Neutral Citation Number: [2026] EWHC 2003 (TCC)

Case No. HT-2026-000045

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

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

Date: 30/07/2026

Before :

THE HONOURABLE MR JUSTICE CONSTABLE

- -

Between:

DURKAN ESTATES LIMITED

Claimant/Respondent

-and-

WALLACE ESTATES LIMITED

Defendant/Applicant

Alice Sims (instructed by **Mayer Brown International LLP**) for the **Claimant**
Kerry Bretherton KC and **David Hopkins** (instructed by **Mills & Reeve LLP**) for the **Defendant**

Hearing dates: 20, 22 July 2026

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Approved Judgment

This judgment was handed down remotely at 2pm on 30 July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Constable:

A. Introduction

1. The proceedings concern a Remediation Agreement dated 1 Jul 2024 entered into by the parties (the "Agreement"). Pursuant to the Agreement, the Claimant ("Durkan") agreed with the Defendant ("Wallace") to remedy, at its own cost, certain relevant defects (the "Defects"), within the meaning of s 120 of the Building Safety Act 2022 (the "BSA"), at the building known as Centrillion Point in Croydon. Centrillion Point is a former office building developed by Durkan into dwellings in the late 2000s. Following the development, Durkan was originally the landlord. Wallace has been the landlord and owner of the freehold interest in the Property since 1 May 2014.

2. The Building is a relevant building within the meaning of ss 117 and 124(1) of the BSA. On 4 Jan 2024, the First-Tier Tribunal ('FTT') made a remediation order under s 123 of the BSA (the "RO") against Wallace. By the RO and the Schedule thereto, the FTT required Wallace, by 31 May 2025, to remedy the Defects in the Building, as specified in the RO.

3. At around the same time the FTT made the RO, Durkan entered discussions with Wallace on the terms on which (as the entity which had converted the Building into residential accommodation, and an entity in which Wallace could seek a Remediation Contribution Order (an 'RCO') pursuant to s 124 of the BSA), Durkan would rectify the defects. These negotiations led, eventually, to the Agreement, dated 1 Jul 2024. Notwithstanding that the deadline under the RO was 31 May 2025, the Completion Date for the remedial works under the Agreement was 19 Sep 2025 or such other date as was agreed by the parties.

4. On 24 June 2025, the FTT rejected Wallace's application to vary the date for compliance provided for by the RO. As at the date of the application, and indeed the FTT's determination, no Gateway 2 application on Wallace's behalf to the Building Safety Regulator ("BSR") had yet been made, as required before the remedial works could commence. The FTT decided, amongst other things, that the lack of any application to the BSR meant that it was not possible to identify an anticipated completion date other than by reference to a point unfixed in time (i.e. a certain period after approval was given by the BSR) and as such had no jurisdiction to grant the application. During the application, Wallace had contended that terminating the Remediation Agreement and proceeding with a different contractor was not its intention as it was not a 'panacea'.

5. Two days after the decision, Wallace sent Durkan a notice terminating the Agreement. That notice alleged an entitlement to terminate under Clause 3 of the Agreement, as Durkan was in 'Substantive Breach', as defined. It also claimed an entitlement to terminate at common law.

6. On 29 Sep 2025, Wallace commenced an application for an RCO under s 124 of the BSA against Durkan and its parent, Durkan Holdings Limited, in the FTT. It claims £13,586,797.02 inclusive of VAT. The RCO is opposed on the basis that Wallace unlawfully terminated the Agreement and it would not be "just and equitable" to impose an RCO in these circumstances, and/or that the maximum sum to which Wallace is

entitled is the sum which it would have cost Durkan to complete the Remedial Works (£6,740,268).

7. Durkan commenced these proceedings on 6 Feb 2026, seeking, among other things, a declaration that Wallace's termination of the Agreement was unlawful, and damages. Wallace made a counterclaim, in effect seeking declarations in its favour about the lawfulness of the Termination Notice and repudiation of the Agreement. It also asserted that the works proposed by Durkan would not have been adequate to remedy further defects at the Development not caught by the RO and the existence of the further defects is an additional ground on which it was entitled to accept Durkan's repudiatory or anticipatory breach of the Agreement.

8. By its application dated 28 May 2026, Wallace seeks an order granting Wallace reverse summary judgment under CPR Pt 24 on the whole of the claim, summary judgment on Wallace's counterclaim and costs. As confirmed by Ms Bretherton KC, the application was confined to the issue of whether Durkan was in repudiatory or anticipatory breach of the Agreement at common law. It was not concerned with Wallace's alleged entitlement to contractual termination for Substantive Breach (as defined by clause 1.1 of the Agreement). The pleaded entitlement to terminate at common law is at paragraph 63 of the Defence. This states:

> "*The breaches identified at paragraphs 11 and 17 of the Termination [Notice] go to the heart of the Agreement. They are fundamental obligations relating to the remediation required to make the Property safe. The breaches are material and irremediable in that there is was [sic] no prospect of the Works being completed by the deadline imposed by the Order and the Agreement. Further, the breaches have deprived* [Wallace] *of substantially the whole benefit of the Agreement*."

9. Paragraphs 11 and 17 of the Termination Notice state:

> "*As at the date of this letter, after nearly a year, Durkan has still not complied with its obligation to provide Wallace a complete and comprehensive copy of the plans and specifications required for remediating the defects at the building within a reasonable period of time (or at all) in breach of Schedule 1, paragraph 4.1.*
>
> …
>
> *In the circumstances, Durkan is in clear breach of its obligations:*
>
> *(a) to diligently perform its duties and obligations under the Agreement and in respect of the Services;*
>
> *(b) to use the Required Standard to avoid or minimise delay to the execution of the Services and the Works;*
>
> *(c) to procure that the Services (and Works) should be designed, carried out and*
> *completed using the Required Standard, with due diligence and by the Completion Date.*"

10. Wallace argues that Durkan was plainly in repudiatory or anticipatory repudiatory breach as at the date of the Termination Notice, such that it has no real prospect of success in establishing the termination as unlawful. In summary, it contends that not only did Durkan not complete the works in the period specified by way of fixed Completion Date in the Agreement, but it did not even commence the works nor complete the necessary initial steps which would enable works to commence. Ms Bretherton argues that, at the time of termination, Durkan's breaches had deprived Wallace of substantially the whole benefit which it was the intention of the parties as expressed in the Agreement that Wallace should obtain for performing its undertakings, and that Durkan's conduct even put Wallace in a position where committal proceedings were issued against it. It is said that there is no other compelling reason for trial. The evidence relied upon by Wallace is the sole witness statement of Mr James Hordern, Special Counsel at Mills & Reeve LLP, solicitors for Wallace.

