FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/HYI/2022/0005 & 0016**
Property	**:**	**2-4 Leigham Court Road, London SW16 2PG**
Applicants	**:**	**(1) Ms Sarah Waite** **(2) Karin Ida Christina Martensson &** **(3) Other leaseholders**
Representative	**:**	**Mr Robert Bowker, counsel, instructed by Russell-Cooke LLP**
Respondent	**:**	**Kedai Limited (freeholder)**
Representative	**:**	**Mr David Sawtell, counsel, instructed by Taylor Wessing LLP**
Interested Person	**:**	**London Borough of Lambeth** **(Mr Gibrilla Musa, EHO)**
Type of application	**:**	**For a remediation order under section 123 of the Building Safety Act 2022**
Tribunal	**:**	**Judge Timothy Powell** **Mrs Helen Bowers MRICS**
Date of Decision	**:**	**9 August 2023**

DECISION

Numbers in square brackets [ ] refer to the Respondent's hearing bundle and those with additional letters SB refer to the Applicants' Supplementary hearing bundle.

Summary of the Tribunal's decisions

(1) The Tribunal makes a remediation order in respect of Block A and Block B, 2-4 Leigham Court, Road, London SW16 in the terms of the Order that accompanies this decision.

(2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 that 80% of the landlord's cost of these proceedings may not be passed on to non-qualifying leaseholders through the service charge (the qualifying leaseholders being protected against payment of any costs by reason of paragraph 9 of Schedule 8 to the Building Safety Act 2022).

Introduction

1. These were two consolidated applications for a remediation order under section 123 of the Building Safety Act 2022 ("the BSA") in respect of the development at 2-4 Leigham Court, Road, London SW16 2PG. (the "Development"). The first application in time was received on 20 September 2022 in respect of Block B (the South Block) and the second application was received on 7 December 2022 in respect of Block A (the North Block). The Development comprises 35 residential flats and one commercial unit on the ground floor. 30 of the 35 long leaseholders in the two blocks have joined the proceedings as Applicants. The Respondent is the freeholder, Kedai Limited.

2. The BSA 2022 is the legislative response to the Grenfell Tower fire in June 2017, when 72 people lost their lives. On 28 June 2022, the relevant provisions of Part 5 of the BSA came into force. Part 5 deals with "Other Provision about Safety, Standards etc" and, within Part 5, sections 116 to 125 deal with the "Remediation of certain defects". Schedule 8 of the BSA is concerned with "Remediation costs under Qualifying Leases etc" and contains leaseholder protections in respect of service charge costs arising from certain remediation works.

3. Section 123 of the BSA provides for applications to be made to the Tribunal for a remediation order in respect of relevant defects in a relevant building. Section 120 contains definitions and defines a "relevant defect" by reference to a "building safety risk". The relevant provisions are set out in full later in this decision.

Factual background

4. The Development began life as the offices of the South London Press, fronting Leigham Court Road, London SW16 in the London Borough of Lambeth. Between 2015 and 2016, building and construction works were carried out on the site by Formation Construction Limited, acting as managing contractor. Formation Construction Limited later changed its name to Hackney Construction Limited. Its parent company was Formation Group Plc. The offices were converted to residential flats with a commercial unit on the ground floor and two additional storeys were added to the original brick-built building, making it six storeys high (ground plus five), plus a roof terrace (the North Block). Behind the converted office building, a new seven-storey block of flats was constructed (ground plus six), plus a roof terrace (the South Block).

Structurally speaking, the two blocks are separated by a party wall and have separate entrances at ground floor level. Each block has one or two roof terraces, accessible and used by long leaseholders of the residential flats. A façade contractor, IPS, was engaged to carry out the supply and installation of the external wall system of the buildings.

5. The construction works were completed on 29 January 2016. Upon completion, the works were deemed compliant under the Building Regulations 2010 by the appointed Approved Inspector, HCD Building Control Limited (apparently now operating as Bureau Veritas) [402 & 420]. In addition to this, Building LifePlans Limited (BLP), as underwriting agents for Allianz Global insurance, were appointed and carried out inspections during the construction works. After completion, BLP issued the certificates of insurance, which certified "that the Premises have been subjected to the technical risk management system operated by BLP as appropriate to the specific form of construction" [423].

6. Hackney Construction Limited was dissolved on 3 October 2020. Its associated company, the Respondent Kedai Limited, continues involvement with the Development as freeholder. From quite early on, concerns grew about the quality of the construction work. Following the Grenfell Tower fire in June 2017, those concerns focused on the gold-coloured aluminium cladding on the upper two storeys of each of the two blocks and the internal compartmentalisation of the blocks (in layman's terms: the stopping up of holes in the structure, floors and ceilings, to prevent the spread of fire).

7. Kedai Limited procured a report from for 4Site Consulting Limited dated 24 October 2019. That report was unable to determine if the cladding installed on the external elevations met current standards of fire performance and installation. It concluded that the cladding had not been subjected to the recommended MHCLG (Ministry of Housing, Communities and Local Government) testing regime. The stated action required was to "*ensure that the external cladding was subjected to the recommended MHCLG testing regime*".

8. That step was not taken, but Kedai Limited obtained further reports.

Further reports

9. A report from Tri-Cad Surveyors Limited dated 12 March 2020 with an EWS1 form (External Wall System Fire Review) was procured. Both documents turned out to be fraudulent. Subsequently, there was a report from AESG dated 8 April 2020 [76] with an accompanying letter [74] which concluded that because the Development was less than 18 metres high, it was not possible to produce an EWS1 form. The letter also identified the products that had been selected for the external wall construction [75], which included Marley Eternit fibre cement boards,

Kingspan [Kooltherm] K15 insulation behind the cladding panels, and glazed ceramic tiles and "PPC aluminium tiles" around the retail unit entrance façade (which may have been a reference to the "aluminium flashing piece" above the ceramic tiling, or may have been an error because the aluminium façade cladding was on the upper two floors). The report also included photographs showing that several corners of the fibre cement panels had broken off [90], following which Kedai Limited made a claim against insurers. However, the report confirmed that no remedial works were required.

10. There was a second AESG report dated 17 June 2021, which after an invasive inspection of the external wall system concluded, amongst other things, [470] that: there were limited horizontal cavity barriers in place, no vertical cavity barriers were located, the Kingspan K15 insulation, while compliant at the time of construction, was now considered non-compliant, there was no firestopping around vents within cavities, the vents used were not fire rated and combustible materials had been used as part of the external wall system. The report stated:

> "At the time of construction 2-4 Leigham Court Road was non-compliant with standards set out within the Building Regulations 2010 and Approved Document B, this is due to the lack of cavity barriers, and no cavity closers in place around external openings."

