Neutral Citation Number: [2021] EWHC 3507 (TCC)

Case No: HT-2019-000112

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

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

Date: 23 December 2021

Before :

ADAM CONSTABLE QC
SITTING AS A JUDGE OF THE HIGH COURT:

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Between :

MISS ELAINE NAYLOR AND OTHERS	**Claimants**
- and -	
(1). ROAMQUEST LIMITED	**Defendants**
(2). GALLIARD CONSTRUCTION LIMITED	

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Siân Mirchandani QC and David Sawtell (instructed by **Leigh Day**) for the **Claimants**
Dominique Rawley QC and Simon Goldstone (instructed by **Howard Kennedy LLP** (for the First Defendant) and **IBB Law LLP** (for the Second Defendant))

Hearing date: 10 December 2021

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 23 December 2021 at 10:30 am.

MR ADAM CONSTABLE QC :

1. This is the adjourned application of the Defendants to strike out parts of the Particulars of Claim, issued on 30 July 2020 and initially the subject of a Judgment of Mrs Justice O'Farrell dated 10 March 2021 ([2021] EWHC 567 (TCC)). It is also the Claimants' application to amend the Particulars of Claim, pursuant to permission granted by Mrs Justice O'Farrell when, having accepted there existed deficiencies in the particularisation of the claim, gave the Claimants the opportunity to remedy them.

2. This claim arises out of a mixed residential and commercial development, comprising eleven tower blocks, known as New Capital Quay in Greenwich London. The 124 Claimants are leasehold owners of one or more of the flats in six of the tower blocks. The First Defendant was the developer and freehold owner of the property. The Second Defendant carried out the design and construction of the development.

3. The development was carried out between 2009 and 2014. The external envelope of the tower blocks was constructed using aluminium composite (Alucobond) cladding and timber rainscreen cladding with Kingspan K15 insulation. Following the Grenfell Tower fire in June 2017, the Building Research Establishment ("BRE") carried out testing on the external envelope of the development. That testing disclosed that it had no flame retardant properties and therefore failed to comply with applicable Building Regulations.

4. The Claimants have the benefit of an NHBC Buildmark Policy in respect of their flats. By letter dated 9 July 2018 the NHBC accepted the claim under the Policy for the remedial scheme required, including replacement of the Alucobond cladding, Kingspan insulation and cavity barriers, together with the 'waking watch' scheme put in place to ensure safety of the residents pending completion of the remedial works. The Defendants commenced the remedial works in 2018 or 2019 - the parties are in dispute as to when the works were started - and the remedial works were completed in stages between December 2019 and May 2021 ('the Remedial Works').

Proceedings

5. Proceedings were commenced on 2 April 2019. The Claim Form was served on 31 July 2019. An application to extend time (for a second time) for the service of the Particulars of Claim was granted by Miss Joanna Smith QC sitting as a Deputy High Court Judge. Particulars of Claim were served on 24 January 2020.

6. There are three categories of Claimants:

    1) Category A: Claimants with a direct contractual relationship with Roamquest which were 'Off-Plan Contract' purchases (40 properties / 64 Claimants);

    2) Category B: Claimants with a direct contractual relationship with Roamquest to purchase long leases of flats, which were 'Sold as seen Contract' purchases (22 properties);

3) Category C: Subsequent purchasers who do not have a direct contractual relationship with Roamquest as they had purchased from the primary purchasers (20 properties).

7. The claim contained claims for damages under the Defective Premises Act 1972 ('DPA') in relation to all Claimants, and for breach of contract in relation to the Category A Claimants only. The damages claimed include the cost of additional remedial works and for other uninsured losses including diminution in value and distress and inconvenience.

8. When first served, the Claimants' claim in relation to additional remedial works rested upon '*further defects* [which] *were detected and/or are reasonably suspected as being included in the construction of the Building*' (paragraph 69 of the Particulars of Claim).

9. Defences were served by both Defendants on 3 July 2020, complaining that the allegations of defects in the Particulars of Claim from paragraphs 69 to 82 were speculative, unparticularised, unsubstantiated and should be struck out. The Defendants according applied to strike out parts of the claim.

10. That application was heard by O'Farrell J.

11. At paragraphs 20-21, 32-34 of her Judgment, the Judge said:

> *'20. Mr Goldstone's complaint is that the claim was issued prematurely, to avoid limitation difficulties, and without the benefit of expert evidence. As a result, the additional defects claim is speculative and inadequately particularised.*
>
> *21. That complaint is well made. The Particulars of Claim and the Schedule of Defects at Appendix B refer to assumed or potential defects in the tower blocks but do not assert with any particularity the nature, extent and location of the alleged defects so as to enable the Defendants to know the case they have to meet.*
>
> …
>
> *32. Mr Goldstone's position is that it is not legitimate for the Claimants to bring a speculative claim when they have had plenty of opportunity to investigate in order to make a positive case. He submits that the Court should strike out this part of the claim or grant summary judgment in respect of the same.*
>
> *33. Ms Mirchandani submits that the facts of Nomura were very different in that the claim was issued by the plaintiff on the basis of a contingent claim that it anticipated might be brought against it. In contrast, this claim has been brought following the BRE tests, identifying cladding that failed to comply with the Building Regulations, and the FRS reports indicate that assessment of the efficacy of the remedial works is ongoing.*
>
> *34. I am satisfied that the claim should not be allowed to proceed on the current defective pleading. The onus is on the Claimants to plead a positive case; the Defendants are entitled to know the case that they have to meet. However, it would be wrong in principle to strike out the defects claim without giving the Claimants an opportunity to correct the deficiencies by amendment.*

> *Therefore, the Court will allow the Claimants time to draft amendments to the defects claim set out in the body of the Particulars of Claim and the schedule at Appendix B to plead a proper case.*'

12. The Defendants also submitted that (on various bases) the Claimants had no standing to bring the claim. They also brought a challenge against the claim for residual diminution in value. However, the Court rejected the Defendants' argument and concluded that the Claimants have an arguable case that they have sufficient standing to bring their claims, including a claim for residual diminution in value.

13. As a result of the application, the Court ordered that the Defendants' application to strike out parts of the claim and/or for summary judgment in respect of those parts be adjourned, and that if the Claimants intend to apply for permission to amend the Particulars of Claim to address the matters raised by the Defendants in the application, such draft amendments must be filed and served, together with any further evidence relied on. It is the adjourned application for strike out and the application to amend arising out of this Order which has been argued before me.

14. After the hearing of the application, the Claimants made a request to carry out an intrusive inspection of the facades. This was a change in position from that advanced at the earlier application before Miss Joanna Smith QC to extend time. At that stage, as recorded at page 7 of the judgment ([2019] EWHC 3653 (TCC)), the Judge recorded, '*I was told that* [the claimant's experts] *do not consider that any further inspections of the development are required prior to particularisation of the claimants' case in the particulars of claim*'. The Defendants were resistant to these intrusive investigations on the grounds that the Claimants had had two years to visit the site and inspect the building facades as remedial works progressed and before the works were complete, and that the Claimants had not presented a reasonable basis for their request for these works.

15. This led to a further application before Mrs Justice O'Farrell. In giving judgment ([2021] EWHC 2353), the Judge set out her reasons for significantly limiting the extent of inspection to be permitted from that applied for (paragraphs 21-2):

> *"there have been plenty of opportunities for the claimants and their experts to undertake inspections, whether of an intrusive nature or otherwise…"*
>
> *any further investigations into the replacement cladding works, at least, will require those new works to be reopened to facilitate any further inspection….*
>
> *…these tower blocks are occupied by tenants….*
>
> *It is a material factor that those tenants have already had to suffer more than two years of building works…*
>
> *…there is a risk of damage to the buildings if the claimants are permitted to go ahead and dismantle parts of the brickwork, insulation and other materials sitting behind it…"*

16. At paragraph 28, the Judge concluded that on the basis that aluminium panels could be demounted to facilitate an inspection with relatively little inconvenience or risk to the building, intrusive inspections of 12 (not 45, as requested) aluminium panels were permitted. In relation to an inspection of more intrusive works, behind brickwork, in relation to retained elements (i.e. parts of the original construction which were not remediated in the remedial works), the Judge said:

> *"The starting point for the Court is that the claimants, back in 2019, were given the full O&M file in respect of the construction. Therefore, they have had plenty of opportunity to identify and request an inspection, or opening up, if that be the right course in respect of any part of the works about which they have suspicions as to the adequacy of workmanship. Further, the Court is not satisfied that it has been shown any evidence of defective work in the retained areas.*
>
> *…*
>
> *The Court was taken to photographs in the Meinhardt reports but those were dealing with the cladding works that have now been replaced. Therefore, they do not provide any evidence of the workmanship defects, if any, in respect of other, different, retained elements. It is for the claimants to show good reason why the Court should order the buildings to be dismantled in parts so as to enable the claimants to carry out inspections in a case that has been ongoing for more than two years. The court is not satisfied that any good reason has been put forward for such additional intrusive inspections. Therefore, that part of the application is refused."*

17. As pointed out by Ms Rawley QC for the Defendants in her written skeleton argument, the Claimants did not appeal that ruling, nor apply for the Order to be varied or revisited.

