



Neutral Citation Number: [2024] EWHC 2656 (Ch)

Case No: CR-2023-005574

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INSOLVENCY AND COMPANIES LIST (CHD)**

**IN THE MATTER OF RE A COMPANY**

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

Date: 21/10/2024

**Before :**

**INSOLVENCY AND COMPANIES COURT JUDGE BURTON**

**SITTING IN PRIVATE**

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**Faith Julian** (instructed by **Wedlake Bell**) for the **Applicant**  
**Phillip Patterson and George Eyre** (instructed by **Irwin Mitchell**) for the **Respondent**

Hearing dates: 7 & 8 October 2024  
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## **Approved Judgment**

This judgment was handed down remotely at 04.15pm on 21 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**ICC Judge Burton :**

1. This is the hearing of the Applicant's application for an injunction to restrain presentation of a petition in respect of a debt of approximately £7m (the "Debt"). For the purposes of these proceedings only, the debt is not disputed, but an injunction is sought on the basis that the Applicant claims to have a genuine and substantial cross-claim against the Respondent in an amount of at least £44m and as such, far exceeding the Debt.
2. The Applicant is a company involved in the acquisition of land for development primarily into residential apartment blocks.
3. The Respondent was once the Applicant's parent company. However following a group reorganisation, its shares were acquired by the Respondent's parent company such that they are now sister companies.
4. The Respondent is in liquidation. Prior to liquidation it operated as a construction company undertaking projects both for the Applicant and third parties. Its directors primarily attributed its liquidation to the losses that it made in the course of one such contract for a third party.
5. The Applicant states, in general terms (I shall come to the detail later), that the Respondent carried out all of the work on a number of projects undertaken by the Applicant, in particular in relation to four apartment blocks, all of which are clad in materials which render them ineligible for external wall system certification. As this hearing has taken place in private, with anonymised parties, I shall describe the four apartment blocks simply as Sites W, C, T and M.
6. The Applicant claims that having retained the freehold to the Sites, this exposes it to potential claims by those with leasehold interests and exposes both itself and the Respondent to potential claims from the current owners of the apartments under the Defective Premises Act 1972 (the "DPA"). It claims that it consequently has a genuine and serious cross-claim against the Respondent under both the DPA and the Civil Liability (Contribution) Act 1978 (the "Contribution Act").
7. Following the Grenfell Tower tragedy, the Government set up schemes to provide funding for parties with responsibility to carry out necessary remedial works. The two main funds referred to in these proceedings are the Building Safety Fund which opened in June 2020 for buildings over 18 metres tall and the Cladding Safety Scheme which opened in July 2023 for buildings between 11 and 18 metres high. Each of the buildings except M exceed 18 metres. Oral submissions focussed on alleged cross-claims in respect of cladding at Sites W, C and T.

**Relevant legal principles:**

***The Defective Premises Act 1972***

8. The Defective Premises Act 1972 (the "DPA") imposes duties upon persons taking on work for or in connection with the provision of a dwelling. Section 1 provides as follows:

"1 Duty to build dwellings properly.

(1) A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—

- (a) if the dwelling is provided to the order of any person, to that person; and
- (b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;

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

(2) A person who takes on any such work for another on terms that he is to do it in accordance with instructions given by or on behalf of that other shall, to the extent to which he does it properly in accordance with those instructions, be treated for the purposes of this section as discharging the duty imposed on him by subsection (1) above except where he owes a duty to that other to warn him of any defects in the instructions and fails to discharge that duty.

(3) A person shall not be treated for the purposes of subsection (2) above as having given instructions for the doing of work merely because he has agreed to the work being done in a specified manner, with specified materials or to a specified design.

(4) A person who—

- (a) in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings; or
- (b) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment;

arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work.

(5) Any cause of action in respect of a breach of the duty imposed by this section shall be deemed, for the purposes of the Limitation Act 1980, to have accrued at the time when the dwelling was completed, but if after that time a person who has

done work for or in connection with the provision of the dwelling does further work to rectify the work he has already done, any such cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished.”

