WRITTEN CLOSING SUBMISSIONS FOR PHASE 2, MODULE 6 ON BEHALF OF THE NATIONAL HOUSE-BUILDING COUNCIL (NHBC)

A. INTRODUCTION

- As stated in opening, NHBC is committed to assisting the Inquiry to ensure that what occurred at Grenfell Tower never happens again. It is crucial that the house-building industry learns from events that took so many lives on 14 June 2017. NHBC again expresses its deepest condolences to those who lost loved ones in the Grenfell Tower fire, to the survivors of the fire and to all those affected by this tragedy.
- 2. NHBC has fully co-operated with the Inquiry's requests, voluntarily providing extensive disclosure and detailed witness statements from seven key individuals who were employed by NHBC at the relevant time.
- 3. Steve Evans, John Lewis and Diane Marshall gave evidence over a combined period of six and a half days. Each of them answered questions to the best of their ability in the face of close professional scrutiny by the Inquiry and with appropriate introspection and candour.
- 4. We invite the Inquiry to analyse the position of NHBC with the following seven starting points in mind:
 - (1) NHBC Building Control Services (NHBC BCS) as a Building Control Body (BCB) operates within a system of building regulation that at its heart relies upon subjective assessments regarding whether systems such as external wall arrangements will meet the functional requirements of the Building Regulations. That system is imposed, and can only be strengthened, by the Government.
 - (2) NHBC is only one of a number of organisations offering building control services. It should not be held to a higher standard than others including local authority BCBs simply on the basis that it has a larger market share.

To the extent that NHBC has been criticised for allowing combustible cladding systems to be used above 18 metres, and in particular K15 in reliance upon the British Board of Agrément (BBA) certificate, NHBC did so based on third-party assessment of products and materials as outlined in Government guidance. The evidence shows that the same or a less stringent approach was taken by other BCBs.¹ What this points to is a wider problem within the building industry as opposed to a failing by NHBC;

- (3) The Panel should have regard to how the house building industry, including BCBs, were directed by Government policy at the relevant time. For example, the evidence shows that the whole house-building industry was being urged to find ways in which to make homes more energy efficient to reduce their environmental impact. Government policy also required (for example under the Enforcement Concordat) those responsible for implementing building regulation to work in partnership with the industry. To the extent that NHBC and others have been criticised for working with the building industry, this was what Government policy required when NHBC was discharging a statutory function, both at the relevant time and today;²
- (4) There have been suggestions during evidence that NHBC's actions in addressing the use of K15 were driven by a desire to hide past errors and/or commercially motivated. It was suggested that some evidence has been an *ex post facto* rationalisation or similar. These are serious allegations which require cogent evidence before any such conclusion can be drawn. Brian Martin said that he regarded "*people at NHBC as decent people doing their best to get something right*"³ and that he considered Diane Marshall and Steve Evans, with whom he had most of his dealings, as honest people.⁴ It is submitted that he was clearly correct in this regard. There is no proper basis to conclude that there has been any kind of dishonesty by NHBC, nor that commercial considerations were put before public safety. This is addressed further at paragraphs 20 and 47 below;

¹ See for example Steve Evans 219/146/3-10 and paragraph 53 below

² Brian Martin 254/71/11 - 254/72/6

³ Brian Martin 254/26/12-17

⁴ Brian Martin 254/94/13-15

(5) The evidence is that between 2013 and 2014, it was primarily NHBC staff challenging Kingspan, requesting test evidence and ultimately driving the industry away from reliance upon certificates which it is now known were issued in error and based upon deception by Kingspan. It was Brian Martin's evidence that he believed NHBC was "*taking the lead*" on challenging Kingspan and that Government thought this was the best way for the problem to be addressed (see paragraph 75 below). NHBC, however, never sought this role and was never informed by Government that it had decided that NHBC should take on this responsibility.

A spotlight has been thrown upon NHBC in this Inquiry because it was acting upon its concerns and challenging Kingspan. Whilst NHBC accepts it should have done more, and acted more quickly, the Panel should ask what other industry groups and BCBs were doing at the relevant time before drawing adverse conclusions against NHBC;

- (6) NHBC has always recognised that the use of testing or desktop reports was only evidence that could assist in showing whether minimum standards had been met as required. Wherever NHBC considered such reports as a means of showing compliance, NHBC's own fire engineers and their line managers would critically evaluate the reports against the background of their own professional knowledge and experience. Further information would be required from the builder and or its fire engineer as necessary before NHBC would reach a conclusion as to whether all of the evidence showed that the minimum standards had been met; and
- (7) Whilst the actions of NHBC and its staff have been closely scrutinised during Module 6, it is important not to lose sight of the fact that NHBC was not involved at any stage in the refurbishment of Grenfell Tower. The evidence is one way: neither the guidance issued by NHBC nor that issued by the industry group, the Building Control Alliance (BCA) was applied, referred to or contemplated by the Royal Borough of Kensington and Chelsea Council (RBKC) or the relevant architects and contractors when considering the cladding that was used at Grenfell

Tower. The suggestion put in questioning that the NHBC 2016 guidance was "*central to the Grenfell Fire*" must be viewed in this context.⁵

- 5. NHBC has undergone a period of considered self-reflection since the fire, including in the wake of evidence heard by the Inquiry, to consider what it could have done differently during the relevant period and what it could do in the future to promote safer house building.
- 6. NHBC accepts the following:
 - (1) It should not have placed the level of reliance it did upon the Kingspan K15 BBA certificates. The evidence shows that there was over-reliance throughout the industry upon these as directed and endorsed by Government. The potential for an error within a certificate and the consequences of this should have been far clearer to the whole industry, including NHBC.

As a result of learning from this Inquiry, NHBC has reemphasised to its surveyors and managers the need to maintain a strict focus upon the functional requirements to ensure that there is a robust challenge process in place where NHBC has concerns about such certificates. There is tight management oversight of this, and on firesafety matters generally

The Panel might think that a particularly unsatisfactory element of the current regime is that independent certification is capable of showing evidence of compliance with the regulations but the test evidence behind those certificates is confidential to the manufacturer and not available to builders or BCBs who seek to rely upon that certificate. Instead, the BBA refers builders and BCBs to the manufacturer for any additional or supporting evidence they require.

NHBC submits that this has created the opportunity for unscrupulous manufacturers to exploit certificates issued in error to an alarming degree. Had the BBA and others had a system whereby NHBC had been able to obtain the (it transpires illusory) test evidence upon which some BBA certificates were based, this would have exposed Kingspan's misconduct far earlier;

⁵ Diane Marshall 226/101/6 – 226/102/6

(2) NHBC should have acted more swiftly to change its own policy once the problems with Kingspan became apparent. The level of Kingspan's deceit and manipulation that has been exposed in this Inquiry is utterly shocking and all the more so given Kingspan's previous standing in the industry. NHBC was not aware until receiving disclosure in this Inquiry as to how far this manufacturer was prepared to go to market its products.

It is accepted that one way of tackling the problem could have been for NHBC to refuse to issue building control final certificates and warranties where K15 was specified over 18 metres. It is hard to say in 2022 what the effect of this would have been had NHBC taken this stance alone at the time. As set out elsewhere in this document, other BCBs would have issued building control final certificates and the possibility of effective enforcement action through the local authority would have been limited. Nevertheless, it is accepted that unilateral action at the time might have raised awareness of the issue and could have forced swifter and more decisive action by the industry;

(3) It is accepted that NHBC's guidance, 'Acceptability of common wall constructions containing combustible materials in high rise buildings' (2016 NHBC Guidance Note), was insufficiently clear. In view of (i) the drafting of the document, (ii) the fact that (unbeknownst to NHBC staff) there was a Class B 100% PE core ACM panel on the market in 2016 and (iii) what NHBC now knows about the quality of some of the Option 3 reports which had been prepared in the industry; NHBC accepts that the 2016 guidance was deficient.

The evidence, however, demonstrates that this guidance (which could only apply to NHBC's builder customers) was not in fact used by builders as a route to demonstrating that any ACM PE cladding facades were compliant.

B. NHBC

7. NHBC is a private company limited by guarantee; it has no shareholders and is non-profit distributing. Any revenue above operating costs is reinvested in the organisation to fund its purpose and ensure sufficient capital is in place to back its insurance business. As an insurer, it must hold significant assets in order for its solvency ratio to be acceptable to the NHBC Board and the Prudential Regulation Authority. The

evidence regarding NHBC's invested assets of £1.56 billion in 2017 must be seen in that context as well as alongside the liabilities shown which total around £1 billion.⁶

- 8. For more than 30 years, BCBs have comprised both local authorities and private sector organisations known as Approved Inspectors (AIs) who are authorised to discharge some statutory functions previously reserved to local government. NHBC provides building control services through its subsidiary NHBC BCS⁷ as an AI.
- 9. As CTI correctly identified during questioning, "*NHBC has no legal or regulatory standing to issue guidance to industry; it's a private company like any other.*"⁸
- 10. NHBC is not the house-building industry's regulator. This was clearly explained by Steve Evans in evidence.⁹ Whilst NHBC BCS must apply and interpret Building Regulations and make judgements as to whether these have been complied with, this does not make it a regulator in the manner in which the Royal Institute of Chartered Surveyors (RICS) for example regulates chartered surveyors. Construction Industry Council Approved Inspectors Register (CICAIR) Limited is the regulatory body for AIs and issues a code of conduct which applies to all AIs.
- 11. Statements by Mr Lewis during his evidence that NHBC is a "regulator" are incorrect from a technical perspective. Mr Lewis was not using the word in such a context but in the context of BCBs applying Building Regulations. If the Panel were to conclude that NHBC was an industry regulator, that would be an error which would not assist the public in understanding how the building industry operates. The question of John Lewis about the "*striker conspiring with the goalkeeper and corrupting the role of the regulator*" was premised upon the incorrect suggestion that NHBC is a regulator.¹⁰ It is not. It is also a premise that is at odds with the Government's expectation set down in policy that BCBs should work with the industry in securing compliance and show a flexible and helpful approach to "customers." If the Panel were to disagree with such policy statements, then that should be a recommendation directed at Government.