18. The Claimants' application to amend the Particulars of Claim was served on 29 October 2021. The proposed Amended Particulars of Claim ('APOC') includes

    1) new paragraphs 51A to 51U, introducing the Building Regulations 2010, as amended by the Building (Amendment) Regulations 2018, their alleged effect and application to the Remedial Works;

    2) a document entitled, '*Updated Schedule of Defects*', which is a fresh document replacing the original version. The introductory narrative sets out as following 'Route Map':

> *"The Schedule of Defects performs two functions: firstly it details the defects present in the external walls following the NHBC Works – and the remediation required; secondly it details the defects which were present in the external walls as originally constructed, which is relevant to the Claimants' case on breach of contract and/or the Defective Premises Act 1972. Following the NHBC Works, the ACM and Cedar rainscreen cladding, and*

> *the cavity barriers behind that cladding have been removed. Certain parts of that original rainscreen cladding have been retained (backing board, Tyvek breather membrane, timber window supports, curtain wall, masonry cladding). These are referred to as 'retained elements".*

3) various amendments to the text to reflect the allegations principally particularised in the Updated Schedule of Defects.

19. I set out a summary of the Updated Schedule of Defects, taken from the Defendants' written skeleton argument:

Item	Building Component	Original	Retained	Remedial work required
1	Backing board **	yes	yes	
2	Tyvek breather membrane **	yes	yes	
3	Timber window supports **	Yes	yes	£3,536,515
4	ACM panels in original	Yes	No	-
5	Cedar cladding	Yes	No	-
6	K15 insulation	Yes	No	-
7	Original OSCBs testing	Yes	No	-
8	Original OSCBs installation	yes	No	-
9	Spandrel panel Styrofoam **	yes	Yes	£652,375
10	Masonry cladding cavity barriers	Yes	Yes	£251,000
11	Masonry cladding K15	Yes	Yes	£1,055,755
New rainscreen cavity barriers				
12	Rockwool SP OSCB 44 – no testing on tray cassette		New	
13	Horizontal OSCB – no testing on corner façade		New	
14	Horizontal OSCB – corner details		New	
15	Horizontal OSCB – abutment with VCB details		New	
16	OSCB pigtail screws		New	
17	OSCB – Rockwool instructions		New	£183,850
18	Vertical cavity barriers- gaps between back of panels		New	
19	Vertical cavity barriers – foil membrane damage/gaps		New	
Service penetration firestopping				
20	Service penetrations	yes	no	-
TOTAL REPAIR COST CLAIM (ESTIMATE)				£5,679,495

20. The parties helpfully grouped their oral submissions into categories (albeit there being some overlap), namely items 1-3, 4-8, 9, 10-11, 12-13, 14-19 and 20. I will in due course adopt the same categorisation when considering the parties' arguments.

21. Accompanying the application to amend was the Sixth Witness Statement of Gene Theodore Martin Matthews, a partner at Leigh Day on behalf of the Claimants. This witness statement appended two expert reports, one from Mr John Boucher (referred to

as an expert façade engineer), and Mr Mostyn Bullock (a fire safety engineer). Consideration of this expert evidence forms a key part of the basis upon which each party has address the question of whether the amended pleas have a reasonable prospect of success.

22. In opposition to the application, the Defendants served the Fifth Witness Statement of Edward Thomas Alun John, with exhibits. In summary, the point that Mr John makes is that the Claimants' fire safety expert (Mr Bullock) is not of the view that the remediation works are actually required: the Claimants' claim for the costs of performing those works is advanced on a false premise and does not have a real prospect of success. Thus, the Defendants submit the amendments should not be allowed. Whilst procedurally, the Court is effectively dealing with the adjourned strike out application of the Defendants, the substance of the application has focussed on whether permission to allow the amendments should be granted. To the extent that permission is not granted, this has the effect of striking out those parts of the Claimants' case. It is no doubt for this reason that the Defendants' oral and written arguments focussed on whether the amendments stood a 'real prospect of success'.

23. In oral argument, Ms Rawley conceded that in certain respects the Defendants' application as regards breach (as opposed to causation/loss) was not pursued. Ms Rawley was asked in post-hearing submission to clarify which elements of the amended pleading were objected to and which conceded. The following table was produced:

§	*Complaint*	*Defendants' position*
69*	Introductory and speculative allegation of breach of Building Regulations	Amendments accepted; strike out application withdrawn in light of amendments.
70*	Cavity barriers in original cladding inadequately installed	Not opposed, in light of amendments to paragraph 69.
71*	Cavity barriers missing around windows in original cladding	Not opposed, in light of amendments to paragraph 69.
72*	Cavity barriers absent at edge of cavities in original cladding	Not opposed, in light of amendment to paragraph 69.
73*	Backing board and timber window supports in original cladding likely not to comply with BR	Amendment opposed: Mr Bullock's opinion is that Cempanel was compliant when installed and gave rise to no contravention of B4(1) [Bullock §7.25]
74*	Backing board and timber window support retained in new cladding	Struck out by Claimants by amendment
75*	Cavity barrier in new cladding not proven by to close gaps against articulated surface	Struck out by Claimants by amendment

§	*Complaint*	*Defendants' position*
76*	Spandrel panels assumed to have combustible materials and insulation, giving rise to a breach of B4(1)	Amendment opposed: no evidence in support of allegation of breach of requirement B4(1) save in circumstances explained under 'The Exception'.
77*	Assumed firestopping should have been installed at edge of curtain wall and compartment floor and likely to be missing	Struck out by Claimants by amendment
78*	If masonry walls have K15 insulation in cavity then did not comply B4(1) or ADB para 12.7	Not opposed, in light of amendment to paragraph 69
79*	Cavity barriers in masonry facades likely to have been similarly inadequately installed	Amendment opposed on basis of Claimants' misunderstanding of the evidence regarding the use of Thermaclose.
80*	Cavity barriers missing around windows and edge of cavities	Struck out by Claimants by amendment
81 *	Assumed fire-stopping should have been installed service penetrations through compartment walls, and above ceilings in common parts- likely to be defective	Struck out by Claimants by amendment
82*	Assumed fire-stopping should have been installed service penetrations in basement and likely to be defective	Struck out by Claimants by amendment
103 **	Cavity barriers defective contrary to Regulations 7(a)(i)(ii) and (iii); Requirements B3(4); B4(1); ADB	- Amendment opposed: no evidence in support of allegation of breach of requirement B4(1) save in circumstances explained under 'The Exception'.
104 (1) **	Tyvek cannot adequately resist the spread of fire contrary to Regulation 7(1)(a)(i) and (iii) and Requirement B4(1) of the Building Regulations 2010	- Allegation that Tyvek gives rise to a contravention of Requirement B4(1) is unsupported by Mr Bullock. - Retention of Tyvek is expressly permitted per Regulations (see [Boucher §16 at 2/359])

§	*Complaint*	*Defendants' position*
104(2) **	Campanel boards are not non-combustible, contrary to Regulation 7(2) of the Building Regulations 2010 and / or paragraphs 10.3(b) and / or 10.6 of ADB 2019, and cannot adequately resist the spread of fire contrary to Regulation 7(1)(a)(i) and ((iii) and Requirement B4(1) of the Building Regulations 2010	- Allegations that Campanel gives rise to contraventions of Regulation 7(2) and/or B4(1) are unsupported by Mr Bullock. - The cause of action for breach of Regulation 7(2) includes a statutory precondition that the offending material 'become' a part of the wall, and the Claimants have not pleaded particulars of how or when Campanel '*became*' a part of the wall in the APOC.
104(3) **	Timber Supports are not non-combustible, contrary to Regulation 7(2) of the Building Regulations 2010 and / or paragraphs 10.3(b) and / or 10.6 of ADB 2019 and cannot adequately resist the spread of fire contrary to Regulation 7(1)(a)(i) and (iii) and Requirement B4(1) of the Building Regulations 2010	- Allegations that timber supports give rise to contraventions of Regulation 7(2) and/or B4(1) are unsupported by Mr Bullock. - The cause of action for breach of Regulation 7(2) includes a statutory precondition that the offending material 'become' a part of the wall, and the Claimants have not pleaded particulars of how or when the timber supports 'became' a part of the wall in the APOC.
104 (4) **	K15	- Amendment opposed: The allegation that the masonry walls containing K15 '*cannot adequately resist the spread of fire*' is unsupported by Mr Bullock.
104 (5) **	Styrofoam in spandrel panels contrary to breach of Regulation 7(1)(a)(i) and (iii) and Requirement B4(1).	- Amendment opposed: no evidence in support of allegation of breach of requirement B4(1) save in circumstances explained under 'The Exception'.
108	Flats are unfit for habitation upon completion of the remedial scheme contrary to Defective Premises Act 1972.	- Amendment opposed: This is a question in respect of Mr Boucher defers to Mr Bullock (§11 and §12 at [2/397 and 2/398]); however Mr Bullock does not support the Claimants' case in this regard. The amendments should not be permitted, save to the extent that the Exception applies.

The Defendants made clear that its submissions with respect to the proposed new paragraph 99A, and the amendments to the Updated Schedule and allegations of loss were maintained even though those paragraphs are not mentioned in the table. Single asterisks denote allegations concerning the original 'as-built' scheme. Double asterisks denote allegations concerning the buildings following the Replacement Works. Greyed paragraphs are those to which the Defendants raise no objection (and in relation to which permission to amend is granted). Pink paragraphs are those which the Defendants applied to strike out but which the Claimants have voluntarily struck through by way of amendment.