11. Ms Sims for Durkan resists, on numerous grounds, the contention that this matter is suitable for summary disposal. Durkan rely upon the evidence of:

(1) Mr James Morris, Partner for Mayer Brown International LLP, solicitors for Durkan;
(2) Mr Gary Barton, Group Technical Director at Durkan;
(3) Mr James Briggs, former managing director at Durkan, who was the senior representative involved in the day-to-day management of the proposed remedial works at Centrillion Point;
(4) Mr Paul McClelland of JPI Fire and Building Regulation Consultants Ltd, a third party consultancy advising Durkan in respect of the remedial works;
(5) Mr Frank Hinds, a senior director and shareholder at Comprehensive Design Architects Ltd, who provided a preliminary report in respect of various expert issues.

B. The Contract

12. The Agreement was entered into by the parties on 1 July 2024. During oral argument, Ms Bretherton essentially relied upon a number of contractual provisions which, she argued, rendered the factual matters raised by Durkan irrelevant: the terms of the Agreement provided a complete answer for the purposes of summary judgment. It is therefore necessary to set out in some detail the provisions of the contract central to Wallace's argument. These are set out in Annex 1 to the Judgment.

C. The Law

C1. Summary Judgment

13. CPR r 24.3 provides:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—
(a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

14. There was, unsurprisingly, no dispute about the applicable principles to apply. As formulated by Lewison J, as he was then, in Easyair Ltd (t/a Openair) v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15], and approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301 at para 24:

> "*i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v) However, 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 also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
>
> *vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. […] However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

15. Ms Bretherton emphasises, additionally, the judgment of Moore-Bick LJ in Korea National Insurance Corp v Allianz Global Corporate & Specialty AG [2007] EWCA Civ 1066 at [14], in which the Court observed that if a party wished to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court.

16. For her part, Ms Sims drew the Court's attention to Okpabi v Royal Dutch Shell Plc [2021] UKSC 3 in which, at [127]-[128] Lord Hamblen indicated that, in summary, when considering that new evidence, the correct approach is not to ask whether there is a clear prospect that new material will become available before the trial which is likely to give the claimants a real prospect of success but rather to ask whether there are reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success.

C2. Repudiatory Breach

17. In Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd (The Spar Capella, The Spar Vega, The Spar Draco) [2016] EWCA Civ 982; [2017] 4 All ER 124, Gross LJ (with whom Etherton MR and Hamblen LJ agreed) held at [21]:

> *"Breaches of contract entitling the innocent party to treat the contract as at an end may be classified as follows:*
>
> (i) *Breach of condition*;
>
> (ii) *Repudiatory breach*, ie, an *actual* breach of an innominate term where the consequences are such as to entitle the innocent party to treat the contract as at an end;
>
> (iii) *Renunciatory breach*, ie, an *anticipatory* breach of contract (ie, in advance of the due date for performance), where the other party makes clear to the innocent party that it is not going to perform the contract at all or is going to commit a breach of a condition *or* is going to commit a breach of an innominate term and the consequences will be such as to entitle the innocent party to treat the contract as at an end; in each case here, the innocent party has an election to accept the renunciatory breach at once and to terminate the contract, without waiting for the due date of performance: see, *Burrows*, [*A Restatement of the English Law of Contract* (2016)], at pp 116–117."

18. Anticipatory breach means simply that a party is in breach from the moment that its actual breach becomes inevitable: Universal Cargo Carriers Corp v Citati [1957] 2 QB 401 per Devlin J at p 438.

19. Where a term is innominate, the test for whether breach of that term warrants termination is, per Diplock LJ in Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir) [1962] 2 QB 26 at p 66:

> *"…does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?"*

20. In Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri) [1979] AC 757 at p 779C, Lord Wilberforce held that "*to amount to repudiation a breach must go to the root of the contract*". Considering the metaphor central to this description, Lewison LJ observed in Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd [2013] EWCA Civ 577; [2013] 4 All ER 377:

> "[50] The trouble with expressing important propositions of English law in metaphorical terms is that it is difficult to be sure what they mean. As the High Court of Australia majority judgment pointed out in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [54] to describe a breach as 'going to the root of the contract' is 'a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party'.
>
> [51] Whatever test one adopts, it seems to me that the starting point must be to consider what benefit the injured party was intended to obtain from performance of the contract. […]
>
> [52] The next thing to consider is the effect of the breach on the injured party. What financial loss has it caused? How much of the intended benefit under the contract has the injured party already received? Can the injured party be adequately compensated by an award of damages? Is the breach likely to be repeated? Will the guilty party resume compliance with his obligations? Has the breach fundamentally changed the value of future performance of the guilty party's outstanding obligations?"

21. The foregoing passage was relied upon by Ms Sims fairly to emphasise the acutely fact sensitive nature of the enquiry. Similarly, in Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd [2013] EWCA Civ 577 at [49]–[54], Lewison LJ identified the need to consider (amongst other things) the benefit the injured party was intended to obtain, the actual and prospective effect of the breach, whether the guilty party would resume compliance with his obligations (i.e. whether the breach was remediable) and whether the breach fundamentally changed the value of the future performance of the guilty party's outstanding obligations.

22. Although Ms Bretherton's oral submissions focussed on the benefit the injured party was intended to obtain from performance of the contract in seeking to elevate the alleged breach into repudiatory, the enquiry is no less highly fact-sensitive if the question is whether the actual and/or anticipatory conduct evinces an intention to abandon and altogether refuse to perform the contract (categorised as renunciation rather than repudiation). As such, all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker:

see Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 at [61] - [63], per Etherton LJ.

23. The extent of the enquiry in a claim requiring the Court to consider whether a contract has been lawfully terminated at common law is perhaps reflected in the following passage from *Chitty on Contracts* (36th Edn) at 28-011:

> "The best that can be said is that the entitlement of a party to terminate further performance of the contract depends upon a range of factors. These factors include the nature of the contract, and of the term that has been breached, the nature of the breach and the consequences of breach".

24. In the context of the present case, it is relevant in addition to note that a common law right to terminate does not render the termination provisions of the contract irrelevant. Here, clause 3 of the Agreement provides for a definition of 'Substantive Breach' which itself distinguishes between breaches which are capable of remedy and those which are not. Where the parties have expressly agreed that specified defaults are to be addressed by notice and an opportunity to cure, that machinery forms part of "*all the circumstances*" which are generally required to be weighed. The contractual regime may also inform the objective meaning of the alleged contract-breaker's conduct, in that conduct falling within a regime the parties designated as remediable may not readily be characterised as abandonment. In this regard, Ms Sims relied upon the guidance of Ramsey J in BSkyB Limited & Ors v HP Enterprise Services UK Limited (formerly Electronic Data Systems Limited) & Ors [2010] EWHC 86 (TCC) at [1363], that "*the contractual provisions may give guidance on whether a particular breach is to be treated as repudiatory*." He continued at [1366]:

> *"…Rather, in deciding whether by its conduct a party evidences an intention not to be bound by the terms of the contract, the way in which parties agree to treat breaches within the terms of their contract must be a factor to take into account. In particular, if a breach of a term had to reach a degree of seriousness before a contractual termination clause could be applied, it is unlikely that a breach which was less serious would, by itself, amount to a repudiatory breach. Equally, the fact that for a particular breach the contract provided that there should be a period of notice to remedy the breach would indicate that the breach, without the notice would not, in itself amount to a repudiatory breach."*

25. At the heart of the claim brought which underpins the alleged common law right to terminate are, as can be drawn from paragraphs 11 and 17 of the Termination Notice (through paragraph 63 of the Defence), allegations of breach of time stipulations. Paragraph 11 relates to failure to provide plans and specifications within a reasonable period of time. Paragraph 17 relies on failures to diligently perform services, to avoid or minimize delay or to procure that the Services (and Works) should be designed, carried out and completed with due diligence and by the Completion Date.