⁸ Steve Evans 219/37/1-5

⁶ Steve Evans 219/20/18-25

⁷ Where the references to NHBC below relate to the role of an Approved Inspector, it should be noted that the work was carried out by NHBC's subsidiary, NHBC Building Control Services Limited

⁹ Steve Evans 219/37

¹⁰ John Lewis 223/195/14-15

- 12. Whilst appropriate scrutiny has been brought to bear upon the role of BCBs, it is the sole responsibility of the builder to ensure that the Building Regulations are complied with. An AI such as NHBC BCS is "*far removed from the provision or creation of a dwelling*" and has limited powers which allow only the performance of an essentially negative role of checking for compliance (*Herons Court v Heronslea* [2019] EWCA Civ 1423, [2019] BLR 600 at [42- 43, 53- 57]. See further at paragraph 68 below).
- 13. An AI cannot be an expert in every single element of a complex construction build. It is for the builder and their engineers to determine how all the various different materials and elements within a complex build fit together. It is also the builder's responsibility to consider carefully whether all elements will comply with the Building Regulations in that configuration and to provide evidence to support that assessment. The AI's role is to consider whether, based on the evidence presented, he or she is satisfied using professional skill and judgment that the building will comply with the Building Regulations Regulations such that a final certificate can be issued.¹¹
- 14. NHBC's reputation, built over more than eighty years, is grounded in public, industry and customer confidence in the safety of the buildings that it is involved with (whether it provides warranty or building control services). Upholding standards is a key part of ensuring that reputation is maintained. Put another way, there is no incentive or driver for NHBC to cut corners or lower standards; that would be damaging to both its reputation and its business, as well as being the antithesis of the reason for its existence.¹²
- 15. Each NHBC witness was questioned about their expertise and qualifications. It is submitted that those in key positions at NHBC were suitably qualified and experienced to perform the roles required of them. The nature of the industry is such that expertise is frequently gained on the job. By way of example, Mr Martin was not a qualified fire engineer and had no technical training, relying on his experience to understand compliance with the Building Regulations and the Approved Documents for which he was responsible.¹³

¹¹ John Lewis second witness statement, {NHB00001332/2} at [5a]

¹² Steve Evans witness statement, {NHB00003020/7} at [22]

¹³ Brian Martin 250/4/20-25, 250/16/15-24, 250/33/24 - 250/34/8

- 16. At the time of the fire in 2017, between Mr Evans, Mr Lewis and Ms Marshall there was a combined total of nearly 100 years working in the building control industry. Mr Evans has a degree in building surveying. Whilst he is not a fire engineer, since he began working as a building surveyor in 1991, he had been involved in buildings ranging from small houses to airport terminals and football stadiums, all of which required him to keep himself "abreast of Approved Document B and the fire safety provisions within it." In addition, he received ongoing training in his field.¹⁴ Ms Marshall holds a first-class degree in building engineering, qualified as a building surveyor in 1991 and is a Past President of the Chartered Association of Building Engineers. Mr Lewis holds a BSc in Construction Management and an MSc in fire and explosion engineering. He has worked as a building surveyor since 1994 and, from 2013, as a specialist fire engineer. Mr Maulik Katkoria joined NHBC in late December 2015 also as a fire engineer. Prior to Mr Lewis's appointment, external fire engineering expertise was also sought from Jim Golt, a former head of fire engineering at the London Fire Brigade. Prior to Mr Golt, Mike Tucker provided internal fire engineering expertise. Other external fire engineers were also used when required after Mr Golt's retirement in around 2015/2016.¹⁵ This meant that for the key period in question from 2013 onwards, NHBC had either internal or external fire engineering advice available. NHBC's approach was always to take specialist external advice when required.
- 17. NHBC had an appropriate and open relationship with the (then) Ministry of Housing Communities and Local Government (MHCLG) which was responsible for the drafting of the regulations and approved documents.
- 18. Having had the advantage of reflecting on the evidence of NHBC witnesses and the close scrutiny of NHBC's actions, Government witnesses (including Brian Martin, who was the Head of Technical Development at MHCLG) continued to express their positive view of NHBC and its role. Whilst there has been suggestion that NHBC should have kept Mr Martin more frequently briefed on the situation with Kingspan, whenever Mr Martin contacted its staff, NHBC replied. There was also nothing preventing Mr Martin from himself seeking information at any time from NHBC or

¹⁴ Steve Evans 219/4-9; Steve Evans witness statement, {NHB00003020/2-4} at [6-13]

¹⁵ John Lewis 223/29/18 - 223/34/14

indeed any other organisations that could assist, such as the BBA or LABC. Indeed, it was incumbent upon MHCLG to take such action if it had urgent safety concerns.

- 19. The evidence is that Mr Martin had an open dialogue with NHBC. Examples of NHBC's transparency with MHCLG include:
 - (1) NHBC providing draft versions of its guidance to MHCLG;¹⁶
 - (2) NHBC discussing concerns relating to some desktop assessments with MHCLG; and
 - (3) the invitation by NHBC to Brian Martin to speak at the conference at which the 2016 NHBC Guidance Note was presented.¹⁷
- 20. To the extent that it has been suggested to NHBC witnesses that they or NHBC's actions in dealing with Kingspan were motivated either by a desire to cover up past mistakes or to increase market share for commercial advantage, this is strongly refuted and is inconsistent with a fair reading of the evidence. NHBC would urge the Panel to consider the following four matters in this regard:
- (1)Raising standards in the industry and improving the quality of housing is why NHBC exists.¹⁸ Profits that are made by NHBC are reinvested for that purpose. Mr Martin said in this regard that NHBC was "*more than just a commercial enterprise*" and had taken some really positive steps in dealing with combustible cladding problems.¹⁹

The suggestion that standards were lowered for profit was strongly refuted by all NHBC witnesses. As Mr Evans stated in evidence when it was put to him that it would have been '*bad for business*' had NHBC stopped accepting the use of K15 over 18 metres:

"It was not done to protect market share, it was not done with any other reason than to allow industry to give us the information so we could make an informed decision, which we did in 2015. ...I'm a building control professional. I've been in the industry 32 years. At no time was any approach made to me to find a

¹⁶ Email Steve Evans to Brian Martin, 15 August 2014, {NHB00000759}

¹⁷ Emails Steve Evans/Brian Martin, 24 June 2016, {NHB00001325/3}

¹⁸ Steve Evans witness statement, {NHB00003020/7} at [22]

¹⁹ Brian Martin 254/89/10-19

solution to this problem to protect NHBC's — either its integrity or its historic buildings... if anyone had, I would not be working for that employer."²⁰

This typified the reaction of all NHBC staff when such suggestions were put to them;

(2) There is no evidence that could reasonably and safely lead to a conclusion that NHBC's actions were in some way designed to "cover up past mistakes." NHBC has disclosed all relevant communications from key personnel over an extensive period. The disclosure exercise has been thorough and overseen by both internal and external lawyers. The correspondence in question covers every aspect of the subject matter of this Inquiry insofar as it relates to NHBC. Many of the internal communications are unguarded and frank and have on occasions been embarrassing to NHBC and the authors of the emails who would have been unaware that the content would be published. No email has been identified which supports any posited theory that evidence now being given is a "recent invention," far less that NHBC was acting out of a desire to secure a commercial advantage. The emails in fact show clear and candid concern on the part of NHBC about, in particular, the actions of Kingspan and a determination to get to the bottom of whether K15 was safe for use above 18 metres and, if so, in what circumstances.

Whilst with hindsight NHBC acknowledges it should have moved faster, there is no basis to suggest that this was due to any form of complicity or cover-up. The absence of any such admissions in the extensive disclosure provided is telling in this regard;

(3)As to being driven by profits, the Panel has heard that NHBC's approach led to projects being rejected and negative commercial consequences for NHBC.

One example of this is the Apex Project (a warranty proposal) where a desktop report was provided by the builder supporting the use of ACM PE cladding.²¹ NHBC refused to provide a warranty for the building as its own internal procedures suggested that the cladding makeup was not compliant. This refusal was made notwithstanding the very full evidence provided from Dr Raymond Connolly who provided further updated reports insisting that the cladding was compliant with the Building Regulations and presented an acceptable risk. NHBC was also aware that the project had received a final

²⁰ Steve Evans 220/105/25 – 220/106/18

²¹ John Lewis second witness statement, {NHB00001332/28} at [100 - 105] and Steve Evans witness statement, {NHB00003020/47} at [130]

certificate from the relevant local authority (Ealing Borough Council) who provided building control for the project. Following this refusal, a different warranty provider was content to offer a warranty and took a fee for doing so notwithstanding the presence of 100% PE ACM cladding in the façade;²²

More generally, it was the evidence of Steve Evans that the letter sent to NHBC's builder customers in March 2015²³, informing them of the change in NHBC procedure (to require compliance with the BCA Guidance Note), caused difficulties with clients.²⁴ John Lewis also said that NHBC's builder customers were complaining that NHBC was requiring more than (their interpretation of) ADB required.²⁵

Due to its own actions in challenging Kingspan, NHBC moved from a position in which the K15 BBA certificate was being accepted as proof of compliance across the industry to requiring a full desktop or later Option 4 report (see below at paragraph 76). This was implemented across the industry because of NHBC raising the matter with the BCA, which in turn issued the BCA Guidance Note. It was the evidence of John Lewis that the increased cost and complexity involved in this process drove many builder customers away from using combustible materials;²⁶

(4) CTI has established from each of NHBC's witnesses that NHBC interpreted ADB as requiring compliance with both paragraph 12.7 and diagram 40, thus requiring that all elements of the cladding makeup (including "filler" materials) were materials of limited combustibility.²⁷ As the Inquiry has established, this was far from the universal approach adopted across the industry with some designers, manufacturers and builders considering only the combustibility of the outer face of the panel and not its core.²⁸ Had NHBC been attempting to apply lower standards for commercial advantage then it could have chosen to interpret ADB as requiring compliance with either paragraph 12.7 or diagram 40, which would have enabled combustible materials to be used in a wider variety of makeups without desktop reports (which were themselves more time consuming options for NHBC's builder customers and required a greater degree of scrutiny to demonstrate compliance).

²² John Lewis 225/62/20 - 225/64/10

 $^{^{23}}$ {NHB00001032}

²⁴ Steve Evans 221/233/19 - 221/234/3

²⁵ John Lewis 224/76/4-14

²⁶ John Lewis 224/44/15-18

²⁷ Steve Evans 220/180

²⁸ Brian Martin 252/19/19-23

It is untenable to suggest that these were the actions of an organisation seeking to lower standards for commercial advantage.