24. In response to the statement from Mr John, there is responsive evidence by way of a further, seventh, statement from Mr Matthews.

25. In addition to oral submissions and the further written submissions invited in relation to paragraph 9.61 of Mr Bullock's Report, which I refer to further below, the Claimants were also permitted to provide written Reply submissions following the Defendants' oral submissions, given that the time estimate of the parties had already been significantly exceeded and this was considered to be the most efficient way to allow the Claimants' reply submissions to be received by the Court.

The applicable principles

26. The Claimants' application for permission to amend their Particulars of Claim (including the Schedule of Defects at Annex 2) is made pursuant to CPR, r17.1(2)(b). Although the amendments have been made outside the limitation period, no argument was advanced in oral or written submissions by Ms Rawley on behalf of the Defendants that a limitation defence was relevant to the disposal of the application.

27. There was no dispute that the relevant test to be applied in an opposed application to amend a statement of case is the same as the test to an application for summary judgment. The question is whether the proposed new claim has a real prospect of success: *SPI North Ltd v Swiss Post International (UK) Ltd* [2019] EWHC 2004 (Ch) at [5] – [10] per Mr Andrew Hochhauser QC sitting as a Deputy Judge of the High Court.

28. Ms Mirchandani QC drew particular attention to the judgment of Mrs Justice Asplin (as she then was) in *Tesco Stores Ltd v Mastercard Incorporated* [2015] EWHC 1145 at [9 to 10] who included at [10] the principles derived by Lewison J in *Easy Air Limited v Opal Telecom Limited* [2009] EWHC 339(Ch):

> *"(1) The Court must consider whether the Claimants have a 'realistic' as opposed to a 'fanciful' prospect of success, see Swain v. Hillman [2001] 1 All ER 91, 92.*
>
> *(2) A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see ED & F Man Liquid Products v. Patel [2003] EWCA Civ 472 at [8].*
>
> *(3) The court must avoid conducting a 'mini-trial', without the benefit of disclosure and oral evidence: Swain v. Hillman (above) at 95.*

> *(4) The Court should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by a trial process ....*
>
> *(5) In reaching its conclusion, the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but the evidence that can reasonably be expected to be available at trial...*
>
> *(6) Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better, see the Easyair case. On the other hand … it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116].*
>
> *(7) The overall burden of proof remains on the Defendants… to establish, if it can, the negative proposition that the [Claimants have] no real prospect of success (in the sense mentioned above) and that there is no other reason for a trial*
>
> *(8) So far as Part 24.2(b) is concerned, there will be a compelling reason for trial where 'there are circumstances that ought to be investigated*"

29. In circumstances where, even if successful, some issues will remain to be determined at trial, particular emphasis was placed upon the further dicta of Lewison J's relating to the sixth and seventh principles at [27]:

> *". . . I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see Potter LJ in Partco v Wragg [2002] EWCA Civ 594; [2002] 2 Lloyds Rep 343 at 27(3) and cases there cited. Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; see Partco at 28(7). Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy: see for example Hudson and others and HM Treasury and another [2003] EWCA Civ 1612."*

30. These principles were not in dispute.

31. I also bear in mind the following passage, from *Shulman v Hogan Lovells International* [2021] EWHC 2779

> *''The court can take into account not only the evidence actually placed before it on the application, but also the evidence that*

> *can reasonably be expected to be available at trial. This principle is itself subject to the caveat that it is not enough simply to argue that the case should go to trial because something may turn up […]*
>
> *One issue that arises in the present case is the evidential burden that rests on the party seeking to establish, for example, that its proposed amendments have a real prospect of success. In Elite Property Holdings Ltd v Barclays Bank plc [2019] EWCA Civ 204 Asplin LJ stated (at 41): "A claim does not have [a real prospect of success] where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences…"*
>
> *47. This was endorsed in the Kawasaki case I have referred to above as follows (at para 18(3)): "The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct."*

32. In this case, the Defendants assert that (b) in the quoted text above is particularly applicable here: the Claimants, it is said, do not have material to support at least a *prima facie* case that the allegations are correct.

33. It follows that, in assessing whether the amendments have a real prospect of success, I will consider whether the expert evidence upon which the Claimants rely demonstrates, when taken at its highest, at least a *prima facie* case in relation to both breach and causation. Whilst it is also necessary for me to bear in mind that disclosure and factual witness evidence are stages yet to take place, and therefore that there is evidence which may not be before me at this stage but which can reasonably be expected to be available at trial, I must also consider in the particular circumstances of this case whether and to what extent there is any realistic prospect that the outcome of the particular issues in dispute will be further influenced, let alone determined, by reference to factual, rather than expert, evidence.

Expert Evidence

34. The Claimants rely upon the expert evidence of Mr Mostyn Bullock, a fire safety engineer. He has a degree in Civil Engineering; he is a Companion Fellow of the Institution of Fire Engineers; he has, since 1998, been a Chartered Engineer registered through the IFE with the Engineering Council. The Defendants take no issue with Mr Bullock, and contend that it is he who is qualified to give evidence as to whether the alleged additional defects give rise to a fire safety issue such that they need to be rectified.

35. The Claimants also rely upon the expert evidence of Mr Boucher. Mr Boucher describes himself as a Façade and Envelope Engineer and Consultant. His qualifications include an HND in Building Studies, and an MSc in Façade Engineering from the University of Bath; his CV states that this included fire safety. He also states that he has undertaken CWCT (Centre for Window and Cladding Technology) modules in various aspects of envelope design and construction, including modules on fire safety. The Defendants assert that Mr Boucher is not a qualified engineer, that he has no professional qualifications concerning fire safety and he is not a fire engineer. They state that it is Mr Bullock who is qualified to give evidence as to whether the alleged additional defects give rise to a fire safety issue such that they need to be rectified. Although in his witness statement, Mr John raises the question of whether Mr Boucher's evidence would even be admissible, this line of argument was, correctly in my view, not pursued by Ms Rawley in oral argument. The more nuanced argument was that, in essence, insofar as Mr Boucher professes to give opinion evidence relevant to these questions, and that evidence is contradicted by Mr Bullock, I should carry out my assessment of prospects on the basis of Mr Bullock's evidence alone.

36. I do not consider that even this, more measured, approach would be correct. In the present case, it would not be appropriate for me to determine summarily the weight to be afforded to Mr Boucher's views on the basis of the criticisms advanced of his qualifications. This is an assessment best left to trial. I shall, therefore, take both his evidence and Mr Bullock's evidence at their highest, and I shall assume that were this matter to go to trial, the Court would accept that evidence in full. Whether, of course, the Court would do so having heard the witnesses give evidence is an entirely different matter, but it would clearly not be right for me on this application to carry out a summary assessment of the merits of that evidence on the basis of submissions.

Items 1 to 3 - Cempanel, Tyvek and Timber Window Supports

37. Paragraphs 73, 104(2) of the APOC and Item 1 of the Updated Schedule of Defects relate to the outer sheathing backing wall to the SFS system, which is said to be comprised of Cempanel cement particle and wood chip sheathing board, manufactured by Cembrit. Cempanel is classified as Class 0 pursuant to BS 476 Part 6 and 7 for surface spread of flame. It is rated Class B, s1, d0 when tested to BS EN 13501- 1+A1 for reaction to fire. Paragraph 104(1) of the APOC and item 2 relates to Tyvek, which is a proprietary membrane layer behind the mineral wall insulation. Paragraph 104(3) and item 3 relates to timber window supports. It is claimed that neither Tyvek nor the timber supports are of at least Class 0 (limited combustibility) or European Class A2-s3,d2 B-s3, d2 (when classified to BS EN 13501). It is also claimed, in relation to the Cempanel, that there are open joints between the sheathing boards such that they are not adequately sealed, and that the sheathing board was cut into haphazard sizes, such that there is no proper seal.

38. It relation to each item, it is claimed that, as originally constructed, the use of these materials as part of the rainscreen cladding system breached obligations under regulations 4, 7(a)(i) and 7(a)(iii) and Schedule 1 Part B4(1) of the Building Regulations 2000 and/or ADB 2006, paragraphs 12.2, 12.5 and 12.7.