11. The report was then followed by two height verification reports by Mr Adam Kiziak of Harris Associates in April 2022, which measured each block at 17.55m [474-475]; and an intrusive survey of the blocks on 13 June 2022 by Harris Associates. That survey led to an External Façade Review by Harris Associates/ Tri Fire Limited [481] and a form EWS1 and Fire Risk Appraisal of the External Wall (FRAEW) [476], both dated 1 August 2022. The External Façade Review identified the aluminium cladding on the upper two floors of the buildings, for the first time, as Aluminium Composite Material ("ACM") and concluded that overall risk rating for the building was "high", requiring remedial action to be taken. It also advised that the Kingspan insulation should be removed and replaced with a non-combustible alternative.

12. An External Wall Fire Review & Executive Summary was then issued on 9 August 2022 [514]. It was prepared and signed by Head of Façade Consultancy, Tamer Duman and Senior Façade Consultant, Chris Radev, both it seems of Harris Associates. At the same time, a further height verification report gave an increased height for the Development of 17.97m (up from 17.55m), measured as with the others to the finished floor level of the top floor. Due to the upwards revision of the building height, the External Façade Review by Harris Associates/ Tri Fire was revised and re-issued on 1 September 2022 [529], together with a revised External Wall Review. The key difference was that, at 17.97m, the buildings were now considered to be a "tall building" being

within the 30cms tolerance for the threshold of 18m. This meant that the height risk factor for the building turned from "Neutral" to "Negative" (adding to the several other "Negative" factors already present) and an application for funding could be made to the Building Safety Fund. Finally, Kedai obtained an internal compartmentalisation survey by Ark Workplace Risk of 15 March 2023 [577], which found an 'unacceptable' level of compartmentation in the premises.

13. Since these reports, it has now been realised that the height survey should not have been measured to the finished floor level of the top floor of the buildings, but it should have been taken to the level of the communal roof terraces above the uppermost floor. That realisation has led to an acceptance that the true height of the Development is more than 18m high, a significant difference, resulting in the application of different Building Regulations requirements.

Application

14. On 20 September 2022 the Tribunal received an application for a remediation order from Ms Sarah Waite, the long leaseholder of Flat 24, 2-4 Leigham Court Road in the South Block. The originally named Respondents were Patrick Kennedy and David Kennedy, being the directors and/or shareholders of both the freeholder, Kedai Limited, and Formation Group PLC (Formation), said to be the building contractor. Preliminary directions were issued with a view to holding a case management hearing. Those preliminary directions named Kedai Limited as First Respondent and Formation as Second Respondent, directing Kedai Limited to produce a short position statement for the hearing and inviting Ms Waite and Formation to do likewise, as well as produce relevant key documents for the Tribunal to consider.

Case management hearing and directions

15. The initial case management hearing took place on 11 November 2022. Both Kedai and Ms Waite produced a position statement for that hearing. Formation wrote a letter to say they were not a "relevant landlord" within the meaning of section 123 of the BSA and applied to be removed from the proceedings; an application that the Tribunal granted.

16. In its position statement, Kedai confirmed that the South Block (Block B) was a "relevant building" but pointed out that Ms Waite's application was purely in respect of Block B, as Block A was structurally separate. Kedai confirmed that it was a "relevant landlord" under the Act. Kedai reserved its position as to whether defects at the premises were "relevant defects" and stated that technical evidence would be required to determine whether any alleged defect amounted to a "building safety risk".

17. After lengthy discussion, directions were drawn up in consultation with the parties, setting out the steps each party had to take to prepare the case for a final hearing, which was fixed for 10-13 July 2023.

18. The directions included an invitation to other leaseholders in Block B, who wished to join in the current application, to write to the Tribunal; and an invitation to any leaseholder in Block A, who wished to apply for a remediation order in respect of their block, to apply on the Tribunal's application form. Both the local authority, the London Borough of Lambeth, and the London Fire Brigade were invited to apply to join the proceedings as interested persons or, if they wished, to apply to join as parties. As a result of these directions, Mr Gibrilla Musa, an environmental health officer, indicated that Lambeth Council would wish to apply to become an interested person.

19. The directions also provided for Kedai to disclose reports to Ms Waite; for the sequential filing and service of statements of case; for Kedai to obtain, file and serve a report of a fire safety engineer, to include a specification of works and timings; for Ms Waite to serve and file her own report, if she wished to do so; for the exchange of witness statements; without prejudging the Tribunal's decision, for the filing and service of draft remediation orders; and preparation of documents for the final hearing.

20. On 7 December 2022, the Tribunal received a second application for a remediation order in respect of Block A. The application was made by Ms Karin Ida Christina Martensson of Flat 1 and numerous other leaseholders. Several other leaseholders in Block B also applied to join the proceedings as Applicants. As mentioned above, some 30 leaseholders overall have applied to join the two applications.

21. Although Lambeth Council joined as an interested person, they have taken no active part in the proceedings.

22. In response to the directions of 11 November 2022, Kedai Limited obtained a report from a fire safety engineer, Mr Brian Martin of DCCH Experts LLP. Much will be said about that report and the evidence given by Mr Martin later in this decision. However, at this stage it is sufficient to say that Mr Martin, whose report is dated 20 April 2023, identified several relevant defects which, he concluded, should be removed and replaced.

23. In May 2023, Kedai Limited applied to postpone the July hearing date, to enable it to obtain a feasibility study to be produced by a specialist façade engineer and/or an architect, as recommended by Mr Martin in his report.

24. The Applicants opposed a postponement of the hearing date, and the

matter was considered at a further case management hearing on 31 May 2023. After considerable discussion, the Tribunal decided not to postpone the hearing for several reasons, not least that on the face of the evidence as it then stood, it appeared that a tribunal could conclude that the conditions for making a remediation order would be satisfied in this case. Retaining the July hearing with the possibility of a remediation order being made might also give peace of mind to the applicant leaseholders and their mortgages, and to insurers. Further directions were given making arrangements for the Applicants to ask questions of Kedai's expert, Mr Martin, and making further provision for the drafting of remediation orders.

25. By further directions dated 13 July 2023, the Tribunal directed Kedai Limited to confirm its position regarding the status of the North Block (Block A) and Ms Martensson's lease; and indicated its wish to inspect the Development on the morning of 10 July 2023.

26. On 7 July 2023, the Tribunal received a letter from Taylor Wessing solicitors to confirm that Kedai "*is engaging with Buro Happold as façade engineer, Delta Architects as architect and Formation Design and Build as project manager*". The letter set out the necessary actions to be undertaken to complete any remedial works at the Development, giving an estimate of the duration for each step. The overall time estimate was 115 weeks, starting with Buro Happold undertaking a feasibility report and measured survey and Delta investigating and agreeing suitable materials prior to submission of a planning application. The letter from Taylor Wessing continued: "*Separately, we are instructed that the works to rectify the internal compartmentation defects identified in the Internal Compartmentation Survey Report by Ark Workplace Risk Ltd dated 15 March 2023 commenced on Wednesday 5 July 2023 and are anticipated to conclude in approximately 3 weeks*."