26. As pointed out at [28-011] of *Chitty on Contracts*, the law relating to the breach of time stipulations is an area which has given rise to a substantial amount of litigation across a variety of areas of law. It is necessary to consider this specifically.

C3. Time Stipulations

27. Time being of the essence means that one or more stipulations as to time are conditions. This means in turn that delay in performance is treated as going to the root of the contract without regard to the magnitude of the breach.

28. In this case, Wallace expressly admit that time is not of the essence. Whether time is of the essence is specific to particular terms, rather than the contract as a whole. In this case, Wallace rely upon both a 'subsidiary' time obligation at paragraph 4.2 of Schedule 1 (in which Durkan shall submit one electronic copy of an updated and finalised version of the Plans and Specifications to Wallace within a reasonable time); and a time stipulation to complete by the Completion Date as defined.

29. Durkan's pleaded allegation, admitted by Wallace, that time was not of the essence related in context to the whole of the contract. However, no further distinction was made by Ms Bretherton to suggest that, somehow, whilst time was not of the essence in the whole of the contract, it was of the essence in respect of the subsidiary time obligation. Time is not ordinarily of the essence in construction contracts, unless it is expressly so provided (see *Keating on Construction Contracts* [12th Edn] at 8-008)

30. If, as here, time is not originally of the essence, a notice can be served which makes time of the essence. As summarized at [28-030] of *Chitty on Contracts*:

> "*Where time was not originally of the essence of the contract, but one party has been guilty of delay, the other party may give notice requiring the contract to be performed within a reasonable time. Notice can be served at the moment of breach; it is not necessary to wait until there has been an unreasonable delay by the party in breach before service the notice. The period of notice given must, however, be reasonable and what is reasonable will depend upon all the facts and circumstances of the case. Factors to which the courts will have regard in assessing the reasonableness of the period of notice include what remains to be done at the date of the notice; the fact that the party giving notice has continually pressed for completion, or has before given similar notices which it has waived, or that it is especially important for it to obtain early completion*"

31. Giving notice does not unilaterally make 'time of the essence', because one party cannot unilaterally vary the terms of the contract. The principles were set out by Christopher Clarke J in Dalkia v Celtech [2006] 1 Lloyd's Rep 559 at [131], as cited by Popplewell J in Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd [2015] EWHC 718 (Comm); [2015] 1 All ER (Comm) 879 at [184]. Relevantly, the judge made clear that if the defaulting party fails to perform after service of such a notice, the failure is not automatically a repudiation of the contract, giving rise to a right to terminate. The breach must go to the root of the contract. The notice operates as evidence of the date by which the promisee considers it reasonable to require the contract to be performed, failure to perform by which is evidence of an intention not to perform.

32. It must follow from this that a failure to have served a notice making time of the essence cannot, of itself, be fatal to claiming that a breach was repudiatory; nor, of itself, determinative of that fact. This was reflected in the judgment of May LJ in Shawton Engineering LTD v DGP International Ltd [2006] BLR 1, in which he said:

> *"…such an obligation was not a condition such that breach of it would automatically entitle Shawton to determine the contracts. Shawton could only in law legitimately determine the contracts for delay if either:*
>
> *(a) They gave reasonable notice making time of the essence or*
> *(b) DGP's failure to complete within a reasonable time was a fundamental breach such that the gravity of the breach had the effect of depriving Shawton of substantially the whole benefit which it was the intention of the parties that they should obtain from the contracts.*
>
> *Where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach in this sense."*

33. This passage was quoted by Lewison LJ in Ampurius at [47], relied on by both parties in argument, before going on to observe that the relevant authorities adopt as the relevant test whether the breach has deprived the injured party of 'substantially the whole benefit' of the contract which is the same test as that applicable to frustration. This, Lewison LJ stated, "*sets the bar high*".

C4. Waiver and Affirmation

34. Where an innocent party elects to treat the contract as continuing, it is usually said to have affirmed the contract. There are a number of elements to this doctrine as described in *Chitty on Contracts* (36th Ed) at [28-056]:

> *"The innocent party will not be held to have elected to affirm the contract unless, first, it has knowledge of the facts giving rise to the breach, and, secondly, it has knowledge of its legal right to choose between the alternatives open to him. When deciding whether the innocent party has affirmed the contract, a court is not conducting a "mechanical exercise" but is exercising a judgment… Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of its right to choose, the innocent party does some unequivocal act from which it may be inferred that it intends to go on with the contract regardless of the breach or from which it may be inferred that it will not exercise its right to treat the contract as terminated… Equally a party cannot affirm the contract for a limited period of time and then abrogate it on the expiry of that period of time. Mere inactivity after breach does not of itself amount to affirmation, nor (it seems) does the commencement of an action claiming damages for breach. The mere fact that the innocent party has called on the party in breach to change its mind, accept its obligations and perform the contract will not generally, of itself, amount to an affirmation:*

> > *"… the law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognize his obligation."*
>
> *But if the innocent party unreservedly continues to press for performance or accepts performance by the other party after becoming aware of the breach and of its right to elect, it will be held to have affirmed the contract…"*

35. Once the innocent party has elected to affirm the contract, and this has been communicated to the other party, then the choice becomes irrevocable. The innocent party, having affirmed, cannot subsequently change its mind and rely on the breach to justify treating itself as discharged: see Bentsen v Taylor & Sons & Co [1893] 2 QB 274. However, there is a distinction to be drawn in the following circumstances as explained in *Chitty* at [28-057]:

> *"Nevertheless, in the case of a breach which is persisted in by the other party, the fact that the innocent party has continued to press for performance will not normally preclude it at a later stage from terminating the contract. In such a case the innocent party is not terminating on account of the original repudiation and going back on its election to affirm but rather is "treating the contract as being at an end on account of the continuing repudiation reflected in the other party's behaviour after affirmation. Nor, in the case of an ongoing contract, will affirmation in respect of one breach preclude the innocent party from terminating further performance of the contract by reason of further subsequent breaches."*

C5. Estoppel

36. The requirements of an estoppel by convention were authoritatively restated by the Supreme Court in Tinkler v Commissioners for HM Revenue and Customs [2021] UKSC 39; [2022] AC 886 at [45], approving the summary of Briggs J (as he was then) in HMRC v Benchdollar Ltd [2009] EWHC 1310 (Ch) at [52], identifying the following principles:

(1) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them;
(2) the expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it;
(3) the person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
(4) that reliance must have occurred in connection with some subsequent mutual dealing between the parties;
(5) some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped,

sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

D. Summary of the Claimant's resistance to Summary Judgment

37. Ms Sims argues that the summary judgment application should be dismissed on account of seven interrelated reasons, which can be reduced in substance to the following points, resolution of which turns on disputed factual and expert evidence to a greater or lesser degree, and which would be shaped by disclosure, such that summary judgment is inappropriate:

(1) Time was 'at large' with respect to the time for performance of the design element of the Remedial Works and consideration by the BSR of the Gateway 2 application;

(2) time was not of the essence, such that delay in performance without more and without any notices of warning was not repudiatory. The delay was not so long so as to deprive the innocent party of substantially the whole benefit of the contract. The alleged conduct was not repudiatory when (a) judged against the framework of the Agreement which allowed for a Completion Date to be updated, a termination clause requiring remediable breaches to be notified, permitting the opportunity to cure, and a mutual duty of utmost good faith; and (b) significant delays to the Remedial Works were not caused by Durkan, but caused by Wallace's own approach to progress;

(3) the purported Termination Notice was not preceded by any notices of written complaints. Indeed, the Termination Notice was immediately preceded by Wallace's legal representative (at the application to vary the RO) by a clear statement to the Tribunal and in the presence of Durkan that Wallace wished to continue working with Durkan and that terminating the Agreement would not assist matters. This amounted to affirmation.

E. Time at Large

38. Durkan's case is that the originally specified Completion Date was amended by the agreement of the parties so that time was at large for both the design of the Remedial Works and approval of the same by the BSR and/or the same effect had been achieved by a convention of the parties.

39. Ms Sims's argument is as follows:

(1) Completion Date is defined as being 19 September 2025 "*or such other date as is agreed as part of the Plans and Specifications in accordance with this Agreement*";

(2) The definition of Plans and Specifications includes '*any programme(s) for the Works… to be developed by the Developer and agreed by the Freeholder in accordance with paragraph 4 as may be further amended from time to time in accordance with paragraph 4*";

(3) Paragraph 4.2 of Schedule 1 provided for the submission of an updated and finalised version of the Plans and Specifications within a reasonable time after the date of the Agreement for review and approval.

(4) Whilst the Plans and Specifications "*must enable the Developer to deliver the Works in accordance with the Order*" (Paragraph 4.2), this must be a reference to the quality and performance, rather than temporal, requirements of the Order, given that the Order required completion of the remediation by 31 May 2025 and the date in the Agreement was 19 September 2025. This was consistent with the fact (admitted/asserted in Wallace's Defence) that both parties '*anticipated [that] an extension of time for compliance with the RO would be required…*';

(5) the effect of paragraph 1.1 of Schedule 1 with regards to the definitions for Plans and Specifications and the Completion Date was that the original Completion Date of 19 September 2025 could be amended from time to time by programmes issued by Durkan and agreed by Wallace (as programmes for the Works were included within the definition of Plans and Specifications).

40. Ms Sims then relies upon pre-contract communications seeking to demonstrate that at the point the Agreement was entered into the parties knew that an amendment to the 19 September 2025 date was going to be needed. There is then reliance upon post-Agreement communications as follows:

(1) A further version of the Master Programme (which did not have a fixed completion date) was discussed between the parties at a meeting on 3 October 2024. The e-mailed notes of the meeting record that "*Timescale does not have calendar date. We can't confirm until the scope has been agreed*." Of this, Mr Briggs' evidence (unchallenged in the context of this Application) was:

> "A further revision of the programme was issued in October. This programme was the same as the programme issued in March in providing for a 68 week construction period and again used week numbers rather than fixed dates. The issue of the programme at this stage reinforced the fact that the September 2025 date would not be achievable. I held regular meetings with Ms McQueen-Price and Ms Chambers, during which no objection to the programme was raised, other than that [Wallace] wanted dates to be applied, and we told them we could not, which again, they understood and accepted. [Wallace] had a number of other ongoing remediation projects and was well aware of the inherent uncertainty surrounding the timing of the design and the Gateway 2 application. We discussed this with [Wallace] repeatedly at meetings."

(2) At meetings between the parties held on 16 October 2024 and also 6 November 2024, "*Durkan confirmed that the current programme would not be re-issued until the Fire Alarm and BSR submission have been concluded. Until this time, no dates can be confirmed*." Mr Briggs evidence was:

> "Ms McQueen-Price [sic] confirmed that the dates on the current programme were not going to be met given where we were, which I took to mean the referenced September date given the programme did not contain dates and we

had already agreed Durkan's programme. However, this was not said by Ms McQueen Price [sic] in a way that was critical of Durkan: it was just accepted as a fact because we were now all working to Durkan's programme.

At this meeting [Wallace] were seeking an updated programme to include a construction start date. We reiterated that the current programme would not be re-issued until the BSR submission had been concluded and that until this time no dates could be confirmed. However relevant individuals within [Wallace] including Ms McQueen-Price [sic] and Ms Chambers accepted and agreed that neither the RO nor RWA date was going to be met."

(3) During a meeting held between the parties on 8 January 2025, it was further agreed that there were no further comments on the Master Programme at this time and that the timescale would be confirmed "*once gateway 2 has gone though this can be actioned*."

(4) the contemporaneous documents show that Wallace's team continued to operate on this footing well into 2025. Mr Barton's evidence was:

"I did not consider that the programme committed Durkan to having the design completed or the BSR application finalised by 19 September 2025. The 68-week period related to the construction works themselves, not the period needed to complete the design and Gateway 2 process. I am confident from my recollection that the deadline of 19 September was never raised in any meeting I attended. I have reviewed contemporaneous documents that support this. For instance, in an email of 12 March 2025 from Sam Gumble, Simarc, to Nigel Shields (Durkan), Sam refers to Excel attending site for final inspections and to thereafter share a full specification. Sam says "On receipt of the specification, Durkan to produce a high-level project programme. Dates TBC based on BSR approval time but should provide an indication of programme length." This seems to me to clearly show that Simarc/[Wallace] understood the basis on which the Master Programme in March 2024/October 2024 was issued i.e. that time only began to run from BSR approval and dates could not be applied at this stage. My review of the matter is that this was what was relayed to [Wallace] all along."

41. Ms Sims therefore argues that there is a real prospect in establishing Wallace's agreement to the Master Programme and its revisions, inferred from its lack of challenge or objection to the same and/or the agreements at the meetings on 2 and 16 October 2024, 6 November 2024, and 8 January 2025 (as recorded in the meeting minutes). The alternative pleaded claim is that there was a convention that existed between the parties that the Completion Date would be interpreted as at large until such time as the design was complete, relying on the evidence from Mr Barton and Mr Briggs, unchallenged on this application, that both parties were in fact proceeding on an assumption that there was no defined date by which the completion of the design and approval by the BSR would be finished. Durkan, it is said, relied on that assumption by continuing to progress the design in accordance with the revised Master Programme and by not applying for an extension of time consequent upon the delays to the design which were not of its own making.