C. LEGAL FRAMEWORK AND GUIDANCE

21. This Inquiry has clearly confirmed that the building regulation regime, and in particular the law and guidance which was in force before the Grenfell fire, is complex and non-prescriptive with a deficit of clear guidance.²⁹ Brian Martin has accepted he made mistakes in relation to ADB. The extensive reform of fire safety and building safety regulation and guidance following the fire at Grenfell Tower amply demonstrates the pressing need for reform which existed in 2017. One of Dame Judith Hackitt's key findings was that "*the package of regulations and guidance (in the form of Approved Documents) can be ambiguous and inconsistent*."³⁰ NHBC, other BCBs and the industry as a whole had to work within that imperfect framework.

a. The Building Regulations

- 22. The Building Regulations govern the design and construction of buildings with a focus on how a building should perform by setting functional requirements. References to Regulations below are to the Building Regulations 2010 unless indicated otherwise.
- 23. By Regulation 4(1) building work is to be carried out in accordance with the substantive requirements set out in Schedule 1 thereto. Part B of Schedule 1 addresses fire safety under five sub-Parts B1 to B5 (the functional requirements). Regulation 8 provides the purpose of the regime is that, inter alia, Part B of Schedule 1: "*shall not require anything to be done except for the purpose of securing reasonable standards of health and safety for persons in or about buildings*...".
- 24. Section 7(1) and (4) of the 1984 Act provide that if:

²⁹ Brian Martin 252/162/6-11

³⁰https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707785/Buil ding a Safer Future - web.pdf Executive Summary

- (1) "it is alleged that a person has contravened a provision of building regulations(a) a failure to comply with a document that at that time was approved for the purposes of that provision may be relied upon as tending to establish liability and (b) proof of compliance with such a document may be relied on as tending to negative liability."
- (4) "A certificate given in accordance with this regulation shall be evidence (but not conclusive evidence) that the requirements specified in the certificate have been complied with."
- 25. A person intending to carry out building work must give notice and deposit specified plans of the work with the local authority³¹ which a local authority shall pass unless "*they are defective*" or "*they show that the proposed work would contravene any of the building regulations*."³² Local authorities may reject the plans, pass them, or pass them subject to conditions including making such modifications to the plans as they may specify. A local authority shall give a completion certificate where they have been able to ascertain, "*after taking all reasonable steps*", that, following completion of building work carried out on it, a building complies with the relevant provisions.³³
- 26. AIs may carry out some of the statutory functions of local authorities in relation to building control.³⁴ An AI shall, if requested to do so by the person intending to carry out the work, give a plans certificate where the plans neither "*are defective*" nor "*show that work carried out in accordance with them would contravene any of the building regulations*" (subject to certain further procedural requirements).³⁵ The AI is required to take such steps as are reasonable to enable them to be satisfied, within the limits of professional skill and care, that the building works in question comply with the relevant part of the Building Regulations.³⁶

³¹ Part 3 of the 2010 Regulations

³² Section 16(1) of the Building Act 1984

³³ Regulation 17

³⁴ Part II of the 1984 Act and the Building (Approved Inspectors etc.) Regulations 2010

³⁵Section 50(1) of the 1984 Act

³⁶ AI Regulation 8(1)

- 27. Unlike local authorities, AIs do not have the power to impose sanctions. AIs can only cancel an initial notice or refuse to issue a final certificate if the AI is not satisfied the minimum requirements of the Building Regulations have been complied with.
- 28. Where AIs are satisfied that any work to which an initial notice they issued relates has been completed, they must give to the local authority by whom the initial notice was accepted a final certificate with respect to the completion of the work and the discharge of their functions as may be prescribed.³⁷ However, it remains the builder's sole responsibility to ensure those works do comply with the Building Regulations. A BCB cannot provide a guarantee of compliance with the Building Regulations and the process does not remove the obligation of the person carrying out the work to achieve compliance with the Building Regulations.³⁸
- 29. An AI cannot insist on a higher standard than that set out in the Building Regulations and its decisions would be vulnerable to judicial review (by dint of performing the statutory function of a local authority) in the event that it sought to issue and apply its own standards above and beyond those issued by Government.
- 30. An AI cannot therefore withhold the issue of a plans certificate or a final certificate where (in the latter case) the works are complete and the AI, having carried out its functions to the standard prescribed in Regulation 8 of the Building (Approved Inspector etc.) Regulations 2010, is of the view that the minimum requirements of the Building Regulations are satisfied.³⁹

b. Approved Documents

31. As compliance with Approved Documents is deemed to be evidence of compliance with the Building Regulations,⁴⁰ the Approved Documents are critical to the industry's understanding of the regime.

³⁷ Section 51(1)

³⁸ Herons Court, the Lessees And Management Company of v Heronslea Ltd & Ors [2019] EWCA Civ 1423 confirms that the liability in Section 1(1) of the Defective Premises Act 1972 does not extend to Approved Inspectors

³⁹ Section 50 and 51 of the Building Act 1984

⁴⁰ Section 7(1) Building Act 1984. See also preamble at page ii that "there may be other ways to comply with the requirements- there is no obligation to adopt any particular solution contained in an approved document. If you prefer to meet a relevant requirement in some other way than described in an approved document, you should discuss this with the relevant building control authority." This is re-stated at paragraph 1.1 of AD7.

- 32. The Approved Documents⁴¹ are supposed to be "For the purpose of providing practical guidance with respect to the requirements of any provision of building regulations..." as opposed to providing prescriptive details on how a project must reach that outcome. There is no single, compulsory route to demonstrating compliance with the Building Regulations so a builder can consider a range of methods.
- 33. There has long been confusion over the application of ADB, so much so that the Coroner in the Lakanal Inquests, HHJ Frances Kirkham CBE, made recommendations in 2013 to Government⁴² in which she concluded that "ADB is a most difficult document to use." Her recommendations included that clear guidance in relation to Regulation B4, with particular regard to the spread of fire over the external envelope of the building, was provided and expressed in words intelligible to the wide range of people engaged in construction, maintenance and refurbishment of buildings.
- 34. The Secretary of State responded:

"Finally, in relation to Building Regulations, I have noted your concerns about the difficulties that some of those involved in the Inquests had with the interpretation of Approved Document B. I can assure you that my Department is <u>committed to a programme of simplification</u>. However, the design of fire protection in buildings is <u>a complex subject</u> and should remain, to some extent, in the realm of professionals. We have commissioned research which will feed into a future review of this part of the Building Regulations. We expect this work to form the basis of a formal review leading to the publication of a new edition of the Approved Document in 2016/17. The revision would be drafted in accordance with a new 'style guide' for Approved Documents, aimed at ensuring the guidance is capable of <u>being more easily</u> <u>understood</u>, and that the need to cross- reference is reduced" (emphasis added).⁴³

35. The reality, however, was that the recommendation within the Lakanal House report to prevent future deaths was not acted upon before 2017 and instead Government relied upon the industry to issue guidance in the interim.

- ⁴² <u>https://www.lambeth.gov.uk/sites/default/files/ec-letter-to-DCLG-pursuant-to-rule43-28March2013.pdf</u> 43
- $\label{eq:https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/205567/Annex_B SoS_DCLG_Rule_43_response.pdf$

⁴¹ Section 6(1) Building Act 1984

c. Industry guidance

36. Industry guidance does not have the same status as statutory guidance. Nonetheless, MHCLG's approach was to rely on industry guidance to fill at least a temporary gap where interpretation was required because it did not have:

"a mechanism for changing the approved documents very quickly. So this was something that became the way we worked on a range of issues, where we'd try to get industry guidance to resolve problems that might have arisen in between reviews."⁴⁴

- 37. In light of the acknowledged problems with the regulations and guidance issued by the Government, the industry had little option but to issue guidance itself to fill the gap left by the long delay in new Government guidance being issued.
- 38. For example, Arup Fire was proposing its own guidance in relation to the use of combustible insulation above 18 metres.⁴⁵ As Mr Lewis told the Inquiry of his meeting with Arup: "Arup's view was that ADB was largely out of date".⁴⁶ According to Mr Martin:

"Most of the trade bodies across the industry produce guidance for their members, often in relation to achieving compliance with Building Regulations. So they would provide an extra layer of detail on the guidance that was in the approved document, and so we could work with those bodies to fill in the blanks and assist interpretation where there was confusion or some other reason why you might want to extend that."⁴⁷

39. Mr Martin counted industry guidance as amongst the appropriate steps relevant to B4.⁴⁸ To a significant extent the Government was relying upon the industry to issue guidance to fill the void left by its own guidance. The evidence was that had industry not sought to adopt a consistent application of the Building Regulations through guidance, there would have been a "*really big problem, bigger than the one we are dealing with now*."⁴⁹

⁴⁴ Brian Martin 254/48/17 - 254/49/3; 254/185/15 - 254/186/22

⁴⁵ Steve Evans 220/164/5-17

⁴⁶ John Lewis 224/67/2-4

⁴⁷ Brian Martin 250/47/18-25

⁴⁸ Brian Martin 252/159/12-19

⁴⁹ Brian Martin 252/166/16-19

40. Mr Martin went on to say that he was desperately trying to revise ADB but lacking the resources to action this. The answer was (in relation to the problem with K15 in particular) the BCA Guidance Note (see below at paragraph 100) which he saw as the best and only way to solve the problem. He described the situation as ridiculous.⁵⁰ NHBC submits that the house-building industry should not have been placed in this position and the Panel should be slow to criticise those who used their best efforts to ensure consistency and drive improved standards whilst working within such an imperfect system.

D. KINGSPAN AND THE BBA CERTIFICATE

- 41. The use of combustible materials in construction is not new. MHCLG was well aware of the issues concerning external cladding systems throughout the review of ADB which led to the 2006 edition being published.⁵¹
- 42. Regulation 7 requires that building work shall be carried out with adequate and proper materials. Approved Document 7 (AD7) provides guidance towards compliance with Regulation 7. If AD guidance is followed, there will be a rebuttable presumption of compliance with this Regulation.
- 43. Paragraph 1.2 of AD7 permits the assessment of "the suitability of a material for use for a specific purpose in a number of ways, as described in paragraphs 1.3 to 1.21." These include by paragraph 1.14:

"Other national and international technical specifications" that: "An international technical specification...may be used to demonstrate that a product not covered by a harmonised European standard meets the performance requirements of the Building Regulations" where the "material is covered by a national or European certificate issued by a European Technical Approvals issuing body, and the conditions of use are in accordance with the terms of the certificate."

44. BBA was (before Brexit) a European Technical Approvals issuing body.⁵² These also include "Independent certification schemes" as defined in paragraph 1.15: "Such

 ⁵⁰ Brian Martin 254/185/2 – 254/186/22
 ⁵¹ {CLG00019469_35} at [106]
 ⁵² <u>https://www.bbacerts.co.uk/2021/02/22/the-bbas-ongoing-purpose-in-a-post-brexit-world/</u>

schemes certify that a material complies with the requirements of a recognised document and indicates it is suitable for its intended purpose and use." These certification bodies are to be accredited by the United Kingdom Accreditation Service (UKAS). BBA is accredited with UKAS.