39. These items have all been retained in the remedial scheme. The following allegations are made about their retention. The following relates to the Cempanel (item 1), but similar allegations are advanced in relation to Tyvek and the timber supports:

> *"(7) The Cempanel sheathing board was not appropriate in the circumstances in which it was used, namely in a residential building over 18m high, in breach of regulation 7(a)(i) and Part B4(1)of the Building Regulations 2010.*
>
> *(8) The use of Cempanel sheathing board as part of the rainscreen cladding system breached the obligation under regulation 7(a)(iii) of the Building Regulations 2010 that requires building work to be carried out with adequate and proper materials which are applied, used or fixed so as adequately to perform the functions for which they were designed.*
>
> *(9) The Cempanel sheathing board does not adequately resist the spread of fire within the building contrary to regulation 4 and Part B4(1) of Schedule 1 of the Building Regulations 2010.*
>
> *(10) The Cempanel sheathing board does not adequately resist the spread of fire contrary to paragraph B4(1) of Schedule 1 of the Building Regulations 2010.*
>
> *(11) As the Cempanel sheathing board is not of class A2-s1, d0 or better it should not be used in a building with a storey 18m or more in height, as this would be contrary to paragraph 10.10 of ADB 2019.*
>
> *(12) As the Cempanel sheathing board does not achieve achieve European Classification A1 or A2-s1, d0, and it became part of an external wall contrary to Regulation 7(2) of the Building Regulations 2010 (as amended), not being a material exempted by Regulation 7(3)."*

40. Under the column '*Remedial Work Required*', the following is pleaded (again, by reference to Cempanel, but in similar terms for each item):

> *"Pursued as retained elements for Items 1 to 3 and 9 to 11 for the six Buildings. "*
>
> *Remove and replace all combustible material i.e. not Class A1/A2: BS EN 13501, within the construction of the external walls and replace with materials of limited combustibility that achieves class A2-s1, d0 or class A1.*
>
> *Or provide documentation demonstrating that the external envelope meets the performance criteria set out in BR 135, using test data from BS 8414-1:2002 or BS 8414-2:2005.*
>
> *If the NHBC Works commenced before 21 February 2019 then remove sheathing board, cladding and insulation and replace with cladding and insulation compliant with ADB 2006 clauses 12.5 to 12.7, or*

> *If the proposed remedial Building Work commenced after 21 February 2019 then remove cladding and insulation and replace with cladding and insulation materials compliant with the amended Regulation 7 of the Building (Amendment) Regulations 2018 (i.e. materials meeting at least European Class A2-s1,d0).*
>
> *It is understood that Building Control bodies will permit European Class B sheathing board to remain in place subject to the material not needing to be removed to facilitate remedial Building Work to non- compliant cladding. If they do need to be removed to facilitate the work or because they are damaged then they must be replaced with material rated as at least A2-s1,d0.*
>
> ***Estimated cost** for removal of all backing wall, breather membrane, timber window supports. Supply and install appropriate fire rated replacements. Remove and reinstall windows. Includes for installation of cavity barriers around window openings: **£1,379,820***
>
> ***Estimated cost** for supply and install appropriate cavity barriers for compartmentation: (Item 12) **£183,850***
>
> ***Estimated cost** for assumed full scaffolding of six Buildings: **£1,175,670***
>
> ***Estimated cost** for removal, set aside and reinstallation of aluminium cladding panels (allows £15/ m2 for removal and £60/m2 for reinstall): **£797,175"***

41. Thus, the primary claim appears to be for the cost of removal and replacement of the materials in the total sum of £3,536,515. There is an alternative claim for the provision of documentation demonstrating that the external envelopment meets the performance criteria set out in BR135 using test data from *BS 8414-1:2002 or BS 8414 – 2: 2005*.

42. The Defendants object to permission to amend both in relation to the question of breach, and in relation to the loss pleaded.

43. Both parties agree that the question of breach turns on the proper application of the Building (Amendment) Regulations 2018. This is pleaded out at length by way of amendment, which is opposed, particularly within paragraphs 51A to 51G of the proposed APOC. Paragraph 51B of the APOC sets out the principal relevant sections:

> *"By the Building (Amendment) Regulations 2018, ('the 2018 Amendment Regulations'), the Building Regulations 2010 ('the Building Regulations 2010') were amended so as to insert new regulatory requirements for works to the external wall of a relevant building, as defined within the amended Building Regulations 2010. Amongst the amendments to the Building Regulations 2010, the following new provisions were inserted (with added emphasis in bold):*
>
> > *Regulation 2 (interpretation)*
> >
> > *(6) In these Regulations*

> *(a) any reference to an "external wall" of a building includes a reference to—*
>
> *(i) anything located within any space forming part of the wall;*
> *(ii) any decoration or other finish applied to any external (but not internal) surface forming part of the wall;*
> *(iii) any windows and doors in the wall; and*
> *(iv) any part of a roof pitched at an angle of more than 70 degrees to the horizontal if that part of the roof adjoins a space within the building to which persons have access, but not access only for the purpose of carrying out repairs or maintenance;...*
>
> *Regulation 7*
>
> *(1) Building work shall be carried out—*
>
> *(a) with adequate and proper materials which—*
>
> *(i) are appropriate for the circumstances in which they are used,*
>
> *(ii) are adequately mixed or prepared, and*
>
> *(iii) are applied, used or fixed so as adequately to perform the functions for which they are designed; and*
>
> *(b) in a workmanlike manner.*
>
> *(2) Subject to paragraph (3), building work shall be carried out so that materials which become part of an external wall, or specified attachment, of a relevant building are of European Classification A2-s1, d0 or A1, classified in accordance with BS EN13501-1:2007+A1:2009 entitled "Fire classification of construction products and building elements. Classification using test data from reaction to fire tests" (ISBN 978 0 580 598616) published by the British Standards Institution on 30th March 2007 and amended in November 2009."*

44. The Claimants plead (at paragraphs 51D and E) what they contend to be the effect of the transitional provisions. It is clear that whether the Building Regulations as amended apply at all (which the Defendants dispute) will itself turn on the factual question of when works started, in relation to which, as indicated in paragraph 4 above, the parties are in dispute. This is not a dispute which can be resolved summarily.

45. However, the Defendants argue that even if the 2018 regulations apply, they do not on their proper construction mandate the removal of the Cempanel, Tyvek or timber supports. They point to the view of the Claimants' own fire engineering expert, at paragraph 7.22 of his Report. He states (with regard to Cempanel), for example:

> *"7.18 My opinion is that compliance of remediation building work with the amended regulation 7 does not require removal*

and replacement of all materials in the external wall that are not at least European Class A2-s1,d0 and that are not otherwise on the list of exempted materials in Regulation 7(4). The principle is clarified in MHCG's published response to FAQ13 as follows a

https://www.gov.uk/government/publications/building-amendment-regulations-2018-frequently-askedquestions /building-amendment-regulations-2018-frequentlyasked-questions

13. How does the ban affect materials that are temporarily removed to remediate another part of the wall?

Some building work may involve temporarily removing materials which are already part of the external wall in order to replace another part of the wall system, such as where a rainscreen is removed to access the insulation beneath.

Regulation 7(2) states that "building work shall be carried out so that materials which become part of an external wall, or specified attachment, of a relevant building are of European Classification A2-s1.d0 or A1". It is for building control bodies to assess compliance with this requirement. Materials which are retained and are not impacted by remediation activity are unlikely to be considered to become part of the external wall. However, the application of the ban will depend on the particular circumstances and the specifics of each project should be discussed with the relevant building control body.

It should be noted that regardless of whether the ban applies, compliance with Regulation 4 must always be demonstrated.

…

7.21 I am aware that there are differing opinions between various experts in relation to whether existing materials that do not a[c]hieve A2-s1,do or A1 can be retained if other materials/products are being removed and replaced.

7.22 My opinion, which I believe would be shared by a body of professional expert opinion of qualified fire engineers, is that the removal and replacement of the Cempanel CP board is not required to comply with the Building (Amendment) Regulations 2018

7.23 Ultimately, this is a difference of opinion about the meaning and intent of the wording of amended Regulation 7, which is a matter of law, which is likely to be subject to determination at some point in a court of law."

46. In oral submissions, Ms Rawley rightly accepted that the meaning and effect of the regulation was a matter of law. However, she contended that it would be open to me to determine summarily that the regulation did not mandate the removal of these items. I do not agree. Neither party engaged, in their submissions, with the substantive question of the proper construction and application of the regulations. Not least in light

of the potential industry wide implications of a determination of the proper meaning and effect of the amendment, it would be wrong for me even to proffer a view on this question of law, let alone determine it, when the matter has not been subject to proper argument. Whilst ultimately a question of law, it is a matter of interpretation which may well be affected, in addition, by evidence from the expertise within the fire and façade industries about, for example, the technical implications of a particular construction. That is a matter best left to trial.

47. I note that in its supplemental written submissions, Ms Rawley contended in addition that the Claimants have not pleaded particulars of how or when Cempanel 'became' a part of the wall in the APOC. It seems clear to me that that the Claimants rely upon the application of the statute to the fact of the retention of these items, such that the retention led to the various items 'becoming' part of the external wall. Whether that approach is right is a matter that cannot be determined summarily.

48. It follows that I decline to strike out those paragraphs from the pleading which introduce the amended regulations and their effect. It also follows that I decline to determine that there are no real prospects of the Claimants' establishing that, as a matter of law, that retention of items 1 to 3 constituted a breach of the various statutory obligations pleaded, and in turn contractual breach (in relation to the Category A Claimants).

49. The Defendants' further argument is, however, related to the claimed remediation. They argue that even if the Claimants are permitted to argue that the Defendants are in breach by reason of either the original construction or retention in relation to these items, which may sound in the Claimants' claims for diminution in value and/or distress and inconvenience, there is no real prospect of the Claimants establishing that it is necessary to remove and replace these items at significant cost, and that therefore permission to bring that element of the claim should be refused. This goes to the claim under the DPA (in relation to the remedial works), and the question of causation and loss for the contractual claims.

50. The Defendants advance this argument on the basis of Mr Bullock's evidence. The Claimants contend that the Defendants have cherry picked elements of that evidence. It is of course essential to have regard to all of Mr Bullock's evidence and, for the reasons I have stated, the evidence of Mr Boucher.