42. This argument is, it is said by Ms Bretherton, hopeless; it can be dismissed summarily. As a matter of contractual interpretation, agreement of some other date than that fixed (i.e. 19 September 2025) could only be agreed in accordance with the definition of Completion Date as part of the Plans and Specifications. Whilst this may include a programme, the agreement needed to be achieved through the paragraph 4 procedure. Paragraph 4.2 provided that this procedure would be initiated by the submission of 'an updated and finalised version of the Plans and Specifications….', but which the Agreement envisaged as a single, finalised submission. The 'agreement' of the Master Programme relied upon by Durkan did not, on Durkan's own evidence, form part of any such submission made pursuant to paragraph 4.2 and therefore the contractual machinery for reaching an agreement by which the Completion Date became something other than 19 September 2025 had not been operated. It is also argued that the minutes of meetings relied upon were all contained in e-mails and therefore excluded from constituting an agreement 'in writing' for the purposes of the Agreement. Although Ms Bretherton also made reference to the Entire Agreement clause, including a no-oral modification machinery and a requirement for variations to be in writing, this does not add materially to the argument where Durkan's case is that the Completion Date changed through the paragraph 4 process rather than by way of standalone change or variation.

43. There is no doubt that Ms Bretherton's contractual analysis (about which I need not express a definitive view) is a potentially powerful one. However, it does not meet Durkan's case on estoppel by convention which would be, if correct, an alternative way of achieving the same outcome. Cases of estoppel overriding clear contractual machinery are generally not straightforward, but it is not possible to determine such a case against Durkan summarily. On the documentation and factual evidence before the Court, it is plainly arguable that the parties were in fact proceeding on the basis that (a) notwithstanding its inclusion in the Agreement, no one actually anticipated completion by 19 September 2025; (b) the Completion Date would be 68 weeks after such date as became clear after approval by the BSR; (c) given that time was not of the essence, and there were no liquidated damages provisions, the date of 19 September 2025 was not being treated by either party as one of contractual significance. If those facts were, at trial, established, the trial judge would have to consider whether, in all the circumstances, they were sufficient to give rise to an estoppel. If Wallace were estopped from relying upon 19 September 2025 as the Completion Date, the anticipatory breach case would fall away.

44. That cannot be determined summarily, not least in circumstances where it is likely that disclosure may well produce documentation which is relevant to Durkan's estoppel case.

F. Delay Not Repudiatory

45. There is no dispute that time was not of the essence. Moreover, no notices were served to 'make' time of the essence (insofar as that is possible – see the analysis above).

46. In the circumstances, Wallace would have to establish that the delay was so prolonged that it deprived Wallace substantially of the whole benefit of the contract, which is the same test as that applicable to frustration. This is a high bar.

47. As Lewison LJ said in Telford Homes, relevant questions would include what financial loss has the breach caused?; How much of the intended benefit under the contract has the injured party already received?; Can the injured party be adequately compensated by an award of damages?; Is the breach likely to be repeated?; Will the guilty party resume compliance with his obligations?; Has the breach fundamentally changed the value of future performance of the guilty party's outstanding obligations?

48. The answer to these questions is acutely fact sensitive and must take into account all the circumstances of the case, and is likely to be inherently unsuitable for summary determination.

49. It is insufficient, as Ms Bretherton sought to do, to point simply to the fact that delay could result in the directors of Wallace facing committal proceedings for non-compliance with the RO, particularly in circumstances where taking Wallace's contractual case at face value, it had itself signed up to an Agreement which (without achieving an extension to the RO) already gave rise to such a risk. Ms Bretherton's argument was in substance a submission that although she accepted that the contract itself did not make time of the essence, the risk of committal in the face of delay was such that a failure to comply with the temporal obligation, without further enquiry, was repudiatory. Whilst the Building Safety Act context and the RO materially increase the importance of timely performance, they do not of and in themselves alter the test for repudiation nor convert a non-essential time stipulation into a condition.

50. Where time is not of the essence, the analysis which is required in order to answer the question of whether the delay was repudiatory in nature would need to take account of all the circumstances, which include the reasons for the delay. Those are in dispute: Durkan's evidence squarely places blame for some of the delay at Wallace's feet, and has the support of independent expert evidence in doing so. In answer to this, Ms Bretherton in her oral submissions pointed to various contractual provisions which, she argued, was a complete answer to Durkan's factual case. For example, in relation to Durkan's evidence that Wallace delayed in the provision of necessary documentation, Ms Bretherton pointed to those parts of the Agreement that stipulated that all documentation relevant to the BC Application was to be developed by Durkan. Similarly, in relation to Durkan's evidence that Wallace's conduct had contributed to delays to access, Ms Bretherton identified the provision of the licence to access, and the requirement upon Durkan to seek access through Wallace's Management Company. A further example is Ms Bretherton's reliance upon the notice/extension of time machinery to argue both that the complaints made did not fall within the definition of 'Relevant Event' and/or no notices were issued by Durkan so that, on any view, the facts relied upon would not justify any adjustment to the Completion Date.

51. The first difficulty faced by Ms Bretherton is that her case on the effect of the various contractual clauses is entirely unpleaded. In responding to the various allegations of Wallace's contribution to the fact of delay, Wallace's pleading merely denies that they did, in fact, act in such a way so as to cause delay. Wallace does not plead that the answer to the allegations of interference and prevention lies in particular clauses of the contract which render the factual cause of delay irrelevant. Whilst it is right that the Defence makes the not uncommon plea that Wallace will rely on the entire Agreement at trial, this is not sufficient to raise what are specific contractual defences to specific allegations of prevention. A pleading is not required to argue the law: it must plead the

facts relied upon. Ms Bretherton relies upon the fact of particular clauses (and their legal effect); and those facts should have been identified so that any potential answers to the contractual points are themselves made clear in reply. For example, a typical response might be to raise an estoppel in so far as the facts support such a case. That is something which evidence is likely to be relevant to the determination of, and must be raised by the pleading process for the matter fairly to be dealt with in the litigation. It cannot fairly be raised for the first time in oral argument during a summary judgment application.

52. In any event, even if the specific clauses relied upon had been pleaded, their existence would have been insufficient to allow disposal of the matter summarily. That is because of the fact specific nature of claim of repudiatory breach at common law. Taking the first of Wallace's allegations relied upon for the purposes of repudiation, it is that Durkan, nearly a year after the date of the Agreement, had still not complied with its obligation to provide Wallace a complete and comprehensive copy of the plans and specifications required for remediating the defects at the building within a reasonable period of time (or at all). The obligation was to do that in a 'reasonable' period of time. It was a subsidiary obligation in respect of which time was not of the essence. Without more, its breach was not therefore repudiatory. It was also not an obligation to which any particular extension of time machinery attached. The question on breach (before one turns to whether that breach was repudiatory), therefore, would be what a 'reasonable' time in all the circumstances would be. There is a real prospect that Durkan could argue that what *in fact* caused delay could be relevant to determining what that reasonable time would be, irrespective of the minimal obligations imposed upon Wallace under the Agreement. For example, taking another of the points made by Ms Bretherton, Wallace was not under an obligation to hire their own consultants or to involve itself in review of Plans prior to the ultimate submission to them under paragraph 4.2. However, Durkan's evidence is that *in fact* Wallace did involve itself, and the delay in the appointment of their own consultants impacted the ability of Durkan to progress matters. That fact may be relevant to what a reasonable time was, irrespective of the absence of obligation upon Wallace.

