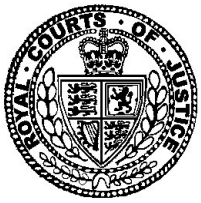

Neutral Citation Number: [2024] EWHC 3235 (TCC)

Case No: HT-2024-000316

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2024

Before :

MRS JUSTICE JOANNA SMITH DBE

- -

Between :

BDW TRADING LIMITED

Claimant

- and –

ARDMORE CONSTRUCTION LIMITED

Defendant

- -

Rupert Choat KC and Max Twivy (instructed by **Howard Kennedy LLP**) for the **Claimant**
David Pliener KC (instructed by **Mantle Law (UK) LLP**) for the **Defendant**

Hearing date: 5 November 2024

- -

Approved Judgment

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

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MRS JUSTICE JOANNA SMITH DBE

Mrs Justice Joanna Smith:

1. This is a summary judgment application by the Claimant ("**BDW**") to enforce an adjudication decision ("**the Decision**") made by Mr John Riches ("**the Adjudicator**") on 17 September 2024 (as corrected on 18 September 2024), requiring the Defendant ("**Ardmore**") to pay £14,454,914.45 by way of damages together with £84,329.00 for the Adjudicator's costs and expenses. The Adjudicator held that Ardmore had breached its duties under a construction contract (and that limitation did not apply by reason of deliberate concealment) and, separately, that Ardmore was liable under the Defective Premises Act 1972 ("**the DPA 1972**").
2. Ardmore acknowledges that, in the vast majority of cases, the court will enforce the decision of an adjudicator, but it says that this is a rare case in which the court should take a different approach. Specifically, Ardmore raises four grounds of objection to the Decision which it says preclude enforcement. First, that the dispute referred to in the Decision had not crystallised ("**Ground 1**"), second that the Adjudicator had no jurisdiction to determine a tortious claim for breach of the DPA 1972 ("**Ground 2**"); third that the Adjudication was inherently unfair owing to the inequality of arms in terms of documentation ("**Ground 3**") and fourth that the Adjudicator intentionally failed to consider a material Defence relevant to the allegation of deliberate concealment against Ardmore ("**Ground 4**"). I shall refer to Grounds 3 and 4 together as "**the Natural Justice Challenges**".
3. If Ardmore has a real prospect of success on either Grounds 1 or 3, then it will successfully resist enforcement by way of summary judgment. However, if these grounds fail, Ardmore accepts that (owing to the nature of the Decision made by the Adjudicator) it must have a real prospect of success on both Grounds 2 and 4 to resist enforcement.
4. Ground 2 raises a point of principle which may be of broad interest to the construction industry as a whole, given the current number of disputes in the industry relating to the fire safety of dwellings. Specifically it requires me to consider whether the reasoning of the House of Lords in *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951, HL ("*Fiona Trust*"), a case in which the court considered the true interpretation of an arbitration clause, also applies to an adjudication provision. Accordingly, I am invited to determine the point even if my decisions on one or more of the remaining three grounds render it unnecessary to do so.

Factual Background

5. On 30 October 2002, the Basingstoke Property Company Limited ("**BPCL**"), as Employer, and Ardmore, as Contractor, entered into a building contract ("**the Building Contract**") for the design, erection and completion of the shell and core, primary services and partial fitting out of apartments at Crown Heights, Basingstoke, Hampshire ("**the Development**"). Barratt Southern Counties ("**BSC**") was appointed as BPCL's Employer's Agent. Another Barratt company, Barratt East London ("**BEL**") appears also to have been involved. The Contract Sum was £22,593,000.

6. The Building Contract is a construction contract within the meaning of section 104 of the Housing Grants, Construction and Regeneration Act 1996 ("**the HGCRA 1996**").
7. Article 5 and clause 39A of the Building Contract make provision for the reference of a dispute or difference to adjudication. Clause 39A.2, read together with Appendix 1, provides that "[t]he Adjudicator to decide the dispute or difference shall be either an individual agreed by the Parties or, on the application of either Party, an individual to be nominated" by the Royal Institution of Chartered Surveyors.
8. By a Deed of Assignment of Building Contract dated 3 November 2004, BDW took an absolute assignment of the full benefit of all of BPCL's interests and rights under the Building Contract, together with all rights for BPCL to sue or take action in respect of any breach of the obligations contained in that contract.
9. It seems that practical completion occurred between December 2003 and June 2004. Accordingly, until the coming into force of the provisions of the Building Safety Act 2022 ("**the BSA 2022**"), Ardmore had, for some time, a complete limitation defence under the Limitation Act 1980 ("**the LA 1980**") to any claims that might be brought against it by BDW under section 1(1) of the DPA 1972, which imposes a duty on "[a] person taking on work for or in connection with the provision of a dwelling" to carry out the work in a "workmanlike" or "professional manner" with "proper materials so that as regards that work the dwelling will be fit for habitation when completed".
10. However, section 135 of the BSA 2022 inserted a new section 4B into the LA 1980 which had the effect, amongst other things, of increasing retrospectively the limitation period for a claim under section 1(1) of the DPA 1972 from 6 years to 30 years, thereby raising the spectre of a claim being pursued against Ardmore for its work on the Development.
11. This legislative change prompted BDW to write a Pre-Action Protocol letter to Ardmore on 14 July 2022 ("**the Letter of Claim**"), nearly twenty years after practical completion, identifying "fire safety defects at the Development". I shall return to the detail of the correspondence that then ensued between the parties which is relevant to Grounds 1 and 3, but that correspondence culminated in BDW issuing a Notice of Adjudication dated 21 March 2024. The Notice of Adjudication asserted that a dispute had arisen as to Ardmore's liability to BDW in respect of fire safety defects in the Development, arising by reason of Ardmore's breaches of the Building Contract and/or its duties pursuant to section 1(1) DPA 1972. BDW sought damages in the sum of £15,037,615.01 (excluding VAT), or such other sum as the Adjudicator may decide.
12. On 25 March 2024, the President of the Royal Institution of Chartered Surveyors nominated Mr John Riches as the Adjudicator.
13. In its Referral Notice dated 27 March 2024, BDW set out its case on two alternate legal bases: first, breach of the Building Contract, a claim that was said to be "in time" for limitation purposes by reason of the provisions of section 32(1)(b) LA 1980 on the basis that there had been deliberate concealment of Ardmore's alleged breaches of duty, including a duty to install fire barriers. Second, a claim under the DPA 1972,

limitation no longer being an obstacle owing to the extended limitation period provided by the BSA 2022.

14. On 8 May 2024, Ardmore provided its Response to the Referral. Thereafter, over what was an unusually protracted timetable, the parties exchanged additional documents setting out their respective cases (a Reply, a Rejoinder to the Reply, a Surrejoinder, a Rebutter and a Surrebutter). The Decision, running to 166 pages, was provided to the parties on 17 September 2024. The Adjudicator declared that Ardmore had breached its duties under the Building Contract in respect of fire safety aspects in the Development and that it was also liable under the DPA 1972 in respect of the same fire safety defects. He required Ardmore to pay damages and costs in the sums to which I have already referred.
15. Ardmore subsequently informed BDW that it intended to resist enforcement of the Decision, thereby prompting BDW to issue a claim form seeking enforcement on 1 October 2024, supported by a witness statement from Mr Mark Pritchard of Howard Kennedy LLP, BDW's solicitors. On 3 October 2024, O'Farrell J granted permission to BDW to issue an application for summary judgement prior to service by Ardmore of either an Acknowledgement of Service or a Defence and gave directions for the hearing of the summary judgment application. Further evidence has since been served on both sides in the form of a witness statement from Ms Georgia Whiting, Legal Counsel for the Defendant and a second statement from Mr Pritchard.
16. It is common ground that the court may grant summary judgment "on the whole of the claim or on an issue", if it considers that the relevant party (in this case Ardmore) "has no real prospect of succeeding on the claim, defence or issue" (CPR r.24.3(a)) and "there is no other compelling reason why the case or issue should be disposed of at a trial" (CPR r.24.3(b)). The overall burden of proof rests with BDW to establish that Ardmore has no real prospect of succeeding in the defences it raises against enforcement. However, if BDW adduces credible evidence in support of the application, then Ardmore comes under an evidential burden to prove some real prospect of success or other reason for having a trial (White Book Vol 1 at CPR 24.3.3).
17. At the hearing, Mr Pliener KC advanced Ardmore's four Grounds of objection to the Decision at the outset, with Mr Choat KC replying on behalf of BDW - a tacit acknowledgement from both sides that, in an adjudication enforcement, the existence of a decision in the adjudication will almost inevitably mean that it is for the paying party to satisfy the evidential burden of establishing that it has a real prospect of success on one or more of its arguments against enforcement.

Ground 1: Crystallisation of the Dispute

18. To address the contention that the dispute had not crystallised at the time it was referred to adjudication, I need to begin by looking in more detail at the correspondence between the parties starting with the Letter of Claim of 14 July 2022.

19. Under the heading "The Legal Framework", the Letter of Claim identified that the obligations owed by Ardmore to BDW were to be found in various sources. It went on to identify that: "the extant cause of action against you is under the Defective Premises

    Act 1972", but said that "for context and to provide clarity on the true meaning and extent of those obligations, we refer to the broader applicable contractual and statutory framework below".

20. The Letter of Claim then described Ardmore's obligations (i) under the Building Contract, together with its standard of care under clause 2.5.1 (to which I shall return in more detail in connection with Ground 2); (ii) under the DPA 1972; and (iii) under the relevant Building Regulations. The claim was said to be based on the use of an inappropriate cladding system (an Alumasc product, rather than the Sto product set out in the design intent) and on the failure to install horizontal fire barriers. BDW set out, at some length, a chronology of what it considered to be relevant extracts from contemporaneous correspondence on the subject of the inclusion of fire barriers, and attached copies of this correspondence to the letter at Appendix 3. BDW asserted a breach of Ardmore's duty under the DPA and made clear that the identified defects had put BDW "at substantial risk of loss". BDW stated that it would particularise its losses in due course.

21. On 19 October 2022, Ardmore replied to the Letter of Claim seeking voluntary preaction disclosure "of all and any documents BDW has in its possession…relating to the project" in circumstances where, as Ardmore explained, it no longer possessed all project records. Ardmore also sought some specific documents relating to BDW's standing to bring the claim, together with details of the remedial works that were required and details of the programme of works envisaged.

22. BDW responded some 9 months later on 20 July 2023. As it recorded in its letter, it had, by this stage, provided Ardmore with certain factual reports as to the condition of the Development together with (on a without prejudice basis) an advice note from its then expert. Beyond these documents, BDW refused to provide anything further, stating that Ardmore now had all that it needed to understand BDW's position and to "make informed decisions about settlement and how to proceed". BDW now explained that the basis on which it claimed against Ardmore was threefold: (i) under the DPA 1972; (ii) under the Civil Liabilities (Contribution) Act 1972; and (iii) that "[b]y omitting cavity barriers behind the Ispotherm system above the second storey of the Development, having sought advice from Alumasc who confirmed that cavity barriers were required…, Ardmore deliberately breached its duty under the Building Contract and/or deliberately concealed these defects from BPC and/or BDW (for the purposes of s.32(2) and s.32(1)(b) of the Limitation Act 1980 respectively)". The letter went on to say that the necessary remedial works would commence on site in October 2023 and it invited Ardmore to inspect the defects before any works were commenced, an offer which Ardmore never took up. The letter provided no particulars as to the nature of the remedial works or their cost.

23. On 25 August 2023, Ardmore responded noting that BDW had not provided details as to, amongst other things, the loss BDW had suffered and the nature and scope of the remedial works. Ardmore observed that this information was essential to enable it to consider BDW's claim and provide a meaningful letter of response and reserved its position pending receipt of such information.
24. After a further 6 months' delay, on 8 March 2024, BDW wrote to inform Ardmore that it considered a dispute to have arisen "as to Ardmore's liability for breaches of (a) the Building Contract…and/or (b) the Defective Premises Act 1972 (and/or clause 2.5.2 of the Building Contract) – in relation to fire safety defects at the Development". This letter went on to provide more detail in relation to what had now been narrowed down to two asserted claims; first the contract claim (which, for the first time identified a number of specific provisions of the Building Contract which it was said Ardmore was in breach of and relied upon the provisions of section 32(1)(b) and 32(2) LA 1980) and second the DPA 1972 claim. Various new particulars of the DPA 1972 claim were provided, including as to automatic opening vents, insulated spandrel panels and the use of silicon mastic. Finally, the letter asserted that BDW intended to procure the carrying out of remedial works and that the loss and damage it was likely to incur in so doing was £14,580,714.76. Attached to the letter was a high level breakdown of this figure. BDW sought payment from Ardmore within 7 days (a period subsequently extended), failing which it expressed the view that it would "proceed to adjudication without further notice".
25. Ardmore responded on 20 March 2024, alleging that an adjudication would be oppressive, unreasonable and in breach of natural justice. It also asserted that no dispute had arisen, essentially because the 8 March 2024 letter had "pivoted in its presentation of [the] claim" from a freestanding DPA 1972 claim to a breach of contract claim and that no, or no sufficient, details had been provided as to the proposed remedial works and the quantum breakdown. Ardmore said that it remained committed to considering the claim "but is not in a position to know whether there is actually a dispute (or its scope) until the further information is provided". Ardmore went on to suggest that the only fair way of resolving any disputes between the parties would be by way of arbitration under the Building Contract.
26. BDW issued its Notice of Adjudication the following day (21 March 2024). BDW's subsequent referral included two expert reports, neither of which had previously been provided to Ardmore.
27. On 28 March 2024, Ardmore wrote to the Adjudicator challenging his jurisdiction on the grounds, *inter alia*, that there was properly 'no dispute' on a major element of the claim. The basis for this challenge was explained by reference to the fact that (i) Ardmore had not been provided (prior to the Adjudication) with the vast majority of the documents relied upon by BDW in its Referral; (ii) these documents "go to the heart of the dispute"; and (iii) Ardmore had not been given a reasonable period of time in which to admit or deny the claim. On the latter point, Ardmore asserted that "[a] period of 13 days before commencing this adjudication is clearly not a reasonable

time in relation to the size, detail and staleness of this claim". BDW rejected these concerns at some length in a letter dated 2 April 2024.

