could not. There is a myriad of reasons why a project may or may not be profitable for either developer or contractor, none of which have any obvious bearing on whether it is just and equitable that effective redress should be borne by a party responsible for historic building safety defects. The legislative purpose of the BSA is in ensuring those who caused historical building safety defects, not those with the deepest pockets, pay for their remediation. There may, of course, be other situations where, amongst other factors, a

significant disparity in financial heft between applicant and respondent could be a matter which weighs in the balance, but I do not consider that to be the case presently.

93. In the context of prematurity, Mr Hughes KC contends that disclosure provided so far relating to the level of Crest's profits is inadequate and this of itself is a reason that an Anticipatory BLO cannot justly and equitably be ordered. In light of the lack of weight afforded to the point in the assessment of what is just and equitable in this case, the broad outline of 'comparative profit' point is plainly sufficiently clear at this stage for such weight as may ever be afforded to the point to be assessed fairly. Indeed, a detailed and costly granular investigation into Development-related or historic profits of the contractor versus developer would rarely be anything other than an enormously wasteful distraction, far removed from that which may properly shed light on whether a BLO is just and equitable.

G6. The Main Claim/The amount of the BLO/Ardmore's Financial Position [G(ii), G(iii), G(iv), H(iii), H(vi), H(x), H(xii), H(xiii)]

94. Crest has not admitted or settled its liability in the PNB Proceedings, which remain extant, but have been stayed. Mr Hughes KC argues that as far as the BLO Defendants can tell, it is not a mere formality or foregone conclusion that Crest will admit liability or settle and that the quantum of any settlement appears to be entirely at large. It is said that it would not be just and equitable to order a BLO where Crest has not formally recognised or agreed a liability with PNB, and the amount of Crest's liability is not settled. In oral argument, Mr Hughes KC fairly accepted that this point essentially folded into his argument that it was not just and equitable to order a BLO when the quantum that might attach to the BLO was unclear or unresolved.

95. There are plainly considerable uncertainties around what the quantum of any relevant liability may be at this stage. There is a central dispute about the extent of remedial works. There are other specific points that may affect quantum, the outcome of which will not be known until the end of trial, such as an argument that elements of the original works would have cost more, and ACL would have been paid more by Crest, if they had been carried out as Crest alleges that they should have been; and an argument that a credit is required to be given in respect of recoveries already made against the Second Defendant.

96. Mr Hughes KC argues that the amount of the liability must impact the question of whether it is just and equitable for that sum to be subject to a BLO. Mr Hughes KC contends that the Court would have very different views as to whether it is just and equitable if the amount of liability was £50,000 or £30,000,000. However, it is not obvious why this would be so. Jefford J made an Order in Click St Andrews pending quantification of the relevant liability (which may form a subset of the overall liability of the original body to the claimant) and there is nothing inherently inequitable or unjust to make such an order when quantum remains to be determined.

97. Mr Hughes KC links the uncertainty about the amount of any future liability to the BLO Defendants' financial position. It is said the question of whether the BLO Defendants can, in due course, pay the relevant liability, and the impact of a BLO on their financial position, is a relevant factor as to whether it is just and equitable to make a BLO, and that this cannot, by definition, be determined at this stage. However, if the BLO Defendants can pay whatever the relevant liability is in due course, that would be a factor that would be in favour of making the BLO. The Court can, today,

assume the worst, namely that the effect of making the BLO may, at the point at which any liability against ACL is crystallised, expose the BLO Defendants to a liability it then cannot or cannot fully discharge. Set against the other factors which would weigh in favour of making a BLO, I do not consider that this fact would, after trial, weigh against making an order to any material degree, and it need not therefore do so in the context of an Anticipatory BLO. This approach echoes that taken by Jefford J in Click St Andrews. It also reflects that taken by the FTT (and by implication the Court of Appeal) in Triathlon, in which it was observed that it would be an unusual case in which the source or extent of a respondent's assets or liabilities will carry much weight when deciding whether it is just and equitable to order that respondent to meet a relevant liability pursuant to Section 130. There are no particular features of this case which serve to increase the weight that should be attached to the BLO Defendants' present, or potentially, future ability to pay.

98. I afford no weight in the exercise of discretion to Mr Hughes KC's related submission that the effect of making an Anticipatory BLO in this case would be to create a queue of other parties seeking anticipatory BLOs against the BLO Defendants in relation to other claims, that it may make borrowing or raising money for performance bonds more difficult or, vaguely, "*what it will project to the market*". This is, in effect, the claimed prejudice in making an Anticipatory BLO. The first answer is that there is no evidence to this effect: the point was made, as Mr Hughes KC conceded, wholly by way of submission. In any event, if there was to be a deleterious financial effect to the BLO Defendants in the Court stating now that it is just and equitable for, upon the finding of any relevant liability against ACL, the BLO Defendants to stand behind it, that cannot sensibly be regarded as weighty prejudice, at least on the facts of this case. The anticipatory nature of the BLO does not of itself make it unjust or inequitable, even in circumstances where making such an order has a negative financial impact on the BLO Defendants.

G7. Relevance of the underlying issues and knowledge [G(v), G(vii), H(vii), H(viii)]

99. Mr Hughes KC submits that the question of whether it is just and equitable to make a BLO must involve a consideration of the culpability or blameworthiness of the different parties, and that that will not be known until the conclusion of the trial on liability.

100. Initially, this submission extended to a contention that until the Court had assessed the relative contribution of any and all third parties, whether or not part of the Proceedings, it would not be able to determine whether it was just and equitable to make a BLO against the BLO Defendants. However, Mr Hughes KC accepted during argument that the Court will determine the relative contributions of those third parties who share responsibility for the defects during the course of the Proceedings and this would be reflected in the finding of relevant liability which ultimately attaches to the BLO. So, if ultimately ACL were only to be found 50% responsible as between it and other defendants/third parties then, subject to joint and several liability, the BLO Defendants would only be required to stand behind ACL to the extent of that determined liability. The fact that the extent of this relative liability is as yet unquantified is not a reason why it would not be just and equitable to grant an Anticipatory BLO now. It is essentially just another facet of the uncertainty around quantum. The possible responsibility of other third parties, not part of the Proceedings, should similarly not weigh against the making of such an order. There is nothing to stop the BLO Defendants bringing other parties into the litigation and their

contribution can be weighed in due course. Ultimately, Mr Hughes KC did not pursue the argument that the potential liability or responsibility of third parties for building safety defects in the Development impacted the ability of the Court to make a just and equitable anticipatory BLO.

101. Mr Hughes KC did, however, pursue his submission that a factor in whether it is just and equitable to grant a BLO is the blameworthiness of Crest. The BLO Defendants plead:

> "Crest is not a 'truly innocent' party. Crest was (or ought) itself to have been a knowledgeable developer, which owed its own duties and obligations to PNBC, including a duty under section 1 of the DPA. Crest engaged consultants, including Wintech, to review, inspect and approve the design and the Works. It is likely that Wintech and other consultants would have provided reports to Crest. Crest is required to prove, and disclose documents showing, its involvement in and/or knowledge of the elements of the design which it now alleges are defective during the Works."

102. Crest deny any knowledge of the relevant defects, and plead, in addition, reliance upon contractual provisions which stipulate that any approval shall in no way reduce ACL's obligations under the terms of the Design and Build Contract.

103. In contrast to the position in respect of third parties, it is not alleged that Crest caused the defects or that its conduct amounted to anything giving rise to legal responsibility for the losses (e.g. contributory negligence) resulting from the defects, or a break in the chain of causation, which would serve to reduce or eliminate the liability of ACL as between it and Crest. If this had been pleaded, then as with third parties, the extent to which that allegation succeeds will simply reduce the amount to which the BLO ultimately attaches. It would be a matter that resolves itself in due course, and is not a reason why it would not be just and equitable to make an anticipatory BLO which would attach to whatever the ultimate relevant liability is determined to be.

104. It is nevertheless said by Mr Hughes KC that Crest's 'fault' by way, through its consultants, of approval of the design and the works, is a factor which should be taken into account (when the facts are known) in considering whether it would be just and equitable to issue a BLO, irrespective of the fact that the 'fault' does not sound legally in a reduction of liability. In parallel to this contention, Mr Hughes KC argues that another relevant factor in the exercise of discretion should be the nature and extent of ACL's 'fault', irrespective of the extent of ACL's legal liability e.g. a failure to have carried out the works with reasonable skill and care may mean that ACL is more at 'fault' than if its liability arises out of a technical breach. Both points give rise to the same issue: to what extent it is just and equitable to make an anticipatory BLO in circumstances where what may be described as 'relative factual blameworthiness' as between Crest and ACL has not been considered (and could not be determined on this Application).

105. In this context, both Counsel advanced submissions as to whether or how the Court could take relative factual blameworthiness into account when making a BLO. Could, for example, the Court order, in its discretion, a BLO in relation to a proportion of the

relevant liability which reflected, justly and equitably, the relative factual blameworthiness?

106. Mr Hughes KC contends that this would be possible in principle, but that the Court could only do so in a single unitary exercise after trial. As such, it would not be possible, as a matter of jurisdiction under the BSA, to order an anticipatory BLO which left to the trial judge the question of whether or to what extent the relevant liability could be reduced to reflect relative factual blameworthiness. Mr Hughes KC also contended that it would not be pragmatic to do so, even if he were wrong about jurisdiction.

107. Mr Selby KC contended that there was no power at all, when making a BLO, to reduce the relevant liability when that liability is transmitted to the associated company. In support of this, he placed reliance upon Edwin Johnson J's description of section 130 in Edgewater, in which (at [127]), he stated:

> *"Section 130 is engaged where a body corporate has a relevant liability, of a kind described in Section 130(3). That liability can then be made transmissible from the original body to a specified body corporate, or it can be made transmissible as the joint and several liability of two or more specified bodies corporate. The transmission of liability takes place pursuant to paragraph (a) or paragraph (b) of subsection (2), depending upon whether a building liability order is sought against one specified body corporate or two or more specified bodies corporate, and provided, in each case, that there is the required association with the original body."*

108. As to whether a judge can reduce the relevant liability upon transmission (to use Edwin Johnson J's phrase), I agree with Mr Hughes KC. Edwin Johnson J was providing a generalised description, and certainly not considering whether a Court may specify that only part of a relevant liability may be transmitted, if the Court considered that it was just and equitable to do so. The purpose of the statute is to enable the Court to pass the liability for a building safety risk to those responsible for the defects only if it is just and equitable to do so. There is nothing in the language of the statute which requires such a binary outcome as would result from Mr Selby KC's construction. A BLO "*is an order providing that any relevant liability (or any relevant liability of a specified description)*" is transmitted to the associate. Section 130(6)(b) provides that "*specified means specified in the building liability order*". There are no express restrictions on what or how the Court may provide a specified description, but as a matter of language, the words convey the ability to specify some part of a relevant liability which is to be transmitted, and by implication leave some part or parts of a relevant liability which are not being transmitted. In a joint note from counsel following the hearing, they confirmed that there was no material in the authorities, parliamentary debates, explanatory notes or briefing papers that shed particular light on what "*any liability of a specified description*" was intended to mean. It is possible that the phrase, construed narrowly, encompasses no more than the ability to specify that the BLO attaches to a relevant liability for some specified defects and not others i.e. definable and separately identifiable elements of a relevant liability (as opposed to a *proportion* of a relevant liability). However, this is not a distinction necessitated by the language. The question of statutory interpretation is whether, considering the purpose of the BSA, the Court may, in ordering '*a specified*

description of a relevant liability' to be subject to a BLO, specify a proportion of that relevant liability if it considers just and equitable to do so. I consider that it would be consistent with the purpose of the BSA to construe the phrase broadly so as to permit such an Order, if justice and equity demand it. A broad construction is also preferable as it allows the Court, to the extent it is just and equitable to do so, a way to limit the potential exposure of associate companies to the erosion and elision of corporate identity which the BSA entails.