45. Under the heading "*Limitation on Requirements*" and sub-heading "*Independent certification schemes*" there is general guidance endorsing the use of independent schemes of certification and accreditation of installers and maintenance firms which:

"will provide confidence in the appropriate standard of workmanship being provided. <u>Building Control Bodies may accept the certification of products</u>, components, materials or structures under such schemes <u>as evidence of</u> <u>compliance with the relevant standard</u>. Similarly, Building Control Bodies may accept the certification of the installation or maintenance of products, components, materials or structures under such schemes as evidence of compliance with the relevant standard. Nonetheless, a Building Control Body will wish to establish, in advance of the work, that any such scheme is adequate for the purposes of the Building Regulations" (emphasis added).

46. The status of a BBA certificate has been the subject of judicial consideration. In *Skinner v Crest Nicholson Residential (South) Limited* [2003] EWHC 2984 (TCC), at [71]:

"The reference to the Agrément Certificate was to Agrément Certificate No. 91/2608 issued by the British Board of Agrément that in the opinion of the Board was satisfactory if used as set out in the Certificate. The Certificate was issued on 21 March 1991. <u>A certificate of the Board is generally considered evidence that a product used in accordance with the methodology set out in the certificate is a suitable one to use for the application the subject of the certificate" (emphasis added). And in Resistant Building Products Ltd v National House Building Council [2020] NICh 6 the Recorder of Belfast said (at [5]): "The British Board of Agrément ("BBA") is a building product certification authority...the certificate contained a statement that the products were fit for purpose for their intended use provided they are installed used and maintained as set out in the body of the certificate" (emphasis added).</u>

- 47. At some points in evidence, it was suggested to NHBC witnesses that reliance upon the BBA certificate was an *ex post facto* justification for NHBC accepting K15.⁵³ This is strongly refuted. As the above demonstrates, reliance on an independent certificate as evidence of compliance was wholly permissible and the use of BBA certificates has long been a part of industry-wide building control processes in the UK (as it remains today).
- 48. NHBC accepts that, in its role as an AI, NHBC BCS is concerned with whether there is compliance with a specific or functional requirement of the Building Regulations in order to fulfil the Regulation 8 purpose of the regime to secure reasonable standards of health and safety for persons in or about buildings. NHBC also accepts that NHBC BCS, in its role as an AI, is required to take reasonable steps to satisfy itself of this within the limits of its professional skill and care. In doing so, it is clear that BBA certificates may be relied upon by a BCB in carrying out its function in circumstances where the BBA is an accredited and trusted organisation and where NHBC has no reason to doubt its competency.
- 49. In answer to the Chair's question:

"can I just ask you this: your answers suggest that it may have been beyond anyone's contemplation that a BBA certificate might include an inadvertent mistake. Did you ever think that was possible?,"

Ms Marshall told the Inquiry:

"At the time, no, because of the rigour of UKAS accreditation and the process it would have to go through to get produced. So, no, at that time there was no reason to question the validity or the content of a BBA certificate."⁵⁴

50. The actions of NHBC in respect of the various versions of the BBA certificates do not, however, suggest that it blindly relied upon the certificate without question. This needs to be considered against the context that NHBC had no reason to suspect that the BBA did not thoroughly investigate K15 before issuing the certificate that it did. The following exchange between Mr Evans and CTI is apposite:

⁵³ Steve Evans 219/146/21 – 219/147/12

⁵⁴ Diane Marshall 225/134/21 - 225/135/5

"Q. So does that tell us -- we'll come to regulation 7 shortly -- that the NHBC, in relying simply on the BBA certificate up to this time, was approving the use of K15 above 18 metres without seeing the full test data, without seeing the details of the wall build–up, without seeing any BR 135 report, for what it's worth, and without any of the data indicated by Approved Document B?

A. So at that time we would refer to the BBA certificate, and the BBA certificate, we would assume at that time, would have looked at all of that information in order to make the statements it did."⁵⁵

- 51. If it had been the case that NHBC was blindly following the certificate, it would not have needed to have undertaken its own investigation of K15, which took up a significant period of time between 2014 and 2015.
- 52. The Inquiry must be cautious to put out of its mind what is now known about Kingspan's lies and deception when considering why NHBC took the approach that it did. This Inquiry has shown that many reputable organisations were taken in by Kingspan and its apparent standing in the industry. NHBC did not, for example, know that K15 had failed a previous test as Kingspan had hidden this from NHBC when asked.
- 53. The BBA certificate for K15 had been in use and accepted by other BCBs since 2008. Prior to 2013, no concerns had been raised in industry or by Government about it.⁵⁶ Mr Evans told Mr Martin of MHCLG, in reply to Mr Martin's email to Neil Smith on 2 July 2014 (the 'friendly warning' email), that on the basis of the BBA certificate of 2008, NHBC and other BCBs had accepted the use of K15.⁵⁷ This did not cause Mr Martin to contact Mr Evans and raise concerns over this. Mr Martin could have contacted Kingspan which he did not. Whilst he did contact the BBA, he made no meaningful attempt to find out why it was the BBA had issued a certificate in these terms.
- 54. That other BCBs accepted the BBA certificate at face value, and that this was standard practice within the industry, is beyond dispute. This was the evidence of Steve Evans

⁵⁵ Steve Evans 219/86/6-17; 219/142/10-13

⁵⁶ Steve Evans 219/137/10-20, John Lewis 223/141/1-18

⁵⁷ Steve Evans 220/69/3-20; Email Steve Evans to Brian Martin, 11 July 2014{NHB00000732}

and John Lewis (who frequently saw that K15 had been accepted by other BCBs when NHBC was providing warranty services only).⁵⁸ It was Mr Evans' evidence that other BCBs interpreted paragraph 7.3 of the K15 BBA certificate in the same way as NHBC (that it allowed for K15 to be used over 18 metres either based on the certificate(s) alone or by reference to the manufacturer).⁵⁹ This was confirmed in the Philip Pettinger email of 03 April 2014⁶⁰ which stated that "on warranty only jobs we are accepting K15 if the building control body is happy and deem it to comply they always are and do".

55. Mr Turner of LABC, who had previously worked for a local authority providing building control, stated that:

"whenever...in my role within local authority, when anybody came to me with a product that I'd never heard of or not seen before, was: does it have a BBA certificate? Does it meet the requirements laid down?"⁶¹

56. Indeed, as the Panel is aware, LABC went further and issued its own registered details certificate for K15⁶² which originally stated:

"Since K15 can be considered a material of limited combustibility, it is suitable for use in all situations shown on Diagram 40 of Approved Document B Volume 2, including those parts of a building more than 18m above the ground".

57. This was issued on the basis that *K15 had the appropriate BBA certificate*. LABC's position remained supportive of K15's use even when concerns were raised with LABC by another manufacturer. Mr Turner stated in this regard:

"I put my trust in those that had dealt with the matter and the certifications that were in place by the likes of BBA, rather than believe an argument put forward by a competitor."⁶³

58. NHBC certainly was not alone in accepting the BBA certificate as evidence of compliance.

⁵⁸ John Lewis 223/140/23 - 223/141/18

⁵⁹ Steve Evans 219/146/3-10

⁶⁰ {NHB00000688/1}

⁶¹ Barry Turner 216/41/18-22

⁶² {KIN00005705}

⁶³ Barry Turner 216/83/16-20

- 59. There were also real problems with a major BCB suddenly taking a unilateral stance to refuse to accept the certificate.
- 60. As Mr Evans explained to the Inquiry, had NHBC refused to accept K15, its only real power as an AI would have been to refuse to issue a final certificate so that development would revert back to the local authority for them to take action. Mr Lewis stated that NHBC, however, knew that a local authority BCB would regard the use of K15 as compliant (given the existence of the BBA certificate and/or LABC registered detail) and consequently would not take enforcement action.⁶⁴ NHBC's refusal would not have stopped the use of K15 and was likely to have created more confusion in the industry especially if a local authority would subsequently accept its use.⁶⁵ This underlines both the inability of a BCB to impose higher standards than the minimum required and the need for consistency in interpretation. The Building Regulations cannot function if there is a disconnect between the standards applied at the building control and enforcement stage (or a different interpretation of those standards).
- 61. The problem therefore required action across the industry which was provided by the BCA through the BCA Guidance note (as described below).
- 62. The above was the context in which the BBA certificate was relied upon. In answer to the Chair's question "on what basis did you think it was proper to accept its use?" Mr Evans explained:

"Until we had that information — we didn't have information either way, I suppose. We had the — the information we did have was positive towards the use of the material; we had the BBA certificate and we had one report. We didn't at that time have any information which said — so we had no failed test reports, we had no information that said anything different. So we wanted to — before we actually said, "We can't use this material, we're not going to accept this material", as we would with other — not just Kingspan, but any other material where we don't have all that information, we would generally try

⁶⁴ Steve Evans 220/102/22 - 220/103/11

⁶⁵ John Lewis 224/19/1-24

to seek additional information to make sure we had a fully informed case before making that decision."⁶⁶

63. Mr Evans was also asked to explain why he allowed NHBC surveyors to permit the use of K15 having seen the amended BBA certificate dated 6 April 2010 but published in 2013 which suggested K15 could be used in accordance with paragraph 12.7. First, as Mr Evans explained, NHBC had questions at the time that it wished to explore when faced with this certificate, produced by a reputable accredited body, who NHBC knew would have investigated K15 before certifying its use. As Mr Evans stated:

> "in our mind, there had to be a reason why BBA were making that statement. Kingspan must have provided them with information at that time in order to make that statement. What we wanted to understand was: what information had they provided? What information had they got which we hadn't, which allowed them to make that statement?"⁶⁷

- 64. Secondly, NHBC could not require anything beyond the minimum standards in the Building Regulations and so, it needed to explore whether K15 did not (contrary to the statement in the BBA certificate) meet those minimum standards.⁶⁸ Whilst it is accepted that Kingspan would not be able to show that K15 was a MOLC it was not unreasonable to think that, having apparently passed one test, Kingspan would be able to provide, as repeatedly promised, further test results which would demonstrate K15's suitability in a variety of wall make-ups.
- 65. Thirdly, after the re-issue of the certificate on 17 December 2013,⁶⁹ NHBC did not stop allowing the use of K15 as it knew that the complex buildings being designed would not have concluded their construction stage for quite some time. So, there was time for NHBC to complete its investigation at a time when Kingspan was repeatedly assuring NHBC that it could provide information to demonstrate compliance with the Building Regulations.⁷⁰ As Mr Evans explained:

⁶⁶ Steve Evans 219/197/16 - 219/201/11

⁶⁷ Steve Evans 219/158/14-20

⁶⁸ Steve Evans 219/162/11-18; 220/92/25- 220/93/11

⁶⁹ {KIN00000454}

⁷⁰ Steve Evans 219/169/19 - 219/171/4

"If we'd taken a knee-jerk reaction and said, "We're not accepting it on any building which is presently under design or build or indeed new-build", that would have meant at that point a great deal of upheaval for those designers, builders, for the industry as a whole, which could, in three months' time, have actually been demonstrated was the wrong action. So taken that these buildings actually take a great deal of time to actually design and get to site, you've got something like, you know, 18 months from starting to design a building to actually getting it on to site to start to build, there was time to actually allow industry to do that research to provide that information."⁷¹

- 66. Fourthly, the time Kingspan was taking did not initially seem unreasonable. NHBC was aware that, given the limited testing facilities available in the UK, there could be a wait of up to five months to book a test rig and longer to get the results.⁷² NHBC now understands that Kingspan was lying to NHBC about its plans to undertake testing and show compliance with the Building Regulations.
- 67. Fifthly, as set out above, refusal to issue a final certificate would lead to a disconnect with the BCB refusing to accept K15 but the enforcement body regarding it as compliant.
- 68. NHBC as an AI has very limited powers and performs an essentially negative role of checking for compliance. As per Hamblen LJ in the *Herons Court* case (at [42- 43]):

"The powers of the AI are confined to refusing to issue a plans certificate or final certificate in the face of non-compliant work. Moreover, unlike the local authority, the AI has no power to impose conditions or prescribe modifications to the works and the relevant enforcement powers are left entirely with the local authority.