28. In a short decision on Jurisdiction issued on 4 April 2024, the Adjudicator rejected this challenge to his jurisdiction. At paragraphs 11 and 12 of his decision he said this:

> "11. The claim is exactly what it was on 14 July 2022. The dispute is not therefore an unknown entity.
>
> 12. In broad terms the nature of the dispute is known and the further documents provided in this adjudication simply go to the claim and are not sufficient to make it an unknown or a new claim".

29. Against this background, Mr Pliener advances four propositions in support of the contention that no dispute has arisen such that the Adjudicator had no jurisdiction to determine BDW's claims:
    a. First, he submits that, although Ardmore accepts that in the most generalised sense the essential claim has always been one of fire safety defects, nevertheless the nature of the claim has evolved in the correspondence and it was only set out in the form subsequently used in the Referral in the 8 March 2024 letter.
    b. Second, he submits that at no point did Ardmore actually deny liability. He submits that the stale nature of the claim, the new defects identified in the 8 March 2024 letter and the lack of documentation (taken together) justify Ardmore's position that it could not determine whether to admit or deny the allegations.
    c. Third, he submits that, even if a dispute on liability had arisen, it could not be said that a dispute had arisen as to the scope or cost of the remedial scheme. He points out that the breakdown given in the 8 March 2024 letter is very high level and that there was no suggestion of a scheme of works.
    d. Fourth, he contends that, even if one takes the view that BDW properly identified its case in the 8 March 2024 letter, given the scope, complexity and size of the dispute, 13 days between that letter and the 21 March 2024 Notice of Adjudication is not a sufficient time for a dispute to crystallise, alternatively is not a sufficient time for a dispute as to the scope and cost of remedial works to crystallise.

The relevant legal principles

30. In considering Ardmore's arguments, I bear in mind the following observation made by Coulson J (as he then was) as to crystallisation of disputes in *AMD Environmental Ltd v Cumberland Construction Company Ltd* [2016] EWHC 285 (TCC), 165 ConLR 191 ("*AMD*") at [8]:

> "I have observed before that this argument is frequently advanced and almost as frequently rejected by the courts: see *St Austell Printing Co Ltd v Dawnus*

Construction Holdings Ltd [2015] EWHC 96 (TCC), [2015] BLR 224, [2015] All ER (D) 167 (Jan). The only recent case of which I am aware in which it was successfully argued that the dispute had not crystallised by the time that the adjudication started, was *Beck Interiors Ltd v UK Flooring Contractors Ltd* [2012] EWHC 1808 (TCC), [2012] BLR 417, [2012] All ER (D) 31 (Jul). That was a situation where the claim was sent to the responding party after close of play on Maundy Thursday, and where the notice of adjudication was then served the following Tuesday. Akenhead J had no difficulty in finding that the claim had not been disputed by silence over the Easter weekend, so that crystallisation had not occurred by the following Tuesday. But in general terms, the courts have found that a claim which is not accepted in whole or in part for a reasonable period thereafter, is deemed to be disputed: see *Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd* [2007] EWHC 2421 (TCC), [2007] All ER (D) 333 (Oct)".

31. The applicable law is uncontroversial and (beyond the general observation that it will be very unusual for an argument of this sort to succeed) I am able to draw the following propositions (relevant to the facts of the case before me) from the various authorities to which I was referred by the parties:
    a. The word "dispute" does not have some special or unusual meaning conferred upon it by lawyers, and courts should not adopt an overly legalistic analysis (see *Amec Civil Engineering Ltd v The Secretary of State for Transport* [2004] EWHC 2339 ("*Amec*") per Jackson J at [68(1)] and *Cantillon Ltd v Urvasco* [2008] EWHC 282 ("*Cantillon*") per Akenhead J at [55(a)]).
    b. In considering whether there is a dispute, it is necessary to look at "the essential claim" which has been made and whether it is challenged or opposed (*Cantillon* at [55]).
    c. The disputed claim is neither defined nor limited by the evidence or arguments submitted by either party to the other prior to the referral to adjudication or arbitration (*Cantillon* at [55(b)]).
    d. When a claim is made it is for the paying party to evaluate that claim promptly and "form a view as to its likely valuation, whatever points may arise as to particularisation. Efforts to acquire further particularisation should proceed in tandem with that valuation process" (*AMD* at [14]). The absence of particularisation is not a proper ground for resisting enforcement of an adjudicator's decision (*AMD* at [17]).
    e. While it depends on the circumstances of the case, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted (*Amec* at [68(3)] and *Collins (Contractors) v Baltic Quay Management (1994) Ltd* [2004] EWCA Civ 1757, 99 ConLR 1 ("*Collins*") per Clarke LJ at [63]).
    f. There may be many circumstances in which it can reasonably be inferred (objectively) that a claim is not admitted. These include discussions between the parties and the prevarication or silence of a putative defendant (see *Amec* at [68(4)]).

g. The imposition of a deadline for responding to the claim does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding (see *Amec* at 68[6]).

h. Consistent with the observation of Coulson J in *AMD* at [8], the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication (*Collins* at [64]); but

i. A "possible exception" is where the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it. In such a case neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication (*Amec* at 68[7] and *AMD* at [17]). Analysis

32. As attractively as Mr Pliener put Ardmore's arguments on crystallisation of a dispute, I cannot accept them. My reasons are as follows:

a. BDW set out its "essential claim" in the Letter of Claim, identifying Ardmore's general obligations under both the Building Contract and the DPA 1972 and making clear that the claim related to fire safety defects. In so doing it provided contemporaneous correspondence relevant to the installation of fire barriers. By the time of its July 2023 letter, it had provided Ardmore with some expert reports and had offered inspection of the site. The allegations raised as to the unsuitable nature of the Alumasc product and the omission of fire barriers are the key allegations that were subsequently advanced in the Adjudication.

b. Although the Letter of Claim appeared to focus on advancing a case under the DPA 1972, the July 2023 letter identified that BDW also relied upon Ardmore's deliberate concealment, which, together with the statement that Ardmore "deliberately breached its duty under the Building Contract" was plainly an indication of an intention to pursue a contractual claim. Accordingly I reject the contention that the 8 March 2024 letter amounted to a change to the fundamental premise of BDW's claim.

c. Instead of taking steps to instruct an expert to inspect the site, to consider liability and to advise on the potential value of any claim, as it could and should have done, Ardmore continued to maintain in its response to the July 2023 letter that it required further particularisation. By now, however, it was abundantly clear that allegations of defective workmanship (including under the Building Contract) were being made against it in respect of fire safety requirements. Accordingly, it is difficult to conclude that Ardmore's continuing refusal to respond pending receipt of further information was anything other than prevarication. Indeed it is clear from Ms Whiting's

witness statement in the Adjudication (dated 8 May 2024) that Ardmore took the positive decision not to "divert significant resources into investigations" until 8 March 2024 "when BDW provided the assignment of the contract and intimated an immediate adjudication". In the circumstances I am not persuaded by the argument that Ardmore never actually denied liability – it apparently chose not to undertake an investigation into liability.

d. It is true that the 8 March 2024 letter identified new clauses on which BDW wished to rely for the purposes of its claim under the Building Contract together with some new particulars in respect of its DPA 1972 claim. However, I reject the suggestion that prior to receipt of the 8 March 2024 letter the claim (as it was then formulated) was so nebulous or lacking in clarity that Ardmore could not have responded to it and I infer that, by reason of Ardmore's continuing failure to respond to the claim, a dispute had plainly crystallised. I repeat that I do not accept that the 8 March 2024 letter amounted to a fundamental change in the nature of the case being intimated by BDW.

e. Although it could potentially explain Ardmore's lack of documentation (a point to which I shall return later), the fact that the claim was stale does not appear to me to assist Ardmore on the question of whether a dispute was crystallised. The passage of time should have provided the impetus to investigate the claim that was being advanced as soon as possible, in tandem with continuing to seek additional information in so far as was necessary. As Ardmore must have known, once remedial works had been commenced any physical evidence that might be relevant on site would be lost. Ardmore has provided no explanation in its evidence for its failure to take up the offer to inspect the site.

f. I have considered whether it may be correct to say that while a dispute had crystallised on liability by 8 March 2024, no dispute had crystallised on quantum, owing to the fact that (prior to 8 March 2024) BDW had provided no information as to the remedial works or as to the quantum of the claim. However, I do not consider that I need to decide the point. On 8 March 2024 BDW provided information about its quantum claim. I agree with Mr Choat that the time that elapsed between the 8 March 2024 letter and the Notice of Adjudication on 21 March 2024, together with the terms of the letter of 20 March 2024 from Ardmore, was plainly sufficient to give rise to a reasonable inference that the quantum element of the claim was not admitted by Ardmore, particularly where the fundamental essence of the liability element of the claim had been known to Ardmore for some considerable time.

g. By its letter of 20 March 2024, Ardmore continued to insist that it was not in a position (nearly two years after the Letter of Claim) to respond on the substance of the allegations made by BDW but that it remained committed to considering the claim if further information was provided. I consider that

BDW was justified in concluding (and I infer given the background context to which I have referred) that this was a non-admission of its claim which clearly crystallised a

dispute (in so far as that dispute had not already been crystallised).

33. Accordingly I dismiss Ground 1, which has no real prospect of success as a defence to BDW's application for enforcement of the Decision by way of summary judgment.

Ground 2: Jurisdiction over the DPA claim

34. Pursuant to section 108(1) of the HGCRA 1996, an Adjudication is limited to disputes which are "under the contract".
35. Article 5 of the Building Contract mirrors this wording as follows:

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

36. By contrast, Article 6A of the Building Contract (which deals with referral to arbitration) reads, in so far as material, as follows:

> "…if any dispute or difference as to any matter or thing of whatsoever nature **arising under this Contract or in connection therewith**…shall arise between the Parties…it shall be referred to arbitration in accordance with clause 29B and the JCT 1998 edition of the Construction Industry Model Arbitration Rules (CIMAR)" (**emphasis added**).

37. The issue arising between the parties on Ground 2 concerns the meaning of the words "under the contract" in section 108(1) HGCRA 1996. Ardmore's primary case is that they are to be interpreted narrowly; that there is in general terms a difference in meaning and scope between the words "under the contract" and "connected with" the contract – the former being more limited in scope than the latter - and that the difference in wording in Articles 5 and 6A of the Building Contract is a clear indicator that the draftsman of this Building Contract intended the words in Article 5 to have a more limited scope. Accordingly, Ardmore submits that the words "under the contract" are not capable of encompassing a claim under the DPA 1972 and that the Adjudicator had no jurisdiction to decide that claim.
38. Ardmore accepts that in *Fiona Trust*, the House of Lords deprecated linguistic distinctions of this kind in the context of interpreting the wording of an arbitration clause, but it says that the rationale of the court in that case does not apply to adjudications. Alternatively, Ardmore contends that there is, at least, a lack of certainty or consistency over the meaning of the words "under the contract" in various authorities decided since *Fiona Trust* and that this state of affairs is also reflected in the leading text books.
39. BDW rejects these arguments. It points out that the courts have emphasised that the wording of dispute resolution provisions should not be interpreted narrowly and it contends that the overwhelming weight of the authorities tend to the view that the

Fiona Trust reasoning applies equally to adjudication provisions – specifically it rejects the existence of any real uncertainty or inconsistency on this score. Further it rejects the contention that the distinction between the wording in Article 5 and Article 6A of the Building Contract is of any real significance. Alternatively, BDW relies upon clause 2.5.2 of the Building Contract which it submits imports an obligation to comply with the DPA, such that a breach of the DPA amounts to a breach of the Building Contract, albeit a breach which attracts the 30 year limitation period.

40. In order to examine these competing positions, I must first consider the decision in *Fiona Trust*, together with (i) the subsequent authorities on which each party relied in its submissions; and (ii) the leading text books to which I was referred.

Fiona Trust: Analysis

41. *Fiona Trust* concerned the scope and effect of an arbitration clause in eight charterparties; specifically, first, whether the arbitration clause was apt to cover the question of whether the contract was procured by bribery and, second, whether it was possible for a party to be bound by submission to arbitration when he alleged that, but for the bribery, he would never have entered into the contract containing the arbitration clause. The arbitration clause incorporated the words "any dispute arising under this charter" and so the House of Lords was concerned with the interpretation of those words.