9. It appeared to be uncontroversial for the purposes of the hearing before me that, as submitted by Ms Julian, residential apartments fall within the undefined meaning of “dwelling” and that a dwelling will not be fit for habitation if it is not capable of occupation for a reasonable time without risk to the health and safety of the occupants and without undue inconvenience or discomfort to them (see *Rendlesham Estates Plc v Barr Ltd* [2014] EWHC 3968 (TCC)).
10. Whilst section 1(4) of the DPA provides that a cause of action under section 1 accrues on the date the dwelling is completed, pursuant to section 4B of the Limitation Act 1980, where the cause of action accrued before 28 June 2022, the claim under the DPA is subject to a 30-year limitation period.

### ***The Civil Liability (Contribution) Act 1978***

11. Section 1(1) of the Contribution Act provides under the heading “Entitlement to contribution”:

“(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).”

12. A contribution may be recovered from any other person liable in respect of the same damage, whatever the legal basis of its liability, whether in tort, breach of contract, breach of trust, or otherwise. In *URS Corporation Limited v BDW Trading Limited* [2024] 2WLR 181 the Court of Appeal held that the right to make a claim for contribution is established when the three ingredients set out in s.1(1) of the Contribution Act can be properly asserted and pleaded, namely:

- i) is Party B liable, or could be found liable, to Party A?
- ii) is Party C liable, or could be found liable, to Party A?
- iii) are the respective liabilities of Party B and Party C in respect of the same damage suffered by Party A?

13. Coulson LJ stated:

“If those three ingredients are capable of being pleaded, then there is a cause of action for a contribution. The making of a formal claim by A against B is not required by the [Contribution Act].”

14. Pursuant to section 2(1) of the Contribution Act, the amount of contribution recoverable under the Act is such as may be found by the court to be just and

equitable, having regard to the extent of that person's responsibility for the damage in question.

***Restraining the presentation of a winding-up petition***

15. The legal principles governing the exercise by the court of its discretion when considering an application to restrain the presentation of a winding-up petition based upon a debt that is subject to a cross-claim were clearly summarised by David Stone, sitting as a Deputy High Court Judge in *LDX International Group LLP v Misra Ventures Limited* [2018] EWHC 275. Starting at paragraph 13 he said:

“13. It is well established that the court will restrain the presentation of a winding up petition if the debt is disputed on genuine and substantial grounds. Even if the debt itself is not disputed, the court will restrain the presentation of a winding up petition if the debtor has a genuine and serious cross-claim that exceeds the value of the debt.

14. (I note in passing that, technically, the cross-claim need only equal the debt less £750. Whilst the £750 will be material in some cases, it is not in this case, and so I say no more about it.)

15. In *In re Bayoil SA* [1999] 1 WLR 147, Nourse LJ, with whom Ward and Mantell LJ agreed, said this (at page 155):

‘The ability of a petitioning creditor to levy execution against the company does not entitle him to have it wound up. Moreover, an order that a company be wound up, unlike a bankruptcy order, is often a death knell. Nor can it be certain that a liquidator, even with security behind him, will prosecute the company's claims with the diligence and efficiency of its directors. These, I believe, are considerations which go to justify the practice in cross-claim cases. I emphasise that the cross-claim must be genuine and serious or, if you prefer, one of substance; that it must be one which the company has been unable to litigate; and must be in an amount exceeding the amount of the petitioner's debt.’

16. I note in passing that later courts have occasionally reworded slightly Nourse LJ's requirement that the cross-claim be "genuine and serious or, if you prefer, one of substance" (emphasis added) to a requirement that the cross-claim be "genuine and serious and of substance" (emphasis added): see, for example, Laddie J in *Orion Media Marketing Limited v Media Brook Limited and Anor* [2002] 1 BCLC 184 at paragraph 35. I have, below, adopted the Court of Appeal's formulation.

17. In *In re Bayoil*, Ward LJ added this (at page 156):

‘Fourthly, a winding up order is a draconian order. If wrongly made, the company has little commercial prospect of reviving itself and recovering its former position. If there is any doubt about the claim or the cross-claim, that seems to me to require that the court should proceed cautiously.’