109. The next question is whether the Court can make an Anticipatory BLO now, leaving to trial the question of whether any relevant liability would be the subject of reduction by way of specified description on account of relative factual blameworthiness. I do not consider that the language of the statute prevents this approach as a matter of what Mr Hughes KC describes as 'jurisdiction'. It is inherent in the making of an Anticipatory BLO, which power has been vested in the Courts, that the determination of a relevant liability, or relevant liability of a specified description, follows the making of the BLO. Turning an Anticipatory BLO into a BLO which is ultimately enforceable rather than contingent is inherently a two-stage process. If a lack of certainty as to the outcome of the second stage means that it is not just and equitable to make an Anticipatory BLO (which is the argument advanced as a separate ground of objection under '*the extent of the BLO*' at paragraphs 138-143 of his written submissions) it would mean in practical terms that the power vested in the Court could rarely, if ever, be exercised in practice.

110. Click St Andrews makes clear that the Court can grant an unspecific BLO following findings of liability in advance of quantifying those liabilities or providing a specified description of which defects the BLO applies to. There is similarly no reason in principle not to apply this two-stage process, inherent in an anticipatory BLO, to the future possibility of a reduction in a relevant liability upon its transmission when identifying the relevant liability or, as may be required, a specified description of the relevant liability, providing it is just and equitable to adopt this approach when the anticipatory BLO is made.

111. This is not to say that if there was a situation where the potential factual investigation of relative factual blameworthiness might go to whether it was just and equitable to make a BLO *at all*, then the Court should not do so in advance of the outcome of that factual investigation. However, such cases are likely to be rare, and this is not one of them. This is because the effect of Mr Hughes KC's contention is that, after trial, a Court may conclude that the relative factual blameworthiness is such that, upon transmission to the BLO Defendants, the relevant (legal) liability should be reduced. In turn, this would only serve to *increase* the ability of the BLO Defendants to pay. If the Court determines in all the circumstances that it would be just and equitable to grant an Anticipatory BLO assuming *no* reduction will ultimately be made out (i.e. the worst case for the BLO Defendants), then the fact that the relevant liability might be reduced following trial is plainly not a factor which weighs against that determination. The point is, in substance, similar to Mr Hughes KC's arguments, which I have rejected, that uncertainty around the quantification of liability should preclude an Anticipatory BLO. There is no reason for it to do so providing the Court assesses whether such an order is just and equitable assuming the worst-case scenario for the BLO Defendants.

112. If I am wrong about the ability of the Court to reduce the relevant liability when providing a specified description insofar as it considers it just and equitable to do so,

this does not alter the outcome on the facts of this case. Even taking the BLO Defendants' claim as to relative factual blameworthiness at its highest, in circumstances where the only choice open to the Court at the end of trial (as Mr Selby KC contends) was to transmit the legal liability in full, or not at all, I regard it as fanciful that the Court would conclude that the issue was of such significance (when weighed against actual legal responsibility) that it was not just and equitable to make a BLO.

G8. Building Safety Funding [G(ix), H(xi)]

113. The BLO Defendants, in their Defence, require Crest to prove if it or AQPM, the management company for the Development, received any funding from the Building Safety Fund for the remedial works, the amount of funding it received and the terms on which it did so. Mr Dawtrey's evidence on the Application is that Crest has not been the recipient of any funding from the Building Safety Fund or the Waking Watch Replacement Fund. There appears to be no dispute that APQM was the recipient of £2.2m in funding to cover pre-tender support works. Mr Hughes KC contends in his written submission that whether there is an overlap between the sums for which AQPM has received funding and the sums claimed by Crest is a factual dispute which requires proper disclosure and evidence at trial. It is said that this would be relevant because if AQPM has been paid for the same costs, then it would not be just and equitable to grant a BLO against the BLO Defendants for them. This was not a submission that was developed orally.

114. Mr Selby KC argues that as a matter of law, like tax benefits, public funds are collateral and do not normally operate to reduce damages and that, in any event any recipient of funding is obliged to pursue third parties in respect of the funds advanced. He denies that Crest would be required to give credit for a benefit which Crest has not received.

115. Whether or to what extent, following the factual investigation envisaged by the BLO Defendants, and legal argument, Crest must give a credit against its claim will primarily affect the quantum of its claim against ACL. This point is analogous to Mr Hughes KC's arguments on the uncertainty of quantum. If (although it is not clear), the BLO Defendants' case is that there may be a circumstance where funding has been received by Crest but which would not legally impact its claim but may nevertheless impact the just and equitable test, the point is analogous to the relative factual blameworthiness issue. Either way, providing the assessment by the Court is carried out at this stage assuming the worst case for the BLO Defendants, the fact that this investigation is yet to come does not affect the ability to make an Anticipatory BLO. It is fanciful to suggest that the Court would conclude following trial that Crest could not benefit from a BLO at all on account of this issue.

G9. Insurance [G(viii), H(ix)]

116. The BLO Defendants plead that Crest may have the benefit of insurance in respect of PNB's claim and the remedial works, and require Crest to prove what sums it has recovered or may recover by way of insurance in respect of the claims and costs pursued in these proceedings. In his written submissions (albeit not developed orally), Mr Hughes KC argues that Crest has refused to provide sufficient explanation or evidence as to the amount of its insurance policy or the status of its insurance claim for the Court or the BLO Defendants to understand its position and likely recovery. It

is said that it is therefore too early for the Court to decide the impact of Crest's insurance position on whether it is just and equitable to grant a BLO against the BLO Defendants.

117. The BLO Defendants accept that in terms of ACL's relevant liability, Crest's insurance position is irrelevant. However, it is argued that it is relevant to whether to grant a BLO against the BLO Defendants because in the context of a 'hierarchy of liability', a claim for recovery against an insurer should come above a claim which depends on a BLO on the basis that (a) Crest's insurer knowingly contracted with Crest, for financial benefit, and thereby voluntarily assumed a risk. When an insurer provides an insurance policy, they know that there is a risk that they may face a claim under that policy and have to pay out and (b) in contrast, the BLO Defendants did not contract with Crest or voluntarily assume a risk because the BLO regime has been imposed.

118. Mr Selby KC makes the point that this ignores the purpose of a BLO, which is to hold those directly responsible for historical building safety defects to account, and not their respective insurers. Moreover, were Crest's insurers to meet any policy claims, those insurers would be subrogated to any claims that Crest has against the BLO Defendants.

119. The fact of Crest's insurance position should be given no or little weight in the exercise of discretion. Even if I am wrong about this, the position is analogous to the relative factual blameworthiness issue. It is fanciful to suggest that the Court would conclude following trial that Crest (or its subrogated insurers) could not benefit from a BLO at all on account of this issue.

G10. Other Factual Disputes [G(x)]

120. Mr Hughes KC contends in his written submissions, but not developed orally, that there were a number of factual disputes between the parties which were relevant to the question of whether it is just and equitable to grant a BLO. These are summarised in Appendix C to the written submissions, under the following heads: (1) whether the BLO Defendants obtained tax relief for remediation cost provisions made by ACL; (2) Crest's knowledge of the defects; (3) third-party responsibility for the defects; (4) Crest's insurance position; (5) the motivation behind the decision of the directors of ACL to put ACL into administration; and (6) Crest's financial position. These have either been addressed above in the context of other arguments or are not matters to which any or any material weight should be given in the exercise of discretion. Their outstanding resolution are not reasons why it would be unjust or inequitable to make an Anticipatory BLO.

G11. Crest's alleged failure to provide adequate disclosure/RFI [G(xi), G(xii)]

121. By the order dated 27 October 2025, the Court permitted the BLO Defendants to request with their Defence the documents or categories of documents which they contended were relevant for the determination of the BLO Application and which Crest should disclose. Crest was required to "*put up, or shut up*", either disclose the documents requested or run the risk that the Court decides that, without providing the disclosure, it is not entitled to a BLO.

122. Mr Hughes KC's written submissions argued that the disclosure was inadequate and insufficient for the Court to be in a position to decide it is just and equitable to grant a BLO or to exercise its discretion to do so. The topics which were pressed as being those in respect of which inadequate disclosure affected the just and equitable test were (1) Crest's profit; (2) Crest's insurance position; and (3) Crest's claims against third parties. A further complaint has been made about the inadequacy of an RFI in relation to (1) and (2); and additionally in relation to the nature of remedial works. None of these matters are of relevance to the making of an Anticipatory BLO for the reasons already dealt with.

G12. Overall contribution to fire safety remedial works [H(xiv)]

123. Mr Hughes KC argues that since January 2018, the Ardmore group of companies has, collectively, incurred (up to 31 November 2025) overall costs of c.£100m in relation to fire safety defects and associated claims across 49 projects since the Grenfell Tower fire plus £15m for one project with both fire safety and non-fire safety defects. Mr Selby KC points out, as appears from the accounts, that (a) c£75m of this seems to have come from insurers and (b) the £15m referred to, to the extent it relates (as it seems to) to the judgment in BDW v Ardmore, was only paid after considerable legal wrangling in an effort to avoid paying it. However, putting Mr Selby KC's forensic point aside and taking the statement at face value, it is of no weight to the exercise of discretion on the Application before me, which relates to liabilities relating to the Development. It is, in any event, a fact stated now and can be taken account of now, and is not a point which militates in any way, as submitted, against the anticipatory nature of the order sought.

G13. ACL's Administration [H(xv)]

124. Mr Hughes KC pushes back on Crest's contention that ACL's administration was a cynical move, possibly timed to coincide with the Adjudicator's Decision. I make no determination that that characterisation is correct. The extent of the facts which I have weighed in my exercise of discretion relevant to the issue is as set out in Sections C and D above.