42. In his lead speech at [5]-[13], Lord Hoffmann said this:

> "[5] …Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.
>
> [6] In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. **The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.**
>
> [7] If one accepts that this is the purpose of an arbitration clause its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions

arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

[8] A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause. But the same policy of giving effect to the commercial purpose also drives the approach of the courts (and the legislature) to the second question raised in this appeal, namely, whether there is any conceptual reason why parties who have agreed to submit the question of the validity of the

contract to arbitration should not be allowed to do so

[9] There was for some time a view that arbitrators could never have jurisdiction to decide whether a contract was valid. If the contract was invalid, so was the arbitration clause. In *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63 at 66 Evans J said that this rule 'owes as much to logic as it does to authority'. But the logic of the proposition was denied by the Court of Appeal in *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897, [1993] QB 701, [1993] 3 WLR 42 and the question was put beyond doubt by s 7 of the 1996 Act:

'Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.'

[10] This section shows a recognition by Parliament that, for the reasons I have given in discussing the approach to construction, businessmen frequently do want the question of whether their contract was valid, or came into existence, or has become ineffective, submitted to arbitration and that the law should not place conceptual obstacles in their way.

[11] With that background, I turn to the question of construction. Your Lordships were referred to a number of cases in which various forms of words in arbitration clauses have been considered. Some of them draw a distinction between disputes 'arising under' and 'arising out of' the agreement. In *Heyman v Darwins Ltd* [1942] 1 All ER 337 at 360, [1942] AC 356 at 399 Lord Porter said that the former had a narrower meaning than the latter but in *Union of India v E B Aaby's Rederi A/S, The Evje* [1974] 2 All ER 874, [1975] AC 797 Viscount Dihorne ([1974] 2 All ER 874 at 885, [1975] AC 797 at 814), and Lord Salmon ([1974] 2 All ER 874 at 887, [1975] AC 797 at 817) said that they could not see the difference between them. Nevertheless, in *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63 at 67, Evans J said that there was a broad distinction

between clauses which referred 'only those disputes which may arise regarding the rights and obligations which are created by the contract itself' and those which 'show an intention to refer some wider class or classes of disputes.' The former may be said to arise 'under' the contract while the latter would arise 'in relation to' or 'in connection with' the contract. In *Fillite (Runcorn) Ltd v Aqua-Lift* (1989) 26 ConLR 66 at 76 Slade LJ said that the phrase 'under a contract' was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract. Nourse LJ gave a judgment to the same effect. The court does not seem to have been referred to *Mackender v Feldia* AG [1966] 3 All ER 847, [1967] 2 QB 590, in which a court which included Lord Denning MR and Diplock LJ decided that a clause in an insurance policy submitting disputes 'arising thereunder' to a foreign jurisdiction was wide enough to cover the question of whether the contract could be avoided for non-disclosure.

[12] **I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law.** It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsman of so widely used a standard form as Shelltime 4 obviously regarded the expressions 'arising under this charter' in cl 41(b) and 'arisen out of this charter' in cl 41(c)(1)(a)(i) as mutually interchangeable. So I applaud the opinion expressed by Longmore LJ in the Court of Appeal (at [17]) that the time has come to draw a line under the authorities to date and make a fresh start. I think that a fresh start is justified by the developments which have occurred in this branch of the law in recent years and in particular by the adoption of the principle of separability by Parliament in s 7 of the 1996 Act. That section was obviously intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration. But s 7 will not achieve its purpose if the courts adopt an approach to construction which is likely in many cases to defeat those expectations. The approach to construction therefore needs to be re-examined.

[13] In my opinion **the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction**. As Longmore LJ remarked, at [17]: '[i]f any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.'" (**emphasis added**).

43. I pause here to observe that Mr Pliener relies heavily on paragraph [6] of Lord Hoffmann's reasoning. In particular, he says that it explains the rationale for the decision in relation to arbitration clauses but that the factors identified in paragraph [6], which underpin the decision in paragraph [7], are not factors which apply when one is considering adjudication. Mr Choat disagrees. He submits, to the contrary, that

the 'underpinnings' in [6] are entirely supportive of the approach taken in *Fiona Trust* being applicable to adjudications. I shall have to return to this issue in due course.

44. Since *Fiona Trust*, there have been four cases in which the court has addressed the question of whether Lord Hoffmann's rationale applies equally to adjudications.

45. The first, and most helpful to Ardmore, is the case of *Hillcrest Homes Ltd v Beresford & Curbishley Ltd* [2014] EWHC 280, (2014) 153 ConLR 179 ("*Hillcrest*"). This was a Part 8 claim for a declaration that the decision of an adjudicator was unenforceable, *inter alia*, on the grounds that he had no jurisdiction to make declarations of misrepresentation and/or negligent misstatement because claims in respect of those causes of action fell outwith the scope of the adjudication provision. As is clear from [18] of the judgment of HHJ Raynor QC, sitting as a Deputy High Court Judge, the terms of the adjudication provision were, in so far as material, in identical terms to section 108(1) HGCR 1996 and also Article 5 of the Building Contract ("[i]f any dispute or difference arises under this Contract…"). Furthermore, the arbitration clause was in what the judge described as "significantly wider terms" providing for reference to arbitration of any dispute or difference "of any kind whatsoever arising out of or in connection with" the contract.

46. At [50]-[51], after setting out paragraphs [12] and [13] of the speech of Lord Hoffmann in *Fiona Trust*, the Judge dealt with the submission that Lord Hoffmann's reasoning is inapplicable to adjudication clauses, saying this:

> "50. …Ms Cheng submits that Lord Hoffman's reasoning in Fiona Trust is inapplicable to adjudication clauses, which are present or implied by reason of statutory intervention. In my judgment there is considerable force in this submission.
>
> 51. In addition the draftsmen of the JCT Contract have, presumably intentionally, chosen different formulations of disputes that may be referred in the one case to adjudication under Article 7 and in the other to Arbitration under Article 8. As stated in paragraph 18(c) above, Article 8 is expressed in much wider terms (namely "any dispute or difference….of any kind whatsoever arising out of or in connection with this contract"), in contradistinction to the words of Article 7 ("any dispute or difference [arising] under this Contract"). It seems to me that the draftsmen must be taken to have intended that the disputes capable of being referred to arbitration were wider than those capable of being referred to adjudication, where the words of Article 7 simply followed the wording of section 108 of the Housing Grants, Construction and Regeneration Act 1996, which conferred the right to refer disputes to adjudication.
>
> 52. …the claims referred to adjudication included a claim for damages arising under section 2(1) of the Misrepresentation Act 1967, a claim which was upheld by the Adjudicator in Declarations 20 and 21, the claim for loss and expense arising under the Building Contract being rejected. In my judgment that claim under the 1967 Act was not, on the proper construction of the Building Contract, a claim arising "under this contract". On the contrary, it was a claim arising under the Act. It follows that in my judgment the Adjudicator had no jurisdiction to determine the same".

47. It would appear from these paragraphs that the primary factor that persuaded the judge of the absence of jurisdiction was the contrast between the wording of the adjudication provision and the wording of the arbitration clause. In so far as the judge considered that Lord Hoffmann's reasoning in *Fiona Trust* did not apply to adjudication provisions, it is clear that his focus was on the fact that the words in the adjudication provision had derived from statute rather than from contract ("**the Statute Argument**"). The judge did not address the factors identified in paragraph [6] of Lord Hoffmann's speech (on which he does not appear to have had any detailed submissions), just as he did not explain his answer to Lord Hoffmann's underlying point that reasonable businessmen must be taken to have agreed that they would only have one forum for all of their disputes (as the learned editor of *Coulson on Construction Adjudication (4th edn)* points out at 7.129).
48. In *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] UKSC 38 [2015] 1 WLR 2961 ("*Aspect*"), the Supreme Court was concerned with the basis of any entitlement to recover sums paid out pursuant to an adjudication decision and the limitation period for any such claim. It held that there was an enforceable right to recover any overpayment to which the adjudicator's decision could be shown to have led, whether by contractual implication or by virtue of an independent restitutionary obligation. During the course of his speech, Lord Mance considered various arguments identified by the parties, including an argument to the effect that a 'coterminous' tort claim was capable of being submitted to adjudication along with a contract claim. He addressed this at [22], observing that he was "very content" to proceed on the basis that the principle in *Fiona Trust* applied to statutory adjudication. He went on to reject a submission that, if the principle did apply to statutory adjudication, then that would mean that a tort claim would be capable of being a claim arising under the contract and that therefore it would not be subject to section 14A or section 2 of the LA 1980, in the following terms:

> "It is unnecessary to say more than that I do not, as at present advised, accept this submission. Assuming, as I am presently prepared to, that a coterminous tort claim can fall within the language of section 108(1) of the 1996 Act and paragraph 1(1), it does not follow that it ceases to be a tort claim for limitation purposes".

49. It is common ground that these observations by Lord Mance were *obiter*. No doubt owing to their *obiter* nature, there is no explanation from Lord Mance as to why he was "very content" to proceed on the basis that the principle in *Fiona Trust* applies to statutory adjudication just as there is no detailed analysis of the decision in *Fiona Trust* or its underlying rationale.
50. At first instance in *J Murphy & Sons v W Maher and Sons Ltd* [2016] EWHC 1148 (TCC), (2016) 166 ConLR 228, [2017] Bus LR 916 ("*Murphy*"), Sir Robert Akenhead addressed the question of whether an adjudicator had jurisdiction to decide a dispute as to whether there had been a full and final settlement agreement. The adjudication

clause with which the judge was concerned included both 'under' and 'in connection with' the contract.

51. The judge set out paragraphs [5]-[13] of Lord Hoffmann's speech in *Fiona Trust* at [23] of his judgment, observing immediately that although these paragraphs refer to arbitration and involve questions of construction "there may well be useful analogies to adjudication". At [31]-[32] he said this:

> "[31] The commercial common sense spoken of by Lord Hoffmann in the *Fiona Trust* case has a particular resonance, albeit that it relates to a contract and arbitration, in at least the following ways:
>
> (a) Adjudication is expected to be consensual, albeit underpinned by statute such that one cannot exclude it from construction contracts and that there are basic requirements which must be incorporated (s 108(1)–(4)).
>
> (b) Parliament must be taken to have intended in relation to construction contracts and parties who agree to enter into them must have envisaged that there would be some socio-economic or commercial purpose for there to be adjudication. It is well known that Parliament intended to improve cash flow and a speedy, temporarily binding and relatively uncomplicated dispute resolution process, adjudication, so that the parties could know where they stood in a short period. To borrow Lord Hoffmann's words by prescient analogy Parliament and the parties 'want a quick and efficient adjudication and do not want to take the risks of delay' (*Fiona Trust* at [7]).
>
> (c) It is most doubtful that Parliament and the parties would want as a rational legislature and business people respectively 'only some of the questions arising out of their relationship were to be submitted to [adjudication] and others were to be decided by' their chosen tribunal for the final dispute resolution. If there 'is no rational basis upon which [Parliament and] businessmen would be likely to wish to have questions' about entitlement under the original contract to be 'decided by one tribunal and questions about' whether some or more of claims arising under that contract had been 'decided by another, one would need to find very clear language before deciding that they must have had such an intention' (*Fiona Trust* at [7]).
>
> (d) 'A proper approach to construction therefore requires the court to give effect, so far as the language used by [Parliament] the parties will permit, to the [policy and] commercial purpose of the arbitration clause' (*Fiona Trust* at [8]).
>
> (e) If there were to remain 'the distinctions' between arbitration, and by analogy adjudication, clauses which require arbitration or adjudication for disputes on the one hand 'under' and, on the other hand, arising 'out of' or 'in connection with' the underlying contract between the parties they reflect no credit upon English commercial or statute law (*Fiona Trust* at [11]).
>
> (f) In adjudication cases under the 1996 Act (coincidentally the same year as the Arbitration Act) the court: 'should start from the assumption that [Parliament] and the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal' (*Fiona Trust* at [13]).

> (g) There is no logical reason for thinking that there should be any difference in meaning or application between dispute resolution clauses (or even dispute resolution arrangements adumbrated in a statutory instrument such as the Scheme) whether in arbitration or adjudication which call for disputes arising 'under' the contractual or statutorily imposed dispute resolution regime to be treated jurisdictionally differently from those 'arising 'out of' or 'in connection with' the underlying regime.
>
> [32] In this context, I consider that the courts at the highest level have strongly signposted a departure from such previous distinctions and that the courts on adjudication cases should follow this direction. It follows that a dispute as to whether all or some of the alleged entitlements which one contractual party has against the other has been settled in a binding way arises 'under' the original contract. That is wholly logical because what is supposedly settled is the alleged entitlement to be paid 'under' the original sub-sub-contract (in this case) of Maher. It would be extraordinary and illogical if the parties here or Parliament had intended that an otherwise properly appointed adjudicator would have jurisdiction if addressing what entitlement a contractor or sub-contractor might have to be paid in all circumstances save in relation to where a dispute arises as to whether that entitlement had been settled. If Murphy was right, save by ad hoc agreement, one could never adjudicate in a construction contract on an interim or final account which had been agreed in some binding way; that makes commercial and policy nonsense in circumstances in which such agreements must occur all the time and should be encouraged and supported by retaining the right to adjudicate if one party seeks to challenge the settlement on one basis or another".

52. Finally, in *Bresco Electrical Service Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, [2021] 1 All ER 697, the Supreme Court decided that a dispute can be referred to adjudication even if one of the parties is in liquidation and there are cross claims, notwithstanding that the Insolvency Rules create a single net balance between the parties; that dispute was still "under the contract". The *ratio* of the decision turned on the compatibility of the adjudication and insolvency regimes. Lonsdale advanced various arguments in an attempt to persuade the Supreme Court that the single net balance created by the Insolvency Rules was not a claim "under the Contract", but was instead a claim under Bresco's insolvency. These included the argument (recorded at [38]) that the liberal construction afforded to similar provisions in agreements to arbitrate (by reason of the *Fiona Trust* principle) was inappropriate in the adjudication context "mainly because adjudication was imposed upon the parties by the 1996 Act, rather than freely agreed [i.e. the Statute Argument], but also because arbitration was different in kind from adjudication".