An AI therefore has no statutory power to influence the design or construction of a building in any way, save to stipulate that it must comply with the law. In certifying, or refusing to certify, plans and works, the AI is not engaged in the positive role of the provision or creation of the relevant building, but performs

⁷¹ Steve Evans 219/175/8-21; 219/197/1-14

⁷² Steve Evans 219/180/10-22

the essentially negative regulatory role of checking for compliance against prescribed criteria."

- 69. It is for the builder to provide to the AI the evidence necessary for the AI to confirm if the guidance in the Approved Documents and, ultimately, the Building Regulations are complied with. If there is a suspicion that the evidence presented does not support compliance, this should be raised with the builder whose responsibility it is to then take steps to have that suspicion resolved or provide alternative evidence demonstrating compliance with the Building Regulations. In this particular scenario, as NHBC was not concerned with a specific build, there was no builder as such to go back to. As the BBA would not provide the information used in its assessment, NHBC took the only available route it had and raised its concerns and requests for evidence directly with Kingspan. Brian Martin's evidence was that in this difficult situation *"I thought NHBC waiting for more tests to come back was the best available answer we had."*⁷³
- 70. NHBC was not permitting Kingspan to '*mark its own homework*'; what it was doing was investigating the evidence to support Kingspan's claims. The fact that Kingspan prevaricated and lied to NHBC significantly contributed to the length of this process.
- 71. There was a suggestion in the questioning of NHBC's witnesses that NHBC could have sought information from the BBA. The reality is that the BBA would not have provided such information to NHBC on the basis of confidentiality to Kingspan and would have referred NHBC to Kingspan with whom it was already in dialogue. As Ms Marshall told the inquiry:

"..the most direct route for investigation was to go to the product manufacturer, who would have had all of the information available that they sent to BBA. From previous experience, BBA have a commercial arrangement with any company that they certify, so they wouldn't generally release any confidential or commercial information to a third party. So the decision was taken to go direct to the manufacturer."⁷⁴

⁷³ Brian Martin 253/185/15

⁷⁴ Diane Marshall 225/121/22 – 225/5

- 72. Further, NHBC did approach BBA on 27 January 2015 in respect of the certificate changes. It did not receive a satisfactory response.⁷⁵ We pause here to note that the only organisation in a position to be able to quickly discover the true position, by contacting Kingspan and the BBA, was the Government.
- 73. Similarly, had NHBC gone to BRE for example to ask about what tests had been undertaken, BRE would not have been permitted to provide such information given client confidentiality and would have had to direct NHBC to Kingspan to seek permission to release the information. Mr Lewis stated that "when we met with BRE, they were very clear that they couldn't discuss client confidential matters."⁷⁶ Indeed, in the context of questioning about desktop reports, CTI suggested the same to Mr Evans:

"Q. What about client confidentiality, in this sense: do you accept that it might be the case that the BRE might be aware that K15 had failed a BS 8414 test or the poor performance of a particular part of the test rig, but if Kingspan had not agreed to release the test data, what would happen?"⁷⁷

- 74. As stated in the introduction, the Panel might think it unsatisfactory that certificates such as these provide evidence of compliance based upon test data which must remain confidential between the manufacturer and issuer of the certificate. It is hard to see how such a system operates in the public interest, but it was at the time and remains today the system within which NHBC BCS and other BCBs are required to operate.
- 75. NHBC refutes the suggestion that it took a "very soft and lax approach to fire safety."⁷⁸ The evidence is that NHBC was regarded as difficult by the building industry and that this harmed its commercial relationships (see paragraph 20(3) above). Contrary to the suggestion that NHBC was in league with Kingspan, Brian Martin stated in evidence that NHBC was "*taking leadership over dealing with Kingspan*"⁷⁹ and that he saw NHBC doing this both as a positive thing and reflecting the way Government encouraged industry to behave.⁸⁰ Whilst NHBC has always sought to work to improve

⁷⁵ Steve Evans 221/45/8 - 221/54/15

⁷⁶ John Lewis 224/127/15-16

⁷⁷ Steve Evans 220/52/1-8; Steve Evans witness statement, {NHB00003020/26} at [78b]; Email John Lewis to Steve Evans, 10 December 2014 including a summary of meeting with BRE on 27 November 2014, {NHB00000829}

⁷⁸ Steve Evans 219/181/13-23

⁷⁹ Brian Martin 253/170/24-25

⁸⁰ Brian Martin 253/171/10-14

standards in the industry, we repeat that it is unfair to require a private company to take the lead in resolving deficiencies in building regulations guidance or the tension between client confidentiality and the availability of test evidence in the market. This required Government action. It is also right to reiterate that MHCLG never informed NHBC at the time that it was, apparently, leaving this task to a private company.

- 76. NHBC's efforts to confront Kingspan are evidenced by the volume of correspondence which shows NHBC challenging Kingspan and pressing it for test data, absent which builder customers would be informed that the product would not be accepted. For example, on 16 June 2014 Mr Evans wrote to Kingspan explaining that unless it provided additional test evidence that supported the use of K15 in constructions that differ from the BS8414 test, NHBC would need to consider whether it would accept K15 in buildings over 18 metres as fit for purpose.⁸¹ Further, on 10 October 2014, at a meeting with Kingspan, NHBC explained that unless it received a letter of comfort from BRE and Arup, it would start to inform its builder customers that K15 was no longer acceptable in buildings over 18 metres. This was followed up by email where NHBC emphasised the need for Kingspan to move quickly⁸² and the letter to Kingspan dated 5 February 2015⁸³ in which NHBC set out the action it was taking and additional requirements that K15 would now be subject to. These were then communicated to all NHBC builder customers. When considering the degree to which it is fair to be critical of NHBC for its approach, the Panel might ask what evidence there is of other BCBs, including local authorities, taking similar steps during the relevant period.
- 77. Whilst NHBC did more than others in the industry, NHBC accepts that this was not enough.⁸⁴

E. BCA GUIDANCE

- 78. NHBC was not a member of the BCA, which has the following five members:
 - (1) Association of Consultant Approved Inspectors (ACAI);
 - (2) Royal Institution of Chartered Surveyors (RICS);
 - (3) Chartered Institute of Building (CIB);

⁸¹ {NHB00000700}

⁸² {NHB00000795}

⁸³ {NHB00000922}

⁸⁴ Diane Marshall 225/162/6-8; Steve Evans 221/226/17-24

- (4) Chartered Association of Building Engineers (CABE); and
- (5) Local Authority Building Control (LABC).
- 79. Mr Evans explained that one of the reasons for the formation of the BCA was because as a profession BCBs:

"..didn't want to compete on technical standards... So the technical group was formed between the two sides of the profession, so public and private sector, to form consistent interpretations which informed building control bodies what the BCA would consider would be a benchmark to go by, but would also give our customers, you know, the view that actually whichever — whether they went to public or private sector building control, they would get the same interpretation. They shouldn't be shopping around for lower standards."⁸⁵

- 80. The BCA produced two guidance notes of relevance to the Inquiry in relation to combustible materials on buildings over 18 metres:
 - Technical Guidance Note 18 "Use of combustible cladding materials on residential buildings", June 2014 (BCA Guidance Note 2014);⁸⁶ and
 - (2) Technical Guidance Note 18 "Use of combustible cladding materials on residential buildings", June 2015 (BCA Guidance Note 2015),⁸⁷
 (together, the BCA Guidance Notes).
- 81. The Panel must of course be careful to differentiate between NHBC and the BCA. This is not a matter of semantics nor NHBC hiding behind the cloak of another legal person. The two organisations are separate and perform different functions from one another. The importance of not conflating NHBC with the BCA, especially when considering guidance approved by the BCA technical committee, was clearly explained by Mr Martin.⁸⁸
- 82. It is unsurprising that NHBC is not a member of the BCA. NHBC is represented at the BCA through ACAI's membership of the BCA in the same way that individual local authorities are not members of the BCA but are represented through LABC's membership. It is also unsurprising that NHBC's staff would hold positions within the

⁸⁵ Steve Evans 219/52/3-22; 220/33/2-5

⁸⁶ {NHB00000760}

⁸⁷ {NHB00001145}

⁸⁸ Brian Martin 254/39/10-20

ACAI, CABE and the BCA, given NHBC's role in the industry. This was the case in relation to Steve Evans and Diane Marshall during the relevant period.