51. Mr Bullock deals at paragraphs 9.46 to 9.48 with the remediation work. He records:

> *"9.46 A remediation project has been carried out by RL and GC to replace all the ACM cladding and associated K15 insulation with polyester powder coated solid alumium cladding and mineral fibre insulation. This is new building work becoming part of the external wall.*
>
> *9.47 The remedial works retain the European Class B-s1,d0 Cempanel sheathing board, Tyvek breather membrane and timber window sub-frames as existing building work that is already part of the external wall.*

> *9.48 Therefore, the new building work complies with Regulation 7(2) in terms of achieving European Classification A2-s1,d0 or better."*

52. He then considers the findings of Mr Boucher, remarking that given that Mr Boucher is an expert facades engineer, he is satisfied that he can treat his report as providing factual evidence of the current as-built post-remediation status of the cladding. Whilst this comment is subject to criticism relating back to the Defendants' observations about Mr Boucher, this is not something to determine summarily. Mr Bullock then notes that Mr Boucher's report has identified significant workmanship defects in relation to cavity barrier installation due to non-compliance with the manufacturer's detailed installation instructions. He states that the extent of these defects in the areas inspected indicates that they '*are likely to be prevalent rather than occasional*'. In the key passage of his report, he then sets out his views as follows:

> *"9.57 In terms of the impact on the fire risk to which Relevant Persons (i.e. occupants of the building) are exposed and whether that risk is sufficient to represent a breach of the functional requirement of B4(1) of the Building Regulations, it is necessary to consider the significance of these defects as to whether they will place Relevant Persons in a situation of imminent danger. That is the consideration which is effectively described by Regulation 8 and that is appropriate to determine whether the functional requirement of B4(1) of the Building Regulations has been complied with, notwithstanding non-compliances with ADB guidance which may be shown to exist.*
>
> *9.58 The completed remedial works to the combustible ACM clad external wall constructions have replaced the principal components of the insulation and cladding with limited combustibility/non-combustible materials that pose no risk of fire propagation. The retained European Class B-s1,d0 sheathing board will not contribute significantly to fire growth or spread and will, in any event, be protected by the mineral fibre that now oversails it. The retained timber sub- frames for windows do not provide a significant fire load as they are provided at isolated locations and are not continuous through the cavity.*
>
> *9.59 The chances of a fire being propagated faster from one floor to another when compared with the speed at which such fire spread could occur from window to window would not be significant. This is because fire spread will not be accelerated by combustion of the cladding materials themselves and the cavity is provided with sufficient cavity barrier provision to mitigate the risk of channelling of significant flames and hot gases from one*

> *floor level to another in the cavity or across compartment wall boundaries.*
>
> *9.60 I would therefore largely be satisfied that, despite the clear workmanship defects identified by Mr Boucher in breach or Regulation 7(1), the criteria stated by Regulation 8 would be met as a reasonable standard of health and safety for the persons in or about the buildings (and any others who may be affected by buildings, or matters connected with buildings) would still be achieved and this would mean that the functional requirement of B4(1) of the Building Regulations would have been met.*
>
> *9.61 The exception to this in my opinion is where the cavity barriers with defects described by Mr Boucher are located on compartment lines between locations of adjacent sandwich panels with combustible foam cores (likely to be XPS) that are being retained. An example of this is shown in the following photograph where such sandwich panels exist behind the louvers. In these areas it is important that the cavity barriers at compartment floor interfaces in the aluminium rainscreen cladding between the louvers are free of defects such that fire propagation does not occur easily to the Styrofoam core of the sandwich panel."*

53. First, it is plain from the report that Mr Bullock's view is predicated on the assumption of prevalent defects in the cavity barrier installation behind the ACM panels, as identified by Mr Boucher's inspections. Second, Mr Bullock specifically turns his mind to the existence of the retained elements of Cempanel and the timber supports. He then, notwithstanding these issues, makes clear that he considers that the functional requirement of B4(1) of the Building Regulations is met subject to the exception stated at paragraph 9.61. Without more, and subject to the exception, this on the face of it appears consistent with the Defendants' case that no remediation works are necessary. Given the obvious potential importance of paragraph 9.61, the parties were invited to make post-hearing written submissions as to their understanding of the ambit of the exception.

54. Neither party were able to articulate a clear position as to what the exception means in practical terms, either by way of a description of the remedial works associated with the exception or the cost. The Claimants submitted that the Court does not have a concluded position on (even) the estimated quantum for carrying out only the works at limited instances of these locations of Styrofoam panels with a cavity barrier at compartment lines. They do contend, however, that logically it would seem to follow that the construction to which Mr Bullock's caveat applies is anywhere in any of the Buildings where the same construction detail exists '*i.e. a compartment line located cavity barriers with defects which are found between panels with combustible foam cores or Styrofoam'* (Claimants' Supplemental Written Submissions paragraph 13(3)). This appears to be extrapolated to remediation of '*the entire external envelope'* (paragraph 14 of the Claimants' Supplemental Written Submissions). Whilst I accept

that the reference to Block D (Dundas Court) is plainly an example rather than a description of the limited extent of the problem, it is far from clear to me on the evidence that this broad conclusion can be justified, and one would imagine that Mr Bullock would have expressed it in such a broad way if that were the case. Indeed, the exception would not really be an exception at all, it would be the defining problem.

55. Ms Rawley accepts that there is material to support the (arguable) need for remediation by reference to the exception (see the table above). Her post-hearing written submissions indicates that Mr Bullock will be asked to clarify the ambit of the exception; it is not (for example) contended that there should not be any opportunity for this.

56. The Claimants' argument is that the uncertainty, at a time when pleadings have not closed and there have been no directions for expert evidence, should lead the Court to exercise caution in adopting what it has described as the 'interrogatory approach' adopted by the Defendants. Whilst it is plainly right that I should exercise caution in refusing permission to amend, in line with the authorities identified above, it remains the case that this was a claim issued over two and a half years ago, and in relation to which the first attempt at pleading a coherent case was judged as speculative, inadequate and unsupported by expert evidence. The Claimants were given the opportunity to put this right and provide supporting evidence, but in my view the mismatch between pleading and evidence means that the claim is still incoherent. The uncertainty caused by the vagueness of the 'exception' as articulated by Mr Bullock is not a factor which helps the Claimants in the present application.

57. Against this background, it is necessary to consider the claims under the DPA and the contractual claims separately, as each gives rise to a different analysis.

58. In relation to the DPA, the duty imposed by Section 1(1) is one '*to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner….so that as regards that work the dwelling will be fit for habitation when completed.'*.

59. The key pleaded allegations in paragraph 108 of the APOC, amended so as to rely upon the Updated Schedule of Defects are:

1) Paragraph 108.1:

> *"by reason of [the breaches alleged in the Updated Schedule of Defects and/or 'Remedial Works – issues arising'] the Defendants together (or each of them) breach their duties to see that the work taken on was done in a workmanlike or professional manner, which breaches meant when the flats were completed and/or remediated pursuant to the NHBC Works they were unfit for habitation"*

2) Paragraph 108.3:

> *"The said failures to comply with the applicable Building Regulations, and the resulting defects as a whole, in each of the Buildings and/or in one part thereof, being matters which the fire*

> *safety of the Buildings and the risk of fire to like, are defects of quality of work; alternatively are dangerous defects, that render the flats with the Buildings unsuitable for the intended purpose, namely to be occupied and inhabited safely and without inconvenience, and accordingly the flats were unfit for human habitation at completion."*

3) Paragraph 108.4:

> *"The flats are unfit for human habitation because there is widespread use of Category 3 ACM cladding over K15 insulation, Class B/C sheathing board, timber window supports, open state cavity barriers, and significant defects affecting the internal stopping. The defects that remain (as detailed in the Updated Schedule of Defects and above under 'Further Breaches' and/or 'Remedial works – issues arising') indicates that there is a risk of significant harm from fire to persons living in or visiting the flats in the buildings."*

4) Paragraph 108.6A:

> *"Despite the NHBC Works, and as set out above, there remains combustible material within the Buildings and/or there is defective workmanship and/or inappropriate use or choice of materials or components in the installation of the OSCB, with the result that the Development remains unfit for habitation."*

60. It is very clear, therefore, that the Claimants necessarily plead that the basis upon which the Buildings are said to remain unfit for habitation is that, following the Remedial Works, there remains a risk of significant harm from fire to persons living in or visiting the flats in the buildings.

61. The Defendants contend that because Mr Bullock says that the remediated facades are safe and that repair is not required as a result of items 1 to 3, the Claimants can have no claim under the DPA that the flats are unfit for habitation.

62. Subject to the exception to Mr Bullock's view as expressed in 9.61, the Defendants are correct. Taken at its highest, Mr Bullock's view is that, subject only to the exception, the blocks do not need remediation because they meet the 'functional requirements' of the Building Regulations, irrespective of the defects identified by Mr Boucher and the combustibility of the retained items.

63. Ms Mirchandani advanced further two points. The first was that the Claimants' claim is supported by Mr Boucher's evidence, irrespective of the views of Mr Bullock. The second is that the Court will need to take account of the factual evidence of the residents.

64. The first contention is not correct. This is because Mr Boucher expressly disavowed the provision of any view on fitness for habitation.