53. Lord Briggs (with whom the other members of the court agreed) addressed this argument at [39]-[41]:

> "[39] There is some reported authority, but little agreement, on the question whether the liberal construction afforded to jurisdiction provisions in arbitration agreements should inform the construction of s 108 of the 1996 Act and para 1 of the Scheme, in relation to the jurisdiction of an adjudicator. In

the leading arbitration case *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951, [2007] Bus LR 1719, the question was whether an arbitration agreement which conferred jurisdiction in relation to a dispute about repudiation of the contract should extend to the question whether the contract should be rescinded for bribery or misrepresentation in its inception. The House of Lords held that it did, and that this did not depend upon fine distinctions about whether the contract required that the dispute arose 'under' or 'in relation to' or 'in connection with' the contract.

[40] A similar issue arose in relation to adjudication under a construction contract in *Hillcrest Homes Ltd v Beresford and Curbishley Ltd* [2014] EWHC 280 (TCC), (2014) 153 ConLR 179. At para [50] HHJ Raynor QC saw 'considerable force' in the submission that the reasoning in *Fiona Trust* was inapplicable to construction adjudication because the provision for adjudication was the consequence of statutory intervention. By contrast in *J Murphy & Sons Ltd v W Maher and Sons Ltd* [2016] EWHC 1148 (TCC), (2016) 166 ConLR 228, [2017] Bus LR 916 Sir Robert Akenhead reached the opposite conclusion, treating the learning about arbitration in *Fiona Trust* as a useful analogy at para [23]. The editors of Hudson's Building and Engineering Contracts (14th edn, 2019) prefer Judge Raynor's view, at para 11–022, while the editors of Keating on Construction Contracts (Supplement to 10th edn, 2019), para 18–077 appear to veer toward recognising the force of *Fiona Trust* by analogy.

[41] There is in my view little to be gained by an extensive analysis of the question how close is the analogy between arbitration and adjudication for the purpose of applying or not applying the learning in *Fiona Trust*. There are plainly points to be made on both sides. There are obvious differences between arbitration and adjudication, but they are both types of dispute resolution procedures for which provision is made by a contract between the parties, in which recourse to that procedure is conferred by way of contractual right. I am not persuaded that the statutory compulsion lying behind the conferral of the contractual right to adjudicate points at all towards giving the phrase 'a dispute arising under the contract' a narrow meaning, by comparison with a similar phrase in a contract freely negotiated. The fact that, after due consideration of the Latham Report, Parliament considered that construction adjudication was such a good thing that all parties to such contracts should have the right to go to adjudication points if anything in the opposite direction. Indeed, the fact that the right to adjudicate is statutorily guaranteed is a powerful consideration favourable both to its recognition as a matter of construction, and to the caution which the court ought to employ before preventing its exercise by injunction".

54. Turning to the leading textbook commentary, Ardmore drew my attention to *Coulson on Construction Adjudication (4th edn)*, *Keating (11th edn)* and *Hudson's Building and Engineering Contracts (14th edn)*. In summary:

    a. The editor of *Coulson*, published after *Aspect* but before *Bresco*, comments at 7.129 on the conclusion in *Hillcrest* to the effect that "…on a strict interpretation of the words 'arising under the contract', such a conclusion may well be right", but notes (as I have already alluded to) that the case does not fully explain the reasons for its conclusion or how it addresses the commercial

point relied upon in *Fiona Trust*. The editor goes on to say that the issue of whether there is an analogy with *Fiona Trust* in respect of adjudication provisions "therefore remains open for clarification. Its potential importance should not be underestimated".

b. The editors of *Keating*, published after the decision in *Bresco*, read the Supreme Court in that case to be saying that "while there are obvious differences between arbitration and adjudication, the fact that the right to adjudication was considered by Parliament to be such a good thing that it is statutorily guaranteed, was a powerful consideration in favour of applying the *Fiona Trust* principles to adjudication provisions" (at 18-089).

c. The editors of *Hudson's* (published before *Bresco*) examine the *Fiona Trust* principle at 11-022 and submit that "this reasoning is inapplicable to adjudication clauses". The footnote reference clarifies that this submission relies upon the decision in *Hillcrest*. The editors go on to refer to the Statute Argument and point out that the purpose of the regime under HGCRA 1996 was to introduce a speedy mechanism for resolving disputes on an interim basis. They then opine that "[t]hat purpose does not require any dispute arising out of the relationship into which the parties have entered or purported to enter to be decided by the same tribunal. Indeed it encompasses the possibility of different disputes being decided by different tribunals: the parties are not bound to adjudication and a dispute can be submitted to arbitration or litigation following an Adjudicator's decision". Later in the same paragraph, the editors consider both *Aspect* and *Murphy* and observe that "[n]either of these decisions addressed the rationale behind the decision in the *Fiona Trust* case, which is specifically applicable to arbitration, or the fact that when the HGCRA 1996 was enacted, there was a long standing and well-recognised distinction (which the legislature must be taken to have appreciated) between disputes 'arising under' a contract and those 'arising in connection with' a contract".

d. The Supplement to the 14th edn of *Hudson's* addresses the decision in *Bresco* at 11-020, observing that the reasoning of Lord Briggs in [41] of that decision did not form part of the *ratio* and that it also fails to account for the fact that "Parliament considered that the 'good thing' should be governed by the narrow meaning". By way of explanation, the editors then point out that a proposed amendment to the Bill to insert the words 'or in connection with' in what became section 108 HGCRA 1996 was not proceeded with and that this background to the passing of the HGCRA 1996 "brings into play the rule in *Pepper v Hart* that the court may have regard to reports of the debates in Parliament on a Bill for the purpose of ascertaining the meaning of a provision of the resulting Act where: the provision is ambiguous or obscure, or leads to an absurdity; a statement as to the meaning of the provision is made by or on behalf of a minister or other promoter of the Bill, and the statement is clear".

> The editors conclude by saying that "[t]his would strongly support the argument that the phrase 'a dispute arising under the contract' should be given a narrow meaning in accordance with the law as understood at the time of the passing of the HGCRA 1996".

55. Attempting to draw the strings of these various authorities and text book commentaries together, and having regard to the arguments of both parties, I reject Ardmore's case that the *Fiona Trust* principle does not apply in respect of adjudication provisions. My reasons are as follows.

56. Although the *Fiona Trust* principle applies to arbitration clauses, I agree with Sir Robert
Akenhead in *Murphy* (at [32]) that Lord Hoffmann's speech in *Fiona Trust* confirms a "strongly signposted" departure from previous linguistic distinctions between disputes arising on the one hand "under" and, on the other hand, "arising out of" or "in connection with" the underlying contract between the parties. Such distinctions "reflect no credit upon English commercial law" (*Fiona Trust* at [12] and *Murphy* at [31](e)). Contrary to Mr Pliener's submissions, I do not consider that the general nature of Lord Hoffmann's observations on interpretation is undermined by the fact that a relevant factor in that case was his analysis of section 7 of the Arbitration Act 1996.

57. Against that background, while Lord Mance's observations in *Aspect* as to the analogy between arbitration and adjudication are *obiter* and not binding on this court, it is perhaps not surprising that he expressed himself in the way that he did, i.e. that he was 'very content' to proceed on the basis that the *Fiona Trust* principle applies to statutory adjudications. He did not seek to make any countervailing points against the application of the *Fiona Trust* principle to adjudications, as Mr Pliener very fairly conceded during his submissions.

58. There is nothing in the argument that the *Fiona Trust* principle cannot apply by analogy to adjudication clauses simply because adjudication is a creature of statute (notwithstanding that the Statute Argument was considered in *Hillcrest* at [50] to have "considerable force"). On the contrary, that Parliament considered all parties to appropriate contracts should have a right to adjudicate "points if anything in the opposite direction" - see *Bresco* at [41]. In my judgment, the origin of the clause (whether it be by express agreement or Parliamentary provision) does not affect the principles of interpretation articulated in *Fiona Trust*. I agree with the observations on *Murphy* made by the editors of the Construction Law Reports to the effect that "Parliament should, when legislating for the construction industry, be considered to be as concerned with business common sense as contracting parties are taken to be". Mr Pliener conceded during the course of the hearing that in light of the observations of Lord Briggs in *Bresco*, Ardmore could not sensibly place any weight on the Statute Argument. Importantly, those observations were expressly made having regard to *Hillcrest*, *Murphy* and the competing views of the editors of *Hudson's* and *Keating* (see [40] of *Bresco*).

59. Absent the Statute Argument, *Hillcrest* is authority only for the proposition that the wording of other dispute resolution provisions may serve to narrow the scope of an adjudicator's jurisdiction (see [51]). This is of course an argument that will depend upon the terms of the contract in any given case.
60. In *Murphy*, Sir Robert Akenhead not only considered there to be analogies between arbitration clauses and adjudication provisions, he also took the view that the "commercial common sense" spoken of by Lord Hoffmann in *Fiona Trust* has a "particular resonance" in relation to adjudication and that courts dealing with adjudication cases should follow the direction of travel signposted in *Fiona Trust*. Sir Robert Akenhead provided a careful explanation as to why this was so at [31] of his judgment and Mr Pliener has provided me with no convincing basis on which I could determine that he was wrong.
61. Mr Pliener points out that Sir Robert Akenhead makes no reference to either *Hillcrest* or *Aspect* in his judgment, but I do not consider this to undermine its persuasive authority. Lord Mance's observations in *Aspect* are entirely consistent with Sir Robert Akenhead's views as expressed in *Murphy.* In *Hillcrest*, the only submission recorded in the judgment against the reasoning in *Fiona Trust* being applicable to adjudication clauses (a submission which the judge found to have "considerable force") was the Statute Argument. The judge in *Hillcrest* does not appear to have had submissions about the detailed analogies between adjudication and arbitration with which Sir Robert

    Akenhead was concerned, just as he did not address the detailed reasoning in *Fiona Trust*.
62. Mr Pliener also submits that it is clear from [32] of *Murphy* that Sir Robert Akenhead was approaching the *Fiona Trust* issue through the prism of the point that arose in that case as to a settlement agreement. He contends that the judge was not considering the reasons at [6] in *Fiona Trust* which he submits underpin the outcome at [7]. Accordingly, Mr Pliener contends that the ratio of *Murphy* is "of limited assistance" to BDW. I disagree.
63. Paragraph [31] of *Murphy* appears to me to involve a careful and detailed analysis of the ways in which adjudication and arbitration are similar. It is not specifically tied to the factual question that was before the court in that case (to which Sir Robert Akenhead turns only in [32] of the judgment). That analysis picks up:
    a. (at [31(a)]), the consensual nature of adjudication, albeit underpinned by statute. Paragraph [6] of *Fiona Trust* also focuses on the relationship and agreement between the parties in the context of arbitration. Once the Statute Argument is removed, there is no meaningful distinction to be made. As Lord Briggs pointed out in *Bresco*, although there are obvious differences between arbitration and adjudication "they are both types of resolution procedures for which provision

        is made by a contract between the parties, in which recourse to that procedure is conferred by way of contractual right".

b. (at [31(b)]), the desire for a "quick and efficient adjudication" and the concern to avoid "the risks of delay" emphasised by Lord Hoffmann as part of his reasoning in paragraph [6] of *Fiona Trust*[1] in relation to arbitration. It is common ground that speed and efficiency are watchwords of the adjudication process.

c. (at [31](c)]), that it is doubtful that Parliament and the parties "would want as a rational legislature and business people respectively 'only some of the questions arising out of their relationship…to be submitted to [adjudication] and others to be decided by' their chosen tribunal for the final dispute resolution". This is the point Lord Hoffmann makes in *Fiona Trust* at [6], when he says that the parties to an arbitration clause "want those disputes decided by a tribunal which they have chosen". I add that the parties to adjudication are equally free to choose the identity of their adjudicator, as is clear from clause 39A.2 of the Building Contract (referred to above at paragraph 7) which is in similar terms to those that apply to arbitration in clause 39B.1 ("an arbitrator shall be an individual agreed by the Parties or appointed by the person named in the Appendix…"). I accept of course, as Mr Pliener points out, that parties may refer a number of different disputes arising over the course of a lengthy building project to adjudication and that this may (over time) involve the use of different adjudicators. However, I do not consider this to detract from the general proposition that business people are likely to want their existing (live) disputes to be determined by an adjudicator of their choice, as the most commercially efficient and cost effective means of dispute resolution.

64. It is true that some of the points raised in *Fiona Trust* at [6] were not specifically addressed by Sir Robert Akenhead in *Murphy* at [31], but, dealing with these in turn, Lord Hoffmann focused on the reasons why parties are likely to want their disputes determined by a tribunal which they have chosen, namely:

a. "on the grounds of such matters as its neutrality, expertise and privacy". These are features which generally apply also to adjudication[2]. As the court observed in *Beumer Group UK Limited v Vinco Construction UK Limited* [2016] EWHC 2283 (TCC) at [22]: "adjudication, which for all its time pressures and characteristics concerning enforceability, is still a formal dispute resolution forum with certain basic requirements of fairness. Although adjudication proceedings are confidential, decisions by adjudicators are enforced by the High

1 The reference in 31(b) of *Murphy* to *Fiona Trust* at [7] appears to be a typo – it is clearly a reference to *Fiona Trust* at [6].