- 83. The BCA's members are represented on its committees by professionals working within the building control industry with the expertise to contribute to and review proposed guidance independently. Whilst the first drafts of the BCA Guidance Notes were written by Steve Evans and John Lewis, neither this nor other BCA guidance notes were NHBC guidance "rubber stamped" by the BCA. In 'putting their names' to the guidance under the BCA umbrella, each member had an obligation to its own organisation to ensure it reviewed and agreed with the terms of that guidance. As set out above the members included bodies with a regulatory function such as RICS which has its own independent regulatory board.
- 84. The BCA did not (and could not) have "customers" and it is not correct (as was suggested to Brian Martin) that BCA guidance only applied to NHBC or BCA customers. This has not at any time been suggested to be the case by any witness from the BCA or NHBC.⁸⁹ It is also incorrect to state that BCA advice is limited to BCA *members* as has been suggested. This was not Mr Evans' evidence.⁹⁰ The "members" of the BCA are the industry groups set out above. Guidance issued by the BCA would be of general applicability to the industry and it would be for those in the industry to decide whether to follow it or not.
- 85. Beyond representatives of the BCA's members reviewing and approving the guidance notes, draft guidance was provided to the MHCLG as a 'papers only' member of the BCA. Aside from receiving relevant documents, MHCLG could and would occasionally attend meetings. Mr Evans, when asked, was confident that "*they were the type of people that if they did see something which they were unsure of or had an objection to, they would pick up the phone and contact me or contact a member of the group to say they had some views on that.*"⁹¹

⁸⁹ cf question to Brian Martin 252/159/20-23

⁹⁰ cf question to Brian Martin 254/44/14

⁹¹ Steve Evans 219/55/16 - 219/2; 220/38/10-20

a. Option 3

- 86. As set out above, Brian Martin's evidence was that Government relied upon industry to issue guidance to assist in the interpretation of ADB. In relation to the BCA Guidance, Mr Martin stated that this was a short-term solution to the problem.⁹²
- 87. Option 3 was a desktop assessment of the cladding system based on test data and permitted by:
- (1) The preambles and paragraph 0.21 to ADB which state that a practitioner is not required to "adopt any particular solution contained in an approved document if you prefer to meet the requirement in another way"; and
- (2) Paragraph 1, Appendix A of ADB which states: "In such cases the material, product or structure should have been assessed from test evidence against appropriate standards, or by using relevant design guides, as meeting that performance... For this purpose, laboratories accredited by UKAS for conducting tests and suitably qualified fire safety engineers might be expected to have the necessary expertise."
- 88. Desktop reports were not a creation of the BCA or NHBC. NHBC had seen desktop reports for other elements of construction such as fire doors and cavity barriers.⁹³ It was an established convention.⁹⁴ Steve Evans confirmed that NHBC had received desktop reports in other areas "*as part of our daily work*."⁹⁵
- 89. The use of desktop study reports as evidence of compliance with ADB was first raised not by NHBC or the BCA but at a meeting with and by Wintech. This is documented in Mr Lewis' note of that meeting on 15 November 2013 in which Wintech's summary of the "route to compliance" was recorded in the following terms:⁹⁶

"Wintech outlined the route to compliance as recommended in AD B2. The procedure is:

....

The client may instead submit a desktop study report from BRE stating whether, in BRE's opinion, BR135 criteria will have been met. Such a report will be based

⁹² Brian Martin 252/165/18-22

⁹³ Steve Evans 219/118/3-14; Diane Marshall 225/173/25 - 225/174/3

⁹⁴ Steve Evans 220/35/1-8

⁹⁵ Steve Evans 219/120/5-7

⁹⁶ {NHB00000604/4}

upon test data which BRE already has in its possession and so this option will be of no benefit if the products have not already been tested by BRE in multiple situations / arrangements. Other test bodies (Chiltern, Warrington Fire etc would also be acceptable but these bodies are not known to have any test data)."

90. Mr Lewis, was asked about his note of the meeting and he confirmed:

"Yes, I believe that was the first time that I'd heard of it, and I believe that Wintech stated it because they had — on some other schemes, not ones that we'd been involved with that I was aware of, that is how it had been accepted by other building control bodies. Q. Right. So to shorten that answer, you'd understood from that that Wintech had got a desktop from BRE that other inspectors had approved? A. Maybe not Wintech, but, you know, they were obviously aware that a scheme had been approved on the basis of a desktop study from BRE on some other scheme."⁹⁷

91. This accords with the evidence of Stuart Taylor of Wintech who states that:

"To comply with the Building Regulation B4(1) I was aware that there were potentially alternative ways of demonstrating compliance. Page 5 of ADB2 (2007) states that "The Approved Documents are intended to provide guidance for some of the more common building situations. However, there may well be alternative ways of achieving compliance with the requirements". I was aware that the BRE were conducting desktop assessments in 2013 as an alternative means of demonstrating compliance with the requirements of Part B of the Building Regulations. I cannot recall when I first became aware of BRE desktop assessments, it may have been slightly before 2013. Up until this point in time, this method of demonstrating compliance with the requirements of Part B of the Building Regulations had not been seen by Wintech..."⁹⁸

92. BRE was therefore already issuing desktop reports as evidence of compliance with the Building Regulations and Wintech was aware of the same before 2013. It is

⁹⁷ John Lewis 223/66/6-22; 223/107/6-14; 223/109/5-11; 223/190/17-24

 $^{^{98}}$ {WIN0000002/22}

unsustainable therefore to suggest this was a creation by NHBC or the BCA to legitimise alleged past practice.

93. The BCA Guidance Note 2014 stated that:

"If no actual fire test data exists for a particular system, the client may instead submit a desktop study report from a suitable independent UKAS accredited testing body (BRE, Chiltern Fire or Warrington Fire) stating whether, in their opinion, BR135 criteria would be met with the proposed system. The report should be supported by test data which the test-house already has in its possession and so this option may not be of benefit if the products have not already been tested in multiple situations / arrangements. The report should also specifically reference the tests which they have carried out on the product."⁹⁹

- 94. As set out above, the assessment was to be carried out by "*a suitable independent UKAS accredited testing body (BRE, Chiltern Fire or Warrington Fire)*" and based on reasoned arguments or facts, not opinion. Whilst the document did not 'spell out' the requisite qualification of the desktop author, it was Mr Evans' expectation that it would come from a fire engineer and a report would not have been accepted by NHBC if its author was not sufficiently qualified.¹⁰⁰ The fire engineer would issue a report that demonstrated equivalent performance to a BR135 compliant system and refer to test data. The report would be specific to the project being proposed.
- 95. At no time, did MHCLG raise any concerns or suggest that Options 3 or 4 (below) were not compliant with ADB. On the contrary, in his witness statement to the Inquiry, Brian Martin said he "found no reason to disagree with its [BCA Guidance Note 2014] contents" and "was satisfied appropriate guidance was being given to the industry."¹⁰¹ In an email to Mr Evans on 21 June 2016, Mr Martin stated: "I'm comfortable with the principles set out in the BCA guidance note. The 4 options are a matter of fact."¹⁰² Mr Martin confirmed in evidence that, whilst MHLG might have had no statutory power to intervene if industry guidance misunderstood ADB, he would have tried to intervene

⁹⁹{NHB00000760/2}

¹⁰⁰ Steve Evans 220/49/25 - 220/50/19

¹⁰¹ Brian Martin witness statement, {CLG00019469/45}

¹⁰² {NHB00001325/5}; Steve Evans 221/125/2-4

had this happened.¹⁰³ Mr Martin's evidence was clear that the BCA Guidance Note was a good thing and that it was more restrictive than (at least some) interpretations of ADB.¹⁰⁴ He said that it made ADB safer.¹⁰⁵

96. Where Option 3 desktop assessments were provided by NHBC's builder customers to NHBC, these would be scrutinised, challenged and further evidence required where necessary before NHBC would issue a final certificate for building control purposes. The process was that a fire engineer (generally John Lewis) would review each Option 3 desktop assessment. He would then escalate it to Steve Evans for a further review, who would escalate it for formal internal sign-off by a senior manager, usually Diane Marshall or Ian Davis (in his role as Operations Director at NHBC). Whilst NHBC accepts this was not a formal peer review process, in that neither Mr Evans nor Ms Marshall were qualified fire engineers, Ms Marshall and Mr Evans were long standing professionals working in the building control industry who were familiar with the requirements. Had there been any desire to lower standards, NHBC would not have put in place a multi-layered approvals process. One example of this which was explored with John Lewis related to the Barking Site G report.¹⁰⁶ The report specified the use of Reynobond rainscreen cladding. Mr Lewis stated that further evidence was required from H&H in relation to this report:

"my first question after getting this was to go back and say, 'Can you confirm this is the FR version of Reynobond that you're using', because, you know, we didn't want any confusion with a 100% PE cored one."

97. The role of a BCB is to take all of the available evidence and make a judgment as to whether the functional requirements are met. NHBC BCS would therefore consider any Option 3 reports submitted but would not issue a final certificate based on such a report alone. Wherever necessary, NHBC would require further evidence from builders and fire engineers¹⁰⁷ and would look holistically at the evidence during the review and

¹⁰³ Brian Martin 252/169/14-23

¹⁰⁴ Brian Martin 254/33/1-25

¹⁰⁵ Brian Martin 254/102/4

¹⁰⁶ {NHB00001408}

¹⁰⁷ Steve Evans witness statement {NHB00003020/7} at [190 (b)] and John Lewis second witness statement {NHB00001332} at [95 (b)]

escalation process to decide whether the proposal met the requirements set out in the Building Regulations.

- 98. It was not NHBC's role within the industry to police how other BCBs operated or to assess whether they had equivalent safeguards in place. While other bodies should have had similar procedures, NHBC could not know whether that was the case. The fact that there was some industry-issued guidance, such as the BCA Guidance Note, did not change this, as it was not the role of the BCA to investigate the policies and procedures of BCBs.
- 99. Whilst some BCBs might not have their own internal fire engineers, they would of course be able to use external experts to assess the desktop reports received. This was Mr Evans' experience of practice when working as a building control surveyor for a local authority before his employment at NHBC.¹⁰⁸
- 100. It is correct that Mr Martin discussed with NHBC concerns regarding some desktop assessments being produced within the industry, in particular by email and at a meeting held before the NHBC Facades to Tall Buildings Conference on 7 July 2016.¹⁰⁹ In that email chain, Mr Martin explains that his concern was how specific reports were produced, but that this did not relate to sites for which NHBC was the BCB. In evidence Mr Martin said that raising this was more a "*lever*" he was using to encourage the industry to apply scrutiny to the reports than a concern about the reports being issued.¹¹⁰ Mr Martin says of the conference that he was happy with how Mr Evans (speaking on behalf of the BCA) addressed the issue during his own presentation and he "*hoped that this would improve the industry's understanding and provide clarity until the issue could be addressed by way of a review of ADB*."¹¹¹ Steve Evans confirmed that part of the purpose of the presentation was to address concerns about the standard of some desktop assessments.¹¹²
- 101. NHBC has been questioned about its motives in "alighting on and then publishing option 3 as a further alternative means to compliance."¹¹³ It is important to repeat that

¹⁰⁸ Steve Evans 220/201/1-14

¹⁰⁹ Email Brian Martin and Steve Evans, 27 June 2016 {NHB00001325/5}

¹¹⁰ Brian Martin 255/111/12-15

¹¹¹ Brian Martin witness statement, {CLG00019469/52}at [145]

¹¹² Steve Evans 221/128/22- 221/129/4

¹¹³ John Lewis 223/193/22-25

it was the BCA and not NHBC that published the BCA Guidance Note. As Mr Lewis explained:

"It was to, you know, not -- well, it was to assist the industry to get -- you know, to come to conclusions that these claddings would work. It wasn't being done as a way that NHBC could improve its market share because it was being done under the BCA. We were trying to share what we'd picked up and what we knew with the rest of the building control profession ..."¹¹⁴

- 102. The Panel will appreciate the obvious point that if it was truly NHBC's motive to increase its own profits by winning more work for itself by allowing Option 3 reports, it would have issued the guidance in its own name and not worked with other bodies around the BCA table to produce, review and issue the BCA guidance.
- 103. As set out in NHBC's opening statement, the ethos behind the BCA Guidance Note was not to lower standards, nor to make compliance easier, but to seek to set out the methods that existed within ADB to meet changing needs within the industry whilst ensuring continued safety of buildings.
- 104. In the years prior to 2014, the thermal requirements in the Building Regulations meant architectural designs incorporated vast numbers of different cladding combinations. Driven by Government and public desire, the house building industry needed to find ways in which to make homes more green and efficient. As Mr Evans told the Inquiry:

"the focus of the industry was very much on thermal efficiency. The drive from government was very much on thermal efficiency, changes to the U-values and the thermal efficiency of walls . In many cases, the only way you could achieve that was to use this type of insulation."