53. What was actually causing delay is also likely to be relevant to an assessment of whether the delay is repudiatory in nature. As May LJ said in <u>Shawton,</u> where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach. Thus an assessment of whether Durkan was 'making an effort' is likely relevant to the analysis. The factual evidence served is clear that Durkan was making such an effort, irrespective of the allocation of contractual risk. However, whether this is in fact the case, and the role that evidence plays in the overall assessment of whether Wallace have been deprived of the substantially the whole benefit of the contract, or whether Durkan were evincing an intention not to be bound by the contract, are questions for determination at trial.

54. The progress made, and the reasons for any absence of progress, would also form part of an assessment of whether Wallace had, at the time of repudiation, been deprived of substantially the whole benefit of the contract. Mr Hordern accepted the existence of disputed facts, but nevertheless submitted in his evidence that the Court could proceed safely on the basis that Durkan had made no material progress toward conferring on Wallace the benefit of the contract. However, that itself is a disputed fact and cannot be

determined summarily against Durkan. Mr Hordern relied in part on an analysis of the pleadings by which it was said that Durkan, by reference to CPR r 16.5, must be taken at the time of the Termination Notice to accept that it had not submitted to WALLACE an updated and finalised version of the Plans and Specifications within a reasonable period after the date of the Agreement as required by the Agreement; and Durkan's failure to provide that prevented any Gateway 2 application to the BSR being made. I accept Ms Sims' argument that, by reference to paragraphs 54 and 55 of the Reply, the relevant allegations in the Defence were satisfactorily traversed such that there is no room for a deemed admission. But on any view, the pleadings put clearly in issue the *reasons* for the delay which will require factual investigation, both in the context of breach and whether any breach is repudiatory in nature.

55. Similarly, the question of whether the delay was remediable may be highly relevant not only to whether any breach could be said to be remediable, but to whether (if so), there was a common law right to terminate at all. Clause 3 of the Agreement provided a regime by which remediable breaches were required to be subject to a notice requiring cure prior to termination. There is a real prospect of success in an argument that delayed progress could be remediated by the allowance of a further reasonable period of time. In this context, Durkan rely upon the expert evidence of Mr Hinds, which is not contradicted for the purposes of the application, that the Gateway 2 submission could have been completed in 8-10 weeks from the date of termination. In fact, having terminated, it took Wallace's replacement contractor many months to make the submission, and it was during this longer delay (rather than in the period identified by Mr Hinds) that committal proceedings were in fact started against Wallace. Wallace deny that an appropriate comparator is looking to how long it has taken the replacement contractor to make a Gateway 2 submission, but that is a question of fact that would need to be determined at trial. However, to the extent that Wallace saw the solution as instructing a replacement contractor who would, or might, take longer to submit a compliant scheme to the BSR than the remaining time in which Durkan would have done so, there is a real prospect that this fact would at least be relevant to the assessment of whether any breach by Durkan had deprived Wallace of substantially the whole benefit of the contract.

56. Similarly, the manner in which Wallace itself approached the importance of timely progress plainly has the potential, at the very least, to be relevant to an assessment of whether delay can be said to have deprived Wallace substantially of the whole benefit of the contract. The authorities make clear that the analysis is an acutely fact sensitive one. The absence of complaints from Wallace about delay is a factual question which may be relevant to the overall assessment of whether delay should be taken to be repudiatory. Put simply: if Wallace's own conduct was, as Durkan's evidence served for the purposes of this application makes a case for, inconsistent with delayed progress being of central importance to it at any point up to the date of termination, can it be said failure to comply with such temporal obligations as Wallace may establish deprived them of substantially the whole benefit of the contract? These are matters which Durkan are undoubtedly entitled to explore at trial.

G. Affirmation

57. Durkan's case is that by the time of the Purported Termination Notice, Wallace had waived and/or affirmed the Agreement and thereby lost any right to assert that Durkan was in repudiatory breach of the Agreement.

58. Durkan's evidence is that in around March 2025 Wallace asked Mr Briggs and Ms Elias of Durkan to meet Mills & Reeve, Wallace's solicitors, to provide factual information in support of Wallace's intended application to extend the RO deadline. Mr Briggs said:

> "There was no suggestion during those discussions that [Wallace] was dissatisfied with Durkan's performance or intended to remove Durkan from the project. On the contrary, the impression given was that [Wallace] would present this information to the FTT in a neutral way to demonstrate that both parties had been working together as a team to facilitate the remediation of the building, but that they had been delayed by various factors outside of their joint control."

59. Mr Barton gave evidence that by the beginning of June 2025, Durkan had substantially reached agreement with Wallace's professional team on the design approach, if not on every remaining detail, and that this had largely been signed off by Part B (Durkan's fire engineer):

> "43. This was confirmed by Tenos ([Wallace]'s fire engineer) and Thomasons ([Wallace's] consultant) at a technical meeting on 3 June 2025, which Nigel Shields attended on behalf of Durkan, but which was relayed at a client meeting the following day. At this client meeting Simarc (for [Wallace]) said: "SG advised the technical meeting took place on 03/06/25 between Simarc, Durkan, Excel, Part B, Thomasons and Tenos to discuss the outstanding points on the fire-stopping solutions. Excel provided solutions for standard and non-standard details with supporting evidence using FSI product datasheets. Thomasons/Tenos confirmed this was suitable – on the strict basis each application is completed in accordance with the manufacturer's installation instruction."

60. The hearing at which Wallace sought to vary the RO ('the RO Variation Hearing') took place on 24 June 2025. The RO Variation Hearing was attended by a representative of Durkan. The skeleton argument for Wallace stated:

> "*Termination of the Remedial Agreement is not the panacea that the Applicants portray.*
>
> *i. If the Remedial Agreement is terminated, then [Wallace] will have to consider how to engage Durkan's subcontractors and design team, who may well not want to be novated to [Wallace].*
>
> *ii. [Wallace] will also have to consider the intellectual property rights in the surveys and design work carried out to date.*
>
> *iii. A new party, such as Thomasons would have to be engaged.*

> iv. *Given how close Durkan is to the submission of a Gateway 2 application, [Wallace] is reasonable in allowing Durkan to continue at this point in time*."

61. In paragraph 26 of her witness statement for the RO Variation Hearing**,** Ms Chambers of Wallace confirmed that:

> "*We also felt by this stage that we had little option other than to continue to engage with Durkan to complete the remediation programme, though our view on that is beginning to change. However, having discussed the option of Thomasons' taking over the project, I feel that is not viable and that it would simply lead to a longer delay in starting work on site*."