18. As counsel for MVL rightly conceded, Lord Justice Nourse's remark that the company be "unable to litigate" its claim is not a barrier to injunctive relief. In *Dennis Rye Limited v Bolsover District Council* [2009] EWCA Civ 372, Mummery LJ, with whom Elias LJ agreed, said this (at paragraph 19):

‘Cases familiar to practitioners in the Companies Court were cited: *Re Bayoil SA* [1999] 1 WLR 147 at 155 per Nourse LJ; *Re a Debtor* (No 87 of 1999) [2000] BPIR 589 at 592H- 594G (Rimer J in a bankruptcy case); *Montgomery v Wanda Modes Ltd* [2003] BPIR 457 at paragraphs 28 to 36 (Park J). The authorities are illustrations of the well-established practice of the Companies Court that, if a company has a genuine and serious cross-claim, which is likely to exceed the petition debt, the court will normally exercise its discretion by dismissing the winding up petition and allowing the company the opportunity to establish its cross-claim in ordinary civil proceedings. A company is not prevented from raising a cross-claim in winding up proceedings simply because it could have raised or litigated the claim before the presentation of the petition or it has delayed in bringing proceedings on the cross-claim. The failure to litigate the cross-claim is not necessarily fatal to a genuine and serious cross-claim defeating a winding up petition. However, in deciding whether it is satisfied that the cross-claim is genuine and serious, the court is entitled to take into account all the relevant circumstances, such as the fact that a company has not even attempted to litigate the cross-claim, or that there are reasons why it has not done so.’

See also *Popely v Popely* [2004] EWCA Civ 463 at paragraph 123 per Jonathan Parker LJ, with whom Ward LJ and Moses J agreed.

19. This court, and the Court of Appeal, have also been clear that an application for injunctive relief is not the occasion for a detailed analysis of the claimed cross-claim. For example, in *Tallington Lakes Limited v Ancasta International Boat Sales*

*Limited* [2012] EWCA Civ 1712, David Richards J, with whom Thorpe and Patten LJ agreed, said this (at paragraph 41):

‘The practical issue is the extent to which the court must go in determining whether there is a genuine dispute on substantial grounds. The court must, as Oliver LJ put it, take a view whether, on the evidence, there really is substance in the dispute. It is not, however, practical or appropriate to conduct a long and elaborate hearing, examining in minute detail the case made on each side. Such a course will involve both delay in getting the issue ready for hearing and a potentially lengthy hearing. In this case, the evidence went through several rounds over a period of some six months. This time would have been better spent in getting a Part 7 claim underway. A lengthy hearing is likely to result in a wasteful duplication of court time. Petitioning creditors must take a realistic view of whether the company is likely to establish a genuine and substantial dispute.’

20. Park J put it this way in *Montgomery* (at paragraph 8):

‘I wish to add one other point of legal principle which is in my view clearly established by the authorities. The point is familiar in cases where the company's ground of opposition to the petition is that it disputes the debt relied on by the petitioner. In the present case WML admits the debt but says that it has a cross-claim in a greater amount. However, I believe that the principle which I am about to state is equally applicable in either context. The principle is that, if the ground of opposition by the company raises substantial questions of fact or law (or both) which are genuinely disputed by it, the petition should be dismissed: a court hearing on a winding-up petition is not the appropriate forum to determine such questions. Rather they should be litigated in the normal forum for resolving them.’

21. Counsel for MVL relied on the decision in *Orion Media Marketing Limited v Media Brook Limited* [2002] 1 BCLC 184 in which Laddie J said (at paragraph 31) "if the recipient of a statutory demand wishes to put forward a substantial defence to the sums claimed, or a cross-claim, it is incumbent upon it to show that the defence or the cross-claim is indeed genuine, serious and of substance". Bare assertions will not suffice for an injunction, he submitted, citing Warren J in *In the matter of Pan Interiors Limited* [2005] EWHC 3241 (Ch). As Mr David Foxton QC sitting as a Deputy High Court Judge put it in *Re a Company* [2016] EWHC 3811 (Ch) at paragraph 33:

‘I accept Mr Davies' submission that applications for injunctions to restrain the presentation or advertisement of a petition are brought on in haste and both this factor and the role of the Companies Court on such applications must temper the court's expectations as to the extent of the evidence which will be available. Nevertheless, as is clear from Warren J's judgment in *Pan Interiors*, there is some minimum evidential threshold necessary before it can be said that there is a substantial dispute.’