The statutory provisions

Building Safety Act 2022

27. Section 123 of the Act provides:

> **123 Remediation orders**
>
> (1) The Secretary of State may by regulations make provision for and in connection with remediation orders.
>
> (2) A "remediation order" is an order, made by the First-tier Tribunal on the application of an interested person, requiring a relevant landlord to remedy specified relevant defects in a specified relevant building by a specified time.

(3) In this section "relevant landlord", in relation to a relevant defect in a relevant building, means a landlord under a lease of the building or any part of it who is required, under the lease or by virtue of an enactment, to repair or maintain anything relating to the relevant defect.

(4) In subsection (3) the reference to a landlord under a lease includes any person who is party to the lease otherwise than as landlord or tenant.

(5) In this section "interested person", in relation to a relevant building, means—

(a) the regulator (as defined by section 2),

(b) a local authority (as defined by section 30) for the area in which the relevant building is situated,

(c) a fire and rescue authority (as defined by section 30) for the area in which the relevant building is situated,

(d) a person with a legal or equitable interest in the relevant building or any part of it, or

(e) any other person prescribed by the regulations.

(6) In this section "specified" means specified in the order.

(7) A decision of the First-tier Tribunal or Upper Tribunal made under or in connection with this section (other than one ordering the payment of a sum) is enforceable with the permission of the county court in the same way as an order of that court.

28. For the purposes of sections 119 to 125 of the Act, "relevant building" is defined in section 117 (so far as is material in this case) as a self-contained building, in England that contains at least two dwellings and is at least 11 metres high or has at least five storeys. A building is "self-contained" if it is structurally detached.

29. Section 120 defines "relevant defect" for the purposes of sections 122 to 125 and Schedule 8 to the Act as follows:

120 Meaning of "relevant defect"

[…]

(2) "Relevant defect", in relation to a building, means a defect as regards the building that—

(a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and

(b) causes a building safety risk.

(3) In subsection (2) "relevant works" means any of the following—

(a) works relating to the construction or conversion of the building, if the construction or conversion was completed in the relevant period;

(b) works undertaken or commissioned by or on behalf of a relevant landlord or management company, if the works were completed in the relevant period;

(c) works undertaken after the end of the relevant period to remedy a relevant defect (including a defect that is a relevant defect by virtue of this paragraph).

"The relevant period" here means the period of 30 years ending with the time this section comes into force.

(4) In subsection (2) the reference to anything done (or not done) in connection with relevant works includes anything done (or not done) in the provision of professional services in connection with such works.

(5) For the purposes of this section—

"building safety risk", in relation to a building, means a risk to the safety of people in or about the building arising from—

(a) the spread of fire, or

(b) the collapse of the building or any part of it;

"conversion" means the conversion of the building for use (wholly or partly) for residential purposes;

"relevant landlord or management company" means a landlord under a lease of the building or any part of it or any person who is party to such a lease otherwise than as landlord or tenant."

30. Section 121 defines associated persons but, given the confirmation that Kedai Limited was associated with the developer, it is not reproduced here.

31. Section 122 of the Act makes provision about remediation costs and provides:

"122 Remediation costs under qualifying leases etc.

Schedule 8 –

(a) provides that certain service charge amounts relating to relevant defects in a relevant building are not payable, and

(b) makes provision for the recovery of those amounts from persons who are landlords under leases of the building (or any part of it)."

32. Schedule 8 incorporates the definitions mentioned above and makes provision for other definitions including:

> "… "relevant measure", in relation to a relevant defect, means the measure taken –
>
> (a) to remedy the relevant defect, or
>
> (b) for the purpose of
>
> (i) preventing a relevant risk from materialising, or
>
> (ii) reducing the severity of any incident resulting from a relevant risk materialising;
>
> "relevant risk" here means a building safety risk that arises as a result of the relevant defect…"

33. Schedule 8 also defines "qualifying lease" by reference to section 119, however the definition is not relevant in relation to the making of a remediation order.

34. Paragraph 2 of Schedule 8 provides as follows:

> *"No service charge payable for defect for which landlord or associate responsible*
>
> (1) This paragraph applies in relation to a lease of any premises in a relevant building.
>
> (2) No service charge is payable under the lease in respect of a relevant measure relating to a relevant defect if a relevant landlord –
>
> (a) is responsible for the relevant defect, or
>
> (b) is associated with a person responsible for a relevant defect.
>
> (3) For the purposes of this paragraph a person is "responsible for" a relevant defect if –
>
> (a) in the case of an initial defect, the person was, or was in a joint venture with, the developer or undertook or commissioned works relating to the defect;
>
> (b) in any other case the person undertook or commissioned works relating to the defect.

(4) In this paragraph –

"developer" means a person who undertook or commissioned the construction or conversion of the building (or part of the building) with a view to granting or disposing of interests in the building or parts of it;

"initial defect" means a defect which is a relevant defect by virtue of section 120(3)(a);

"relevant landlord" means the landlord under the lease at the qualifying time or any superior landlord at that time."

35. Paragraph 8 of Schedule 8 provides as follows:

"No service charge payable for cladding remediation

(1) No service charge is payable under a qualifying lease in respect of cladding remediation.

(2) In this paragraph "cladding remediation" means the removal or replacement of any part of a cladding system that—

(a) forms the outer wall of an external wall system, and

(b) is unsafe."

36. Paragraph 9 of Schedule 8 provides as follows:

"No service charge payable for legal or professional services relating to liability for relevant defects

(1) No service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect.

(2) In this paragraph the reference to services includes services provided in connection with—

(a) obtaining legal advice,

(b) any proceedings before a court or tribunal,

(c) arbitration, or

(d) mediation."

37. Paragraph 10 of Schedule 8 supplements paragraphs 2 to 4, 8 and 9, as follows:

"(1) .....

(2) Where a relevant paragraph provides that no service charge is payable under a lease in respect of a thing –

(a) no costs incurred or to be incurred in respect of that thing (or in respect of that thing and anything else) –

(i) are to be regarded for the purposes of the relevant provisions as relevant costs to be taken into account in determining the amount of a service charge under the lease, or

(ii) are to be met from a relevant reserve fund.

[…]"

38. Those are the pertinent paragraphs of Schedule 8 in this case. For the sake of completeness, section 119 of the Act states that the "qualifying time" is the beginning of 14th February 2022.

Building Act 1984 and regulations

39. Although it is not necessary to reproduce them in detail here, the relevant Building Regulations in force at the time of construction were the 2010 Regulations. Those regulations were made under the Building Act 1984. Sections 6 and 7 of the Act make provision for Approved Documents, which provide practical guidance on how to meet the functional requirements of the Building Regulations. In the 2010 Regulations, the requirements relating to fire safety were contained in Part B of Schedule 1 and the associated guidance was contained in Approved Document B.