G14. Conclusion on Anticipatory BLO

125. Having weighed all relevant factors, I consider that it is just and equitable to order that any liability or any liability of a specified description that the First Defendant may have to the Claimants under section 1 of the Defective Premises Act 1972 or as a result of a building safety risk is also the joint and several liability of each of the BLO Defendants.

H. The Adjudication BLO

H1. Is the enforcement of the Adjudicator's Decision Procedurally Before the Court?

126. Mr Frampton, junior counsel for the BLO Defendants, argues first that, procedurally, the question as to whether to enforce the Adjudicator's Decision is not before the Court on the Application. He submits:

(1) Crest's entitlement to claim sums under the Adjudicator's Decision has not been properly pleaded as it would be in standard enforcement proceedings.

(2) the more fundamental point is that the question of whether Crest is entitled to sums under the Adjudicator's Decision is a disputed matter for trial. It is not procedurally before the Court on this Application where there has been no application for summary judgment (or a preliminary issue) in respect of enforcement of the Adjudicator's Decision.

(3) the BLO Application cannot be the appropriate vehicle for determination where (1) it did not state that it was an application for summary judgment, as required by CPR 24.5(1), and (2) per CPR 24.4(1), Crest was not entitled to apply for summary judgment at the time of its BLO Application on 5 September 2025 because the BLO Defendants had not filed their acknowledgement of service (filed on 6 October 2025).

127. Mr Selby KC accepts that he has not brought a summary judgment application to enforce the Adjudicator's Decision. He contends he does not need to: Crest rely upon the Adjudicator's Decision as a binding determination of ACL's liability under the DPA unless and until challenged by the Joint Administrators. The application Crest makes is under section 130 of the BSA. It must, on evidence, satisfy the Court on this Application of the constituent elements of the BLO, as against the respondents to the Application, i.e. the BLO Defendants.

128. I consider that, assuming that the Adjudicator's Decision is capable in principle of being a 'relevant liability' (which is the BLO Defendants' next substantive point), the Court is capable, on an application brought pursuant to section 130, of determining the existence of such liability when ordering (should it be just and equitable) its transmission to an associate.

129. If I am wrong about this, the substance of the enforceability of the Adjudicator's Decision is, in any event, in issue between the parties. Had it been necessary, I would have granted permission for Crest to amend its application to bring a summary judgment application against ACL, granting such relief as necessary pursuant to CPR3.10(a). For the reasons set out in Section H3, I would have summarily determined that the Adjudicator's Decision should be enforced against ACL.

H2. Is the obligation to comply with an adjudicator's decision a relevant liability?

130. It is said by the BLO Defendants that the temporarily binding nature of an adjudication decision means that, in principle, it cannot constitute a 'relevant liability' for the purposes of the BSA.

131. Mr Frampton relies on the fact, if summary judgment proceedings to enforce the Adjudicator's Decision had been brought against ACL, the liability summarily determined would be the failure to comply with the obligation to pay the sum awarded by the Adjudicator; the Court would not (and not be able to) summarily determine the substantive claim against ACL which had been considered by the Adjudicator. Plainly, findings on the substantive issues may be, at trial, determined differently. He argues that in making a BLO, which is a final order, the Court would on this Application need to be satisfied that there was <u>in fact</u> a liability under the DPA or as a

result of a building safety risk. This is not the same as determining that an adjudicator had decided that there was a liability under the DPA. Put another way, Mr Frampton contends that in circumstances where the Court may determine following trial that no such liability exists, or that it exists in a more limited amount, such a later finding would, in effect, be a finding that the Court did not have the jurisdiction to have made the BLO in the first place.

132. Mr Frampton also submitted that standing back, Parliament cannot be taken to have intended that this 'extraordinary' power to grant BLOs would be exercised in respect of an adjudicator's decision, which is by its nature "*rough justice*" and an "*interim remedy*" as between contracting entities. If it had so intended, he submitted, one would expect it to have been expressly identified within the definition of "relevant liability" in section 130 of the BSA or otherwise addressed in section 130.

133. Noting that BDW Trading Ltd v Ardmore Construction Ltd [2025] 1.W.L.R. 3101 at [29] the Court stated that "*there is no difficulty if the relevant liability has been established by judgment, arbitration award, adjudication decision or admission.*" Mr Frampton, correctly, identified that HHJ Keyser's comments were concerned with the jurisdiction threshold in section 132(3)(a), which is whether "*it appears to the court*" that there is a relevant liability. Whilst an adjudicator's decision is likely to be sufficient evidence for it to appear to the Court that there is a relevant liability in that context, Mr Frampton submits, with justification, that that is different to being satisfied that there *is* a liability. I accept that this case is not of direct assistance to the point on this Application.

134. Mr Frampton additionally argues that the Court should consider by analogy the position in respect of guarantors. In Beck Interiors Limited v Dr Mario Luca Russo [2009] EWHC 3861 (TCC), [2010] BLR 37, Ramsey J held at [49] and [50] that general words of a guarantee do not bind a guarantor to an adjudicator's decision against the primary party:

> "49. In The Vasso Goff J (as he then was) said this, at page 418-419:
>
> > 'It is well-established that general words of guarantee, guaranteeing the due performance of all the obligations of the principal debtor do not, of themselves, have the effect of the surety as bound by the arbitration award in an arbitration between the principal debtor and the creditor. This was established by the case of Re Kitchin [1881] 17 ChD 668, a decision of the Court of Appeal which had stood unchallenged for nearly 100 years and is still cited in leading text books as good authority today. As was pointed out in that case, if the law was otherwise, serious injustice might occur … Again, to take a more extreme example, the principal debtor might take no part in the arbitration whatsoever …'
>
> 50. Whilst Mr Mort sought to draw a distinction between a temporarily binding adjudication decision and an arbitration award, I consider that the principle derived from the cases

> concerned with arbitration awards is equally applicable to any dispute resolution method which involve a decision on what sum is due or what damages are payable. This is made clear by Lush LJ in the passage from Re Kitchin cited above. The underlying rationale for that principle is that a party might neglect to defend itself properly; might make admissions or might otherwise conduct the case in the dispute resolution differently from the guarantor. Therefore, to overcome that difficulty, what is required is an agreement by the guarantor to be bound by the decision of an adjudicator, arbitrator or the court as between the parties to the contract or other means under which underlying dispute arises."

135. The short answer to each of these submissions is that the Adjudicator's Decision is binding until the dispute is finally determined by the Court. Its interim status does not mean that, pending any trial, it somehow does not create a liability. It plainly does. If the decision is not challenged in Court, it constitutes a binding determination of a party's liability for all time. The determination of the existence of a liability is additional to the contractual obligation to comply with any determination. The fact that the standard method of summarily enforcing an adjudicator's decision is through a cause of action arising out of the obligation to pay does not mean that an adjudicator has not also determined the existence of a substantive liability which may constitute a relevant liability.

136. The fact that an adjudicator's decision may determine the existence of a 'relevant liability' for the purposes of section 130 plainly does no particular injustice, in itself. The BLO Defendants can claim (or more accurately given the extant proceedings, counterclaim) in restitution for return of the moneys ordered to have been paid subject to the BLO (see by analogy Lord Mance's comments (with whom the other Justices of the Supreme Court agreed) in Aspect Contracts (Asbestos) Limited v Higgins Construction Plc [2015] UKSC 38 at paragraph 24). Crest were also willing to give an undertaking in respect of any such overpayment, insofar as necessary. The extent to which, in any particular case, there may be injustice in attaching a BLO to the (potentially temporary) liability can be considered explicitly as part of the just and equitable test. The analogy to the principle that the general words of a guarantee do not bind a guarantor to an adjudicator's decision is not directly apposite to the statutory construction of the meaning of 'liability' in the BSA. As Mr Selby KC points out, the potential injustice lying behind the guarantor principle is directly met by the requirement on the part of the Court explicitly to consider whether it *is* just and equitable to impose a BLO in respect of any particular, established liability. Given that safety valve, there is no imperative to construe the word 'liability' other than naturally.

137. Contrary to the submissions advanced by Mr Frampton, it cannot be presumed that the BSA would or should have expressly made clear that the word 'liability' would include the binding but interim liability created by adjudication. Rather the contrary: liability is an ordinary word, and it is Mr Frampton's argument that seeks to carve out a particular type of liability, the existence of which is well known and, indeed, central to the very industry most closely associated with the BSA. If Parliamentary intention had been that the two regimes – the statutory scheme for adjudication, and the statutory scheme created by the BSA – were mutually exclusive, it is this that one might have assumed would be spelt out.

138. The Adjudication determined (at paragraph [50]) that the extent of the fire safety defects in the external walls is such to render certain dwellings unfit for habitation. It was determined that ACL is in breach of its duty owed to CNR and/or CNO pursuant to Section 1 (1) (a) of the DPA. That is a finding of liability which is presently binding on Crest and ACL. The liability created by the Adjudicator's Decision is a liability under the DPA, as the Adjudicator determined in terms.

139. I reject the contention that, because the Adjudicator did not say '*there is a building safety risk*' in terms, that the Court is precluded from looking at the substance of the decision and asking whether the determined liability was incurred as a result of a building safety risk. The Court can plainly look at the substance of the liability. Mr Frampton did not attempt to argue the point as a matter of substance. Building safety risk means a risk to the safety of people in or about the building arising from the spread of fire or structural failure. Liability for '*fire safety defects in the external walls is such to render certain dwellings unfit for habitation*' as determined falls squarely as one incurred as a result of (a) and/or (b) of section 130(3).

140. Finally, I also agree with the alternative way in which Mr Selby KC puts the case: the failure to comply with the Adjudicator's Decision is itself a liability which is capable of being a 'relevant liability' for the purposes of the BSA. It is a liability that was 'incurred as a result of a building safety risk', by reason of a sufficient causal nexus between the substantive liability (determined by the Adjudication) and the consequent liability (created by non-payment).

H3. Do the BLO Defendants have a better than merely arguable case that the Adjudicator lacked jurisdiction?

141. The BLO Defendants argue that the Adjudicator lacked jurisdiction on three grounds. If these grounds are reasonably arguable as jurisdictional points (i.e. the summary judgment test) it is common ground that the Court should not summarily determine that there is a relevant liability.

142. The grounds are (1) the Adjudicator decided that ACL was liable under the DPA. However, the Adjudicator did not have jurisdiction to determine such a claim. A claim under the DPA is not a dispute arising under the D&B Contract; (2) the Adjudicator awarded sums to CNO who was not a party to the Contract; and (3) even if it was a party to the D&B Contract, CNO was not owed a duty under section 1(1)(a) of the DPA.

H3.1 Is a claim under the DPA a dispute 'under' the D&B Contract?