2 See for example the obligation at 39A.5.5 of the Building Contract on the Adjudicator to act "impartially" together with his or her entitlement to use "his own knowledge and/or experience" (at 39A.5.5.1). Of course the majority of adjudicators will not be chosen for their expertise as lawyers, but because their skills in other disciplines are likely to assist them in finding an interim solution which meets the needs of the case (see *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, (2005) 104 ConLR 1, [2006] BLR 15 at [86]).

Court and there are certain rules and requirements for the conduct of such proceedings".

b. "the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law". These are features which apply to international arbitration but which in any event are primarily focussed on the efficiency of the underlying process (also a key feature of adjudication). Furthermore, as Mr Choat rightly pointed out, the *Fiona Trust* principle applies equally to domestic arbitrations such that Mr Pliener's argument (to the effect that in the international context there are particular reasons why the terms of an arbitration agreement should be given a broad scope which justify the conclusion in [7] of *Fiona Trust*) does not in fact advance his position.

65. I can see nothing in these features which renders Lord Hoffmann's conclusion at [7] of *Fiona Trust* inappropriate or inapplicable to adjudication provisions. In so far as [6] describes the purpose of the arbitration clause, that purpose is, in a number of material respects identified by Sir Robert Akenhead in *Murphy*, mirrored in adjudication provisions. Accordingly I agree with [31(g)] of *Murphy* that there is "no logical reason" why the conclusion arrived at by Lord Hoffmann at [7], which is premised upon the accuracy of his description of the purpose of an arbitration clause, should not also apply to adjudication provisions whose purpose is similar. To use Mr Pliener's terminology, I consider that the relevant "underpinnings" for adjudication are in many ways similar to those identified by Lord Hoffmann for arbitration and I agree with Mr Choat that this strongly supports the application of the *Fiona Trust* principle to adjudication provisions.

66. Mr Pliener raised two additional arguments in support of the proposition that the *Fiona Trust* principle does not apply to adjudication provisions. Both stem from observations made by the editors of *Hudson's*. First, Mr Pliener submits that it is clear from the *Hudson's* supplement that there is scope for Ardmore to rely upon the principles in *Pepper v Hart* and thus to persuade the court of Parliament's intention that section 108(1) HGCRA 1996 should be interpreted narrowly. I do not, however, consider that this is an argument that is open to Ardmore on this application. Aside from the fact that the courts will generally resist the temptation to look at Hansard, this argument has neither been foreshadowed in Ardmore's evidence nor (beyond the passing reference to the *Hudson's* Supplement) has it been developed in any detail in its skeleton. Indeed in his reply submissions, Mr Pliener confirmed that it was not central to his case. Importantly, Ardmore has not sought to refer the court to any extracts from Hansard, just as it has not sought to explain in its evidence how the *Pepper v Hart* requirements are met in this case.

67. It is not enough on a summary judgment application of this type for a defendant to point to the suggestion in a text book that reference to Hansard would support the proposition it seeks to advance, without providing the court with any evidence whatever to that effect. I certainly do not consider that such reference is sufficient on

its own to enable the court to determine that Ardmore has a realistic (as opposed to a "fanciful") prospect of success (see *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15(i)]). I note that in its skeleton argument, Ardmore put its case on this no higher than that "it is **suggested** that the editors of *Hudson's* are correct" (**emphasis added**). But this does not appear to me to satisfy the evidential burden of establishing the existence of a realistic defence that carries some degree of conviction (*Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15(ii)]).

68. Second, Mr Pliener submits that the Building Contract was agreed long before the decision in *Fiona Trust* and thus the relevant factual matrix at the time of entry into the Building Contract must involve the "long standing and well-recognised distinction" identified by *Hudson's* "between disputes 'arising under' a contract and those 'arising in connection with' a contract". This distinction, which the parties and draftsman are to be taken to have been aware of, supports the proposition, says Mr Pliener, that the parties to the Building Contract made deliberate usage of different formulations in the adjudication and arbitration provisions and thus must have intended the adjudication provision to be narrower than the arbitration provision.

69. Once again the difficulty with this submission appears to me to be that it relies heavily upon the assertion by the editors of *Hudson's* of the existence of "a long-standing and well-recognised distinction", an assertion which suggests that the *status quo* prior to *Fiona Trust* was one of certainty as to the meaning of the different expressions "under the contract" and "in connection with the contract". However, Mr Pliener made no attempt to justify this assertion by reference to the pre-*Fiona Trust* case law and, as Mr Choat points out, it is apparent from Lord Hoffmann's speech in *Fiona Trust* itself at

    [11]-[12] that there was in fact no clarity or consistency prior to the date of that decision. Put at its highest, one could only really say that there was a live debate as to the true construction of these differing expressions. Accordingly I cannot see that Ardmore has any real prospect of establishing that the factual matrix on which it seeks to rely was known or reasonably available to both parties (including the draftsman) at the time that the Building Contract was finalised (see *Arnold v Britton* [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619 per Lord Neuberger PSC at [21]).

70. In all the circumstances, I consider that Ardmore has no real prospect of success in arguing that the *Fiona Trust* principles do not apply to adjudication provisions. Ardmore has not satisfied me that there is any other compelling reason why this matter should be disposed of at trial.

71. In arriving at this conclusion I have borne in mind the observation of the Privy Council in *Altimo Holdings v Kyrgyz Mobil Tel Limited* [2011] UKPC 7, [2012] 1 WLR 1804 per Lord Collins at [84] that "[t]he general rule is that it is not normally appropriate in a summary procedure…to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts". However, Mr Pliener realistically accepted that there is no factual

dispute in this matter and that accordingly this warning has considerably less traction than might otherwise be the case. Indeed Mr Pliener was unable to provide me with any convincing reason why I should not determine the *Fiona Trust* question on this application.

72. Finally, I must turn to the issue which appears to have made all the difference in *Hillcrest*; the significance of the use by the draftsman of different wording in the adjudication and arbitration clauses. It was not suggested that this was an issue in respect of which Ardmore would wish to rely upon any factual evidence and accordingly I again see no reason (and none was suggested) why I should not "grasp the nettle and decide it" (*Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15(vii)]).
73. Applying the well-known principles of construction as summarised by Lord Hamblen in *Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2, [2023] 1 WLR 575 at [29], the court must objectively construe the relevant words of a contract in their documentary, factual and commercial context. Given my decision as to the applicability of the *Fiona Trust* principle, however, it seems to me that the words of Article 5 of the Building Contract must be given a wide meaning unless there is very clear language to indicate the contrary.
74. I start from the assumption that the parties to the Building Contract, as rational businesspeople, are likely to have intended any dispute arising out of the relationship into which they had entered to be decided by the same tribunal – whether that be arbitration or adjudication. The nature of the adjudication process and the purpose of the HGCRA 1996 appears to me amply to support this assumption.
75. As Lord Briggs observed at [10] and [13] in *Bresco*:

> "10…Speaking generally, adjudication is one of a spectrum of dispute resolution mechanisms which range from party and party negotiation at one end, through mediation, early neutral evaluation (ENE) and arbitration to litigation at the other end, lying roughly between ENE and arbitration. ENE delivers a private non-binding opinion on the merits of the dispute from an independent, respected and often expert source. Arbitration delivers a (usually) private determination from a similar source which is binding subject to very limited scope for appeal. Adjudication shares with ENE the independent, often expert, respected source together with the speed and economy of ENE, with a provisional element of binding decision, unless and until the matter in dispute is later resolved by arbitration, by litigation or by agreement.
>
> …
>
> 13…It was designed to be, and more importantly has proved to be, a mainstream dispute resolution mechanism in its own right, producing de facto final resolution of most of the disputes which are referred to an adjudicator".

76. The purpose of the Act is thus not controversial: disputes are to be resolved quickly and effectively without delay and then put to one side to be revived in arbitration or litigation only if the parties have been unable to accept the decision of the adjudicator, or have been unable to reach a compromise having regard to the information provided by that decision as to the possible outcome before the ultimate tribunal.
77. Against that background it is difficult to see why it would make commercial sense for the parties to want to restrict the scope of the consideration by the Adjudicator to a narrower scope of dispute or difference than could ultimately be referred to arbitration or litigation. Furthermore, as Mr Choat points out, Ardmore accepts that BDW's claim under the DPA 1972 could be referred to arbitration under Article 6A of the Building Contract. I am inclined to agree with Mr Choat that, absent very clear words, it would make little commercial sense for the parties to have intended that their contractual claims could be referred to adjudication and/or arbitration but that any tortious claims (including tortious claims dealing with the same defects and seeking the same relief) could only be referred to arbitration.
78. I do not consider the fact that different wording was used for the arbitration clause at Article 6A to indicate a clear intention that the jurisdiction of the adjudicator would be narrower than that of the arbitrator (as opposed to, say, indicating merely that the draftsman was following the wording of section 108 HGCRA 1996 for the purposes of the adjudication provision) and I agree with BDW that, on a true interpretation, the contrast between the two provisions therefore has no material significance. The courts have made clear at the highest level that wording in dispute resolution provisions referring to disputes arising 'under' the contract should not be interpreted narrowly and in *Bresco* the Supreme Court took the view, albeit *obiter*, that the statutory underpinning of the (in this case express) contractual right to adjudicate is a factor which, if anything, weighs in favour of giving a broad interpretation to the phrase "a dispute arising under the contract".
79. In all the circumstances, I am not inclined to regard the decision in *Hillcrest* as persuasive. In that case, the Judge was convinced of the force of the Statute Argument and his subsequent decision on construction must be seen in that context. He was not operating on the basis that the *Fiona Trust* principle applied by analogy and, as I have already said, he did not carry out a detailed analysis of Lord Hoffmann's speech.
80. For all the reasons I have given, I find that there is no significance in the differing wording in the arbitration and adjudication provisions of this Building Contract and I consider that BDW has successfully established that Ardmore has no real prospect of success in establishing a lack of jurisdiction on the part of the Adjudicator in respect of the DPA 1972 claim for the purposes of the summary judgment application.
81. Finally, I must address two additional arguments.
82. First, BDW submits that, although its primary case on the true interpretation of Article 5 of the Building Contract is not dependent upon any reference to other provisions of

the Building Contract, if anything further is needed, then that case is reinforced by clauses 2.5.1 and 2.5.2 of the Building Contract, which provide as follows:

> "2.5.1 Insofar as the design of the Works is comprised in the Contractor's Proposals and in what the Contractor is to complete under clause 2 and in accordance with the Employer's Requirements and the Conditions (including any further design which the Contractor is to carry out as a result of a Change in the Employer's Requirements), the Contractor shall have in respect of any defect or insufficiency in such design the like liability to the Employer, whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design who, acting independently under a separate contract with the Employer, had supplied such design for or in connection with works to be carried out and completed by a building contractor not being the supplier of the design.
>
> 2.5.2 Where and to the extent that this Contract involves the Contractor in taking on work for or in connection with the provision of a dwelling or dwellings the reference in clause 2.5.1 to the Contractor's liability includes liability under the Defective Premises Act 1972 and where the application of s.2(1) of the Act is included in the Employer's Requirements the Contractor and the Employer respectively shall do all such things as are necessary for a document or documents to be duly issued for the purpose of that section and the scheme approved thereunder which is referred to in Appendix 1".

83. Given my decision on interpretation, which agrees with BDW's primary case, it is not essential to my reasoning that I address this argument in any detail. However, having heard argument on the point, I am inclined to agree with BDW that if reinforcement is required, then, on balance, clause 2.5.2 provides that reinforcement.

84. Clause 2.5.1 is a deeming provision. Regardless of what its obligations under the Building Contract would otherwise be, clause 2.5.1 provides that Ardmore will have the "like liability" to the Employer as would an architect or other professional designer – whether that liability be under statute or otherwise. Clause 2.5.2 goes on to explain that where the Building Contract involves work on a dwelling, the "like liability" includes liability under the DPA 1972. This does not actually render Ardmore liable under the DPA 1972 - rather Ardmore's liability under the Building Contract depends on whether an architect carrying out design work under a separate contract would have a liability under the DPA 1972; if so, then Ardmore will have "the like liability".

85. Against that background I consider that it would be odd if the parties had intended such "like liability" (expressly provided for in the Building Contract) to be excluded from consideration by an adjudicator by reason of the wording used in Article 5. Much more likely, in my judgment, is that they intended a dispute over whether Ardmore had "like liability", or indeed whether it was itself liable under the DPA 1972, to be determined under Article 5 as a "dispute or difference [arising] under this

Contract". Thus, on balance, it appears to me that clause 2.5.2 is of assistance in confirming the construction for which BDW contends.

86. Second, Ardmore drew my attention in argument to *John Doyle Construction Limited v Erith Contractors Limited* [2020] EWHC 2451, a case decided on very different facts, in which Fraser J (as he then was) observed at [6] that:

> "…the streamlined and fast-track procedure in the Technology and Construction Court for enforcement of adjudicator's decisions was not designed to deal with the sort of issues that arise where decisions are (as this one is) years, not months old; nor that are made in respect of construction operations and disputes that are themselves (as this one is) eight years old. This is a procedural observation, but such older background matters may not be suited in all cases to the very rapid judicial enforcement currently available in the TCC for all adjudication business, a procedure that has been refined over the last two decades to mirror the ethos of the Housing Grants, Construction and Regeneration Act 1996 that intended adjudication to be a speedy remedy…".