Inspection

40. The Tribunal members inspected the Development at 10 a.m. on Monday 10 July 2023 in fine, sunny weather. Details of that inspection are set out below. Others present at the inspection were as follows. For the Applicants: Ms Sarah Waite, Mr Robert Bowker, a barrister, and Ms Pauline Lam from his instructing solicitors, Russell-Cooke LLP. For the Respondents: Mr Brian Martin, fire safety expert, Mr David Jackson of Rendall and Rittner, managing agents, Mr David Sawtell, a barrister, and Ms Rebecca May, from his instructing solicitors, Taylor Wessing LLP. The inspection took 1½ hours.

41. The Tribunal observed the south-west, southern and south-east elevations of Block B (the South Block) from an adjacent car park that is not part of the estate. Those elevations were clad with white and grey cement fibre cladding panels (often referred to in the course of this application as the Marley Eternit panels) on the ground to fourth floor levels. A significant proportion of those panels had either missing pieces at the corner, fixing points or were cracked at the same location. It was also observed that a number of the panels had been replaced.

The ACM panels were observed at the fifth and sixth floors of Block B. It was also possible to see the side and rear of Block A with the brick elevations to the ground to third/fourth floors and the ACM cladding on the upper floors.

42. At the front of Block A, facing onto Leigham Court Road, we observed the original brick façade from the first to the fourth floor and the ACM cladding on the floors above. The ground floor elevation to the retail unit by the entrance gate to the residential section, was clad with ceramic, black tiles. At the time of the inspection many of the tiles around the central element were missing and a workman was on site replacing those tiles. On closer inspection it seemed that the tiles were affixed to a metal framework with a chipboard backing. It was possible to see behind the framework and we saw what appeared to be the original façade that had some original black, ceramic tiling.

43. From Leigham Court Road is a metal gate that gives access to the entrances to the two, residential blocks. This is a covered area that then opens out into a small area giving access to Block B.

44. In Block B, the stairwell included a dry riser system. The stairs gave access to the seventh-floor roof terrace that can be accessed by the residents. This level also has a plant room. At the fourth-floor level there was access to a second communal roof terrace. At this point it was possible to have a close examination of the gold-coloured, ACM cladding. A couple of the panels have been slightly distorted. On the roof terraces it was possible to see many more cracks and missing pieces to the cement fibre panels and evidence of broken pieces of cladding on the roof of the ground floor plant/bike store. At one point the Tribunal noted that there was a significant gap of approximately 150mm between the cement fibre panels and the Kingspan insulation.

45. The internal corridors on each floor have a service riser cupboard/s and at the time of the inspection certain fire stopping works were being undertaken. The work included the removal of a pink, foam, infill material and the closing of gaps around the rising services conduits. The work was not complete and there were still remnant signs of the pink foam material. There is also a smoke shaft system.

46. The roof terrace at Block A is a communal area for residents and provides access to plant facilities. At this level, again there was evidence of a large number of cracked and broken cement fibre panels - one panel had a crack through the centre. Again, it was possible to see the depth of the barrier between the cement fibre panels and the insulation at approximately 150 mm. The rodent mesh, placed at the underside of the cladding panels, was hanging loose in a few locations.

47. In the common parts to Block A there is a smoke shaft. There were fire stopping works to the riser cupboards, but we saw on the fourth floor

that there was no firestopping seal to the top of the riser cupboard. In the bin-store room on the ground floor, the ceiling appeared to be sound and was undergoing re-decoration at the time of the inspection. In the gas meter room on the ground floor there was evidence of pink foam infill material and a large gap in the breeze block construction just below a reinforced, concrete beam.

48. The balconies are a feature of Block B alone. The architectural design means that they are stacked above one another. The Tribunal had access to the balcony of flat 24, in Block B. The balconies appeared to be constructed on timber joists on a metal frame with a plywood base and waterproofing with timber decking as the flooring surface. The ceiling of the balcony (and therefore the underside of the balcony above) is a soffit board, with the edge of the cladding panel just covering the edge of the soffit board. There was a very small amount of staining to the soffit board above the balcony to flat 24.

The hearing

49. The hearing commenced at 1:30 p.m. on 10 July 2023, where all the same persons attended who had been at the inspection (apart from Mr Jackson), with others, including Mr Joshua Lund, another leaseholder and Applicant, and Mr Phillip Waite, the original Applicant's father. The hearing continued until 2 p.m. on Wednesday 12 July 2023.

50. The Tribunal would like to praise the thoroughness and clarity of the hearing bundles prepared by the Respondent's solicitors, and the Applicants' supplemental bundle and other documents, prepared by their solicitors. All the relevant documents in the hearing bundles have been considered.

51. The Tribunal is also very grateful to both barristers for the high quality and thoroughness of their skeleton arguments. This is an entirely new area of law; there is very little, if any, guidance as to the statutory test to be applied; and there is no previous authority, this being the first substantive hearing of an application for a remediation order under the BSA 2022. Although the skeleton arguments raised many issues, the Tribunal has focussed on those that seem most relevant to its decision.

52. The Tribunal was also grateful for the detailed expert evidence from Mr Martin. Although he was the Respondent's expert, he acknowledged his duty to the Tribunal to provide independent and unbiased evidence; and, in his report and in oral evidence, he came across as being balanced, knowledgeable and thoughtful.

Preliminary matters

53. At the start of the hearing, the Tribunal dealt with two preliminary matters.

1. Improvement notices

54. In January 2023 inspections of the Development had been carried out by the Joint Inspection Team (JIT) of Local Authority and Fire Brigade experts, which had resulted in two reports on the condition of the Development [SB101-166]. These had led to Lambeth Council making two improvement notices under section 12 of the Housing Act 2004, one in respect of Block A and one in respect of Block B, dated 21 June 2023 [628 & 699]. Lambeth Council had sent those to Kedai Limited, using an address which was disputed. The notices had first come to the attention of Kedai Limited on 28 June 2023; and Kedai had first seen the JIT reports on 3 July 2023, when they were included in the Applicant's Supplementary bundle. Although it was Kedai's intention to appeal the improvement notices, the question for the Tribunal was whether and to what extent it should take those notices into account when deciding whether to make a remediation order.

55. For Kedai, Mr Sawtell said that either the Tribunal should ignore the improvement notices altogether, or they should be dealt with at the same time, which would necessitate an adjournment of the hearing. For the Applicants, Mr Bowker did not consider that the Tribunal needed to take the improvement notices into account, but he would rely upon the content of the JIT reports to be given weight as relevant background.

56. The Tribunal decided that it would not take account of the improvement notices and would proceed with the hearing. The reasons for this decision were that improvement notices were not relevant to the current proceedings. The test for making an improvement notice under the Housing Act 2004 and the test to be applied by the Tribunal on any future appeal were different to the statutory test for the making of a remediation order under the BSA 2022; neither party applied for an adjournment of the present hearing; and, indeed, the parties expressed a preference for it to proceed.