16. Although the Deputy High Court Judge's decision in *LDX* was overturned on appeal, the Appeal Court noted that he had correctly directed himself on the relevant law, choosing only to refer to one additional case (which itself refers back to another). At paragraph 17 of his judgment in the Court of Appeal, Sir Timothy Lloyd LJ said:

“The case is *Re a Company (No.006685 of 1996)* [1997] B.C.C. 830, a decision of Chadwick J (as he then was), which refers back to a Court of Appeal decision and in particular the judgment of Oliver LJ in *Re Claybridge Shipping Co SA*, which had been decided in 1981 but was not reported until [1997] 1 B.C.L.C. 572. Chadwick J at 835 cited passages from Oliver LJ in the *Claybridge* case from which I quote one sentence:

‘On an application like this court necessarily has to take a view whether, on the evidence, there really is substance in the dispute which is raised.’”

Later on the same page, Chadwick J said:

“In my view those authorities and, in particular the authorities of the Court of Appeal to which I have referred, make it clear that the general rule under which this court refuses to entertain a petition founded on a disputed debt applies only where the dispute is a genuine dispute founded on substantial grounds; and does not preclude this court from determining - or entitle this court to decline to determine—the question whether or not there are substantial grounds for dispute. Indeed, in the passage from the judgment of Oliver LJ to which I have just referred, he pointed out that the court necessarily has to take the view whether on the evidence there really is substance in the dispute which is raised by the alleged debtor.”



***Evidence in support of an application to restrain presentation***

17. Consistent with the principles summarised by the Deputy High Court Judge in *LDX*, only in very rare cases will the evidence in support of an application to restrain presentation of a winding-up petition be the subject of cross-examination. The court's approach to such evidence was explained by Patten J in *Portsmouth v Alldays Franchising Ltd* [2005] BPIR 1394 (Ch) at para12:

“[t]he mere fact that a party in proceedings not involving oral evidence or cross examination asserts that certain things did or did not occur, is not sufficient in itself to raise a triable issue. That evidence inevitably has to be considered against the background of all the other admissible evidence and material in order to judge whether it is an allegation of any substance. Once the court considers that the evidence is reliable in that sense, and not some attempt to obfuscate the real issues by raising a series of hopeless allegations then it does, of course, become necessary to consider what the legal consequences of it are.”

18. In *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488, [2008] BCC 612 Rimer LJ explained circumstances in which the court may reject untested, written evidence:

“The basic principle is that, until there has been such cross-examination, it is ordinarily not possible for the court to disbelieve the word of the witness in his affidavit and it will not do so. This is not an inflexible principle: it may in certain circumstances be open to the court to reject an untested piece of such evidence on the basis that it is manifestly incredible, either because it is inherently so or because it is shown to be so by other facts that are admitted or by reliable documents”

**The basis of the Applicant's asserted cross-claim**

19. The Applicant's first witness statement in support of the application made by its director “Mr R” explains that as a developer and, in many instances, also as the freehold owner of high-rise residential properties, the Applicant has “become involved with the subject of cladding remediation”. He explains that central government launched a scheme to allow for funding to be made available to allow those responsible for remediation work to do so. The Department for Levelling Up, Housing and Communities (“DLUHC”) provided guidance for those applying for funding. That guidance explains that the DLUHC may provide pre-tender funding in an amount of up to 10% of the estimate of the likely cost of carrying out the work. Not all remediation work is funded: the guidance summarises the work that would fall outside the scope of the scheme. It also explains that developers are expected to take reasonable steps to recover the costs of the remedial work from other parties.

***Site W***

20. Mr R's evidence states that the site was purchased by the Applicant with the Respondent contracted to undertake the works as the main contractor. Since

acquisition and following completion of the development and sale of the units, the Applicant has held the freehold interest to the site. The rear of the building and part of one side is clad in a manner which renders the building unsafe. In 2021, the Applicant obtained pre-tender support funding for approximately £212,000. A draft contract was agreed with a contractor to undertake the works and in July 2023, the Applicant was approved for a grant of £15m for the cost of the remediation. However the proposed contractor entered administration and the Applicant will apparently need to “start much of the process again” with “no guarantee whatsoever that funding will be awarded and if so in what amount and in respect of which works”.