87. However, I do not consider Fraser J's procedural observation to advance Ardmore's defence of the application for summary judgment on this ground. Mr Pliener accepts that the stale nature of the adjudication is not enough in itself to thwart the grant of summary judgment on an enforcement application. As Lord Mance observed in *Aspect* at [14], although adjudication "was envisaged as a speedy provisional measure…there is nothing to prevent adjudication being requested long after a dispute has arisen and without the commencement of any proceedings"[3]. While I accept that the nature of this case, involving as it does claims made long after the relevant events took place, is very different from the majority of adjudication enforcement applications that come before the TCC, nonetheless this unusual feature is not sufficient on its own to establish a real prospect of a defence on Ground 2.

The Natural Justice Challenges (Grounds 3 and 4)

88. It is common ground that adjudication is inherently a rough and ready process and that the threshold for a valid natural justice challenge is high (see by way of example *Dorchester Hotel Ltd v Vivid Interiors Ltd* [2009] EWHC 70 (TCC), (2009) 122 ConLR 55, [2009] Bus LR 1026 ("*Dorchester Hotel*") per Coulson J at [18]-[23]). As Chadwick LJ observed in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, (2005) 104 ConLR 1, [2006] BLR 15 at [86]:

> "…The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case…The need to have the 'right' answer has been subordinated to the need to have an answer quickly".

3 See also Lord Briggs in *Bresco* at [13].

89. I need not set out the numerous authorities on this subject in any detail. However, I have extracted the following key principles, relevant to this case, from the authorities to which I was referred:

a. Adjudication decisions must be enforced even if they contain errors of procedure, fact or law (see *Home Group Ltd v MPS Housing Ltd* [2023] EWHC 1946 (TCC), 209 ConLR 177 ("*Home Group*") at [50(1)]). Arguments that merely involve a critique of the adjudicator's reasoning will not succeed (see *AMD* at [26]).

b. While the rules of natural justice do generally apply to adjudication there are obvious limits on the application of those rules owing to the nature of the process and the purpose of adjudication is not to be thwarted "by an overly sensitive concern for procedural niceties". Accordingly, the court should examine any alleged breach of the rules of natural justice in an adjudication with scepticism (see *Dorchester Hotel* at [18]-[20] and *Home Group* at [50(2)]).

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c. An adjudication decision will not be enforced if it is reached in breach of natural justice and the breach is material (see *Home Group* at [50(2)]). The burden of establishing a material breach rests with the party asserting breach of natural justice (see *AMD* at [23]). I shall return in a moment to the arguments in this case as to what is meant by the requirement for a "material" breach.

d. If the adjudicator has endeavoured generally to address the question referred to him (including any sub-issues) in order to answer the question then, "whether right or wrong, his decision is enforceable" (see *AMD* at [21] and *Pilon Ltd v Breyer Group Plc* [2010] EWHC 837 (TCC) ("*Pilon*") at [22.1]).

e. If the adjudicator has failed to address the question referred to him, including a failure to consider the defence to the claim or some fundamental element of it, then his decision may be unenforceable on grounds of natural justice, but only if his failure was both deliberate and material. An inadvertent failure to consider one of a number of issues will not ordinarily render a decision unenforceable (see *AMD* at [21] and *Pilon* at [22.2]-[22.4])). The judge "will not put a fine tooth comb through the adjudicator's decision seeking to ensure that every single point has somehow been addressed" (see *Coulson* at 13.55).

f. The mere fact that an adjudication is concerned with a large or complex dispute, that it is intrinsically complicated or 'heavy', is not a bar to adjudication enforcement (see *AMEC Group Ltd v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC), [2010] All ER (D) 267 ("*AMEC v Thames Water*"), per Coulson J, as he then was, at [60] and *Home Group* at [50(3)]). Merely

pointing to a large quantity of material, some of which is seen for the first time in the adjudication itself, is not sufficient (*Home Group* at [41(2)].

g. Arguments based on time constraints impacting the ability to respond fairly are unlikely to succeed. It is a fact of adjudication life that the process has to be carried out pursuant to a strict timetable. While this often causes pressure on the responding party, it is inherent in the process and complaints of unfairness are generally "given short shrift by the courts" (*Home Group* at [41] and [42]).

h. "What matters is whether, notwithstanding the size or complexity of the dispute, the adjudicator…was satisfied that he could do broad justice between the parties" (*AMEC v Thames Water* at [60]).

i. The question in almost all cases where the Adjudicator has considered the position but expressed the clear ability to render a fair decision, "will inevitably centre upon the timing of the provision of the material to the responding party, and its ability to fairly put its case, rather than the complexity of the material per se" (see *Home Group* at [39]).

j. When considering the opportunities available to the defending party in an adjudication, "the court can and should look at the opportunities available to that party before the adjudication started to address the subject matter of the adjudication and at what that party was able to and did do in the time available in the adjudication to address the material provided to it and the adjudicator" (see *Home Group* at [41(5)], citing *HS Works* (2009) 124 ConLR 69, [2009] BLR 378, per Akenhead J at [49]).

k. It has long been accepted that claims can be made by way of adjudication "at any time" (see *Dorchester Hotel* at [23], *Aspect* at [14] and *Bresco* at [13]).

90. Ardmore relies upon the Scottish case of *Whyte v Mackay Ltd v Blyth & Blyth Consulting Engineers Ltd* [2013] CSOH 54, 2013 SLT 556 ("*Whyte*") in support of the proposition that there are rare cases in which the court will be persuaded to refuse enforcement owing to the size and/or nature and/or timing of the claim. Constable J considered *Whyte* in *Home Group* at [43]-[44] as follows:

> "[43] Mr Neuberger also relied in his written submissions upon the Scottish case *Whyte and Mackay Ltd v Blyth & Blyth Consulting Engineers Ltd* [2013] CSOH 54, 2013 SLT 555, the only reported case in which a court unequivocally refused to enforce the adjudicator's decision because of the size and nature of the claim. The pursuer had employed the defender to advise and prepare a design for construction works. An adjudication award was obtained for £3,000,000 of which £894,674.00 was the assessed cost of future loss in carrying out underpinning to the property. The pursuer applied to enforce the award and the defender sought the reduction of the award on several grounds. The decision was not enforced due to the failure of the adjudicator to deal with certain issues, and Lord Malcolm expressed the view (at [47]) that—

'the adjudicator was presented with a next to impossible task. Even a judge would struggle to identify a procedure which would allow the complex issues of fact and law arising between the parties to be determined in any semisatisfactory manner within six weeks. In the circumstances of the present case, the well known problems, disadvantages and potential injustices of an adjudication are not counter-balanced, let alone outweighed, by any of the aims and purposes lying behind the 1996 Act. It is those public interest benefits which justify enforcement of an adjudicator's award, even a sub-standard and obviously wrong award … but they are more or less wholly absent in the present case. It follows that it would be disproportionate and wrong to enforce the award
…'

[44] In the commentary on this case in Coulson on Construction Contracts, the editor does not take issue with the determination of the Court in any way, describing the decision as careful and well-reasoned. It explains how, in that particular case, adjudication was an inappropriate process. 'Finally', the editor observes, 'there is a case that concludes that, sometimes, a claim will be too large and/or too complicated and/or raised too long after completion to be suitable for adjudication'".

91. At [45] Constable J expressed the view, with which I agree, that:

"[t]he issue in *Whyte* did not turn on questions of volume of complex material and constraints of time to respond…The driving concerns of the Court when considering the proportionality of enforcement (which amounted to an interference with the defenders' entitlement to peaceful enjoyment of their possessions) were the fact that the adjudication, relating to issues of professional negligence, had been brought more than six years after completion of the works, and that the pursuer would suffer no loss for many years into the future. Both of these fundamentally were at odds, it was held, with the rationale behind the statutory regime for speedy non-binding determinations". Ground 3

92. In Ms Whiting's statement she asserts that "[t]he fundamental reason BDW's claims were not suitable for adjudication is because of the passage of time" and she suggests that "Parliament could not have envisaged adjudication being used to resolve disputes on projects up to 30 years after practical completion". However, this was not the case advanced in argument.

93. Instead, Ardmore now makes a rather more nuanced argument. It contends that the unique combination of a 20 year old project and the pursuit of a £15m professional negligence claim by way of adjudication, a procedure which was primarily designed for the resolution of live or recent disputes, has created an inherently unfair situation in which it has "almost no relevant contemporaneous documentation" but must rely upon documents provided by BDW together with the searches made by BDW for documents. The problem it identifies is not the complexity of the issues or the amount of documentation involved, but rather the paucity and imbalance of documentation available to

Ardmore together with a process which is not capable of adequately addressing those problems. Ardmore points out that unlike arbitration or litigation, the adjudication process has very limited procedures to manage or police the disclosure process and that it is therefore impossible to address the unfairness of the position in which it finds itself by reason of its lack of access to relevant documents.

94. Mr Pliener accepts that the mere fact that this is an historic case is not, in itself, sufficient to give rise to a natural justice objection[4]. He also accepts that some element of unfairness, or at least the risk of unfairness, is probably 'baked in' to the retrospective extension of time to the limitation period for claims under the DPA 1972 effected by the BSA 2022. While he suggests that the passage of time militates against a rigorous application of the public policy requirement for a "pay now, argue later" approach, he also concedes that Ardmore must make good its natural justice objection by reference to its complaint of a lack of documentation and thus an inequality of arms. He submits that the key question for the court is the extent of the latitude to be given to the application of natural justice in the context of disputes with an extended 30 year limitation period.

95. Although Ardmore suggests in Ms Whiting's statement that BDW's disclosure in the adjudication was "selective by nature" and that BDW had therefore "exerted a

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disproportionate level of control over the adjudication" leading to inherent unfairness (a suggestion which was strongly resisted by BDW), I did not understand this suggestion to be maintained in such strong terms in submissions. Mr Pliener very properly made clear that Ardmore does not criticise BDW for the approach that it took to disclosure, but rather contends that BDW's initial collection of documents was inevitably selective and that thereafter the adjudication simply had "insufficient teeth" in the way of powers to order disclosure to redress the balance.

96. BDW resists the suggestion that this is a "special" case, whether owing to the passage of time or the position in relation to the disclosure of documents and it rejects any analogy with *Whyte*. It points out that it provided disclosure to Ardmore in response to a request made by the Adjudicator, that Ardmore made no complaint about that disclosure during the Adjudication and that Ardmore has provided no adequate explanation for its lack of project documentation. Further it submits that Ardmore has not satisfied the burden of establishing that any breach of natural justice was material (see *AMD* at [23]).

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4 This is consistent with representations made to the Adjudicator by Ardmore in its letter of 5 April 2024 to the effect that the problem "is not, in and of itself, that the project is 20 years old (although that underlies the issue) …".

97. To address these arguments I must now return to look at the chronology of events leading to the Decision, with a specific focus on the production of documentation by BDW.

98. As I have already said, the Letter of Claim attached what it described as "relevant Podium and Trifire reports" at Appendix 2. It is clear from the Letter of Claim that Podium LLP carried out intrusive surveys in May 2020 "for the purposes of obtaining EWS1 forms for the four buildings at the Development" and that "Podium identified the presence of a void between the insulation and internal block leaf and an absence of any horizontal fire barriers" (i.e. Podium identified the defect about which BDW was making complaint in the Letter of Claim). It is also clear that Trifire were instructed to advise on interim measures (including a waking watch and fire alarm system) necessary as a result of the missing fire barriers. In addition to these reports, the Letter of Claim also attached at Appendix 3 "relevant correspondence between Alumasc, Ardmore, SERS [the façade subcontractor] and others" which had been disclosed to BDW the previous year during investigations. This correspondence was summarised in detail in the Letter of Claim and was said to demonstrate that "cavity barriers were required by the manufacturer and that no alternative route to compliance was established at the time of construction".

99. In its letter of 28 September 2022, Ardmore responded saying that it was continuing "to investigate the allegations" made in the Letter of Claim and that it would need more time to respond. On 19 October 2022, Ardmore invited BDW "to provide voluntary pre-action disclosure of all and any documents BDW has in its possession (or is able to possess upon request) relating to the project…". Ardmore explained that it considered this to be a reasonable and proportionate request because it "will no longer possess records (which would have been disposed of in the ordinary course of business after the expiry of ordinary limitation)". I pause to note the use of the conditional perfect tense here; there is no assertion at this stage that relevant documents had in fact been disposed of and there is nothing in the evidence for this hearing to suggest that this had in fact occurred. Ardmore went on to ask for documents relating to BDW's standing to bring a claim together with details of the proposed remedial works considered necessary to remedy the alleged defects. It also requested that it be given an opportunity "to inspect any and all areas of the Development that are the subject to (sic) BDW's claim prior to any remedial works being undertaken…".

100. In its reply on 20 July 2023, BDW rejected the suggestion that Ardmore was entitled to wide-ranging pre-action disclosure. It noted, however, that in addition to the reports provided under cover of the Letter of Claim, it had also now provided Ardmore with "the Advice Note of Orla Fitzgerald, BDW's expert architect". BDW asserted that Ardmore now had "all that may be

required" to understand BDW's case. However, BDW offered Ardmore the opportunity to inspect the defects at the Development in advance of commencement of the remedial works.

101. Ardmore responded on 25 August 2023 noting that BDW had not provided details of six matters which were said to be "essential for Ardmore to be able to consider BDW's claim". With the exception of a request for information as to what surveys had been completed and whether further investigations were planned, these all related to information about remedial works and loss suffered by BDW.