2. Disclosure application

57. The Applicants applied for disclosure of the Health Safety & Fire Risk Assessment report produced by 4site Consulting Limited on 24 October 2019, which was referred to in the JIT reports. The Applicants considered it was relevant background and it also went the issue of whether Kedai Limited had acted reasonably and expeditiously in dealing with problems at the Development, a matter which went to the Tribunal's discretion whether or not to make a section 20C order. Mr

Sawtell opposed the application, submitting that it was irrelevant to the factual matrix.

58. After consideration, the Tribunal ordered disclosure of the report within 24 hours. The reasons for this decision were that, although, as Mr Sawtell submitted, the content of the report may have been superseded, it was relevant to show the progression of Kedai's knowledge; as it was mentioned in the JIT reports it would appear to be relevant to the factual matrix; and it may well point to the issue of how expeditiously or not, Kedai Limited had responded to concerns about the condition of the property.

Matters agreed

59. The following matters were agreed:

(1) Both blocks in the Development met the definition of "relevant building" under section 117(2) of the BSA 2022. Both are buildings over 11m tall and self-contained. Additionally, each comprises six or seven storeys and more than two dwellings. None of the exclusions in section 117(3) of the BSA apply.

(2) Kedai Limited is registered as the owner of the freehold interest of both blocks and falls within the definition of "relevant landlord" in section 120(5) of the BSA. Kedai is also associated with the developer, said to be Magnolia Services Limited [707], within the meaning of section 121 of the Act.

(3) Both the lease of Ms Sarah Waite and of Ms Karin Martensson is a "qualifying lease" as defined by section 119(2) of the BSA and both Ms Waite and Ms Martensson is a "relevant tenant" for the purpose of section 119(4)(c). Both are an "interested person" for the purpose of making an application for a remediation order, within the meaning of section 123(5) of the Act.

(4) The following defects at the Development are a "relevant defect" within the definition of section 120(2), cause a "building safety risk" within the definition of section 120(5) and require to be remediated: the ACM cladding, the (lack of) fire-stopping, cavity barriers and compartmentation; both the ACM and fibre cement external wall *systems* (i.e. the panels, insulation and (lack of) cavity barriers).

(5) The total height of the blocks exceeds 18m.

Matters not agreed

60. The following matters were not agreed:

(1) Whether the Applicants had established that all the matters

relied upon in the application are a "relevant defect". In particular, it was not agreed that the following constituted a "relevant defect": the Kingspan K15 insulation (by itself), the fibre cement rainscreen (by itself), the balcony soffit boards and the ceramic tiles fronting the North Block at ground floor level.

(2) Whether the Applicants had identified on the evidence an appropriate remediation scheme (including the works to be done and the time for the works to be completed) within the meaning of section 123(2).

(3) Whether it is possible to make remediation order on the evidence before the Tribunal.

(4) Whether the Tribunal had jurisdiction to make an order in respect of the other relief sought by the Applicants (as set out in their statement of case).

(5) Whether it is appropriate to make an order under section 20C of the Landlord and Tenant Act 1985.

Determination

61. Having considered the evidence and submissions in this case, the Tribunal is satisfied that the conditions for the making of a remediation order against Kedai Limited have been met. A remediation order in respect of the two blocks in the Development accompanies this decision. The reasons for the Tribunal's determination and for the form and terms of the remediation order that have been made are set out below.

Reasons

The parties' positions at the hearing

62. Mr Sawtell's primary position at the hearing was that it was not possible, at this time, for the Tribunal to make a remediation order, that the Applicants had not satisfied the burden of proof to establish the relevant defects upon which they relied, and they had not proposed a scheme of works to remedy such defects as might exist.

63. In paragraph 4 of his skeleton argument, Mr Sawtell stated:

> "[Kedai] candidly accepts that there are relevant defects which must be remediated. It also agrees to remediate certain other defects that do not make the statutory test of 'relevant defect' under section 120 BSA 2022. In respect of the Kingspan K15 and the fibre cement panels, however, the evidence simply is not present to allow a remediation order to be made on the date of the hearing. This is not in defiance of the decision on 31 May

2023: instead, the relevant tests need to be established by the Applicants as at the date of the final hearing, on 10 to 11 July 2023. On those dates, it is not possible for the Tribunal to make a remediation order on the material before it. An order to carry out further investigations is not an order to remediate, which is what is required by section 123(2) BSA 2022. If, however, Kedai Limited's primary submission is rejected, it will assist the Tribunal as far as it can to craft an appropriate, realistic, and satisfactory order for the remediation of the Blocks."

64. Without prejudice to his primary contention, Mr Sawtell proffered a draft remediation order that the Tribunal might make. He criticised the Applicants' suggested remediation order as having a serious weakness, especially when it came to making an enforceable order and, in places, he said it was oppressive.

65. For the Applicants, Mr Bowker, who had only been recently instructed in this matter, submitted that a remediation order was entirely justified when considering the evidence as a whole. He said that the three main issues to be decided were: the scope and terms of any remediation order as to the relevant defects that the Respondent must remedy; the date by which work must be finished; and the circumstances in which a party might return to the Tribunal to ask for the scope and/or the date to be varied, including any further directions.

The Tribunal's approach to Part 5 of the BSA

66. The statutory regime for remediation orders is contained within Part 5 of the BSA. Section 1(1) of the BSA states that the Act "contains provisions intended to secure the safety of people in or about buildings and to improve the standard of buildings." The focus of the BSA, therefore, is on building safety and the improvement of standards.

67. Sections 116 to 125 of Part 5 of the BSA 2022 relate to the "remediation of certain defects". They constitute a self-contained code, containing its own specific definitions in sections 117 to 121 and its own statutory test for the making of a remediation order in section 123. As paragraph 957 of the Explanatory Notes to the BSA explains, the leaseholder protections in sections 116 to 125 "*are a one-off intervention designed to deal with the current serious problems with historical building safety defects in medium- and high-rise buildings*." The statutory definitions are intended to be clear, simple and straightforward.

68. Section 123(5) of the Act and subsequent regulations make provision for applications to be made by an interested person, which includes the new building safety regulator, a local authority and a fire and rescue authority, and (by amendment) by the Secretary of State. The definition of interested person also includes a person with a legal or equitable interest in the relevant building or any part of it, namely long

leaseholders, who may well have limited financial resources and expertise, as compared with relevant landlords and other categories of interested person.