143. The standard Article 5 of the D&B Contract states that:

> "If any dispute or difference arises under this Contract either Party may refer it to adjudication in accordance with clause 39A."

144. This provision was deleted by the parties and replaced with:

> "Any dispute which by virtue of Part II of the Housing Grants, Construction and Regeneration Act 1996 is to be referred to adjudication shall be referred to adjudication in accordance with the Technology and Construction Solicitors Association Adjudication Rules (TeCSA Adjudication Rules) current at the time of reference."

145. Section 108 of the HGCRA states that:

> "A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section."

146. Mr Frampton contrasted this wording with Article 6A which referred, in the context of arbitration, to "*any dispute or different as to any matter or thing of whatsoever nature arising under this Contract or in connection therewith…*". This clause was, in fact, deleted. Clause 6B, relating to the Court's jurisdiction, used the phrase, '*all matters touching upon or concerning this Contract*'.

147. The BLO Defendants accept that Joanna Smith J decided in BDW Trading v Ardmore Construction Limited [2024] EWHC 3235 (TCC) that a similarly worded clause (and which similarly could be contrasted with different language in an arbitration clause) provided jurisdiction over a claim under the DPA. By an order dated 11 February 2025, Coulson LJ granted permission to appeal that judgment on the point. Following ACL's administration, the administrators decided not to continue with the appeal which was on condition that ACL pay the costs of the appeal. Mr Frampton submitted that the Court should, on this Application, reach a different view to that reached by Joanna Smith J.

148. Mr Frampton started his analysis by focussing on the construction of the clause (which in effect is the language of the statute imported into the D&B Contract) from first principles, and in particular the word '*dispute*'. He contended that, in the context of adjudication, 'a dispute' is a claim which is not admitted. He then submitted that, in reading Article 5/Section 108, the right to refer to adjudication can be effectively read as, 'A party has the right to refer any claim arising under the D&B Contract which is not admitted for adjudication…' Reworded in this way, Mr Frampton says it becomes clear that a claim under the DPA would not be included.

149. Mr Selby KC starts with the language of the DPA. Section 1 states:

> 'A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—
>
> (a) if the dwelling is provided to the order of any person, to that person; and
>
> (b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;

> to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.'

150. The duty under the DPA relates to work that a person takes on. It is, submitted Mr Selby KC, the D&B Contract which defines the work which ACL took on; put another way, it was the D&B Contract which created the obligations giving rise to the DPA duty. In this context, a claim brought pursuant to the DPA would be a claim 'under the Contract' even before the decision of the House of Lords in Fiona Trust & Holding Corporation and Ors v Privalov & Ors [2007] UKHL 40. Whilst Mr Frampton was right to point out that an express clause relating to the DPA was deleted from the standard form underlying the D&B Contract, there was included a bespoke contractual obligation in Clause 2.5.2.5 to comply with Statutory Requirements, broadly defined by clause 6.1.1.2.

151. Mr Selby KC then relied upon Fillite (Runcorn) Limited v Acqu-Lift (Runcorn) Ltd (1989) 26 ConLR 66, in which the phrase 'under a contract' in an arbitration clause was held insufficiently broad to include claims for negligent misrepresentation, for misrepresentation under the Misrepresentation Act 1967, or a claim based upon an express oral guarantee or a collateral contract. Slade LJ said:

> 'In my judgment, the parties, by including in the heads of agreement the arbitration clause in the narrow form which it took, demonstrated their intention to refer to arbitration any disputes which might arise regarding the rights and obligations created by or incorporated in the heads of agreement themselves…'

152. The nature of the distinction being drawn in earlier cases is explained in similar terms in Fiona Trust by Lord Hoffman at [11]:

> Your Lordships were referred to a number of cases in which various forms of words in arbitration clauses have been considered. Some of them draw a distinction between disputes 'arising under' and 'arising out of' the agreement. In Heyman v Darwins Ltd [1942] 1 All ER 337 at 360, [1942] AC 356 at 399 Lord Porter said that the former had a narrower meaning than the latter but in Union of India v E B Aaby's Rederi A/S, The Evje [1974] 2 All ER 874, [1975] AC 797 Viscount Dihorne ([1974] 2 All ER 874 at 885, [1975] AC 797 at 814), and Lord Salmon ([1974] 2 All ER 874 at 887, [1975] AC 797 at 817) said that they could not see the difference between them. Nevertheless, in Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd [1988] 2 Lloyd's Rep 63 at 67, Evans J said that there was a broad distinction between clauses which referred 'only those disputes which may arise regarding the rights and obligations which are created by the contract itself' and those which 'show an intention to refer some wider class or classes of disputes.' The former may be said to arise 'under' the contract while the latter would arise 'in relation to' or 'in connection with' the contract. In Fillite (Runcorn) Ltd v Aqua-Lift (1989) 26 ConLR 66 at 76 Slade LJ said that the phrase 'under a contract' was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract. Nourse LJ gave a judgment to the same effect. The court does not seem to have been referred to Mackender v Feldia AG [1966] 3 All ER 847, [1967] 2 QB 590, in which a court which included Lord Denning MR and Diplock LJ decided that

> a clause in an insurance policy submitting disputes 'arising thereunder' to a foreign jurisdiction was wide enough to cover the question of whether the contract could be avoided for non-disclosure.'

153. Mr Selby KC submits, in my view correctly, that the obligation to comply with the DPA was created, at least indirectly, by the D&B Contract, through which ACL took on the works to which (both explicitly by clause 2.5.2.5 and in any event) the DPA applied. A construction which meant that a claim for breach of clause 2.5.2.5 was included within the agreed dispute resolution framework but the identical claim for a direct breach of the DPA was not, is the sort of distinction which would not accord with the reasonable commercial expectations of the parties referred to by Lord Hoffman (even if the clause were otherwise construed 'narrowly' pursuant to the pre-Fiona Trust distinction). Mr Frampton's contention that matters become clearer when considering the fact that a dispute is a 'claim which is not admitted' does not add to the analysis. Similarly, his point that a duty under section 1 of the DPA can arise other than coterminously with the contract, whilst correct, is not relevant where of course those others who may be owed a duty will not be people who benefit from an adjudication provision.

154. Notwithstanding this conclusion, I proceed to consider both Fiona Trust and the arguments articulated forcefully by Mr Frampton that, as had previously been advanced before Joanna Smith J, and indeed canvassed in at least two other first instance decisions, the reasoning in Fiona Trust is inapplicable to adjudication. As noted by Lord Briggs in Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Limited [2020] UKSC 25; [2021] 1 All Eng LR 697 at [40], the two first instance decisions (prior to the decision of Joanna Smith J) were Hillcrest Homes Ltd v Beresford and Curbishley Ltd [2014] EWHC 280 (TCC), (2014) 153 ConLR 179 in which HHJ Raynor QC saw '*considerable force*' in the submission that the reasoning in Fiona Trust was inapplicable to construction adjudication because the provision for adjudication was the consequence of statutory intervention (at [50]); and J Murphy & Sons Ltd v W Maher and Sons Ltd [2016] EWHC 1148 (TCC), (2016) 166 ConLR 228, [2017] Bus LR 916 in which Akenhead J reached the opposite conclusion, treating the learning about arbitration in Fiona Trust as a useful analogy at para [23]. Lord Briggs also noted that differing views are also expressed in the leading practitioner texts: the editors of *Hudson's Building and Engineering Contracts* (14th edn, 2019) prefer Judge Raynor's view, at para 11–022, while the editors of *Keating on Construction Contracts* (Supplement to 10th edn, 2019), para 18–077 appear to veer toward recognising the force of Fiona Trust by analogy.

155. Although the point was not decided by Lord Briggs, it is clear that whilst recognising that '*there are plainly points to be made on both sides*', a fair characterisation of the view then expressed is one which appears to see more force in the application of Fiona Trust:

> "There are obvious differences between arbitration and adjudication, but they are both types of dispute resolution procedures for which provision is made by a contract between the parties, in which recourse to that procedure is conferred by way of contractual right. I am not persuaded that the statutory compulsion lying behind the conferral of the contractual right to adjudicate points at all towards giving the phrase 'a dispute arising under the contract' a narrow meaning, by comparison

> with a similar phrase in a contract freely negotiated. The fact that, after due consideration of the Latham Report, Parliament considered that construction adjudication was such a good thing that all parties to such contracts should have the right to go to adjudication points if anything in the opposite direction. Indeed, the fact that the right to adjudicate is statutorily guaranteed is a powerful consideration favourable both to its recognition as a matter of construction, and to the caution which the court ought to employ before preventing its exercise by injunction."

156. Support at the highest level, albeit obiter and as such not a binding determination, can also be derived from Aspect Contracts (Asbestos) Ltd v Higgins Construction plc [2015] Bus LR 830, in which Lord Mance concluded that he was "*very content*" and, later, "*prepared*" to proceed on the basis that a conterminous tort claim can fall within the language of section 108(1) of the HGCRA.

157. The key passage from Lord Hoffman's judgment in Fiona Trust is found in paragraphs [12] and [13]:

> "[12] I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law. It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsman of so widely used a standard form as Shelltime 4 obviously regarded the expressions 'arising under this charter' in cl 41(b) and 'arisen out of this charter' in cl 41(c)(1)(a)(i) as mutually interchangeable. So I applaud the opinion expressed by Longmore LJ in the Court of Appeal (at [17]) that the time has come to draw a line under the authorities to date and make a fresh start. I think that a fresh start is justified by the developments which have occurred in this branch of the law in recent years and in particular by the adoption of the principle of separability by Parliament in s 7 of the 1996 Act. That section was obviously intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration. But s 7 will not achieve its purpose if the courts adopt an approach to construction which is likely in many cases to defeat those expectations. The approach to construction therefore needs to be re-examined.
>
> [13] In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at [17]: '[i]f any businessman did want to exclude

> disputes about the validity of a contract, it would be comparatively easy to say so."

158. Mr Frampton fairly reminded the Court that what Fiona Trust decided was that, as set out in the first sentence of [13] above, the construction of an arbitration clause should start from the assumption that parties are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. This was said to be a key point of distinction: the right (/obligation to submit) to adjudicate relates to a single dispute, and in practice there is every chance that where different disputes are referred at different times then a different adjudicator may be appointed. The necessary consistency of a single tribunal does not apply.

159. The other points of distinction were submitted to be: (1) adjudication is not generally consensual (cf. Lord Hoffman at [5]). Even where expressed or implied into a contract, this is through the imposition of a statutory scheme which is mandatory; (2) the emphasis upon the parties agreeing arbitration on the grounds of "*neutrality, expertise, privacy, the availability of legal services at the seat of arbitration and the unobtrusive efficiency of its supervisory law*" (Lord Hoffman at [6]) does not apply to adjudication; (3) the distinction between arbitration and court (Lord Hoffman at [7]) is different in the context of adjudication, which does not displace or oust the jurisdiction of the Court, and the related point that there remain questions which adjudicators cannot determine (e.g. whether there is a valid contract); and (4) the fact that the invalidity of a contract does not necessitate the invalidity of the arbitration clause (Lord Hoffman at [9]).