102. Against this background, BDW sent its letter of 8 March 2024 indicating an intention to proceed to adjudication absent confirmation from Ardmore of its liability in respect of the identified defects.

103. In a letter dated 20 March 2024, Ardmore raised its natural justice objections, including that:

> "Ardmore's records in relation to the project are negligible and it has only today learnt that of the relevant project team, only 6 are still employed by Ardmore. Ardmore is investigating the extent of their knowledge and recollection as they could be employees dealing with matters unrelated to the external wall system. In any event, to expect these employees to have any cogent recollection of the project after 21 years and with many other projects completed since is unrealistic. In terms of records located to date, Ardmore has only been able to retrieve just over 1GB of data in relation to the entire project and expects that data to be irrelevant to the external wall render system in any event. It is of course validating this assertion".

104. Ardmore did not explain why its records were "negligible", why it had only just discovered the position in relation to its employees and why it "expected" the data it held to be irrelevant, nor did it say whether it had made any efforts to obtain documents from third parties. Nevertheless, it went on to point out that for the purposes of the Adjudication it would be "heavily, if not almost entirely, reliant" on documents selected by BDW and that this would be "inherently unfair outside the normal unavoidable risk of adjudication unfairness". In its subsequent letter of 28 March 2024, Ardmore expressly pointed to the lack of power on the part of the Adjudicator to order a referring party to comply with disclosure obligations or to require third parties to provide disclosure. BDW responded to these points in a detailed letter dated 2 April 2024.

105. In his decision on Jurisdiction of 4 April 2024 the Adjudicator rejected Ardmore's arguments. He noted that "the largest part of the Referral" was a fire report from Mr Brown and that a large bundle of exhibits containing primarily technical data had been supplied to Ardmore in full. He recorded that there were in essence "three full lever arch files and two smaller files which comprise the whole of the claim and the back up to it" and he rejected

the suggestion that this involved a complex or "mammoth" task for Ardmore. He observed that the Response ought to be capable of being prepared in three weeks and he confirmed that: "[m]y examination of the case as presented in the Referral does not present an adjudication that could not comply with the rules of natural justice nor is the case as presented unreasonable or oppressive".

106. On 5 April 2024, Ardmore wrote again to the Adjudicator to express its concern at his decision. It emphasised that the problem was not "in and of itself" that the project was 20 years old or that the issues are too complex or the documentation too extensive. Instead, it reiterated that Ardmore had "almost no project documents" and that, having now searched its electronic and hard copy archive it had identified only 5 documents of any potential relevance to the dispute. It was this evidential inequality on which Ardmore hung its case of unfairness. The letter went on to say this: "…should your Natural Justice Decision remain, in order to limit that unfairness to some degree at least, we invite you to exercise your powers under Clause 39A of the Construction Contract and direct BDW to search for and produce the narrow critical documents listed below to you and Ardmore". In a table, Ardmore then made four targeted requests for documents which it said would not be onerous for BDW to disclose. It made clear that it was continuing to reserve its position on natural justice even in the event of provision of these documents but it confirmed that three weeks should be sufficient to provide its Response subject to time starting to run from the provision of the documents.

107. I pause to note that clause 39A.5.5.3 of the Building Contract provides that the Adjudicator may "[require] from the Parties further information than that contained in the notice of referral and its accompanying documentation or in any written statement provided by the Parties including the results of any tests that have been made or of any opening up".

108. Also on 5 April 2024, BDW wrote to the adjudicator addressing the proposals in Ardmore's letter of the same date. It pointed out that Ardmore's letter was silent as to any efforts it had made over the last two years to investigate the claim but it indicated that it was content to agree an extended timetable.

109. In his Directions No 1, also issued on 5 April 2024, the Adjudicator directed that BDW provide the documents identified by Ardmore in its table "insofar as the documents requested are in the power and possession of BDW" and that (on the assumption these documents were readily available) they should be provided by midnight on 8 April 2024.

110. BDW provided additional disclosure in response to this direction under cover of a letter dated 8 April 2024. The disclosure provided was explained in an additional column added to Ardmore's original table of requests, which BDW termed "Table 1". BDW explained, however, that in the time available it had not been able to identify any (additional) documents falling within requests 2

and 4. BDW's solicitors updated this position by way of a further letter on 16 April 2024 in which they explained that, in addition to the manual searches that had been undertaken in advance of the adjudication, they had now "conducted further manual searches of the documents available to us". Specifically they confirmed that "we and our client have now completed a reasonable and proportionate search of all such documents and provide by way of disclosure limited additional documents as set out in the updated Table 1, enclosed". The updated Table 1 shows that documents were now being provided by BDW in response to each of the four original requests made by Ardmore.

111. Ardmore responded to BDW's further provision of documents in a letter dated 18 April 2024 by observing that it inferred that "BDW is not and will not be carrying out any further searches or providing any further disclosure". It neither suggested that the searches conducted or the disclosure provided by BDW were inadequate, nor did it identify any additional categories of document that it wanted to see. It did not seek to query what documents were, or were not, searched for and Mr Pritchard confirms in his second statement that no such query was ever raised by Ardmore. Furthermore at no time during the Adjudication was it suggested by Ardmore that BDW had failed to comply with the Adjudicator's direction of 5 April 2024. Instead, in the letter of 18 April 2024, Ardmore raised only two questions as to the external envelope works to the Development, inviting the Adjudicator to make urgent directions as to the provision of further information in response to those questions.

112. It is clear from the Decision [at 68.00] that the Adjudicator directed that he would like to see an answer to these two questions and that, on 19 April 2024, Howard Kennedy wrote two letters attaching further materials[5]. Thereafter a timetable for the adjudication was agreed and on 8 May 2024, Ardmore provided its detailed Response.

113. In its Response, Ardmore again asserted that BDW had been selective in the documents it had disclosed and it maintained its position that it was reliant upon BDW for documents. However, in section 5 it referred to its requests for disclosure and further information, acknowledging that disclosure had been produced on three separate dates and then arguing that this disclosure undermined BDW's case. There was no attempt to identify any further disclosure that was required. On the contrary, the focus appears to have shifted to the significance of the questions raised in the 18 April 2024 letter as to the external envelope works to the Development. I did not understand Ardmore's submissions on natural justice to focus, or rely, upon a breach of natural justice in connection with any perceived failure to respond to these questions. This is

5 I cannot see that these have been provided to me by either party, but the Response refers to a third tranche of disclosure from BDW on 19 April 2024.

unsurprising – in his Decision at 290.00-292.00 the Adjudicator explains that BDW provided a bundle of documents which satisfied the questions posed.

114. Ardmore's Response to the allegations of deliberate concealment and breach of duty under the DPA 1972 comments in detail on the available documents but does not suggest anywhere that further categories of document are sought or required in order properly to defend the claim. On the contrary, Ardmore seeks to rely upon a failure on

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the part of BDW to discharge its evidential burden and prove on the balance of probabilities that Ardmore installed a façade system at the Development that did not comply with the Building Contract and/or the statutory requirements of the DPA 1972.

115. In its Rebutter served on 5 July 2024, Ardmore again raised an issue about disclosure, specifically in relation to a report into the structure of the Development that Ardmore understood had been prepared by AECOM. Ardmore asked in the Rebutter for directions that two categories of document relating to AECOM's review be provided. Ardmore pressed again for this disclosure in a letter of 19 July 2024 and on 25 July 2024, BDW agreed to provide (and did provide) various categories of document sought by Ardmore (albeit maintaining that they were "not material to the issues in this Adjudication").

116. Finally, I should mention that under cover of its Response, Ardmore provided a witness statement from Ms Whiting of 8 May 2024, in which she explains, amongst other things, that (i) the decision had been taken by Ardmore only to divert significant resources into investigations in connection with this claim on 8 March 2024; (ii) Ardmore's record keeping in relation to the project had not been robust; (iii) the archive had not been maintained "as well as we would now hope"; and (iv) that in 2017 there was a full physical relocation of Ardmore's head office at which time "a number of archive boxes were delivered by the relocation company and left outside in the rain", causing significant damage, albeit that it had proved impossible to identify whether any of these boxes had included hard copy records relating to the Development.

Analysis

117. Against that background and in the particular circumstances of this case, I take the view that there is nothing in the complaints raised by Ardmore and that it is not entitled to any additional degree of latitude by reason of the passage of time, essentially for the following reasons.

118. Ardmore accepts, as it must, that the Adjudicator was satisfied that he could do broad justice between the parties. The court should be slow to interfere with that conclusion (see *Home Group* at [38]).

119. Ardmore also accepts that the mere passage of time is not in itself enough to create unfairness and it is clear from the authorities to which I have referred

that adjudication provisions may be relied upon "at any time". Nevertheless, in principle it must be the case that the longer the period since the works in respect of which complaint is made, the more careful the court will need to be in scrutinising any complaint of unfairness. I did not understand Mr Choat to dissent from the broad proposition that the passage of time will, in this sense, be a relevant factor.

120. The complaint here is not a complaint of complexity or volume of documents, just as it is not a complaint that the Adjudicator could not deal with the matter fairly within the relevant time constraints. Instead, it is that Ardmore does not have access to relevant documents but is reliant upon BDW's disclosure, an issue which is said to have been exacerbated by the passage of time. This appears to me to raise two related questions relevant to the natural justice challenge: first, what is the reason for Ardmore's inability to access relevant documents and/or information and second, given Ardmore's stated lack of documents, were the broad requirements of natural justice satisfied during the adjudication process in relation to the provision of disclosure by BDW, even having regard to the passage of time?

121. As to the first question, it is quite clear that Ardmore's record keeping over the relevant period has been deficient. This much is accepted by Ms Whiting in her statement of 8 May 2024 in which she says that "Ardmore's record keeping in relation to recent projects is robust, but this is not the case for projects completed around the time of the Development". One example of this that she gives is that documents relating to one project were sometimes stored in manuscript labelled boxes belonging to another. Although in her statement, Ms Whiting refers to the fact that, until recently, there has been no reason for those operating in the construction industry to retain documents for longer than required for usual limitation periods (i.e. 15 years), she does not say that Ardmore's lack of documentation is the consequence of it having in fact operated on this basis. Instead the essence of her evidence is that Ardmore has been "unable to find" pertinent documents.

122. Against this background I can only infer that Ardmore's lack of documentation is not down to disposing of documents after any relevant limitation period had expired. I note from Mr Pritchard's second statement that there was in fact every reason for Ardmore to retain documents in relation to this project in circumstances where (i) by the time that this dispute was intimated in July 2022, there had already been two previous disputes about Ardmore's works, the first in 2007 when Ardmore carried out remedial works to address water leaks and the second in 2015 when BDW arbitrated against Ardmore regarding balcony defects in Ardmore's works, until a settlement concluded in February 2017 further to which Ardmore carried out remedial works to the balconies; (ii) the Grenfell Tower tragedy occurred on 14 June 2017, whilst Ardmore was carrying out these remedial works; and (iii) in 2019 BDW began asking

Ardmore for documents relating to the cladding materials installed at the Development. Even assuming that Ardmore was operating on the assumption that documents needed only to be retained for 15 years (which does not in fact appear to be the case), these supervening events should have alerted it to the importance of retaining its documents for longer.

123. I consider that where BDW had been asking for documents relating to cladding materials since 2019 and BDW had sent its Letter of Claim in 2022, Ardmore should have taken proper steps over a number of years to find, and gather together, the documentation it had relating to its works. It is not clear to me that such proper steps were in fact taken, notwithstanding Mr Pliener's submission that "in accordance with the usual narrative" Ardmore did "all that it could".

124. In addition, and given the difficulties Ardmore says that it encountered in trying to locate documents, one might have anticipated that it would be keen to inspect the Development before any remedial works commenced – certainly it suggested as much in its letter of 19 October 2022. However, as I have already said in connection with Ground 1, Ardmore did not take up the offer to carry out such inspection and has provided no explanation as to why it did not do so. It may be that the reason is to be found in Ms Whiting's candid statement that "[t]he need for Ardmore to divert significant resource into investigation only arose on 8 March 2024 when BDW provided the assignment of the contract and intimated an immediate adjudication".

125. In so far as Ardmore had a paucity of information going into the adjudication by reason of either its poor record keeping or its own decision not to carry out any detailed investigations into the issues raised in the Letter of Claim and subsequent correspondence, including its decision not to inspect the Development when it had the opportunity to do so, that seems to me significantly to colour its natural justice complaint. Neither of these things would appear to be the consequence of the 20 year passage of time since the works. Specifically, I consider that it is difficult for Ardmore credibly to complain that it was not in a position to know what had actually been installed at the Development when it chose not to carry out its own inspection.

126. Further, and in any event, the chronology I have referred to above simply does not support the proposition that there was a breach of natural justice in relation to the provision of documents to Ardmore (i.e. the second question).

127. In its correspondence pre-adjudication, Ardmore originally sought extensive disclosure from BDW. It was provided with various documents and reports by BDW in advance of the adjudication and it is of course unsurprising that these were selected by BDW. That some reports were only provided upon commencement of the Adjudication (a complaint made by Ms Whiting in her statement) is not a valid complaint and was not pursued by Mr Pliener in his submissions.

128. Once the adjudication got under way, Ardmore chose to identify only four categories of disclosure which it considered "critical" (see its letter of 5 April 2024). Far from being unable to do anything about this request, the Adjudicator directed that it should be complied with. BDW subsequently provided documents corresponding to each of the four categories requested.