65. Question ix posed to Mr Boucher was to provide is opinion on : '*whether the remediated works and/or the retained works or material to the building envelope on the relevant blocks are defective. Please consider the same issues (i) to (viii) above'*. Question (ii) was, '*whether because of any breaches of the Building Regulations you identify there was a present or imminent danger to the physical health and safety of the occupants of the flats*'. Question (vii) had been (relating to the original works) '*whether, as a result of any defects you identify in the facades, you consider that each flat …was fit for habitation when completed. In that regard, please consider whether as a result of any defects in the façade, the buildings were capable of occupation for a reasonable time without risk to the health or safety of the occupants*'.

66. Mr Boucher answered question (ii) as follows:

> *"As to question (ii) whether there is a present or imminent danger to the physical health and safety of the occupants of the flats, my response is that although the risk has been reduced by the removal of combustible materials by the remedial/replacement works to the facades, some combustible materials by the remedial/replacement works to the facades, some combustible materials remain and the design and installation of the cavity barriers remains defective. The question of whether there was, or indeed still is, 'present or imminent danger to the physical health and safety of the occupants of the flats' is a question for the fire engineer to consider."*

67. Answer (vii) merely refers back to answer (ii). Therefore, in considering the question of fitness for human habitation (as opposed to the question of the existence of a defect), the Court can gain no assistance from the views of Mr Boucher, taken at its highest. He explicitly defers to Mr Bullock. Unsurprisingly, in light of this, he expresses no view at all on whether the pleaded remedial works are necessary in order to render the Buildings fit for human habitation.

68. The second contention is also incorrect. Ms Mirchandani was unable to identify any relevant factual evidence that the occupants of the flats could advance in the context of the question of fitness for human habitation. Although Ms Mirchandani referred to *Rendlesham Estates Plc v Barr Ltd* [2015] 1 WLR 3663 to support the proposition that factual evidence demonstrating '*serious inconvenience that is not transient'*, there is no factual pleading (or indeed evidence in support of the application to amend) upon which this contention was grounded. It was, at best, speculation. I do not in any event consider that there is a real prospect, on the evidence before me in the context of this particular case (unlike the 'disrepair' type fitness for human habitation cases), that the question of fitness for human habitation will turn on anything other than the question of fire safety. That will turn on the evidence of the relevant experts, which has been addressed above.

69. Therefore, taking that evidence at its highest, I conclude that save for the exception identified at paragraph 9.61, the Claimant does not have material to support at least a *prima facie* case that the allegation that items 1 to 3 require remediation in order to render the Buildings fit for human habitation.

70. Whilst I specifically bear in mind the caution against accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action, it is of course relevant in this case that the DPA claim is the *only* claim advanced by Category B and C Claimants. Thus, to the extent that, as I have found, there is no real prospect of the Court determining that the Buildings are unfit for human habitation (save to the extent of the exception), a significant proportion of the Claimants have no claim for the cost of further remediation at all in relation to these items. Indeed, it may be considered highly unfortunate that these Claimants are trapped in litigation in which they have no real prospects of success in relation to at least one key aspect of it, with potentially significant cost implications, simply because it forms part of a wider action in relation to which a trial is necessary.

71. In the circumstances, I allow the amendment proposed in relation to items 1 to 3 in respect of the DPA claim only insofar as it is claims the remedial works necessary to address the exception identified at paragraph 9.61 of Mr Bullock's Report. Otherwise the amendment insofar as it relates to the cost of further remediation and/or testing pursuant to a breach of the DPA is not permitted, because it has no real prospect of success. I consider that the Claimants should (as the Defendants appear to accept) be permitted to seek clarification from Mr Bullock to define the ambit of the stated exception, and it must then properly particularise what affect this has on its claimed costs.

72. I turn now to the contractual claim in relation to the Category A Claimants.

73. The Defendants contend that the answer is the same. It argues that, given the Claimants' expert fire engineer Mr Bullock says the walls do not require remediation, then the Claimants have suffered no loss and the claim for damages for repair costs of over £3.5m has no real prospect of success.

74. I have already determined that it is open to the Category A Claimants to argue that the retention of items 1 to 3 is a breach of the Building Regulations, and in turn a breach of contract. It is correct, in light of the evidence of Mr Bullock taken at its highest, the Claimants' claim that, as a result of that breach, it is necessary and reasonable to incur the costs of remediation seems difficult, unless it is right that the addressing the exception justifies wholesale remedial work. However, I have formed the view that it is not fanciful to argue that – even if it is not necessary to do so in order to render the Building fit for human habitation – it is reasonable to do so in order to provide to the Category A Claimants that for which they contracted. It is likely that turns on the question of reasonableness and proportionality, and the Defendants would no doubt rely upon the long-established principles in *Ruxley Electronics and Construction Limited v Forsyth* [1996] AC 344 to argue that carrying out the proposed remedial works is unreasonable where the cost of doing so is out of all proportion with the benefit. Indeed, the Defendants may well be correct that, in light of the evidence of Mr Bullock, it is unreasonable and disproportionate to spend c£3.5m to remove the relevant retained items in circumstances where the construction taken as a whole now meets the functional requirements of the Building Regulations (subject to the exception). However, whether ultimately that is the case depends upon all the factual circumstances. It is no significant leap of the imagination to consider that factual evidence that goes to the wider consequences of the construction of the block which are

already to be considered in the context of the diminution in value claim (which the Court has already determined should not be stuck out, but determined at trial) may be relevant to whether the remedial works are necessary irrespective of the question of fitness for human habitation. In these circumstances, I consider that there is a real prospect of success in the sense that the contractual claim for damages is not fanciful, notwithstanding the views expressed by Mr Bullock. The amendment in relation to items 1 to 3 (and the related paragraphs from the body of the pleading) therefore is permitted in full insofar as it relates to the Category A Claimants' contract claim.

Items 4 to 8

75. Items 4 to 8 in the Updated Schedule of Defects concern the items removed and replaced during the remedial works, namely the ACM and cedar panels, the K15 insulation and the cavity barriers behind those panels.

76. There is no claim for remedial costs in respect of these items, they are relied on to support the Claimants' damages claims in respect of diminution in value, distress and inconvenience etc.

77. The Defendants say that these items have already been pleaded in the Particulars of Claim at paragraphs 54 to 60 and in the original schedule of defects at items 1 and 2. They were not allegations that suffered from being speculative and hence the Court's invitation to amend to resolve those difficulties does not apply here.

78. The Claimants accept that the further pleading relates to matters already included in the Particulars of Claim, and no claim in relation to remediation following the Remedial Works is pursued in relation to these items. They contend that it is useful nevertheless to have all the defects pleaded in a single place. They also say that given the limited extent of admissions in the Defence, the Claimants must plead out a full case in respect of the existence, nature and extent of these defects in order to prove their case on breach, even though most of the primary offending materials (all the ACM & timber cladding and the K15 insulation behind these parts of the external envelope) have been removed.

79. It may well be that the amendment is not strictly necessary. However, there is no question relating to the real prospect of success, and the objection is really one of form rather than substance. The Claimants have contended that the costs of the amendment itself (as opposed to the cost of the application to amend) should be costs in case. However, there is no basis to depart from the usual order that the costs of and occasioned by the amendment are to be paid by the Claimants. To the extent that the duplicative nature of the inclusion of items 4 to 8 is truly unnecessary, the costs of responding (to the extent necessary) are to be met by the Claimants, and the Court will not therefore impose its view on the form chosen by the Claimants to re-present its amended case. There is, in any event, some merit in the proposition that it is useful for the Updated Schedule of Defects to include all defects, irrespective of whether there is a distinction between them when it comes to the claimed losses.

80. In the circumstances, the Court permits the amendment of items 4 to 8 within the Updated Schedule of Loss.

Item 9

81. Paragraph 76 of the APOC, and item 9 in the Claimants' proposed Updated Schedule of Defects concerns the spandrel panels, which are opaque panels located between windows in the curtain walling. It is claimed that the curtain wall contained Styrofoam LB-H-XP insulation, ('Styrofoam') and that Styrofoam is classified as Class D when classified in accordance with BS 13501. It is claimed that the use of Styrofoam as part of the rainscreen cladding system breached obligations under regulations 4, 7(a)(i) and 7(a)(iii) and Schedule 1 Part B4(1) of the Building Regulations 2000 and/or ADB 2006, paragraphs 12.2, 12.5 and 12.7. In the same way as items 1-3, it is claimed that the Styrofoam has been retained, and that as the Styrofoam insulation does not achieve European Classification A1 or A2-s1, d0, it became part of an external wall contrary to Regulation 7(2) of the Building Regulations 2010 (as amended), not being a material exempted by Regulation 7(3). Alternatively, it does not meet the performance criteria given in BRE 135 following a BS 8414 test, contrary to paragraph 10.3(b) of ADB 2019.