69. As Mr Bowker urged the Tribunal to say, the Act must work and be made to work for leaseholders in a straightforward way. This Part of the Act and section 123 in particular are drafted very broadly indeed and give wide power to the Tribunal. We do not consider ourselves restricted in the interpretation of section 123 by reference to other statutory provisions or case law, for example, those relating to the law of specific performance of repairing covenants in a lease, applicable standards and tests applied by Building Regulations, the Regulatory Reform (Fire Safety) Order 2005, the Housing Health and Safety Rating System (HHSRS) under the Housing Act 2004, assessments of fire safety and risk under PAS 9980:2022 (a government sponsored code of practice for assessing the fire risk associated with external wall construction) or section 17 of the Landlord and Tenant Act 1985, all of which were referred to during the hearing or in the papers.

70. Each and every one of those regimes may inform the exercise of the Tribunal's power, but the Tribunal is not bound or prescribed by them in the interpretation of the provisions of the BSA, the quality and standard of the conditions to apply or the extent of the Tribunal's power. The reason is simple, namely that each one of the other regimes, while dealing with the condition of buildings and housing and fire safety, arises in its own circumstances, on its own terms and applying its own tests and criteria. Here, we are dealing with a statutory remedy in simple terms, arising from certain limited criteria being satisfied. In short, the objective of the BSA is (with occasional overlap) different to all other regimes. It is simply to remove a "relevant defect".

71. This distinction also extends to the standards which the Tribunal must apply to its assessment of whether defects in the building are relevant defects, and the extent of any building safety risk which they cause. The BSA creates a freestanding regime designed to address a specific problem. Although other regimes may amount to a "heft of good sense" they are not conclusive as to the Tribunal's jurisdiction or the extent of its powers.

The Tribunal's approach to the facts of this case

72. Starting with the BSA itself, the Tribunal must first be satisfied that there is one or more "relevant defect" in the buildings that comprise the Development. By section 120, this is a defect that "(a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and (b) causes a building safety risk." The "relevant works" includes "works relating to the construction or conversion of the building" if completed within the relevant period of 30 years: section 120(3).

73. A "building safety risk" is defined in section 120(5) as meaning "a risk to the safety of people in or about the building arising from – (a) the spread of fire, or (b) the collapse of the building or any part of it."

74. Once satisfied that one or more "relevant defect" is present in the building, the Tribunal's power is to make a "remediation order": see regulation 2(2) of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 and section 123(2), which defines a "remediation order" as "an order, made by the First-tier Tribunal on the application of an interested person, requiring a relevant landlord to remedy the specified relevant defects in a specified relevant building by a specified time."

75. The date for considering whether a relevant defect creates a building safety risk is the date of the hearing. While the work was done many years ago, the Tribunal is considering the risk that is caused by the state of the building today, using today's knowledge of building materials and processes. Whether or not work done at the time did or did not comply with the then extant Building Regulations is not the issue (though in key respects the construction work at the Development did not so comply). The question is simply whether the work creates a building safety risk in the light of today's knowledge.

76. That was recognised by Mr Martin in his expert's report of 20 April 2023. Having set out some useful guidance at paragraphs 62 to 67 as to the subjective nature of the assessment of risk, he said at paragraph 68, amplified in oral evidence, that there could be circumstances when a building had been constructed in accordance with Building Regulations, but nonetheless presented risks that were clear and "intolerable" that might be considered to be relevant defects.

77. There is no guidance in the BSA about how the Tribunal should assess the risk to the safety of people in or about the building, or the scope of the works that may be required "to remedy" the relevant defects, or the standard to which any remedial works must be carried out. The wording of this Part of the BSA is in deliberately broad terms, to enable the Tribunal to find the best and most practical, outcomes-focussed solutions to myriad circumstances that will inevitably present themselves in applications such as this.

78. The Tribunal has been given a very wide power. As mentioned above, in exercising that power, the Tribunal will have regard to all of the tests and standards in related areas that are brought to its attention, and will give due weight to them where appropriate, without being bound by them.

79. Although Mr Sawtell said it was not possible to make a remediation order at this stage, the Tribunal disagrees. Several aspects of the construction of Blocks A and B are admitted to be a "relevant defect"

causing a “building safety risk”. They therefore fall within the Tribunal's jurisdiction to make a remediation order. Other items were not admitted to constitute a relevant defect and these will be dealt with below.

Burden of proof

80. Mr Sawtell said that the burden of proof was on the Applicants to establish that defects were relevant defects and to propose the necessary steps to remedy them. The Tribunal accepts that the Applicants must establish a prima facie case for the Tribunal to consider. By this we mean that they need to make a coherent, initial case that there were relevant defects at the Development that caused a building safety risk and that would entitle a Tribunal to make a remediation order. The Tribunal is satisfied that the leaseholders had done so in this case, admittedly by relying heavily on the various inspection reports obtained by Kedai Limited over the years, but also by presenting their own detailed arguments, supported by documents and photographs of the Development. It follows that the application was prima facie within its jurisdiction under section 123 and a remedy was available.

81. The Applicants having established a prima facie case, it might be said that the tactical burden of proof passes at this stage to the Respondent. However, the Tribunal does not think it is necessary or helpful to assign formal burdens of proof on either party; nor does the Tribunal consider that it should be constrained by formal burdens of proof. This is an evidence-based exercised, led predominantly by inspection reports and expert evidence, but also informed by the Tribunal's own experience and expertise in building matters and what it saw for itself at the inspection. Once the Tribunal has determined that relevant defects exist, it is for the Tribunal to make an order to remedy those defects within a specified time. That is all that the Act requires.

Scope of works

82. The Tribunal does accept, however, that it is important for any remediation order to be sufficiently precise so that the Respondent can know what it must do to remedy the relevant defects and for enforcement purposes before the county court. However, the Act is not prescriptive as to the works that will be necessary to remedy the relevant defect or defects. The extent of precision will vary from case to case. On some occasions, a full specification will be provided. In others, a broad schedule will be sufficient with a power for either party to apply for further directions or a more detailed specification.

83. That was the approach adopted in *Blue Manchester Ltd v North West Ground Rents Ltd* [2019] EWHC 142 (TCC), [2019] L. & T.R. 13, where a general order was made requiring works to be carried out, but

providing protection for the landlord in that case against any unwarranted application for contempt for non-compliance, by allowing the landlord to make application to the court for variation of the order (the variation application is reported at [2020] EWHC 2777 (TCC)).

84. The Tribunal considers that this mechanism is apt to be adopted in cases under the BSA and it is one that the Tribunal intends to follow in this case, making a remediation order in general terms to achieve a clearly specified result, namely, to remedy the relevant defects at the Development.

85. The purpose of the legislation is not to impose a costly burden on leaseholders requiring them to obtain a detailed specification of works. In this case, the landlord will have the conduct of the works and is best placed to negotiate a specification with contractors.

86. However, Mr Sawtell was concerned that too wide an order would be a disproportionate burden on the Respondent. While the Tribunal has sympathy in those cases where relevant landlords were not responsible for relevant defects, the legislation is intended to protect leaseholders. In this case, the most practical way forward is to place the burden on the Respondent.