129. Its requests for disclosure having been met, Ardmore did not complain of any omissions in the disclosure provided by BDW and nor did it choose to identify any additional disclosure that it needed (even though it was clear that its requests for disclosure would be taken seriously by the Adjudicator). Mr Pliener submitted that this reflected a recognition on the part of Ardmore that it was unlikely to achieve much more in the way of disclosure through the adjudication process, but he accepted that he had no evidence to that effect. Far from seeking additional disclosure, the correspondence shows that Ardmore concentrated on two questions about the building envelope which appear also to have been answered following a direction from the Adjudicator.

130. When Ardmore did identify an additional category of disclosure that it wanted to see in its Rebutter, this was again provided by BDW. During his submissions, Mr Pliener specifically focused upon the fact that the documents provided by BDW did not contain any contemporaneous photographs and that Ardmore has no means of knowing what happened to those. However, as he also accepted, Ardmore made no request for any photographs during the Adjudication, as it could have done. Mr Pritchard confirms in his second statement that if Ardmore had had a reasoned concern about any missing documents during the adjudication that concern "would have been investigated". I have no reason to conclude otherwise.

131. Accordingly, I reject the suggestion that the Adjudication had insufficient "teeth" to ensure that Ardmore had access to the documents it required. Clause 39A.5.5.3 of the Building Contract gave the Adjudicator the power to require the parties to provide further information and documentation, a power which he exercised upon the request of Ardmore. The fact that an arbitrator may have had the power (depending on the procedure he or she decides to adopt under the Construction Industry Model Arbitration Rules[6]) to make more extensive and comprehensive disclosure orders does not appear to me to take matters further in the circumstances of this case.

132. Furthermore, I reject the suggestion that the inevitable consequence of the adjudication process was that Ardmore would receive only "selected" documents from BDW. There is certainly no basis on which to criticise BDW for the approach it took to disclosure, as Ardmore now accepts. On the contrary, it is clear from its evidence that BDW took the entirely proper approach of carrying out reasonable and proportionate searches and disclosing

6 See clause 39B.6 of the Building Contract which provides that the arbitration is to be conducted in accordance with the JCT 1988 edition of CIMAR.

relevant documents to Ardmore. In his second statement, Mr Pritchard confirms again that his firm, Howard Kennedy LLP, and, to the best of his knowledge, BDW, "carried out a reasonable and proportionate search in order to provide documents responsive to Ardmore's requests and the Adjudicator's direction". He explains his understanding that BDW's document review had sought to capture BSC and BEL documents and he rejects the suggestion that the approach to disclosure was "selective". He says that:

> "My firm and I took very seriously the Adjudicator's direction of 5 April 2024 and complying with the same. When complying with it we were not 'selective', rather, we sought to find and provide responsive documents, whether or not they might be helpful or unhelpful to either side's cases".

133. Ardmore does not appear to dispute this evidence. Instead, it complains that it does not know the scope or extent of the searches undertaken by BDW, an issue described by Ms Whiting in her statement as "critical". However, this was not a complaint raised by Ardmore during the Adjudication and it also made no attempt to ask for further information about the scope of the searches, as it could have done had it genuinely considered there to be a need to understand their scope. In his oral submissions, Mr Pliener clarified that Ardmore's real point was that the process of adjudication does not oblige either party to search for documents, but I cannot see that this advances his position where this will always be the case in any adjudication. Does the historic nature of the dispute exacerbate the situation, bringing the absence of searches into sharper relief on the facts of this case? I think not, given Ardmore's failure even to refer to the point during the adjudication, a failure which undermines its credibility at this stage. The complaint at the time of the adjudication concerned only

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the absence of disclosure, but, for the reasons I have given, I do not consider that complaint to be well-founded.

134. Further and in any event, it is common ground that Ardmore carries the burden of establishing the materiality of any breach of natural justice. At the hearing there was a debate between the parties as to whether it is necessary for Ardmore to show that the breach "was" in fact material to the outcome of the Adjudication, as BDW contends, or whether it is sufficient for Ardmore to show that it was "potentially" material, as Ardmore contends. Having considered the authorities with care, I am inclined to agree with Mr Pliener that the breach must be shown to have had "a potentially significant effect" on the overall result of the adjudication in that it is either "decisive or of considerable potential importance to the outcome…and is not peripheral or irrelevant" (see *Pilon* at [22.4] and *Cantillon* at [57(c) and (d)]). Mr Choat

relied upon Constable J's distillation of the relevant legal principles in *Home Group* at [50(2)] for his proposition that the breach must be shown to be material "in that it has led to a material difference in outcome", but I can find nothing in Constable J's earlier analysis of the authorities to support this proposition.

135. In any event, however, whichever test is to be applied, Ardmore has failed to satisfy it. The highest it has been able to put its case on materiality is apparent from Ms Whiting's statement in which she says that "it is probable" that records from BSC or BEL "would be materially relevant to Ardmore's defence to BDW's deliberate concealment claims" and that evidence from these companies "more than likely exists, and…could have provided Ardmore with a compelling defence". To my mind this rather speculative evidence is very far from establishing that any disclosure that might have been available from these companies[7] would have had a potentially significant effect on the outcome of the adjudication, much less that it would in fact have been decisive.

136. I also reject Ms Whiting's suggestion in her evidence that the Adjudicator "seems to recognise that the absence of documents caused material harm to Ardmore's defence". I do not read the Adjudicator's statement that he could only find documents confirming the necessity of fire barriers but could not find anything to suggest that fire barriers were not being provided as being intended to indicate that further disclosure was likely to have made a material difference to Ardmore's defence. On the contrary, it is purely a comment on the weight of the evidence. Ms Whiting's assertion that "if a robust process of disclosure had taken place…it is arguable that BDW would have produced documents that provided Ardmore with a compelling defence" appears to me to be nothing more than wishful thinking.

137. During his oral submissions, Mr Pliener pointed to paragraph 272.00 of the Decision where the Adjudicator explains that, on the evidence, there is "no certainty at all" as to what was installed on the external walls of the Development. He submitted that this was an issue that could have been resolved with additional disclosure.

However, even assuming that he is right about that, the Adjudicator concluded a few paragraphs later in his decision (at 276.00) that this was not even an issue that he needed to resolve because "[t]he thrust of any argument on defects does not go to the cladding system but goes to the lack of fire stopping. Both [potential external cladding] systems require fire stops". At 280.00, the Adjudicator observes that "[i]t is a bad point to even think that this can go to jurisdiction".

138. Mr Pliener then pointed to paragraphs 381.00-394.00 of the Decision, in which the Adjudicator deals with the issue of whether there had been deliberate

7 This of course assumes a lack of disclosure of relevant documents from these companies – an assumption which Mr Pritchard's evidence establishes is in any event incorrect.

concealment of the lack of fire barriers. He submits that the Adjudicator's decision on this point was made in the absence of all relevant documents. However, looking at the reasoning of the Adjudicator in this section of the Decision, I note that he does not say that he has not seen all relevant documents (as Ardmore suggests). He observes at 386.00 that he has examined in excess of 2500 documents and, although he accepts that he has "not seen every document generated in connection with this project" (an entirely unsurprising statement), nevertheless he says "the parties have made it clear given the date of the contract in 2002 they have done their best in finding those documents that exist readily in order to provide as much as they can to assist this Adjudication". At no time did Ardmore identify any additional documents it wanted to see, or seek a further direction from the Adjudicator for the provision by BDW of additional documents or information, in connection with this allegation. Further, there is, in any event, no credible evidence whatever to support the suggestion that any additional disclosure would potentially have made a material difference to the outcome.

139. Finally, Mr Pliener pointed to various paragraphs in Ardmore's Response and in its Rejoinder to Reply in which it made clear that BDW and/or its agents, BSC and BEL, would have been present on site during the construction of the Development – the inference being that they would have had access to numerous project documents. However, none of these paragraphs identifies the absence of relevant documents as a material factor in Ardmore's defence. On the contrary, they make submissions as to what the available documents (including progress reports disclosed by BDW) show, together with seeking to make a virtue of a lack of evidence from BDW. Once again, I consider these submissions on close analysis to be very far from establishing a potentially material effect on the outcome of the Adjudication by reason of a lack of disclosure.

140. Indeed, Ardmore's chosen approach at various junctures in its Response and Rejoinder to Reply (to the effect that there was an absence of substantiation by BDW of its case) does not appear to me to sit well with the submission that Ardmore was potentially materially prejudiced in its conduct of the adjudication. Parties who consider their opponents not to have produced sufficient by way of evidence to satisfy the burden of proof may choose not to seek further disclosure for fear of inadvertently improving the evidence against them. While it is impossible to know whether a strategic decision of that sort occurred here, there can be no doubt that Ardmore chose not to make any additional requests for disclosure beyond those to which I have referred in the chronology above. Equally, it has not chosen to address the reasons for this decision in its evidence. Each of the requests it did make was satisfied.

141. In all the circumstances, I do not consider that there is any real analogy to be drawn between the facts of this case and those in *Whyte*. That case was, in

any event, decided on its own facts. It did not involve arguments of the sort that have been raised here as to a lack of documentation. While it is true that both cases involved the passage of time, that is really where any similarity ends.

142. In my judgment the natural justice challenge under Ground 3 fails; Ardmore has no real prospect of successfully defending enforcement of the Adjudicator's decision on that ground.

Ground 4

143. Given my findings on Grounds 1-3 together with Ardmore's acknowledgement that it cannot escape enforcement with a win on Ground 4 alone (which would undermine the Adjudicator's decision only on breach of the Building Contract and not on liability under the DPA 1972), there is now no real need for me to address this Ground in any detail. However, as it has been argued, I shall deal with it briefly.

144. In short, Ardmore contends that the Adjudicator deliberately ignored a material defence in the context of the claim of deliberate concealment. Specifically (as identified in Ms Whiting's statement) the defence that BPCL or its agent "would have known the position on cavity barriers and that BDW is fixed with that knowledge as assignee". Ardmore's case is that the Adjudicator "clearly decided not to consider that point when resolving the question of what BDW would have known" about the presence of fire barriers.

145. BDW submits that there is no proper basis for a natural justice challenge on this ground because (i) Ardmore's submissions amount in reality to no more than "a critique of the adjudicator's reasoning"; (ii) the material defence on which Ardmore now seeks to rely was not in fact expressly raised by Ardmore in the adjudication; (iii) the Adjudicator did in fact deal with the issue which Ardmore claims was not considered; and (iv) that Ardmore has failed to satisfy its burden of establishing materiality. Analysis

146. Once again, I consider there to be nothing in this complaint and I need focus only on one or two of the points raised by BDW.

147. Having considered the various documents submitted to the Adjudicator by Ardmore, I agree with BDW that this "material defence" was not in fact squarely raised by Ardmore in the Adjudication. There are references in its documents to BSC and BEL, but its Response[8] focuses on what BDW itself knew, as does its Rejoinder to Reply[9]. BPCL is not even mentioned in the relevant sections of either the Response or the Rejoinder to Reply.

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8 For example at 6.13: "BDW would have had knowledge of this omission prior to/during construction" and at 6.16(a): "unless BDW can show the external envelope was constructed over a weekend, there is no prospect of BDW denying it would have seen the lack of cavity barriers if this was the case". 9 For example at 4.4(a) and 4.26.

148. BDW's Reply at 15-17 shows that BDW understood Ardmore to be advancing a case based on BDW's actual knowledge (as opposed to any knowledge that might be imputed to it by reason of the knowledge of BPCL or its agents).

149. Whilst frankly acknowledging that Ardmore did not plead out the 'material defence' on which it now seeks to rely, Mr Pliener nevertheless contends that its submissions could only have been understood on that basis. I disagree. Nowhere is there an express submission by Ardmore that BDW is to be fixed with the knowledge of BPCL, or of BPCL's agents, as assignee, and I can see no reason to suppose that the Adjudicator would therefore have understood the case to be advanced on that basis.

150. Tellingly in my judgment, Ardmore proposed a series of issues for resolution by the Adjudicator. BDW accepted these issues in a letter of 16 August 2024 and the Adjudicator duly dealt with each of Ardmore's identified issues in the Decision. These issues did not include the "material defence" now identified by Ardmore. On page 107 of the Decision, the Adjudicator sets out the issues and sub-issues arising in respect of the claim of deliberate concealment. As Mr Pliener accepts, there is no issue concerned with the knowledge of BPCL or its agents. The only issue concerned with knowledge is sub-sub issue 5: "[w]hat is the earliest date on which BDW with reasonable diligence could have discovered the omission of fire barriers".

151. In the circumstances, I am bound to say that I agree with Mr Choat that the failure to identify what is now said to be a material defence as one of the issues for determination by the Adjudicator, together with the failure to raise that defence in any of its submissions to the Adjudicator, is a fatal impediment to this natural justice challenge. I also agree that, accordingly, this challenge is no more than an attempt to contend that the Adjudicator made an error of law and/or of fact or that his reasoning was flawed.

152. Ground 4 fails. There is no real prospect of Ardmore establishing a breach of natural justice on this ground.

Conclusion

153. Given the conclusions I have arrived at on each of Grounds 1-4, I am satisfied that there is no real prospect of Ardmore successfully defending the claim on any of the Grounds identified. There is no other compelling reason why the case should be disposed of at trial.

154. Accordingly, the Decision falls to be enforced by way of summary judgment and I grant judgment in favour of BDW in the sum of **£14,539,243.45**, together with interest and costs.