82. The Claimant pleads within the 'Remedial work required' column two alternative forms of relief. The first is

> *"Provide a report from a suitably qualified fire engineer to determine whether the curtain walling requires remediation to ensure the safety of building occupants (relevant persons)."*

In the alternative, the Claimant pleads:

> *"If no fire engineer's report can be provided to support then remove/ replace insulation or install fire- stopping as part of the remedial work which should be installed correctly according to manufacturer's certified details for the application and to comply with Building Regulations 2010 And ADB 2019 V1.*
>
> ***Estimated cost** for removal of all non-compliant spandrel panels. Supply and install appropriate fire rated replacements. :* ***£652,375**"*

83. The Defendants admit that there is Styrofoam in these spandrel panels at limited and isolated locations. However, it contends that Mr Bullock does not support the need for remediation. They point to paragraph 9.22 of his Report, which reads (together with paragraphs 9.20 and 9.21 for context) within the section '*As-built infill & spandrel panels including sandwich panels with XPS cores*':

> *"9.20 As indicated by the following extract from Salisbury Glass drawing E402 Rev C2 which shows a vertical section through the louver infill panel detail in fenestration, there are sandwich panels provided as part of the external wall construction. The dimension and description of these panels is consistent with those that are usually constructed with an XPS insulation core (product name 'Styrofoam') and Salisbury Glass window elevation drawings (e.g. E111 Rev C3 – included in*

> *ETAJ4/029) refer the panels containing a 25mm Styrofoam insulation core.*
>
> *9.21 The combustible cored sandwich panels do not comply with ADB clause 12.7 and the form of the sandwich panel construction would not be capable of achieving the classification criteria of BR135 2nd edition if tested as a cladding assembly to BS 8414-2: 2005.*
>
> *9.22 However, for the reason that the width, height, combustible insulation thickness and continuity of the sandwich panels is constrained by their use and location as fenestration infill panels, my opinion is that the risk presented by the panels is not high and I would not regard their specification and installation as a breach of the functional requirement of B4(1) of the Building Regulations provided that they are sited In an external wall construction that is otherwise fully ADB compliant and would therefore act as a fire break between the infill panels."*

84. The Claimants (paragraph 64 of the Seventh Witness Statement of Mr Matthews) identify correctly that Mr Bullock's view that the use of Styrofoam does not compromise the ability of the rainscreen cladding nevertheless to meet the functional requirement of B4(1) of the Building Regulations is subject to a proviso. The Claimants link the proviso to the exception stated at paragraph 9.61 of Mr Bullock's report, which indicates as set out above a concern based upon the evidence of Mr Boucher where there are cavity barriers with defects located on compartment lines '*between locations of adjacent sandwich panels with combustible foam cores (likely to be XPS) that are being retained.*'

85. It follows that the analysis of the position in relation to the DPA claims and the contract claims is the same as for items 1 to 3. The question of breach of contract in relation to the retention of the Styrofoam is a matter that should be determined at trial, dependent as it is (or may be) upon the proper construction of the 2018 Regulations.

86. As to the claimed remediation, in light of the views of the Claimants' own experts, there is no material upon which the Claimants can raise a *prima facie* that any further remedial work is required in order to render the Buildings fit for human habitation, save in relation to those parts of the Buildings to which the exception/proviso relates. Permission is not therefore granted in relation to the DPA claim, save to the extent of the exception. For the same reasons as set out in relation to items 1-3, there is however a real prospect in relation to the contractual claim for the category A claimants in relation to the claimed remedial works, and permission is granted accordingly.

87. I do not, however, grant permission for the amendment (whether in relation to the DPA claim or the contractual claim) insofar as it appears to seek an order for specific performance, namely that the Defendants '*Provide a report from a suitably qualified fire engineer to determine whether the curtain walling requires remediation to ensure the safety of building occupants (relevant persons).*' There is no real prospect that this declaratory relief would be granted. The Court will not injunct the Defendants to provide a particular form of report. The Court will determine (on the basis of the

evidence before it at trial) whether the curtain walling requires remediation to ensure the safety of building occupants as a result of any breaches of contract in relation to the Remedial Works which are proven. It will conclude, on the evidence, either that work is reasonably necessary (in which case it would award damages for the reasonable cost of carrying out those repairs) or that it is not (in which case it does not award the costs of carrying out any repairs). Having carried out that exercise, there would be no basis upon which to order some further report on the issue which the Court has already determined.

88. Instead, if the Claimants contend, in circumstances where no works are reasonably required, that there is in any event some sort of need for a third party certification in a different form to that provided by Mr Bullock for the purposes of re-sale or re-mortgaging (as appears to be the case from paragraph 70 of Mr Matthew's Seventh Statement) then the proper claim would be for the costs of obtaining such a report/certificate, not a claim for injunctive relief to require the Defendants to provide it. That is not the way, however, the proposed amended claim is put and it is not the amendment which the Court is being requested to consider.

Item 10 and 11

89. Paragraph 79 and/or 103 of the APOC and item 10 of the Updated Schedule of Defects concerns the cavity barriers in the masonry walls. Paragraph 104(4) of the APOC and item 11 relates to the retention of K15 insulation.

90. In relation to item 10, the Updated Schedule of Defects claims:

> *"The cavity closer product installed on compartment floor lines and around the windows and other openings in the masonry cladding has been identified by the Defendants Thermaclose Type R. This product has no fire resistance and is not a cavity barrier, it is merely a cavity closer. The as built masonry cladding lacks cavity barriers that offered any fire resistance on the compartment lines and around the windows and other openings in the external façade."*

91. It is then alleged that the Thermaclose Type R cavity closers as installed were not fire resistant cavity barriers, and so cavity barriers were not present around openings, contrary to regulations 7(a)(i) and (iii) of the Building Regulations, regulation 4 and requirement B3(3) and (4), and B4(1), of Schedule 1 of the Building Regulations, paragraphs 8.13, 8.14 and 8.25, 9.2 and 9.3 and Diagram 33 of ADB 2006 and / or paragraphs 12.8 and 12.9 of ADB 2006. By way of required remedial work, the Claimants claim:

> ***"Estimated cost** for supply and installation of cavity barriers around window openings in masonry cladding: **£62,200***
>
> ***Estimated cost** for supply and installation of cavity barriers at compartment lines: **£188,800"***

92. Item 11 alleges that K15 is not of class A2-s3,d2 or better and therefore should not be used in a building with a storey 18m or more in height contrary to paragraph 10.6 of ADB 2019. The Claimants claim:

> ***"Estimated cost*** *for removal of all insulation, backing wall and breather membrane. Supply and install appropriate fire rated replacements. Remove and reinstall new rainscreen cladding and windows:*
>
> ***£1,055,775"***

93. The two items are inter-related because, in the opinion of Mr Bullock, whether the masonry facades meet the functional requirements of the Building Regulations with K15 retained depends upon installation of cavity barriers.

94. Item 10 is not advanced therefore on the basis of workmanship deviations, but the nature of the product installed. As to the product installed, the evidence upon which the Claimants rely is that the cavity closer product installed on both the compartment floor lines and around the windows in the masonry cladding is Thermaclose Type R is the evidence given by Mr John in his Third Witness statement, served in the context of the intrusive inspection application. It is not based upon any intrusive inspection, because Mrs Justice O'Farrell considered (in circumstances where the Claimants had had two years to carry out investigations during the course of remedial works) the opening up of the masonry walls was not justified.

95. Mr John's evidence is as follows. Under the heading 'Masonry Walls', and the sub-heading, 'Cavity barriers in original masonry cladding at compartment lines', Mr John states (after setting out the Claimants' (then) allegation that, '*Cavity barriers on compartment floor lines in the as-built masonry rainscreen cladding are likely to be inadequately installed*'):

> "*The Defendants' position is as follows:*
>
> *(a) This appears to be unparticularised speculation.*
>
> *(b) The Claimants have not presented a reasonable basis for this suspicion and there is no reason to believe there is a systemic fault in these cavity barriers that justifies an expensive and disruptive programme of intrusive inspection.*
>
> *(c) It is notable that the Defendants made this point in the First Defendant's Defence at paragraph 101 and yet detail has not been provided.*
>
> *(d) Notwithstanding that, to meet the unsubstantiated allegation the Defendants have produced evidence that shows what cavity barriers have been installed behind the masonry cladding and where. There are four main items:*

> *(i) A marked up set of elevations of Block E (as an example) can be found at **[ETAJ4/159-162]**. This was prepared by BUJ architects at the time of construction with the location of the horizontal and vertical cavity barriers clearly identified, together with ratings specified, and a mark-up prepared by the Defendants showing the location of the cavity barriers behind brickwork on Block B.*
>
> *(ii) Confirmation from BUJ architects specifying the relevant cavity barriers by reference to the above BUJ drawing, including ratings, and identifying the need for cavity closures around windows with a 60-minute fire resistance at **[ETAJ4/163]**.*
>
> *(iii) Confirmation of the cavity closer product used behind the brickwork which was Thermaclose Type-R at **[ETAJ4/166-172]**.*
>
> *(iv) Confirmation of instructions to the subcontractor at [ETAJ4/173-175, 176-181] and trackers for – amongst other matters – installing cavity closures behind brickwork at Blocks C and J at **[ETAJ4/176, 182]**."*

96. As explained in the evidence of Mr Bullock (paragraph 9.4), the datasheet disclosed by the Defendants for cavity closers (the document referred to by Mr John in (iii) above, at ***ETAJ4/169***) indicates two options: one with fire resistance capability (TYPE-R FIRE STOP') which can act as a cavity barrier, and the other without such fire resistance capability (TYPE-R), which is also referred to as a 'cavity closer' rather than a 'cavity barrier'. The Claimants' factual allegation is that, based upon Mr John's evidence, the Defendants installed TYPE-R (rather than TYPE-R FIRE STOP) both around the windows and at the compartment floor lines.