### *Site C*

21. The Applicant contracted to build a 9-floor block of largely residential flats. Mr R’s evidence states that the Applicant subcontracted the work to the Respondent. The Applicant acquired and retained the freehold to the residential block. His evidence states that Site C “is entirely clad in spandrels, is ineligible for EWS1 certification and needs to be remedied in order to comply with the relevant building regulations etc”. The Applicant obtained a total of approximately £432,000 in pre-tender support funding and in May 2023 entered into a grant funding agreement for approximately £8,328,000. Mr R states that this will not be sufficient to cover all the necessary works and that the Applicant will have to bear a significant amount of additional costs.

### *Site T*

22. Mr R’s evidence states that the Applicant contracted with a housing association to convert office premises to a residential site with 98 residential units. He states that the work was sub-contracted to the Respondent. A housing association took a 999-year lease of the building and granted shorter-term leases in respect of individual units. The cladding on this 13-storey development is extensive. In August 2021, the Applicant obtained pre-tender support funding of approximately £1.5m. Mr R states, in reliance upon DLUHC’s guidance, that the DLUHC’s assessment of the likely cost of remediation work is likely to be “upwards of £15m at an absolute minimum”. He states that the Applicant’s own current estimated cost of the works is £20.6m but there will be a significant unfunded element in relation to balcony work and timber on terraces.
23. The housing association in question has commenced proceedings against the Applicant claiming total losses of £5.5m, with provision to plead further, any additional losses. Mr R states that he understands the proceedings were commenced:

“with an eye to the Limitation Act to safeguard its position. No doubt its ultimate intention was and remains that the claim will encourage or force [the Applicant] to undertake remedial works (and presumably continue to seek funding to assist with such works.)”
24. The claim is currently subject to a stay that will expire in the early part of next year.
25. The crux of the Applicant’s asserted cross-claim is thus that:

“in all projects, [the Respondent] undertook the work whether as main contractor or as lead subcontractor”

26. and in relation to Site T, that:

“...[the Respondent] is every bit as, if not more liable to [the housing association] under the terms of section 1 DPA 1972. Accordingly, [the Applicant’s] claim against [the Respondent] is a simple one under section 1 of the [Contribution Act].”

“in circumstances wherein [the Respondent] was the entity that actually undertook the work, the lion’s share [of any liability found to be due to the housing association] would surely fall to be ordered against [the Respondent]”.

27. The Respondent opposes the application on the basis that it considers it only to have been explained in the vaguest terms, is contingent and highly speculative and, to the extent that any such claim exists, its value is significantly less than the Debt. Mr Patterson submits that adverse inferences should be drawn from the fact that the cross-claim was not litigated or even asserted until after the Respondent’s liquidators demanded payment of the Debt. The Respondent’s liquidator’s witness statement highlights that Mr R’s first witness statement fails to exhibit any of the relevant contracts and fails to refer to any contractual obligations alleged to have been owed by the Respondent. He states that his understanding is that however defective work turns out to be, a party can only be liable for it under the DPA when that party was actually responsible for the work. He states that as the deficiencies in the relevant cladding systems arise from their design, the Applicant cannot establish that the Respondent owed a relevant duty under the DPA unless it can show that the Respondent was responsible for “the design of the element of the cladding system that is alleged to be deficient”. The Respondent will not be liable:

“if it was instructed to design it in the way that it did. That might mean, for example, that it was instructed to use a particular cladding product that has transpired to be non-compliant with the regulatory regime.”

28. The Respondent’s liquidator consequently highlights in his evidence that Mr R does not even allege that the Respondent owed any relevant design obligations in respect of any of the four sites.

29. The Applicant sought to address these criticisms in its reply evidence:

“In the first instance, the argument is that [the Respondent] took on work for or in connection with the provision of dwellings and in so doing undertook work not done in a workmanlike/professional manner, with proper materials so that the building (and/or the dwellings therein) was fit for habitation when completed, with the result that [the Respondent] is liable under the DPA. Put in the simplest possible terms, the argument is that the cladding is unsafe or deemed unsafe and [the Respondent] was responsible for it

across every project. The type of presumed (or actual) claimants will obviously vary across the different projects.”