62. Wallace's barrister at the FTT (as can be seen from the CMS Attendance Note) submitted:

> *"[Wallace] took the view that it should continue working with Durkan to progress the remediations. Let's say today [Wallace] were to try to terminate the contract, this wouldn't take us very much further and would possibly delay matters."*

63. The Notice of Termination was served two days later.

64. Ms Sims contends that the constituent elements of election, (i) knowledge of the facts giving rise to the right; and (ii) unequivocal conduct consistent only with the continuation of the contract, are made out. It was not suggested by Ms Bretherton that Ms Sims was incorrect that Wallace has offered no explanation - in its Defence, in Mr Hordern's statement, or otherwise - for its volte-face between 24 and 26 June 2025. Ms Sims submits that the obvious inference is that the Termination Notice was a sudden reaction to the outcome of the RO Variation Hearing rather than a considered response to anything Durkan had done or failed to do. Ms Sims contends that disclosure of Wallace's internal and advisory communications in that 48-hour window is crucial and likely to bear directly on the waiver and affirmation issues (and on the objective seriousness of the alleged breaches). It is said to be a paradigm example of evidence which can reasonably be expected to be available at trial but is not available now.

65. Ms Bretherton relies, again, on the Agreement. Clause 11.2 states that "any failure or delay by the Freeholder to exercise or enforce any right under this Agreement shall not operate as a waiver of that right or preclude the exercise or enforcement of it at any time or times thereafter, or constitute an election to affirm this Agreement. No election to affirm this Agreement by the Freeholder shall be effective unless it is in writing." It is said that this is a complete answer to the affirmation case.

66. First, it is to be noted that, but for the clause, Ms Bretherton's first point is that the communication to the FTT by way of written evidence or submissions could not constitute an affirmation to Durkan. Whilst it may be relevant to whether affirmation is made out that the submissions were directed at the FTT rather than directly to Durkan, a finding in respect of affirmation will take account of the totality of the evidence, including the earlier meetings in June relating to approval of the designs and Durkan's involvement in helping Wallace prepare for the FTT. Not least because Durkan were

present at the FTT hearing, there is at least a real prospect that the factual elements of election may be made out.

67. There is also a real prospect of establishing, as Ms Sims argued, that clause 11.2 is no bar to Durkan's claim to affirmation. First, it is reasonably arguable that the initial sentence within the clause, directed at failure or delay in the exercise of rights, is simply not directed to election. Whilst a matter for full argument, it is also reasonably arguable that submissions to a Court by the innocent party unequivocally representing an intention to continue with the contract in writing to the knowledge of the contract breaker may be effective as affirmation in writing for the purposes of clause 11.2.

68. There may also be, at trial, a legitimate debate about whether even if affirmation took place on 24 June 2025, there nevertheless existed a renewed right to terminate two days later because of the persisting nature of a breach constituted by ongoing delay. That debate is likely to be informed by the precise factual circumstances established at trial. Were it otherwise, the existence of a persisting breach would always mean that unequivocal conduct amounting to affirmation is effectively writ in water, and neither counsel suggested such an answer in law.

H. Conclusion

69. Durkan's claim that the Notice of Termination was unlawful has a real prospect of success. It will require factual investigation and determination at trial. Wallace's application for reverse summary judgment on the claim and summary judgment on its counterclaim is not appropriate and must be dismissed.

ANNEX 1

1. The Recitals state as follows:

   "Recitals

   (A) The Developer originally procured and constructed the Property around 2008.

   (B) The Freeholder subsequently acquired the legal title to the Property on 1 May 2014.

   (C) It has been established that there are relevant defects at the Property and, pursuant to an order made by the first tier tribunal property chamber (residential property), the Freeholder is required to carry out internal compartmentation and other building safety works required to remediate those defects at the Property.

   (D) The Developer has agreed to design, procure, carry out and complete the Works at the Property. The Freeholder grants the Developer a licence to access the Property in order to do so."

2. In the body of the Agreement:

   (1) "Works" is defined as "*all the works specified by the Order which the Freeholder is required to carry out pursuant to the Order, together with all associated works, necessary for the Project.*"

   (2) "Substantive Breach" means:

   "(a) a material breach of any term of this Agreement which is incapable of remedy;

   or

   (b) a material breach of any term of this Agreement which is capable of remedy but which has not been remedied within a reasonable period after the Party claiming the breach has given written notice of the breach (requiring its remedy) to the Party committing the breach".

3. Pursuant to clause 1.2.2, "Writing" or "Written" means 'excludes email and faxes'.

4. Clauses 2.1 and 2.2, under 'The Services and the Works' provide:

   "2.1 With effect from the Commencement Date the Parties shall comply with each of their respective obligations, and shall benefit from their respective rights, as set out in Schedule 1.

   2.2 The Parties agree that there is no fee for the Services or the Works."

5. Clause 3 deals with 'Termination'. Clause 3.1 states:

> "3.1 Either Party may (without prejudice to any other right, remedy or power available to any of them) after giving fourteen (14) days' written notice to the other Party terminate this Agreement if the other Party:
>
> …
>
> 3.1.2 is in Substantive Breach, in which case this Agreement shall determine but without prejudice to any right of action or other remedy of either against the other in respect of any antecedent breach."

6. Clause 6, 'Entire Agreement', provides:

> "6.1 This Agreement contains the complete and entire agreement between the Freeholder and the Developer relating to the Project and supersedes all other oral and written communications relating to the Project. The Parties shall not be bound by, or be liable for, any inducement, promise, representation, statement or understanding not contained in this Agreement.
>
> 6.2 No changes or variations to this Agreement shall be valid unless they are recorded in writing and executed as a deed by both Parties."

7. Clause 11, 'Non-waiver' states:

> "11.1 No acknowledgement, admission, advice, approval, comment , confirmation, consent, direction, enquiry, guideline, indication of satisfaction, inspection, review, instruction, or anything similar, given or made by or on behalf of the Freeholder, any of the Freeholder's Consultants, Professional Consultants or any of their agents, or failure to give or make any of these, shall exclude, limit, modify, qualify or reduce the Developer's obligations or liability under this Agreement.
>
> 11.2 Any failure or delay by the Freeholder to exercise or enforce any right under this Agreement shall not operate as a waiver of that right or preclude the exercise or enforcement of it at any time or times thereafter, or constitute an election to affirm this Agreement. No election to affirm this Agreement by the Freeholder shall be effective unless it is in writing".

8. Clause 16, 'Good Faith', provides:

> "Each Party owes the other Party a duty to act with the utmost good faith in subsequently all terms of this Agreement."