105. And as Mr Lewis explained in relation to why the BCA looked beyond the linear routes to compliance: "We were aware that insulation -- you know, the need to use high levels of insulation to achieve other part L thermal requirements." It became clear to NHBC (and other BCBs) that the "linear routes" to compliance described in paragraph 12 of ADB were insufficient to deal with the extensive number of different

¹¹⁴ John Lewis 223/194/1-7

combinations of supporting structure, insulation and cladding finishes that were being specified. A wider range of façades was being used within the industry and it was necessary regularly to consider whether these were compliant with the Building Regulations. Therefore, the BCA Guidance Note was developed to explain what the range of industry bodies involved in the BCA considered were acceptable ways, in accordance with ADB, of providing evidence that could demonstrate compliance with the Building Regulations.

106. It has been suggested that, rather than produce guidance, the Government could have been asked to review and amend ADB. As Mr Evans explained, this was not a simple or quick task:

> "the process of changing an approved document is quite a lengthy process, which involves, first of all, undertaking research, carrying out consultations. So had we waited for a change in the approved document, had a change in the document been necessary for this, that could have been two, three years down the line."¹¹⁵

- 107. As set out above, Mr Martin said that he found himself in an impossible position with the Government unable or unwilling to issue new guidance and MHCLG having to rely upon bodies such as the BCA to issue guidance to fill the gap.
- 108. Moreover, when NHBC had raised questions about the interpretation of ADB, for example in relation to the meaning of 'filler', it had been told by Mr Martin, "*I can't offer a formal view as such. Specific projects are a matter for the relevant building control body*..."¹¹⁶ A similar response was received when NHBC sought clarification as to the ambit of paragraph 12.7. Mr Martin admitted that the policy of MHCLG was not to give such answers.¹¹⁷
- 109. The desktop assessments relied upon the underlying testing being conducted properly. NHBC is now aware, based on evidence submitted to the Inquiry, of how some manufacturers approached those BS8414 tests. The Inquiry has heard, for instance, how Kingspan's 2005 test used a different version of K15 to that which was available on the market. NHBC can see, with hindsight, how Option 3 was capable of abuse if

¹¹⁵ Steve Evans 220/31/3-8

¹¹⁶ Steve Evans 221/67/20-22;, Brian Martin witness statement {CLG00019469_0047} at [133]

¹¹⁷ Brian Martin 254/128/20- 254/129/12

unscrupulous manufacturers went to such lengths. Used appropriately, and with the rigour that a BCB should apply, Option 3 was, however, a valid approach to compliance with the Building Regulations.

- 110. There became a concern about the capacity of UKAS accredited testing houses to deal with the volume of requests for Option 3 reports as reported by BRE to NHBC.¹¹⁸ This resulted in the BCA Guidance Note 2014 being amended in June 2015 to allow Option 3 desktop assessments to be undertaken by any suitably qualified fire specialist. As with previous BCA guidance this was agreed by all BCA members. In addition, a more restrictive approach would have precluded organisations with the right kind of experience such as International Fire Consultants who had undertaken a lot of testing over the years and understood the way materials behave.¹¹⁹
- 111. Neither MHCLG nor members of the BCA Technical Group raised the possibility that the term 'fire specialist' might be misunderstood and lead to less qualified people undertaking the assessments. As far as NHBC was concerned, any review by it of a desktop assessment would have picked up any deficiencies including in the expertise of the author(s).¹²⁰ There is no evidence that the change in language led to a dilution in standards. It should be noted that "fire engineer" is not a protected title and those without the qualifications of John Lewis, for instance, would have been able to use this title. Even the post-Grenfell (2022) government guidance PAS 9980¹²¹ speaks of fire engineers "or other competent building professionals". It neither defines "competent" nor requires that such professionals hold any particular qualifications. The only way for this problem to be remedied is for regulation of this field of work by Government.
- 112. It was suggested to John Lewis that BRE Trust BR135 guidance¹²², if read "side by side" with ADB, would suggest that Option 3 was not a valid form of compliance as there was no means of *extrapolating* BS8414/1/2 data. This was based upon wording within the BR135 guidance which states:

"This classification applies only to the system as tested and detailed in the classification report. The classification report can only cover the details of the

¹¹⁸ Seve Evans 220/207/5-21

¹¹⁹ Brian Martin 254/151/7 – 254/12/15

¹²⁰ Steve Evans 221/3/17-23; John Lewis 224/123/23-25 - 224/125/7

¹²¹ https://www.bsigroup.com/en-GB/standards/pas-9980/

 $^{^{122}}$ {LFB00031969}

system as tested. It cannot state what is not covered. When specifying or checking a system it is important to check the classification documents cover the end use application."

- 113. That this wording could preclude the use of Option 3 is not accepted. The restriction set out above is a stricture that applies to what the BCA termed Option 2. The effect is that if the composition of a proposed external wall make-up varies from the <u>tested</u> wall make up then the builder would not be able to rely upon that BS8414 test directly. This has always been the case when relying upon testing under BS8414.
- 114. That this could not, when read side by side with ADB, preclude Option 3 from being a route to compliance is clear from the following:
- (1) If ADB precludes the use of such reports in lieu of testing, then Appendix A Paragraph1 (a) and (b) would be rendered meaningless where it is states (emphasis added):

"the material should be in accordance with a specification or design which has been shown by test to be capable of meeting that performance; or **Note** for this purpose, laboratories accredited by UKAS for conducting the relevant tests would be expected to have the relevant expertise.

....have been assessed from test evidence against appropriate standards, or by using relevant design guides, as meeting that performance or; Note for this purpose, laboratories accredited by UKAS for conducting the relevant tests <u>and</u> <u>suitably qualified fire engineers</u> might be expected to have the relevant expertise" (emphasis added);

- (2) ADB sets out possible, as opposed to, exhaustive or prescriptive routes to compliance. Paragraph 0.21 expressly states that there may be alternative ways of achieving compliance with the Building Regulations than provided in the guidance in ADB; and
- (3) If it were the intention of Government to exclude an (otherwise standard) route to compliance, then this would be explicit. To the contrary, the effect of Appendix A (i) is to allow desktop assessments. This was Brian Martin's understanding of the wording of BR135 as explained to the Inquiry.¹²³

¹²³ Brian Martin 255/157/4-18

- 115. As to the refurbishment at Grenfell Tower, John Hoban confirmed in his evidence that he had not seen the BCA Guidance Note until after the fire and did not even know that the BCA published guidance at the time.¹²⁴ John Allen (Head of Building Control for RBKC) equally did not refer to BCA guidance during his work on Grenfell Tower.¹²⁵ The same can be said for Studio E, Rydon and Harley Facades who did not use BCA guidance when working on Grenfell. It was not used or referred to and therefore had no impact upon the project.¹²⁶
- 116. CTI invited NHBC's witnesses to speculate regarding what John Hoban of the Royal RBKC would have done had he received an Option 3 report in relation to the cladding on Grenfell Tower (which he did not). The answer from a NHBC perspective was clear that he ought to have "*thrown it back*".¹²⁷

b. Option 4

- 117. Option 4 reflected paragraphs 0.30 and 0.34 of the General Introduction to ADB headed Fire Safety Engineering.¹²⁸ That this was not the introduction of a new method of compliance with the functional requirements was also the view of MHCLG and Mr Martin.¹²⁹
- 118.Option 4 was included as an acceptable method within ADB which allowed a fire engineer to consider the building as a whole rather than just the external wall makeups. For example, projects where there were a range of different façades on a single building were inherently more complex and would benefit from a holistic approach to fire safety.
- 119. Whilst not referred to expressly as Option 4, this approach was reflected in the March 2015 letter sent by NHBC to its builder customers.¹³⁰ Option 4 required a holistic fire engineered assessment of the whole building carried out by a suitably qualified fire engineer, taking into account all building factors (which should in any event be the

¹²⁴ John Hoban 45/67/2-12

¹²⁵ John Allen 47/36/1-3

¹²⁶ Neil Crawford 9/187/22 – 9/188/1, Tomas Rek 12/19/20-23, Bruce Sounes 21/168/18-22, Simon Lawrence 22/89/5-8, Stephen Blake 28/88/11-22

¹²⁷ John Lewis 224/116/18-21

¹²⁸ Approved Document B {CLG00000224/15}

¹²⁹ Brian Martin witness statement {CLG00019469_0047} at [134]

 $^{^{130}}$ {NHB00001032}

ultimate goal when considering the functional requirements of the Building Regulations).

120. The BCA Guidance Note 2015 stated:

"If none of the above options are suitable, the client may consider addressing this issue via a holistic fire engineered approach taking into account the building geometry, ignition risk, factors restricting fire spread etc. Such an approach would be expected to follow a recognised design code such as the BS 7974 Application of fire safety engineering principles to the design of buildings suite of documents and be supported with quantitative analyses where appropriate."¹³¹

- 121. For Option 3, the fire engineer's focus was limited to the external wall make-up. In Option 4, he or she would consider the whole of the building and, therefore, how other factors would impact on the external walls.
- 122. Both BCA Guidance Notes were available on the BCA's website and were disseminated by the representative organisations of the BCA within their own organisations. NHBC referred to the BCA Guidance Notes in its internal guidance B500 and its external guidance to its own builder customers (the 2016 NHBC Guidance Note).¹³² Whilst the BCA was an industry association whose members comprised a significant part of the BCB market, its influence was not so widespread as to make it the norm for builders and building control professionals to look to the guidance and follow it.
- 123. Option 4 has not been the subject of any sustainable criticism in the Inquiry.
- 124. As with Option 3, there is no basis to suggest that the introduction of Option 4 had any impact upon the acceptance of the cladding used at Grenfell Tower. No Option 4 report was completed, and no reputable fire engineer could have assessed the cladding on Grenfell as compliant through that route given the factors set out at paragraphs 0.32 to 0.34 of ADB.