30. Following reference to the Court of Appeal’s decision in *BDW Trading Ltd*, Mr R explains that it is his understanding that in addition to a claim under the Contribution Act, the Applicant could also claim directly against the Respondent under the DPA:

“The nature of the claims will of course be similar to the [Contribution Act] iteration of the same principle, i.e. that [the Respondent] took on work for or in connection with the provision of dwellings and in so doing undertook work not done in a workmanlike/professional manner, with proper materials so that the building (and/or the dwellings therein) was fit for habitation when completed. This direct cause of action applies across the range of projects referred to in my first witness statement including [Site T].”

31. In a further witness statement, filed by the director who was in control of the companies when entering into contracts at sites T and C (which preceded Mr R joining the business) (“Mr K”), in relation to Site T, Mr K states:

“The work done on the development was done by [the Respondent] using various sub-contractors. This applied to design aspects in the same way as the construction work itself.

... Design work in a project such as [Site T] is obviously an extensive and on-going process. Much of the design process within the project thus unfolded after the commencement of the construction work.

... In case there be any doubt, the contractual arrangements surrounding the JCT contract between the housing association and [the Applicant] was not one wherein [the Applicant] did (or contracted with the architects and engineers to do) the design work with [the Respondent] following [the Applicant’s] instructions as far as the design was concerned. The design work was done by [the Respondent] with this being process spanning both before and after [the Applicant’s] design and build contract with the housing association dating from February 2006. Nor was the situation one wherein [the Applicant] required [the Respondent] to design the building and such things as the cladding in the way that it was done. To put it in simple terms, the cladding was done in the way that [the Respondent] wanted.

Although we have not been able to locate it, there would have been a formal written JCT contract between [the Applicant] and [the Respondent] in relation to [Site T].”

32. In relation to Site W, Mr K expressly confirms that the Respondent “did all the relevant work”.

33. I have quoted extensively from the witness statements because Mr R failed to exhibit any contractual documents and those exhibited by Mr K are far from conclusively relevant to the contracts that were actually entered into in relation to Site T. Mr R explains the absence of documentation by saying that when the Respondent went into liquidation, all of the relevant documents were handed over to them, regardless, it seems, of the fact that the Applicant would almost certainly have been a party to many of those documents and continued trading after the Respondent entered insolvent liquidation.
34. There is no evidence before the court of the Applicant asking to be given access to the relevant documents or for the liquidators to provide copies of specific contracts – notably not even after proceedings were commenced against it by the housing association in relation to Site T.

***Is there a genuine and serious cross-claim?***

35. Mr Patterson urges me to dismiss the application on the basis that it lacks the necessary degree of substance. He refers to the principles set out in *Orion Media*, summarised in David Stone’s judgment in *LDX* that bare assertions will not suffice and the minimum evidential threshold must be met, as referred to in *Re A Company*. Mr Patterson acknowledges that there is no requirement for an asserted cross-claim to be set out in a pleading as part of an application for an injunction to restrain presentation of a winding-up petition. However, he submits that as Hildyard J concluded in *CoilColour* that once the applicant has persuaded the court that it has a serious cross-claim, that claim should be adjudicated in the context of an ordinary action, it follows that for a cross-claim to be serious, it should be capable of being set out in a pleading: the court “must be able to see the parameters of the claim”.
36. In my judgment, the Respondent’s reliance upon the absence of sufficient detail before this court to enable the Applicant formally to plead its asserted cross-claim puts an unnecessary and hitherto unrequired gloss on the relevant test. Clearly, to be serious, a cross-claim must be capable, at some stage, of being pleaded. But I consider that there is scope for this court to determine an asserted cross-claim to be genuine and serious even in circumstances where all of the information one would usually require for it to be properly pleaded, is not before this court.
37. The witnesses’ written evidence must be considered against the background of all the other admissible evidence and material in order to judge whether it is an allegation of any substance and is not some attempt to obfuscate the real issues by raising a series of hopeless allegations (*Portsmouth v Alldays*). In this case, in the absence of any relevant supporting contractual documentation, the court must determine whether the Debt is subject to a genuine and serious cross-claim by reference only to the undisputed facts, the terms of the statutes relied upon and the untested witness evidence of Mr R and Mr K. Such evidence may, in certain circumstances, be rejected as manifestly incredible, either because it is inherently so or because it is contradicted by the facts or by reliable documents (*Coyne v DRC Distribution Ltd*).
38. Mr Patterson has described the legal basis for the Applicant’s claim as having only “gradually revealed itself.” This appears to be supported by the correspondence in evidence. In June 2023, the Applicant’s solicitors stated that the nature of the Applicant’s counterclaims “may vary depending on a multitude of factors” including

when the Respondent carried out the work, but stated that as far as the oldest projects were concerned, they considered that the Applicant “would at least have the ability to advance claims under the [Contribution Act]”. The direct claim under the DPA was not clearly relied upon until Mr R’s second witness statement.