9. Schedule 1 then sets out the Services and the Works.

10. Paragraph 1.1 deals with further definitions.

(1) "BC Approval" means "the building control approval granted by the Building Safety Regulator under the Building Safety Legislation and Statutory Requirements following the submission of a BC Approval Application";

(2) "BC Approval Application" means "any application(s) made in relation to the Works under any Building Safety Legislation and Statutory Requirements for building control approval for work to an existing HRB";

(3) "Completion Date" means "the date on or before which Practical Completion must be certified, being 19 September 2025 or such other date as is agreed as part of the Plans and Specifications in accordance with this Agreement which may be updated from time to time by the Parties in accordance with this Agreement and confirmed in writing;

(4) "Plans and Specifications" means "the plans and specifications (including any programme(s)) for the Works in relation to the Project (including any fire alarm system changes or upgrades or other like fire and building safety measures) to be developed by the Developer and agreed by the Freeholder in accordance with paragraph 4 as may be further amended from time to time in accordance with paragraph 4".

11. Paragraph 2 deals with 'General obligations'. It provides:

> "2.1 The Developer warrants and undertakes that it shall:
>
> 2.1.1 comply with the terms of this Agreement;
> …
> 2.1.3 diligently perform its duties and obligations under this Agreement and in respect of the Services and the Works; and
> 2.1.4 use the Required Standard to avoid or minimise delay to the execution of the Services and the Works …
>
> 2.4 The Parties acknowledge and agree that, unless subsequently agreed otherwise in writing, the Freeholder hereby delegates to the Developer and the Developer shall be responsible for the preparation and submission of the BC Approval Application and Completion Certificate Application and the Developer shall provide draft applications and assistance for the Freeholder to review and approve in reasonable time prior to submission of each application in accordance with this paragraph 2."

12. Paragraph 3.1 provides a licence to occupy such parts of the Property as may be necessary for the Permitted Use for the Licence Period in common with the Freeholder and all others authorised by the Freeholder.

13. Paragraph 3.6 then provides that:

> "The Developer intends to carry out and complete the Works without, in so far as practicable, accessing the residences and/or allocated parking areas at the Property."

14. Paragraph 3.7 states:

> "To the extent that the Developer cannot practicably carry out and complete the Works without accessing the residences and/or allocated parking areas at the Property the Developer shall notify the Freeholder and Management Company of this and shall, subject to paragraph 3.8, liaise with the same to arrange and agree such access to residences as is strictly necessary for the carrying out and completion of the Works."

15. Paragraph 3.8 provides:

> "Any such access made available to the Developer under paragraph 3.7 shall:
>
> 3.8.1 only be permitted to the extent and for the duration that is strictly necessarily for the Permitted Use;
>
> 3.8.2 be subject to the Developer's compliance with paragraph 3.3 and to the Management Company being given sufficient notice to allow the Management Company to give the resident(s) reasonable notice that such access is required and to allow the Management Company to comply with any residence access protocol in place at the Property…"

16. Paragraph 4, 'Design and Plans and Specifications' central to Wallace's case, states as follows:

> "4.1 The Developer and the Freeholder acknowledge and agree that the Plans and Specifications current at the date of this Agreement are indicative only and shall be replaced by detailed subsequent Plans and Specifications agreed by the Parties in accordance with paragraphs 4.2 and 4.3 and which may then be further amended from time to time.
>
> 4.2 The Developer shall submit one electronic copy of an updated and finalised version of the Plans and Specifications (the "Submitted Plans and Specifications") to the Freeholder within a reasonable period after the date of this Agreement for the Freeholder's review and approval (such approval not to be unreasonably withheld or delayed, provided always that the Plans and Specifications must enable the Developer to deliver the Works in accordance with the Order). The Developer shall take account of any reasonable comments the Freeholder may raise, and shall resubmit the Plans and Specifications in accordance with this paragraph 4.2 until the Freeholder confirms its approval of them in accordance with this clause. The Freeholder will complete its review and provide either the Freeholder's comments or approval as soon as reasonably practicable having regard to the nature of the Submitted Plans and Specifications and such period of time shall, where appropriate to the submission, also include (without limitation) sufficient time as is reasonable for the Freeholder's Consultants to review the Submitted Plans and Specifications and provide comments and advice to the Freeholder in respect of the same."

17. Paragraph 5, 'Carrying out of the Services and the Works', provides:

> "5.1 The Developer acknowledges and agrees that the Works under this Agreement will not commence prior to the date on which:
>
> 5.1.1 BC Approval has been given by the Building Safety Regulator and received by the Freeholder for the Works…."
>
> 5.2 The Developer shall procure that the Services and Works are designed, carried out and completed:
>
> …
>
> 5.2.3 with due diligence and in a good and proper workmanlike manner;…
>
> 5.2.6 by the Completion Date;"

18. Paragraph 12, Delay and the Order, states:

> "12.1 The Developer shall indemnify the Freeholder in respect of all reasonably incurred and properly mitigated costs which the Freeholder incurs in connection with any application the Freeholder is required to make to the First Tier Tribunal Property Chamber (Residential Property) in relation to any extension for the time for compliance specified by the Order. …"

19. Paragraph 13, Delays and extensions of time, provides:

> "13.1 If, at any time, it becomes reasonably apparent that the progress of the Works is being or is likely to be delayed then the Developer shall as soon as reasonably practicable, and in any event within fifteen (15) Working Days of becoming aware (or when it should have reasonably become aware) of the delay or likely delay, give the Freeholder and the Freeholder's Surveyor written notice of the material circumstances…
>
> 13.2 The following are the Relevant Events referred to in paragraphs 13.1 and 13.3:
>
> …
>
> 13.2.2 delay in receipt by the Developer of necessary instructions or other information which the Freeholder is expressly required to provide under this Agreement;
>
> 13.2.3 subject to the express provisions of this Agreement, failure by the Freeholder to give possession of or access to the Site in accordance with this Agreement;
>
> 13.2.4 any impediment, prevention or breach by the Freeholder of its express obligations set out in this Agreement (or, in the case of any impediment or prevention, except to the extent that the same

is in consequence of the reasonable exercise of the Freeholder's rights under this Agreement); and

13.2.5 any prevention or delay to the Developer's carrying out of the Works caused by the residents of the Property preventing the Developer's access to the Site provided that the Developer has complied with its obligations set out in paragraph 3. 7 and paragraph 3.8.

(each a "Relevant Event").

13.3 Provided that the Developer has:

13.3.1 given notice in accordance with paragraph 13.1;
[…]

the Freeholder shall upon a written request by the Developer as soon as reasonably practicable by notice in writing grant an extension of the Period for Completion of the whole or part of the Works as may in its opinion be fair and reasonable […]

…

13.5 The Freeholder and Freeholder's Surveyor shall within twenty-eight (28) days of the issue of the Practical Completion Certificate review all the circumstances of the kind referred to in paragraph 13.1 and shall finally determine and certify to the Developer with a copy to the Freeholder the overall extension of time (if any) to which the Freeholder considers, having due regard to the professional opinion of the Freeholder's Surveyor on the same, the Developer is entitled in respect of the Works."

20. Paragraph 15.2 provides:

"15.2 The Developer shall prepare and maintain the following documents in accordance with this Agreement, the Statutory Requirements and the Development Control Requirements:

[…]

15.2.5 Fire and Emergency File
…"