160. Mr Frampton also argued that:

(1) The Court should place considerable weight on the distinction between the broader words used in Article 6A and the words relating to adjudication;

(2) the D&B Contract was agreed, and the HGCRA was enacted, before the decision in Fiona Trust and thus the relevant factual matrix at the time would involve consideration of the pre-Fiona Trust distinction.

161. Each of these points was dealt with by Joanna Smith J in a lengthy and detailed analysis from paragraphs 41 to 80 of her judgment, which included consideration not just of the points of principle but the previous decisions of Hillcrest and Murphy, and the observations of Lord Briggs in Bresco, and Lord Mance in Aspect. The judge also considered the content of the practitioner texts referred to above, as well as *Coulson on Construction Adjudication* 4th Edn, published after Aspect but before Bresco, which stated [at 7.129] that whilst the conclusion in Hillcrest 'may well be right', the point 'remains open for clarification'.

162. I do not consider that the reasoning of Joanna Smith J can be improved upon. I respectfully endorse and adopt it in answer to Mr Frampton's points which were, in all but one respect which I consider further below (namely Hansard), in substance the same as those advanced in BDW. The following is therefore a summary of my conclusions:

(1) I agree with Joanna Smith J, and Sir Robert Akenhead in Murphy, that Fiona Trust confirms a "strongly signposted" departure from previous linguistic

distinctions between disputes arising on the one hand "under" and, on the other hand, "arising out of" or "in connection with" the underlying contract between the parties, which "reflect no credit upon English commercial law";

(2) whilst HHJ Raynor QC in Hillcrest seemed principally persuaded by the distinction between a wholly consensual relationship in arbitration and the adjudication regime having been imposed by statute, I rely upon the observations of Lord Briggs in Bresco which substantially undermine this argument: indeed, Joanna Smith J records that, in light of these comments, the statutory origin argument was conceded as one upon which no weight could be placed;

(3) when the statutory origin argument is removed, both are types of resolution procedures for which provision is made by a contract between the parties, in which recourse to that procedure is conferred by way of contractual right. It might be apt to note (albeit as, I accept, a purely anecdotal point and one which may be of no real weight in the issue of statutory construction) that, 30 years on from the enactment of the HGCRA, adjudication has been so thoroughly adopted with success by the construction industry that were the statutory imposition of adjudication to be removed, it is highly likely that it would continue as a widespread dispute resolution process by consent;

(4) Joanna Smith J's analysis, with which I agree, at [64] deals directly with the argument that the matters raised by Lord Hoffman at [6] of Fiona Trust do not apply to adjudication. In short, in broad terms they do, and even if some of the issues are not directly transmissible (e.g. convenience of seat of the arbitration), the absence of that point does not of itself explain why the application of Fiona Trust to the construction of adjudication clauses is somehow inappropriate;

(5) the fact that there may be a number of different adjudicators to which a number of different disputes between the same parties may be referred is a potential point of distinction between arbitration and adjudication, but not a necessary or conceptual one. As pointed out by Joanna Smith J at [63], parties may by agreement appoint the same adjudicator for all disputes. It would be odd if the phrase 'under the contract' were to be construed differently depending upon whether the parties have in fact exercised their right to so agree. I also agree with Joanna Smith J's observation that the fact there may be different people appointed for different disputes does not detract from the general proposition that business people are likely to want their existing (live) disputes to be determined by an adjudicator of their choice, as the most commercially efficient and cost effective means of dispute resolution: see also the concurring remarks of Akenhead J at paragraph 31(c) of Murphy.

(6) This applies equally to the remaining differences e.g. that adjudication does not oust the jurisdiction of the Court. Whilst these may be so, the fact of such distinctions does not of itself explain why the application of Fiona Trust would be unprincipled or inapposite.

(7) Mr Frampton's point about the factual matrix at the time of the D&B Contract and the enactment of the HGCRA also arose in BDW, and was dealt with at [68] – [69]. The short answer is that, as pointed out by Lord Hoffman in the

passage at [11] quoted at 152 above, there was no particular clarity or consistency prior to Fiona Trust which itself could inform the proper construction of the phrase.

163. As to reliance upon the wording of clause 6A, this is difficult for Mr Frampton in circumstances where the clause was deleted. Looking within the four corners of the D&B Contract as executed, no such contradistinction exists. Whilst the words applying to the jurisdiction of the Courts were extremely broad ("*all matters touching upon or concerning this Contract*"), there is considerably less force in the comparison with what is in any event a somewhat otiose clause in circumstances where the Court would have jurisdiction in any event. The point was stronger for Ardmore in BDW, in circumstances where the arbitration clause had not been deleted. Yet, the point was regarded as of no material significance by Joanna Smith J for the reasons given at paragraphs [78] and [79], and I take a similar view (particularly where the point is of less force in the present case).

164. It is necessary to deal in more detail with Mr Frampton's reliance upon Hansard. This was only dealt with briefly by Joanna Smith J at [66], in circumstances where the argument before her relied upon no more than the reference to Hansard in *Hudson*, and had not otherwise been foreshadowed in Ardmore's evidence nor (beyond the passing reference to the Hudson's Supplement) had it been developed in any detail in its skeleton. A more thorough approach has been adopted by Mr Frampton before me.

165. Reliance is placed upon the following extract from Hansard for the debate in the House of Commons on 8 July 1996 (Volume 281) in which the Minister of State for Construction, Planning and Energy Efficiency (Robert Jones) made the following comments in response to a proposed amendment by Mr Raynsford to add the words "*or in connection with*" after "*under*" to section 108 of the Bill which became the Housing Grants, Construction and Regeneration Act 1996. The full exchange is as follows:

> Mr Raynsford
>
> "Amendment No. 133 relates to a small point, but one that may have considerable significance. It simply seeks to insert the words 'or in connection with' after the reference to construction contracts in clause 108.
>
> The technical issue that has prompted the amendment was raised by a barrister with considerable experience in construction matters, who regularly writes for one of the best-read magazines in the industry. He has written to me - he also wrote to the Minister - to express concern that the Bill's wording might leave a loophole. He said in his letter:
>
> 'The reason is that the words "arising under a contract" have been held by the Court of Appeal'— 'he quotes the case of Fillite Runcorn Ltd. v. Aqua-Lift in 1992—might be construed "to exclude jurisdiction for such matters as negligent misstatement and misrepresentation."
>
> 'Arising under a contract' is not an all-encompassing phrase.'

> If there is a risk that the wording of the legislation is defective and it is necessary to include the words 'or in connection with' in order to remedy that defect - as the barrister recommends - that is a modest change that will ensure that the purposes of Parliament are not frustrated. I hope that the Minister can give a response to the matter, as he has also received the letter to which I referred.
>
> Mr Robert B. Jones
>
> "I distinctly remember the hon. Member for Greenwich beginning his speeches on this part of the Bill in Committee by saying that he wanted to keep lawyers out of the matter, but he is now citing barristers in support of his argument.
>
> Amendment No. 133 would widen the scope of adjudication from disputes under the contract to disputes under or in connection with the contract, which would be a huge step. The adjudicator is appointed under the contract and must be guided by its terms. He cannot turn his attention to matters that are not covered by the contract or that are the subject of other contracts, even between the same parties. The amendment would give the adjudicator an horizon different from the one that has been subject to debate in the past few months, and we cannot even begin to consider such a change at this stage. Even if we could be persuaded that such a dramatic adjustment were necessary, it would be a major task to give him the new powers to tackle his new role. He would need statutory powers, and he might ultimately become almost an arbitrator. The industry is keen to avoid that, so I hope that the hon. Member for Greenwich will think again. The hon. Gentleman should be happy with the Government amendments in the group, and I commend them to the House."

166. The first question is, of course, the circumstances in which the Court should have regard to this material at all. The leading authority is the House of Lords decision in Pepper v Hart [1993] 1 All ER 42. Lord Browne-Wilkinson articulated the limits of the relaxation of what, up to then, was a restriction of reference to Parliamentary material for statutory interpretation. Reference is permissible only where: (a) legislation was ambiguous or obscure, or led to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together, if necessary, with such other Parliamentary material as might be necessary to understand such statements and their effect; and (c) the effect of such statements was clear (see 631, 634, 640; and the distillation by Lord Bingham in R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme [2001] 1 All ER 195 at [211]).

167. In his concurring judgment, Lord Bridge indicated (at [49g]) that it should only be in the rare cases where the very issue of interpretation which the courts are called on to resolve has been addressed in Parliamentary debate and "*where the promoter of the legislation has made a clear statement directed to that very issue*", that reference to

Hansard should be permitted. Lord Oliver used similar language, and also warned that ingenuity can sometimes suggest ambiguity or obscurity where none exists in fact.

168. Mr Frampton contends that the phrase "under the contract" within the statute is ambiguous. The fact that parties, in argument, advance two different constructions of a word or phrase does not, of itself, mean that the requirement for ambiguity for the purposes of Pepper v Hart is met. Were it otherwise, recourse to Parliamentary material would be commonplace, rather than rare (see also the fear expressed by Lord Bingham at [211d] of Spathe Holme). If the Court can determine the meaning of the words according to ordinary principles of statutory construction, the meaning is not ambiguous. If it is right that, analogous to Fiona Trust, the phrase 'under the Contract' in the HGCRA should be construed broadly pursuant to the ordinary principles of construction adopted in that case, then there in fact is no ambiguity.

169. If I am wrong and the ambiguity threshold is met in circumstances where, as I have already noted, there were at least more than one view prior to Fiona Trust, it is necessary to consider the other threshold criteria. I am content to conclude that the statement relied upon was made by a relevant Minister. The remaining critical question is whether the meaning has been unambiguously clarified by the parliamentary material. As pointed out by Lord Bingham in Spathe Holme:

> "(3) Unless parliamentary statements are indeed clear and unequivocal (or, as Lord Reid put it in Warner v Metropolitan Police Comr [1968] 2 All ER 356 at 367, [1969] 2 AC 256 at 279, such as 'would almost certainly settle the matter immediately one way or the other'), the court is likely to be drawn into comparing one statement with another, appraising the meaning and effect of what was said and considering what was left unsaid and why. In the course of such an exercise the court would come uncomfortably close to questioning the proceedings in Parliament contrary to art 9 of the Bill of Rights 1689 and might even violate that important constitutional prohibition."