97. The Defendants say that no support is derived from the statement of Mr John. Ms Rawley's submission is that in the relevant paragraphs Mr John gave evidence that a distinction was drawn between the windows, where TYPE R, the cavity closer, was installed, and the compartment floor lines, where a TYPE R FIRE STOP, the cavity barrier, was installed. The Defendants then contend that this distinction has been properly identified by Mr Bullock at paragraphs 9.1 to 9.4. The Defendants therefore contend that the factual basis of the draft amendment (insofar as it asserts TYPE R was installed at the compartment floor lines) is incorrect and cannot succeed. The Defendants refer to a letter from Howard Kennedy dated 7 December 2021 to the Claimants where this point was made.

98. I am unable to accept the Defendants' position. I note first that Mr John does not deal with item 10 or clarification of his earlier witness statement in evidence. It is the only item not dealt with in his fifth statement, and given that much of the statement is argument, but that the issue around TYPE-R arising from his previous statement is about the only issue of pure fact, this is curious. Moreover, I do not accept that Mr

John's Third Statement makes it clear, as submitted by Ms Rawley, that TYPE R FIRE STOP was installed at the compartment lines. In the section explicitly dealing with cavity barriers at compartment lines, Mr John clearly refers to TYPE R. Indeed, given the importance of the distinction, it is of importance that Mr John does not refer to TYPE R FIRE STOP at all. In addition, the underlying documents upon which Mr John relies appear to refer to the installation of 'cavity closers' in the brickwork, which is the term used to refer to TYPE R.

99. In my judgment, the Claimants have established a *prima facie* case based upon the Defendants' own evidence that cavity barriers (i.e. TYPE R FIRE STOP) were not installed at either the windows or the compartment floor lines. It may be that that fact is disputed, but it is not for me to resolve that factual dispute upon this summary application. It is an issue, for example, in respect of which disclosure in due course may well be significant.

100. The Defendants next point to the evidence of Mr Bullock, and state that his view, as expressed in his report at 9.4 to 9.18, is that he considers the walls will comply with the functional requirement of B4(1) and will *adequately resist the spread of fire* on the condition of the masonry cavity barriers and any discontinuities being occasional and not prevalent (paragraph 9.16).

101. The point made by the Defendants is that the factual assertion that any discontinuities in the cavity barriers is prevalent is speculation, in light of the lack of any intrusive inspection, and the question of whether such an investigation can take place has already been determined against the Claimants. This is correct. However, the conclusion is also predicated on the assumption the cavity barriers (i.e. TYPE R FIRE STOP) are installed in the masonry facades at the compartment floor lines, which is a factual assumption which the Claimants dispute and which I have held they should be given permission to amend in respect of.

102. It is not ideal that Mr Bullock does not appear to address this possibility directly and in terms, and this mismatch between the expert evidence served in support of the application to amend, and the particulars is unhelpful. However, it seems to me that the obvious inference from paragraph 9.16 of his Report is that whilst occasional discontinuities in cavity barriers would not affect meeting the functional requirement and, thereby, would require no remediation, the absence of cavity barriers (i.e. TYPE R FIRE STOP) would not meet the functional requirement and thereby would need remediation. Where, as I have determined, it is open to the Claimants to pursue a case that TYPE R FIRE STOP cavity barriers were not installed, I consider that there is a real prospect of success (in the sense that it is not fanciful) in relation to items 10 and 11, both in terms of the question of breach (under the DPA and in contract) and for the losses claimed.

Items 12 and 13

103. Paragraph 103 of the APOC and/or Item 12 claims that the 'Open state' cavity barriers (OSCBs) have not been tested for use in this replacement aluminium rainscreen cladding system, and in particular, against surfaces of the cassette/tray cladding system, and item 13 claims that they should not be used in a curved on plan façade. This is said to contravene Regulations 7(1)(a)(i) and (iii) of the Building Regulations 2010,

paragraph B4(1) of Schedule 1 of the Building Regulations 2010 and/or 9.14 of ADB 2018 and/or 5.2.2 of ADB 2019. The Claimants claim:

> *"Remove and replace all defective cavity barriers and install cavity barriers where missing with cavity barriers that comply with The Building Regulation 2010 and ADB 2019: "**Section 8: Cavities – flats**".*
>
> *Cavity barriers should be designed specifically for the cavity within the rainscreen system that it intended to close and tested for use within the rainscreen system and junction with the opening to demonstrate that it complies with the requirements. See "**Construction and fixings for cavity barriers**" clauses 8.8 & 8.9.*
>
> *Alternatively, the OSCBs that Galliard have incorporated in the course of the NHBC Works should be proven by test/certification that they can completely close the cavity against the articulated surfaces of the cladding system such as the tray/cassette end returns.*
>
> ***Estimated cost** for supply and install appropriate cavity barriers for compartmentation: (included at Item 1) : **£183,850"***

104. Two points were advanced by Ms Rawley in her written submissions. The first relates to the alternative case, namely that the OSCBs 'should be proven'. For the same reason as set out in relation to item 10, I agree that there is no real prospect that the Claimants will obtain an order for specific performance requiring the Defendants to prove something. Either the Claimants will succeed in establishing breach and causation (i.e. that remedial works are required as a result of a breach of the DPA and/or, to the extent relevant for Category A Claimants, the contracts) or they will not. Permission is not therefore granted for the alternative claim.

105. The second point made is that the Claimants have struck through the paragraph §75 within the pleading, containing the primary allegation in which this case was originally pursued, on the basis that this may be because Mr Bullock does not support the case that the Claimants had '*speculatively pleaded'*.

106. The paragraph §75 point is not a good one. The inclusion of the allegations through items 12 and 13 of the Updated Schedule of Defects is brought into the body of the main pleading by reference to paragraph 69, which is satisfactory.

107. As to the point that Mr Bullock does not support the claim, the Claimants rely (through paragraphs 82 and 83 of the Seventh Witness Statement of Gene Matthews) upon the exception at paragraph 9.61 of Mr Bullock's Report. As set out above, Mr Bullock's view that remediation is not necessary, notwithstanding the defects identified by Mr Boucher (which would include the complaints made about OSCBs at items 12 and 13) is caveated in relation to '*where the cavity barriers with defects described by Mr Boucher are located on compartment lines between locations of adjacent sandwich panels with combustible foam cores (likely to be XPS) that are being retained.*' I accept the effect of this exception is that there is a real prospect of success in relation to breach

(whether of the DPA or the contracts) and causation/loss but only to the extent consistent with the exception stated in paragraph 9.61 of the Mr Bullock's Report. Otherwise, and for the same reasons as determined in relation to items 1 to 3, there is no real prospect of success in relation to the claimed remedial works in the context of the DPA claim, but permission is granted to the Category A Claimants to pursue the claim as pleaded in full.

Items 14-19

108. Paragraph 103 of the APOC and/or items 14 to 19 relate to Rockwool OSCBs installed as part of the remedial works. The different items relate to different complaints relating to different areas, and it is said that by reason of the various complaints, the Remedial Works were carried out in breach of Regulations 7(1)(a)(i) and/or (iii) and/or 7(1)(b) and/or paragraph B4(1) of Schedule 1 of the Building Regulations 2010 and/or paragraphs 5.2.2, 8.1, 8.3 and 8.8 of ADB 2019. The cost claimed overlaps completely with the cost claimed for item 12.

109. The analysis in relation to items 14-19 is the same as for 12 and 13 so that:

1) the Category A Claimants have permission to amend to the extent pleaded in the proposed APOC on the basis of the contract claim;

2) the DPA claims (for all Claimants) are permitted only to the extent consistent with the exception referred to in paragraph 9.61 of Mr Bullock's Report.

3) Permission is not granted for the alternative claim for declaratory relief requiring that the Defendants to prove the works by test/certification.

Item 20

110. This relates to service penetrations and firestopping in the original construction. The Updated Schedule of Defects states, in relation to Remedial Works Required '*Not pursued. It is assumed that these defects, having been so highlighted, will have been remedied*'. It is said by the Defendants that it has been deleted from the main Particulars of Claim whilst being left in at paragraph 83. The Defendant says that paragraph 83 should be struck out and permission for item 20 refused.

111. Permission is granted for these amendments. The complaints made are *prima facie* supported by Mr Bullock's report at section 10. Although no remedial work is claimed, the Claimants are entitled to rely upon these breaches as part of its case for diminution in value and other causes of action arising out of the original construction (whether under the DPA or contract).

Other paragraphs

112. The pleading at paragraph 99A and 108 are permitted, to the extent identified above.

Consequential matters

113. For the reasons set out above, the Claimants have permission to amend their claim in relation to the APOC and the Updated Schedule of Defects to the extent identified above.

114. It will be necessary for the Claimants to submit (a) clarification from Mr Bullock in relation to the exception and (b) a further draft APOC and the Updated Schedule of Defects reflecting the foregoing decision.

115. The parties are to liaise in relation to a timetable for this and consequential matters such as costs (including the previously reserved costs), which can no doubt be dealt with at the CMC presently listed in January to the extent not agreed. The parties are to liaise with the Court to ensure an adequate time estimate for the CMC.