87. In most cases, the preparation of a specification of works will also have to be at the cost of the developer or landlord because leaseholders simply cannot afford to do so; nor will they have the necessary access to the property in question; nor the appropriate management regime. However, there may be significant advantages to landlords and developers in having a general order under section 123, namely that it leaves the choice of remediation open to them, in conjunction with the appropriate authorities, and leaves them to apply for planning permission for any remediation work, if necessary, unfettered by an overly specified and potentially rigid specification of works determined by the Tribunal.

88. The Tribunal's remediation order makes clear which of those items that are relevant defects must be removed from the Development; and reasons for that are given in this decision. Where the Respondent considers that any item currently constituting a relevant defect might yet be retained at the Development, it can apply to the Tribunal for a variation of the remediation order, in a similar way to what happened in *Blue Manchester*. The ability to apply for variation also provides the Respondent with protection against unwarranted applications for enforcement by way of contempt of court, if different works are proposed to those originally envisaged by the Tribunal. If the Respondent were to apply for variation of the remediation order, the burden of proof, at least to show that there is a prima facie case that the item concerned could be retained safely, will fall on the Respondent.

89. In the present case, a recent height survey has determined that the building now exceeds 18m in height. That means that the Kedai Limited can now apply (indeed, has now applied) for funding from the Building Safety Fund, to cover the cost of the proposed remediation works. This may be an encouragement to proceed with the work more quickly, but, also, it underlines the need for flexibility in designing a remediation scheme that might not be possible with a highly specific remediation order.

90. The new height designation also means that the Development becomes a "high-risk building" within Part 4 of the BSA, so that the appropriate accountable person for the buildings must register with the new building safety regulator under Part 4 of the Act.

Standard of works

91. As to any works that must be carried out to remedy the relevant defects, in particular to replace specified items, the question arises as to the standard to which those works must be carried out.

92. Paragraph 1(6) of the Respondent's proposed remediation order states that:

> "(6) [Carry out the works and remediate the Blocks so that (1) the above defects in the Blocks are remediated so that the Blocks achieve the standards required by the Building Regulations 2010 as at the time of the initial building notice and [2] The above-described defects no longer prevent a satisfactory EWS1 form assessment pursuant to PAS 9980:2022 as at the date of the Order.]

93. In his skeleton argument, Mr Sawtell devoted several paragraphs to the form of remediation order proposed by Kedai Limited, dealing in particular with the standard to which any work should be carried out. At paragraph 82 he said:

> "At paragraph 1(6), Kedai Limited's wording reflects the standards adopted in the Developer Remediation Contract published by the Department for Levelling Up, Housing and Communities. In particular, it reflects the definition 'Standard' (used at page 79) which incorporates PAS 9980; and clause 6.1 at pages 19-20 ("*the Participant Developer will… (i) undertake at its own cost; … all necessary work in relation to each Building Requiring Works so as to ensure that any and all Defects are remediated… in accordance with the Standard*"). This wording reflects the fact that the Tribunal does not have the evidence to actually identify what needs to be done to the Blocks to remediate them. While Kedai Limited does not accept that an order can be made, this form of wording is at least sufficiently clear so as to appear in a contract."

94. Although it is tempting for the Tribunal to link an order to remedy relevant defects to a relevant standard, it was common ground that no such standard is mentioned in section 123; and, in discussion at the hearing, mention was made of several competing possible standards that could apply to the remedial work. In one sense, all remedial work must comply with current Building Regulations and PA S9980:2022 because, otherwise, any subsequent Fire Risk Appraisal of External Walls (FRAEW) report will conclude that an unacceptable fire risk remains in the buildings. While it is a given that any remedial work would need to comply with current Building Regulations, the Tribunal would also expect such work to satisfy PAS 9980:2022, but it feels itself constrained by the terms of the Act from inserting that standard, or any standard of work, into the remediation order itself.

95. Having said that, it is noteworthy that a fuller appreciation of clause 6.1 of the Developer Remediation Contract relied upon by Mr Sawtell shows that remediation work is not just to be carried out "*in accordance with the Standard*" but "*in accordance with the Standard applicable at the date of the relevant Works Contract or, if earlier … commencement of the relevant Works*".

96. Therefore, although no standard or benchmark for such work is specified in the Act, in this case, we are persuaded that the remediation works must:

    (1) Comply with the Building Regulations applicable at the time the remedial work is carried out; and

    (2) At the very least, a post-Works Fire Risk Appraisal of External Walls (FRAEW) pursuant to PAS 9980:2022 should not prevent a satisfactory Form EWS1: External Wall Fire Review from being issued

97. The Tribunal now turns to the defects in the Development.

External wall systems

98. Before considering any individual elements, the Tribunal looked at the two external wall systems at the Development. The external wall systems are a combination of the rainscreen panels used (either ACM or fibre cement), together with the insulation behind it (Kingspan K15) and the cavity barrier elements.

99. In paragraph 160 of his report, Mr Martin states:

> *"in my opinion, both the ACM and fibre cement rainscreen systems installed on the property present a relevant defect, in that the systems (panels, insulation and cavity barriers) present an unacceptable risk from fire spread to the occupants of the building."*

100. In oral evidence, Mr Martin confirmed that the two external wall systems were "relevant defects", by reason of the materials used, poor installation and lack of cavity barriers.

101. Mr Sawtell accepted that the *systems* were a relevant defect, and needed to be remediated, but he disputed that, in isolation, either the Kingspan K15 insulation or the fibre cement cladding were relevant defects as individual elements. From the Respondent's perspective, this was important because, he submitted, both the insulation and the fibre cement panels could be retained as part of remediated external wall systems that complied with Building Regulations and/or met the performance set out in BR 135 (a document that provides guidance and sets the criteria or standard that a cladding system must meet in a large-scale fire test) when tested in accordance with BS 8414 (a document that sets out how the large scale fire test must be performed).

102. The Tribunal is satisfied on the evidence that the external wall *systems* constitute a relevant defect and are within the Tribunal's purview for a remediation order.

103. The Tribunal now goes on to consider the individual elements of wall systems, namely the ACM cladding, the cavity barriers, the Kingspan insulation and fibre cement panels.

ACM cladding

104. Mr Sawtell on behalf of Kedai Limited accepted that the ACM cladding is a building safety risk and a relevant defect which falls to be remediated within the jurisdiction created by section 123(2) BSA 2022. He accepted that "it has to go".

105. We are satisfied that this is correct. It is the same combustible Category 3 ACM cladding as used on parts of Grenfell Tower. It has an unmodified polyethylene core. Mr Martin's expert evidence was that:

> "121. In my opinion, the ACM located on both blocks provides a ready route for fire spread between the upper storeys of both blocks as such:
>
> 121.1 The ACM cladding did not comply with the Building Regulations at the time of construction.
>
> 121.2 The ACM cladding should be replaced with a cladding product that complies with the current Building Regulations."