170. The very issue of interpretation which the court has been called upon to resolve in the present case is whether the phrase "under the contract" can apply to a claim under the DPA. This issue is not referred to nor clarified in any way by the Minister. The context for the question and proposed amendment was "*for such matters as negligent misstatement and misrepresentation*". The rejection of the amendment in this context therefore implies nothing about the breadth of the statutory phrase in its application to a claim made under the DPA, and falls far short of an unequivocal clarification of the point in dispute before me for the purposes of admissible material pursuant to Pepper v Hart. It would be pure speculation if an informed question (which itself reflected properly the distinction to which it existed pre-Fiona Trust insofar as it related to issues arising out of obligations created by the contract) specific to the DPA had been posed to the Minister, and what, if any, clear answer would have been given on the very issue in this case.

171. It follows from this that I do not agree that this material can or should alter my conclusion that the phrase "under the contract" within the HGCRA (and therefore within the D&B Contract) includes the jurisdiction to consider a claim brought under the DPA for works carried out pursuant to a construction contract.

H3.2 Did the Adjudicator have jurisdiction to award sums to CNO?

172. Mr Frampton submits, uncontroversially, that only a party to the D&B Contract has a right to refer a dispute to adjudication: see Paragon Group Limited v FK Facades Limited [2026] EWHC 78 (TCC). It is common ground that CNR was the named Employer under the D&B Contract. The Adjudication was started by both CNO and CNR. CNO's case is that it was acting as the undisclosed principal, and Mr Frampton says that the BLO Defendants have at least a better than merely arguable case that CNO was not acting as an undisclosed principal given:

    (1) Crest has not provided sufficient evidence that CNR was acting as an agent for CNO in entering the D&B Contract and any evidence would need to be tested at trial.

    (2) the BLO Defendants have a reasonable estoppel case (either estoppel by deed, or by representation or common assumption) that Crest has represented that CNR was the counterparty. There are documents in which Crest represented that CNR was the employing entity, including the collateral warranty by ACL in favour of PNBC: (a) only CNR, not CNO, was a party to that collateral warranty, and (b) Recital 1 stated that CNR was the Employer.

173. In terms of the evidence provided, Mr Selby KC relies, as CNO and CNR did in the adjudication, upon what he says are the clear and unequivocal terms of the CNO/CNR Agency Agreement. By clause 2.1, CNO appointed CNS/CNR (as the case may be) as its agent to manage on a day-to-day basis and carry on and conduct CNO's property development business in the name of CNS/CNR "*as agent for and on behalf of [CNO] and for the account of [CNO] ...*". By clause 2.6, CNS/CNR were to pay all monies received in connection with CNO's property development business into a designated account(s) and was to debit from such account(s) (amongst other matters) "any sums which [CNO] may from time to time require to be paid to it out of such account or accounts". By clause 2.7, CNS/CNR were to hold to the order and account of CNO: (a) all real and other property and any estate or interest in any rights in over or connected with such property acquired by CNS/CNR; (b) the benefit of all contracts entered into by CNS/CNR; (c) all sums standing to the credit of any bank account maintained by CNS/CNR in its conduct of CNS'/CNR's property development business.

174. The nature of the relation is confirmed by Mr Neil Dawtrey in his first statement at paragraph 8.2. Mr Selby KC also relies upon CNR's accounts for the year ended 31 October 2006 (the period in which the D&B Contract was concluded) which state on page 1 that "The Company did not trade during the year but acted as an undisclosed agent of Crest Nicholson Operations Limited" and on page 5 that "During the financial year and preceding financial year the Company… acted only as an undisclosed agent of Crest Nicholson Operations Limited".

175. In neither his written nor oral submissions did Mr Frampton indicate the basis upon which the BLO Defendants would seek to "test" this by cross-examination – how would a factual witness's answers in evidence likely affect the proper construction of the various instruments? It can only be assumed that the documents that might be deployed are those documents by which it is said, for the purposes of an estoppel, that Crest represented that CNR was the employing party. One of these brought to the Court's attention during oral submissions was a Standstill Agreement, in which the recitals referred to CNO only as the immediate parent company. Even if that

document were the basis of giving rise to an estoppel, there is no explanation as to how that affects the actual underlying legal analysis of whether CNO was a party to the D&B Contract as an undisclosed principal. Without even a cursory explanation of how the documents referred to by Mr Frampton impact the legal analysis, it is not possible to conclude that there is a real prospect of establishing that Crest is wrong on this point.

176. Even assuming that the estoppel argument is one which gives rise, through the lens of the summary judgment test, to a triable issue, this was not a point which ACL made in the Adjudication. As Mr Selby KC submitted (and this was not challenged by Mr Frampton in his oral submissions), it is not generally open to a party to challenge jurisdiction on a basis not raised during the adjudication Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd (in Liquidation) [2019] EWCA Civ 27; [2019] Bus LR 3051 at [92]. No particular facts were advanced to justify why this general position is not applicable in the present case.

177. Therefore, I conclude that this jurisdictional challenge fails. If I am wrong about this, I deal with Mr Selby KC's further submission about severance below.

H3.3 Was CNO owed a duty under section 1(1)(a) of the DPA?

178. Although this was raised as a jurisdictional issue, it is not. If CNO was a party to the D&B Contract such that they were entitled to adjudicate against ACL, the question of whether a duty was, or was not, owed was merely an issue in the adjudication. It was not a jurisdictional issue. Even if the BLO Defendants are right in relation to this, therefore, it does not affect the enforceability of the Adjudicator's Decision.

179. Again, however, even if I am wrong about this, the objection is met by Mr Selby KC's point about severance.

H3.4. Severance

180. Mr Selby KC submits that insofar as the Adjudicator did not have jurisdiction to make the order that he did in favour of CNO, for either the reasons dealt with in the immediately preceding sections, the Adjudicator's Decision can be severed to enable enforcement in favour of CNR (there being a "core nucleus of the decision that can be safely enforced"): see Pepperall J in Willow Corp S.A.R.L v MTD Contractors Limited [2019] EWHC 1591 (TCC) at [74]:

> "I agree with Edwards-Stuart J that in the context of a single dispute or difference it can often be difficult to divorce any significant flaw in the adjudication from the balance of the decision. Indeed, significant breaches of natural justice are particularly prone to infect and therefore undermine the entire decision. In my judgment, the proper question is not, however, to focus on whether there was a single dispute or difference but upon whether it is clear that there is anything left that can be safely enforced once one disregards that part of the adjudicator's reasoning that has been found to be obviously flawed. Such analysis need not be detailed and, in many cases, it may remain the position that the entire enforcement application should fail. It would, however, further the statutory

> aim of supporting the enforcement of adjudication decisions pending final resolution by litigation or arbitration if the TCC were rather more willing to order severance where one can clearly identify a core nucleus of the decision that can be safely enforced."

181. Mr Selby KC therefore says that, even if the objections to recovery made by CNO were reasonably arguable, the Court could enforce the Adjudicator's Decision insofar as it determined a claim in CNR's favour.

182. Mr Frampton's first objection was that where two parties appointed the Adjudicator, that this effectively infected the whole adjudication and severance is, in principle, not possible. I do not agree. If there are two parties who refer a matter to adjudication and it transpires that the adjudicator lacked jurisdiction to determine one of the two parties' rights but had jurisdiction in relation to the other, it would generally be possible to apply the principle of severance providing of course that it is possible to disregard that part of the adjudicator's reasoning that has been found to be flawed. That may or may not be the case on the facts of any particular decision, but the fact the error lay in the determination of jurisdiction in respect of one out of two referring parties does not of itself preclude severance.

183. Mr Frampton's second argument was, more specifically, that a core part of the reasoning in relation to the recovery by CNR was infused with the flawed conclusion as to the status of CNO. In the Adjudication, ACL contended that CNR was not entitled to any damages as any costs incurred or to be incurred remediating the fire safety defects and making the dwellings habitable will not be incurred by CNR, i.e. as CNR will suffer "no loss" it is not entitled to damages. Crest contended that ACL's "no loss" argument was misconceived, on the basis that CNR was both CNO's agent and trustee of the benefit of the D&B Contract such that CNR can sue for and recover CNO's losses in this adjudication. CNR's measure of loss for ACL's defective performance of the D&B Contract would be the same as the quantum of CNO's losses.

184. The Adjudicator rejected the argument:

> "In support of its position regarding the ability of an agent to sue under a contract to recover losses of its undisclosed principal (or of a trustee in respect of a beneficiary), Crest has referred me to Darlington BC v Wiltshier Northern Limited [1995] 1 WLR 68 and Alfred McAlpine Construction Limited v Panatown Limited [2001] 1 A.CX. 518 (HL). Based on these authorities I agree with Crest that, as a matter of principle, CNR is entitled to advance a claim on behalf of CNO for breach of the duty owed by Ardmore under Section 1 (1) (a) of the DPA, and it therefore follows that the fact that CNR may not have actually incurred and/or be incurring the cost of remedial work does not preclude it from recovering losses incurred or to be incurred by CNO as its principal and/or beneficiary. I therefore reject Ardmore's 'no loss' argument in respect of CNR such that, to the extent that CNO is entitled to recover losses against Ardmore pursuant to Section 1 (1) (a) of

> the DPA, then CNR is entitled to recover those losses on behalf of CNO. However, having found that CNO is entitled to advance a claim for its losses pursuant to Section 1 (1) (a) via adjudication, this may be an academic point as for present purposes it follows that both parties are entitled to recover the losses on a joint and several basis."

185. Mr Frampton argued that the Adjudicator did not consider who suffered what loss as between CNO and CNR because of his finding that CNR was agent for an undisclosed principal. Mr Selby KC sought to dismiss this point because paragraph 55 was about the quantification of CNR's claim, and not related to CNO's entitlement to sue. Whilst it is right that the same agency/undisclosed principal argument lies behind both the jurisdictional question (whether CNO was a party to the D&B Contract and/or had an entitlement to bring an adjudication claim) and the substantive question (could CNR recover for losses on CNO's behalf), in the context of severance, the jurisdictional point is a separate and severable one from the substantive one. Even if it were open to ACL to challenge the enforceability of the Adjudicator's Decision to require payment to CNO, there is no dispute about the ability of the Adjudicator to have determined the claim brought by CNR. In the latter context, an erroneous determination of the "no loss" argument because of a possible debate about the agency relationship (if that is what it was) would not be jurisdictional nor give rise to a basis to challenge the decision to make payment to CNR. Put another way, had CNR been the only party to the adjudication, seeking to recover CNO's losses as agent, and ACL had taken the same no loss point, the Adjudicator would have rejected the point for the same reason. There would be no basis to challenge enforcement. The core nucleus of the decision in respect of CNR's substantive entitlement stands separately to the question of whether CNO had jurisdiction to be part of the adjudication alongside CNR. It is therefore entirely possible to sever the determination that CNR is entitled to payment from the determination that he had jurisdiction to determine loss claimed by CNO.