39. However that claim has now been raised and I shall consider it first. The Respondent’s liability is said to arise under section 1(1) of that Act as:

“A person taking on work for or in connection with the provision of a dwelling ... to see that the work which he takes on is done in a workmanlike or as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed”.

40. Mr Patterson submits that the Applicant has failed to identify any relevant legal obligation owed by the Respondent to the Applicant and has not provided a coherent explanation of the fire safety issues that are said to form the basis of its asserted claim.

41. As regards the legal obligation, the Respondent has not contradicted the Applicant’s evidence that the Respondent was the contractor or lead contractor for each of the development sites. The Respondent also did not seek to distinguish the Court of Appeal’s judgment in *BDW Trading* where the Court accepted that the defendant, an engineer that took on work in connection with the provision of a dwelling, owed a duty under section 1(1) of the DPA to the claimant developer.

42. As regards the specific fire safety issues giving rise to the alleged breaches of the duties owed under section 1(1) of the DPA, the Respondent has highlighted the absence in the Applicant’s evidence of any real detail regarding the specific cladding used and why it is defective. However, having:

- i) reviewed the guidance notes regarding the detail required to pursue an application for funding;
- ii) taken into account that unhelpfully, the application forms were not included in the Applicant’s evidence; but
- iii) noted that the court has before it, unchallenged evidence that the Applicant reached the stage where substantial pre-tender funding was made available and, in relation to two of the sites, approved amounts to conduct the remedial work,

in my judgment it is more likely than not that the cladding – whatever it is or to whichever specification it was manufactured or installed - needs to be removed or otherwise brought into line to remove the identified fire risks.

43. Mr Patterson also highlights the absence of any correspondence or contractual documentation to support the Applicant’s assertion that the Respondent “did all of the work” and in relation to site T, that the Respondent was responsible for the design work. This, he submits, is important in relation to section 1(2) of the DPA: a contractor could be carrying out another party’s design or instructions and would not

be liable if those instructions were defective. He described section 1(1) as “multi-layered”: it does not follow that just because a company was contracted to do work on a site that is not fit for habitation when completed, that they are liable under the section. Consequently, he submits, a claimant needs to navigate through various issues to establish that a party is liable under section 1, which the Applicant has failed to do.

44. Whilst the Applicant’s asserted claim against the Respondent currently lacks the detail that would be required for it properly to be set out in a pleading, in my judgment the Applicant’s right to pursue a claim against the Respondent under section 1(1) is clear. It is not disputed that the Respondent took on work in connection with the provision of dwellings at each of the sites, and it is not expressly denied or disputed that the dwellings at the sites when completed with cladding were not fit for habitation. Section 1(1) establishes the duty that is owed, in those circumstances, to the parties set out at sub-sections 1(1)(a) and (b) and, following *BDW Trading* gives rise to a claim in the hands of the Applicant against the Respondent as a party “taking on” such work. That does not mean that the claim will succeed, nor that it cannot be defended. Section 1(2) provides a defence for those who can show that they were acting in accordance with the instructions of another.
45. However I do not consider that in order to persuade the court that it has a genuine and serious cross-claim, it is necessary for the Applicant to anticipate and conclusively dismiss any grounds that could be raised by way of defence. The Applicant’s evidence states that the Respondent was responsible for all of the work at each of the sites and, in relation to Site T, for the design work. The burden then shifts to the Respondent to show that in fact its defence to such a claim is so clear that this court cannot consider the Applicant’s cross-claim to be genuine or serious. Despite apparently having access to all (or most) of the relevant contractual documents and correspondence (again this is not disputed in the Respondent’s evidence) the Respondent chose not to exhibit any of them or to state that it has searched for or considered such documentation. It has chosen instead to rely solely upon the asserted shortcomings in the Applicant’s evidence and the notable delay in raising and then clarifying the basis of the claim.
46. Threatening to present a winding-up petition in respect of a debt, rather than pursuing the matter by Part 7 proceedings, always carries a degree of risk. Doing so when a cross-claim has been raised, in a manner which merely suggests, but fails to substantiate a defence to such a cross-claim, despite access to the relevant documentation, brings a greater degree of risk.
47. I have taken into account the Applicant’s delay in mentioning, at all, the possibility that it might have a claim against the Respondent. No such claim was mentioned or included in the Respondent’s statement of affairs (approved and signed by Mr R as its director), no reference was made to it in the Applicant’s accounts and even when faced with the threat of a winding-up petition, the legal basis of the alleged cross-claim was vague. Against this, I accept that following the Grenfell Tower tragedy there has been considerable uncertainty concerning the legal obligations surrounding cladding, the risks of each type – not just those used at Grenfell Tower – what needs to be done to make buildings safe, by whom and with what money. Once the Respondent entered liquidation, there was little hope of obtaining its practical assistance or involving it in remediation discussions. The cost of remedial work has