¹³¹ BCA Technical Guidance Note 18 - Use of Combustible Cladding Materials on Buildings Exceeding 18m in Height, Issue 1 {NHB00001145/2}

¹³² B500: {NHB00001017}; 2016 NHBC Guidance Note: {NHB00000065}

F. NHBC GUIDANCE

- 125. Unlike the BCA Guidance Notes, NHBC's external guidance was not for use by the industry as a whole; rather it was solely for use by NHBC's own builder customers. It is accepted that this was a large section of the residential market. The purpose of NHBC's external guidance was to set out in a transparent manner that if the builder could show it had followed NHBC's guidance, NHBC BCS was likely to accept the project in question for building control purposes. That was not a foregone conclusion because NHBC would always check each project on a case-by-case basis.
- 126. NHBC's guidance was just that; guidance for its surveyors or builders rather than a prescriptive set of requirements. If a builder came to NHBC with an alternative way of demonstrating compliance with NHBC Standards or the Building Regulations, NHBC would consider the available evidence and make an assessment regarding how appropriate and robust that evidence was in demonstrating compliance.
- 127. NHBC has its own in-house expertise to produce its guidance. Whilst it was willing to listen to companies and consultants in the industry, and it did take a collaborative approach, including reflecting on the views expressed by other industry bodies to its employees via the BCA, NHBC ultimately reached its own conclusions in order to draft its guidance.
- 128. The 2016 NHBC Guidance Note entitled 'Acceptability of common wall constructions containing combustible materials in high rise buildings' was launched at the July Façades to Tall Buildings conference at which Brian Martin was present. He raised no comments nor criticisms of it.¹³³
- 129. The 2016 NHBC Guidance Note was based upon NHBC experience of reviewing Option 3 and 4 reports. As Ms. Marshall said:

*"it was based on the evidence we had seen. I don't know what other evidence other building control bodies would have seen and what guidance they would have given to their staff to adopt or approach the BCA guidance note."*¹³⁴

130. Brian Martin's view was that this was in principle a permissible approach:

¹³³ Steve Evans 221/181/5-10

¹³⁴ Diane Marshall 226/65/15-20

"I was just saying what NHBC are doing here was saying, "We've got these constructions which we've now reviewed on many occasions and are satisfied that they comply", and NHBC were saying to their clients, "If you follow —— if you use these constructions again, we've already checked them, we don't expect you to jump through as many hoops as perhaps you would have done in the past". So I could understand why they were doing that, and it seemed, from their point of view, a sensible approach."¹³⁵

131. Mr Martin did not view this as widening the routes to compliance with ADB:

"I'm not sure if it does widen the route to compliance. What they were trying to do is to say that these are constructions that they have already reviewed and concluded that they meet one of those routes to compliance."¹³⁶

- 132. Two clear conclusions can be drawn from the evidence of NHBC witnesses in relation to the decision to issue the 2016 NHBC Guidance Note.
- 133. The first is an acceptance that there were shortcomings with the document. When asked by CTI, Mr Evans stated that he did not stand by the 2016 NHBC Guidance Note for ACM cladding based upon the subsequent (post fire) MHCLG testing.¹³⁷ John Lewis broadly agreed with Wintech's view in relation to the 2016 NHBC Guidance Note save that he did not consider it fair to state that the decision to publish that guidance was irresponsible.¹³⁸
- 134. The second conclusion is that the 2016 NHBC Guidance Note was not in the event used to accept any buildings with ACM cladding. Steve Evans said that NHBC checked all builds which had used the 2016 NHBC Guidance Note, and no buildings with ACM cladding had used the guidance as a means of showing compliance.¹³⁹
- 135. After the fire, NHBC reviewed all its relevant guidance and changed internal guidance to reflect the withdrawal of the 2016 NHBC Guidance Note. This resulted in NHBC issuing new internal guidance in August 2017, NHBC Operations Technical Advisory Note 600 (B600), which replaced B500.¹⁴⁰ The purpose remained the same, which was

¹³⁵ Brian Martin 255/126/4-13

¹³⁶ Brian Martin 255/144/9-13

¹³⁷ Steve Evans 221/179/18 – 221/180/23

¹³⁸ John Lewis 225/59/18-24

¹³⁹ Steve Evans 221/198/24-199/6

¹⁴⁰ B500: {NHB00001017}; B600: {NHB00000238}

to aid consistency from NHBC's surveyors and builder customers in applying the NHBC Standards and ADB in respect of external walls on buildings with a floor over 18 metres. B600 was subsequently updated in December 2018.

136. The 2016 NHBC Guidance Note could not have been used when considering whether the cladding used on Grenfell Tower was compliant. First, RBKC should not have used documents such as this to complete their own work and the evidence is that they did not do so. Secondly, the publication date of this guidance note was after John Hoban issued a final certificate for the refurbishment work on Grenfell Tower. Thirdly, John Lewis stated in evidence that if Grenfell Tower had been a NHBC project it would have been referred to him and he would not have accepted it.¹⁴¹

G. REVIEWS

- 137. As has been well established, NHBC conducted various reviews into projects where NHBC provided either building control services or warranty insurance that are relevant to combustible cladding.
- 138. The first was the 2015 review (known as the Combustible Cladding Review) which looked at schemes that were registered (for building control or warranty insurance) from 1 January 2014, and projects still in build registered prior to that date.¹⁴² The review required that for all projects which had commenced (where an initial notice had been issued) pre 2014 there was confirmation from the manufacturer that the product was suitable for use over 18 metres.
- 139. For all projects where the notice was issued in 2014 or 2015, NHBC ensured that one of the routes in the BCA Guidance Note had been followed which included the internal escalation procedure set out above.
- 140. None of the buildings in the 2015 review had specified the use of ACM cladding with a PE core.¹⁴³
- 141. The second key review conducted after the fire (the 2017 review) looked initially at projects which had been accepted under the 2016 NHBC Guidance Note as the basis

¹⁴¹ John Lewis 225/56/10 to 225/58/6

¹⁴² Diane Marshall 225/109/14-18

¹⁴³ Diane Marshall 225/112/2-22

for compliance. A small number of buildings were identified which specified ACM cladding, however, none of these had used the 2016 NHBC Guidance Note to show compliance and none had a PE core.

- 142. The buildings specifying ACM were then investigated under the terms of NHBC's internal guidance B600 which took account of new MHCLG test evidence.
- 143. Once the above process had been completed this was extended to a review of all projects under construction to ensure that wherever Options 3 or 4 had been used as a route to compliance, they met the required standard. These too were checked under the revised procedure under B600.
- 144. CTI has pressed NHBC witnesses as to why the reviews did not cover historical projects where NHBC had provided building control services, as the high market share enjoyed by Kingspan K15 would suggest a large number of projects will have been completed with this product. There are essentially four answers to this:
- (1) An AI has no power to impose conditions or prescribe modifications to completed works. The powers of an AI are limited and cease completely after a final certificate has been issued.¹⁴⁴

In relation to buildings that had been constructed between 2008 and 2014 where K15 had been specified, NHBC would have issued a final certificate (assuming all other matters were compliant) if K15 had been used in accordance with the BBA certificate including reference having been made by the builder to Kingspan as the manufacturer.

Once the final certificate had been issued, NHBC would have no power to contact the builder and require or request that the cladding used be checked. The responsibility to ensure compliance with the Building Regulations rests at all times with the builder;

(2) There remained in any event a practical problem. Even if NHBC had wished to conduct a review of all historic projects, there is no central searchable record of each of the thousands of projects NHBC has acted upon either by building height or by which material has been used (the number of such products that could be specified is practically without limit). The reality is that NHBC would have had to make inquiries in relation to every project in the date range (subject to setting rough parameters over,

¹⁴⁴ John Lewis 224/159/11 - 224/160/16

for example, number of floors) in order to manually check the thousands of files and see what material had been specified. Such a process is impractical.

Even if it were possible to draw up a list of each and every building which had specified K15, NHBC BCS as an AI does not act as a clerk of works. Whilst an AI would undertake inspections at various stages, no AI is on site regularly enough to guarantee that the specified product has been used or that a different combustible or non-combustible product has not been swapped out during the construction of the building. It is the responsibility of the builder or developer to maintain records of the products used and ensure compliance with the Building Regulations.

(3) The above must take into account what has happened since 2017. The reality is that BCBs and warranty providers are not best placed to detect and or raise potential problems with cladding on sites where they have previously acted.

There has been extensive publicity about K15 and combustible cladding generally since the tragic fire at Grenfell. This has led to homeowners, mortgage providers and insurance companies making inquiries with builders and warranty providers in order to establish whether the cladding that has been used was compliant. Frequently claims are made to cover the cost of replacing that cladding where there was non-compliance with the Building Regulations.

To this end, NHBC has (notwithstanding the difficulty summarised at (2) above) conducted a further review of projects over 18 metres including completed projects.

This was known as the Section 4 Exposure Review (a reference to the relevant section of the warranty policy document). NHBC contacted all of its builders in order to determine if they intended to deal with cladding issues (in which case NHBC would not need to consider these as part of its exposure for any claims).¹⁴⁵ This related to projects where NHBC had provided both building control and warranty cover;¹⁴⁶

(4) The above must also be read against the background of central and local Government having conducted its own review into properties which might have combustible cladding. As the panel is aware after the Grenfell Fire, a letter was sent to all local

¹⁴⁵ Steve Evans 221/210/21 - 221/211/9

¹⁴⁶ Steve Evans 221/211/10 - 221/211/20

authorities asking them to assess all buildings over 18 metres within their region and noting the potential risk of ACM cladding.

H. CONCLUDING REMARKS

- 145. NHBC reiterates its commitment to assisting the Inquiry to ensure that what occurred at Grenfell Tower never happens again.
- 146. At all times, NHBC acted with its core purpose in mind to improve standards in housebuilding. At no time did it act with any intention to increase profits and nor has it retrospectively created explanations to seek to justify why it acted in the way that it did.
- 147. Improving standards in the UK house-building industry was and will always be part of NHBC's core purpose. NHBC is keen to learn any lessons it can and to play its full part in ensuring an improved fire safety system in the UK house-building industry for the future.

6 June 2022

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