186. Finally, Mr Frampton, in oral submissions, referred the Court to the decision of Henshaw J in HDR Global Trading Limited v Shulev and Nexo Capital Inc [2022] EWHC 1685 (Comm), in support of a general proposition that "*the right of an agent of an undisclosed principal to sue on the contract is brought to an end by the principal's intervention*". He contended that if Crest wanted to argue that CNR can enforce today they would have to abandon any claim by CNO as undisclosed principal. Not least because of the manner in which the point was raised, this was subject to little elaboration or, indeed, response, save for the obvious concession that on any view, the involvement of both CNR and CNO could not result in the recovery of the same damages twice. I did not take this as more than a submission from Mr Frampton that there may be consequences to CNO's claim if CNR is able to enforce the decision. In the circumstances, to the extent that there is a dispute about what those consequences are, that ought to be a matter of proper argument, with due notice to both Mr Selby KC and the Court as to the point being advanced and the basis upon which it is made.

187. Subject to the question of whether it is just and equitable to do so, I therefore consider that the Adjudicator's Decision is enforceable and determined a 'relevant liability' for the purposes of section 130 of the BSA.

H4. Is making the Adjudication BLO just and equitable?

188. The BLO Defendants raise the following matters to contend that it is not just and equitable. There is, of course, considerable overlap with the matters canvassed in the context of the Anticipatory BLO.

H4.1 Adjudication is an interim solution

189. Mr Hughes KC argued that adjudication is designed to provide an "*interim solution*" to meet the "*cash flow requirements of contractors and their sub-contractors*" in which "*The need to have the right answer has been subordinated to the need to have an answer quickly…*": per Chadwick LJ in Carillion Construction Ltd v Devonport Royal Dockyard Limited [2005] EWCA Civ 1358, [2006] BLR 15 at [85] to [87]. He argues that adjudication has been routinely described as "*rough justice*". Whilst the BLO Defendants acknowledge the policy that Parliament expects parties to comply with an adjudicator's decision, Mr Hughes KC argues that the expectation and obligation to comply with an adjudicator's decision is an obligation of the counterparty to the contract, who was involved in the adjudication. The analogy to a guarantor is repeated.

190. Ultimately, Mr Hughes KC's submission is that adjudication is fundamentally incompatible with the 'extraordinary' remedy of a BLO.

191. For the reasons considered in relation to whether an adjudicator's decision can give rise to a relevant liability, I do not agree. There is no necessary incompatibility between the regime for construction adjudication and section 130 (or related provisions) of the BSA. This is particularly so given that a BLO can only be ordered when it is just and equitable to do so. The fact that an adjudication may give rise to a temporarily binding decision (interim only to the extent that it is subject to challenge) following a short determination process is not of itself sufficient to mean that it is unjust or inequitable for an associate to be required to stand behind the original party.

192. Indeed, a conclusion that adjudication is fundamentally incompatible with the application of BLOs would deprive the construction industry of the use of one of the most important dispute resolution tools from which it has benefited significantly over the last 30 years. As pointed out in a passage from Meadowside Building Developments Ltd (in liq) v 12–18 Hill Street Management Co Ltd [2019] EWHC 2651 (TCC), (2019) 186 ConLR 148, [2020] Bus LR 917, adopted by Lord Briggs in Bresco, it would in my view be wrong to restrict the utility of adjudication, in light of the breadth of the statutory scheme and its practical use within the industry, as being solely about short-term cashflow:

> "Adjudication is often about achieving a quicker and cheaper resolution to the parties' disputes. Where one party regards an adjudicator's decision as a real miscarriage of justice, it has the right to take the dispute to litigation or arbitration to have that decision effectively overturned; where, as is so often the case, the parties regard the decision as a decent attempt to arrive at a fair resolution of the competing positions, the parties generally

> treat the decision as binding or negotiate a settlement around it. This is good for the overall administration of justice and no doubt many cases which would otherwise end up in the TCC are resolved without burdening public resources as a result of the practical utility of adjudication, notwithstanding its temporary nature."

193. It is well known to all practitioners that building safety matters, in the wake of Grenfell Tower, have given rise to what is probably the single largest area of construction disputes in recent history, if not ever. There is no principled justification to limit or significantly de-incentivise the use of such an effective tool for resolving such disputes from the industry, which would be the practical effect of Mr Hughes KC's submission. If a BLO cannot, as a matter of principle, attach to the liability created by an Adjudicator's Decision and/or non-compliance with that Decision, there is considerably less purpose to a party wasting costs in obtaining an unenforceable determination of liability against the original body. Mr Hughes KC's submission leads to the outcome in which the only way to obtain a BLO from the original body's associates is following the establishment of a relevant liability after a full High Court trial. There is nothing in the BSA, nor inherent in the concept of justice and equity, that necessitates this conclusion. This is particularly so where there is no danger that the tools created by the combination of the construction adjudication regime and the BSA can ever be used oppressively or unfairly: the High Court remains the guardian to ensure that any order against an associate is only made if it is just and equitable to do so. There may be many reasons for which it may be unjust to transmit the temporarily binding liability determined by an adjudicator's decision to an associate. One such reason *might* be where the effect of granting the BLO would be to make the adjudicator's decision *de facto* final, in view of the financial standing of the applicant. Whether that is the case will always be fact sensitive and I certainly do not (indeed, could not) suggest that that would inevitably be the case. I raise the example only to illustrate that, in contradistinction to the example, Mr Hughes KC's arguments in this case points to no equivalent case-specific injustice arising out of the temporary nature of the decision; he points to a supposed injustice which exists as a matter of principle.

194. Such injustice does not exist as a matter of principle. Whether it is just and equitable to order a BLO in respect of relevant liability created through adjudication should be determined, according to the statutory test, on a case-by-case basis, and not because to do so would be inherently unjust or inequitable.

H4.2 There is no cash flow need for Crest

195. As set out above, the benefit and purposes of the construction adjudication scheme go beyond short-term cashflow. Whilst it may be that a cash flow need to fund remediation weighs in favour of making an order, there is no reason why it makes it, in any given case, inequitable to order a BLO if there is no such need. I have already referred at [39] to the observations of Nugee LJ about the statutory purposes of the BSA in the context of the argument then advanced that no RCOs were needed as the works were being adequately funded and were being carried out at [87]: one purpose is to deal with the 'who pays' question.

H4.3 BLO by the back door

196. Mr Hughes KC argues that, considering the two preceding factors, it appears that Crest is seeking to subvert and avoid the requirements necessary to establish a BLO.

197. This is circular. If I am correct that, as a matter of statutory interpretation, an adjudicator's decision is capable of constituting a relevant liability for the purposes of the BSA, there is, by definition, no such subversion. It is a right available to Crest. The question is whether it is just and equitable to make an order, and this submission does not advance the BLO Defendants' arguments in this respect.

198. In the context of this argument, Mr Hughes KC's written arguments make reference to repayment, should it be established at trial that an entitlement to the sums ordered by the Adjudicator have not been made out. He does not dispute that the BLO Defendants would have a legal entitlement to repayment under restitution, as posited by Lord Mance in Aspect. He does contend, however, that there is no concept in the statute of an interim BLO or that a BLO can be reversed (save for appeal), contending that if the Court subsequently decided that Crest was not entitled to a BLO on the underlying claim, it does not follow that the BLO Defendants would be entitled to recover the sums paid out under the Adjudication BLO. This was not elaborated upon, but it would be very surprising if correct. The Court has the power pursuant to CPR 3.1(7) to vary or revoke an order, including a final order (even though the instances of doing so with a final order may be rare). There could be little doubt that the final determination of matters at trial would constitute materially changed circumstances for the purposes of the exercise of discretion and, in the context of the two statutory regimes, would not in substance offend against the general principles of finality which usually militates against interference in a final order.

H4.4 BLO Defendants's financial position

199. The BLO Defendants rely upon the evidence of Mr Horne. The paragraphs of central relevance are as follows:

> "34. As part of the BLO Application, Crest seeks an order that the Fourth to Tenth Defendants pay the sum of £14,990,690.40 which it says is due under the Adjudicator's Decision (£14,928,320.40 main sum plus £62,370.00 for the Adjudicator's fees) within 14 days of the date of such an order (paragraph 172.1 of the Particulars of Claim). I have been asked to explain the current financial position of the Fourth to Tenth Defendants in the context of setting out the likely consequences in the event of an order to pay such a sum in the next few months. It is important that I emphasise, at the outset, that the view which senior management of the group takes, and has taken, in conjunction with close work with its auditors and advisors, is that the group, and the Fourth to Tenth Defendants in particular, are and continue to be, a viable and strong set of business enterprises. Cash flows, asset position and potential liabilities must, however, be carefully managed, as with any business.
>
> 35. AGL has recently finalised its consolidated accounts for year ended 30 September 2024 for Companies House. On

> (Friday) 30 January 2026, the board approved the financial statements and the representation letter and authorised these to be returned to the auditors for signature. I exhibit these accounts at [MJH1/414-457]. I was involved in the preparation of these accounts and the discussions with auditors in relation to the various provisions.
>
> 36. The overall position based on the accounts which have been finalised is as follows:
>
> 36.1 The group made a net loss of c.£41.3 million in the year to September 2024.
>
> 36.2 The net asset position as at 30 September 2024 was £23.4 million. This figure factors in a provision for liabilities of £117 million but this provision does not include for the present claim by Crest for a BLO.
>
> 36.3 It should also be noted that the £23.4m figure includes, in part, fixed assets which are the subject of first charges. The sums, based on these accounts, which would be liquid and available for the discharge of any judgment would be less than £15m. I explain this further below based upon the 'cashflow' model that we use within the business.
>
> 36.4 I have reviewed the cashflow model prepared with the auditors as part of the going concern exercise for our current audited accounts. Based on a snapshot of the Base Case model at, say, 30 April 2026 we forecast the following:
>
> Cash Balance: £2.90m
>
> Total Property: £59.4m
>
> of which unencumbered: £11.6m (assume this could be mortgaged at 65% LTV - £7.54m)
>
> Balance: £10.44m
>
> 37. For these reasons, a BLO in the sum of £15 million would present profound problems for the group."

200. Mr Selby KC's written submissions included numerous criticisms of the points made by Mr Horne. Some of these were addressed in a further witness statement, and were not pursued in oral argument.

201. However, a number of submissions continued to be pressed. First, Mr Selby KC made the forensic point that the plea that an order to pay £15m in spring/summer 2026 is likely to present profound problems for the BLO Defendants was a late plea introduced by amendment. More substantively, he contends that the plea is not made out by the contemporaneous documents. As to this:

(1) the 2024 Report to which Mr Horne refers contains the statement,

> "In view of the assessment performed, [Cormac Byrne] is satisfied that sufficient financial resources will be generated to enable the Group and Company to meet its liabilities as they fall due for the period to 3 February 2027."