apparently sky-rocketed and still no fixed amounts have been identified in respect of each of the sites (at least, following the insolvency of two of the proposed contractors, none that can still be considered to be reliable). That does not answer all of the Respondent's submissions regarding delay in raising or even mentioning the asserted cross-claim, but it does, in my judgment, go some way to explain it and influences the weight that I attach to such delay.

48. I have found the absence of documentary evidence in this matter particularly challenging. The Respondent failed, despite apparently having access to the contracts between the Applicant and the Respondent, to exhibit relevant contractual evidence and the Applicant's evidence is "thin" at best. But I remind myself of the low threshold test so often referred to from *Tallington Lakes* and that, as noted in *Re Bayoil*, if there is any doubt about the cross-claim, the court should proceed cautiously.

49. In my judgment, notwithstanding:

- i) the absence of detail or supporting documentary evidence that ideally I would have liked to have seen; and
- ii) the Applicant's delay in raising and then detailing its alleged cross-claim;

its unchallenged evidence regarding the Respondent's role in developing the sites, when seen in the light of the potential liability of relevant parties under the DPA (which include the Respondent), I am satisfied that the Applicant has met the minimum evidential threshold to determine that the Debt is subject to a genuine and serious cross-claim.

50. The alternative claim is under the Contribution Act. At this stage, and in the absence of the contracts, the most that is clear to me is that to the extent that the Applicant is liable to those with a claim against it under the DPA, there is a genuine and serious claim that so too is the Respondent. Thus for the purposes of the three-part test, the Applicant, as Party B could be found to be liable to DPA claimants (as Party A). The Respondent, as the contractor who took on the work, could also be liable as Party C to Party A and, subject of course to defences, their liability is in respect of the same cladding. Here too, therefore, in my judgment, the Applicant has met the minimum evidential threshold to determine that the Debt is subject to a genuine and substantial dispute.

***In an amount equal to or exceeding the Debt?***

51. The Respondent highlights that only one of the sites has resulted in litigation and that as currently pleaded, the amount claimed against the Applicant is less than the value of the Debt. The Applicant relies on the housing association reserving its right to claim a higher figure and the value of pre-tender support provided by the DULHC, in relation to all of the sites, asserting that if the DULHC amounts are treated as just 10% of the total cost of the work which its assessors consider to be realistic, the value of the works will ultimately far exceed the Debt.

52. This court is not the correct forum to determine the quantum of construction debts. The Respondent has not denied that it carried out the construction work at each site



either as main or lead sub-contractor. I have found that applying *BDW Trading* this exposes it to a genuine and serious, albeit as yet unquantified, potential claim under the DPA. Taking into account the pre-tender support provided to date by the DULHC, the undisputed fact that the Applicant obtained a £15m grant for the remediation work at site W, a grant of £8.3m in relation to Site C and that it is obliged, by the terms of the funding arrangements, to try to recover the debt from other liable parties, I am satisfied that there is a genuine and substantial dispute that the value of the asserted cross-claim will exceed the Debt. This is an emerging area of law and these specialist construction and safety issues should, in my judgment, be properly aired in Part 7 proceedings.

53. The application succeeds. In the absence of a satisfactory undertaking, I shall grant an injunction to restrain the Respondent from presenting a winding-up petition in respect of the Debt.