(2) Note 26 recorded:

> "Recent developments in government legislation, notably the Building Safety Act and the introduction of Building Liability Orders ("Orders"), have created significant uncertainty both for the Group and the broader industry, particularly in relation to historic contracts. The Group actively manages these risks wherever possible.
>
> …
>
> The merit, likely outcome and potential impact of these claims is subject to a number of significant uncertainties and, therefore, the Group cannot make any assessment of the likely outcome or quantum of any such litigation as at 30 September 2024. The uncertainties relate to the vague nature of these claims, a lack of supporting evidence from claimants, and the lengthy timeframes involved before a reliable estimate of financial cost can be determined. Factors affecting this include the age and complexity of projects, the judgement required in determining if claims relate to relevant liabilities, the developing interpretation of legislation, particularly regarding the judgement of the claim being fair and equitable, and issues relating to the supply chain and onward claims.
>
> Nonetheless, the Group believes it holds strong positions on many claims. However, given the ongoing evolution of legislation and guidance, it remains difficult to determine outcomes with sufficient certainty. Where claims are successful, the financial impact is likely to be partially mitigated through subsequent claims on the supply chain and/or other parties."

(3) Mr Horne's statement sheds no light on the relationship between AGL and AGHL, the ultimate parent company, and deals only with cash flow from AGL and below.

(4) In this specific context, Mr Selby KC made the point in his opening written submissions that AGHL was incorporated on 27 June 2024 and therefore accounts information is not yet available at Companies House. No financial information has been volunteered, notwithstanding its likely relevance in the context of the BLO Defendants' own plea. Mr Selby KC submitted that it seems likely that AGHL has vast amounts of wealth in its own right. AGL's company accounts (Notes 4 and 5, page 44) appear to show that between y/e

2023 and y/e 2024 a substantial loan was made by AGL to AGHL (as AGL's parent company) in the sum of c.£26.26m. They also appear to show further loans in the sum of c.£1.5m in the same period to Cormac Byrne (as AGL's sole director).

(5) In contrast to other points relating to financial matters to which Mr Horne responded in his second witness statement, Mr Horne did not respond in any way to explain the substantial loan to AGHL (in itself, nearly double the amount of the Adjudicator's Decision), or the inference drawn by Mr Selby KC that it is likely that AGHL has vast amounts of wealth in its own right.

(6) An extract from the Ardmore Group Forecast Model, appended to Mr Horne's second statement, showed that as at 31 January 2026, property assets were stated to be £59.4m. The total *net* assets were significantly reduced by reference to the line item, "*Other net assets and liabilities"* of £55.3m. Mr Selby KC cross-referenced this to the accounts. At Note 21, there is a "provision for loss on contracts" of a nearly equivalent £55m. This is stated in the accounts as relating to live contracts where the director, Cormac Byrne, estimates that costs will exceed revenue on a construction contract. The provision reflects the expected loss and is recognized immediately. The obligation is stated to be likely to crystalise more than one year after the balance sheet date. It can be also seen that the sum for "*Remedial Work Provision*" at Note 21 is some £62.9m, but has been reduced to £537k in the Forecast Model. The provision of £55m is reduced in the Forecast Model by about £2m a month. This, without specific explanation, appears to depress the net assets;

(7) One of the charges over property is "predicted", rather than actual, in the sum of £25.3m on the basis, as Mr Horne explains in his second statement, the BLO Defendants have "*good reason to believe it is close to securing a several hundred million pound contract that will require a £25m-£26m bond*".

202. The short point made by Mr Selby KC is that the documents provided by the BLO Defendants do not support the proposition that ordering the Adjudication BLO would "present profound problems". I conclude on the basis of the documentary evidence that there is considerable reason to be sceptical of this evidence by Mr Horne. This is particularly so in light of the complete absence of transparency about the financial status of AGHL, together with the intercompany loans. The BLO Defendants have chosen not to provide obviously relevant financial information pertaining to AGHL (and notwithstanding notice of the concerns provided in respect of this lack of transparency in advance of the hearing). It is also notable that the language chosen by Mr Horne does not suggest that making the Adjudication BLO would cause an existential threat to the Group. Taking the evidence at its highest, the BLO is likely at most to impact short-term decisions about entering new contracts (the detail of which is exceptionally vague) and only to the extent that entering such contracts require a performance bond (rather than, for example, a parent guarantee from AGHL). It is also surprising that Mr Byrne has not chosen to put his name to any equivalent assertion, given his centrality to important issues in dispute and, as Mr Selby KC submitted, all roads ultimately lead back to him.

203. However, I nevertheless take Mr Horne's statement at face value for the purpose of the Application. On the facts of the present case, I consider for the reasons already

explained in the context of the Anticipatory BLO that it will be an unusual case in which the source or extent of a respondent's assets or liabilities will carry much weight when deciding whether it is just and equitable to order it to bear the cost of remediation, which is ultimately what the costs ordered to be paid by the Adjudicator represent (see Click St Andrews and Triathlon). There are no particular facts which make this one such an unusual case.

H4.5 Remedial Scheme

204. Mr Hughes KC submits that a related factor to Crest's lack of cash flow need, is that the BLO Defendants consider that there is a far cheaper remedial scheme which should be adopted. If Crest receives £15m now either it may be substantially overcompensated if it adopts that scheme, or it may be motivated to proceed with a disproportionate scheme.

205. Little weight should attach to this point. The reasonableness of Crest's remedial scheme will be determined should the Proceedings continue to judgment, and if the BLO Defendants wish to argue that Crest effectively over-spent because of receipt of adjudication moneys, it will be open to them to do so. If they establish that remedial costs should have been lower and that Crest has been overpaid, there is no suggestion on the facts of this case that any overpayment will not be returned.

H4.6 Inequality of Arms

206. Mr Hughes KC's written submissions contended that ACL was compromised in its ability to defend the Adjudication given the short timetable which it faced in producing its Response (in contrast to the time taken by Crest to launch the Adjudication at the time of its choosing). Mr Hughes KC submitted that ACL had dis-instructed its experts in March 2025, and despite attempting to re-instruct them, ACL's experts, most importantly its fire engineering expert, Dr Crowder, was not available during the Adjudication and the lack of specific fire engineering evidence supporting ACL's case was crucial to the outcome. Whilst Crest criticised ACL for dis-instructing its experts, the BLO Defendants relied upon the evidence of Mr Horne who explained that it proved too difficult to instruct an alternative expert given the accelerated timetable and the high demand for fire safety engineering experts at that time. As such, ACL was limited to relying on a FRAEW report produced by Dr Crowder in November 2023. This limited ACL's defence given it was out of date, not responsive to Crest's expert evidence in the Adjudication and the Adjudicator found that "*the purpose of a FRAEW is not to prescribe what remedial works are required.*" Mr Horne also explained that ACL's senior management were focused on the administration process, not the Adjudication.

207. Mr Hughes KC therefore submitted that it would be unjust to require the BLO Defendants to meet an Adjudicator's Decision reached against ACL in those circumstances.

208. The short answer to the point is that I am satisfied of facts (8) to (10), as explained above. The BLO Defendants have long been aware of the matters in dispute, and took a decision at a certain point to focus on ringfencing the potential liabilities of ACL from the wider group rather than continue to 'invest' in substantive engagement on the underlying dispute, even if one consequence of this was that it may not have been as ready for an adjudication as it may otherwise have been. That was a commercial

decision made, no doubt ultimately, by Mr Byrne and/or his advisors. The BLO Defendants engaged as fully in the adjudication process as their own commercial interests allowed or dictated. If (assuming the BLO Defendants' case at its highest) this was not as fully as might in different circumstances have been the case, it does not make it unjust or inequitable to permit Crest to exercise its statutory ability to require the BLO Defendants to stand by the liability created by the Adjudicator's Decision.

H4.7 The Decision does not reflect the claim

209. Mr Hughes KC contends that the sums awarded by the Adjudicator do not reflect the claim now made by Crest or the likely cost of the works it seeks. This is because it is said that:

(1) the sums awarded by the Adjudicator were based on a Contract Sum Analysis provided by Crest which (a) was a budget cost, and (b) did not reflect Crest's expert evidence or the FRAEWs from Artec as to the remedial works required. The BLO Defendants contend that Crest unreasonably refused to answer a request as to whether it accepted that its proposed remedial scheme goes beyond the FRAEW which Crest had obtained from Artec at Responses 12 to 14 of its RFI Response.

(2) The Adjudicator included £724,173 in the sums he decided were due in respect of timber balconies. However, Crest has not pleaded any claim in respect of timber balconies in these proceedings. Crest says it is reasonable to replace the timber balconies because the necessary work was identified in Artec's PAS 9980, but Mr Hughes KC says that that is no answer to the point that Crest does not pursue a claim in these proceedings that it is necessary to replace the balconies or that the need to do so arose from a breach by ACL.

(3) The Adjudicator decided at paragraph 125 of his Decision that Crest should have installed a fire alarm earlier and its failure to do so was a failure to mitigate. However, he only deducted £231,078.33 from the waking watch costs which was an insufficient deduction.

210. It is not suggested that any of these issues go to the enforceability of the Adjudicator's Decision. The points do not materially touch on whether it is just and equitable that the relevant liability determined by the Adjudicator and/or arising out of non-payment of an Adjudicator's Decision is met by an associate.

H4.8 The Building Safety Fund

211. This has been dealt with in the context of the Anticipatory BLO.

H4.9 Recovery from DRP

212. Mr Hughes KC repeats, in the context of the Adjudication BLO, that Crest has already recovered £563,395.16 from DRP, and contends that this was not factored into the Adjudicator's Decision. It is not suggested that this goes to the enforceability of the Adjudicator's Decision. It is a point that may go to the eventual quantum of the claim

should the Proceedings be determined at trial. At least on the facts of this case, it is not a matter which materially touches on the just and equitable test.

H4.10 Uncertainty for contribution claims

213. This point was not developed orally. In his written submissions, Mr Hughes KC argues that it is not clear if the BLO Defendants would be able to pursue contribution claims under the Contribution Act 1978 in respect of any sums paid pursuant to the Adjudicator's Decision on an interim basis. This is not further explained. In particular, there is no articulation on how recovery against other wrongdoers will be *prevented* (which seems improbable) rather than, at best, complicated. It is difficult not to conclude that any such complication as may have arisen is not the unjust application of the statutory regimes but the manner in which the Ardmore Group has (as it is entitled to do) structured itself in the wake of ACL's liabilities. At least as advanced on this Application, this is not a matter to which any material weight can be placed.

H4.11 Conclusion on the Adjudication BLO

214. Weighing all the factors relevant to the exercise of the statutory test, I conclude that it is just and equitable that each of the BLO Defendants is jointly and severally liable for the sums owed by ACL to the First and Third Claimants under the Adjudicator's Decision.