106. In oral evidence, Mr Martin said that in a fire the polyethylene core would melt and ignite; and, as it did so, the aluminium shield would fall away, causing the further spread of fire up the exterior of the building.

Fire stopping, cavity barriers and internal compartmentation

107. To clarify:

- The term "cavity barriers" refers to the external wall system: an arrangement to prevent the spread of fire outside; essentially, the spread of fire in the gap between the rainscreen cladding and the insulation. Here, cavity barriers were missing entirely, or incorrectly installed, or badly aligned, or not restrained (i.e. not fixed in place properly).

- The terms "fire stopping" and "internal compartmentation" refer to internal protections against the spread of fire. These ensure the physical separation of internal parts of the building by filling (sometimes quite large) gaps with non-combustible material. This would cover any openings in the walls, for example, around door frames and windows, or where service pipes rise through walls and ceilings.

108. Kedai Limited accepted that all these constituted a building safety risk and a relevant defect which falls within the jurisdiction of the Tribunal.

109. Again, the Tribunal is satisfied that the Respondent's concession, that fire stopping, cavity barriers and internal compartmentation constitute a building safety risk and a relevant defect, is correct. As to the cavity barriers, Mr Martin deals with these in his report in paragraphs 138-140. He says:

> "138. The only cavity barriers I found during my inspection were horizontal barriers provided at floor levels behind the cement fibre rainscreen. In each case they had not been fixed in accordance with the manufacturer's instructions and in some locations they had become dislodged. As such, their performance cannot be relied upon.
>
> 139. The accessible areas of aluminium composite site rainscreen that I inspected (locations 1 and 2) had no cavity barriers. However, the locations did not align with a compartment floor and it may be the case that horizontal cavity barriers were installed on other elevations, which I was not able to inspect.
>
> 140. In my opinion, the cavity barrier installation for both blocks would not adequately restrict the spread of fire through the cavity. As such:
>
> 140.1 The cavity barrier installation did not comply with the Building Regulations at the time of construction.
>
> 140.2 Works should be carried out to correctly install cavity barriers, both horizontally and vertically, in accordance with

current Building Regulations guidance."

110. As to fire-stopping, the Tribunal was referred to the Compartmentation Survey dated 15 March 2023 by Ark Workplace Risk [577]. This stated that: "The overall findings of the survey have resulted in the general level of compartmentation throughout the premises being considered as "unacceptable" and requiring urgent remediation with all works being completed by third-party accredited specialist contractors." [582]

111. These findings accord with the Tribunal's inspection on 10 July 2023, when we saw workmen on several floors of the blocks removing pink foam that was in situ in water and electrical riser cupboards, and replacing it with proper, solid fire stopping. Mr Martin commented that the pink foam had been used "inappropriately" in these locations and we saw gaps, which might easily encourage fire spread, if not properly stopped.

Kingspan Kooltherm K15 insulation

112. As mentioned above, both the ACM and fibre cement rainscreen cladding systems are insulated with Kingspan K15 insulation and the Tribunal has found those systems to be a relevant defect.

113. In paragraph 10(1)(ii) of his skeleton argument, Mr Sawtell accepted that the present make-up of the external wall system did not comply with the standards required by the Building Regulations 2010 at the time of the initial building notice. However, he said that:

> "The material itself could have been incorporated into a system that met the performance requirements of BR 135 when tested in accordance with BS 8414. It is possible for the Blocks to be remediated while retaining the Kingspan K15 material: it is not known yet whether this will be feasible. The Applicants have failed to discharge the burden of proof in respect of the Kingspan K15 and whether it is a relevant defect, and a remediation order cannot be made in respect of it."

114. Mr Martin said at paragraph 135 of his report:

> "In my opinion, the use of Kingspan K15 insulation within both the ACM and Fibre Cement rainscreen systems presents a risk from fire spread.
>
> 135.1. The insulation did not comply with the Building Regulations at the time of construction.
>
> 135.2 Works should be carried out to replace the insulation in accordance with current Building Regulations guidance.

> 135.3. It may be possible to retain the insulation if remedial works are carried out such that the cladding system closely reflects the construction used in the test described at paragraph 133 above. As a minimum, it would involve replacing the ACM with cement fibre cladding or some other cladding product that has been shown by test to be suitable. A cladding installation specialist would need to consider the feasibility of this option as it may not be practically possible."

115. The reference to paragraph 133 of his report is to one successful test carried out in 2020 involving an external wall system involving Kingspan K15, fibre cement cladding and cavity barriers. Of that, he said: "As such, if the cladding and cavity barriers had been installed correctly there would be a strong case to retain the cladding system as installed", i.e. to retain the Kingspan K15 insulation.

116. Having considered the evidence carefully, the Tribunal concludes that, as an element in its own right, the Kingspan K15 insulation is a relevant defect, not only as it is installed now (often poorly), but also if it were to be retained by reason of some remediation scheme. The reasons for coming to this conclusion are as follows.

117. First, Mr Martin's expert opinion is that the use of Kingspan K15 insulation within both the ACM and Fibre Cement rainscreen systems presents a risk from fire spread.

118. Secondly, but related, Kingspan insulation did not meet the definition of "limited combustibility", which was a prerequisite at the time of construction for any insulation product to be installed on a building of 18m or more. This was a restriction contained within paragraph 12.7 of Approved Document B (2006 with amendments up to 2013). That document did allow for the use of cladding systems that did not conform to paragraph 12.7, if the system met the required performance set out in BR 135, when tested in accordance with BS 8414. That test should only be applied to an entire cladding system; but there was no such test incorporating K15 and ACM cladding at the time of construction; and, since the Grenfell Tower fire, those tests that have been carried out have failed to meet the required criteria.

119. Thirdly, while the Tribunal appreciates that at paragraph 133 of his report Mr Martin is aware of one successful test carried out in 2020, which would be relevant to the fibre cement cladding at the Development, this depended upon both the cladding and cavity barriers having been installed correctly. Mr Martin went on to say at paragraph 134:

> "However, the extent of defects in the installation of both the cavity barriers and the cement fibre cladding [i.e. at the Development] means that this test cannot be relied upon."

120. Fourthly, although Mr Sawtell argued that it was possible for there to be a scheme of remediation that could involve the retention of the Kingspan K15 insulation in the Development, in reality this could only be achieved if there was excellent installation and supervision of the insulation, cavity barriers and rainscreen cladding. The Tribunal has no confidence that the required level of excellence could be achieved, such that the criteria of an all-cladding test could be satisfied.

121. In the Tribunal's judgement, the Kingspan insulation must be removed. It is not a question of waiting for a feasibility study for retaining the Kingspan insulation: such a study would only go to the possibility of retention. It would not affect the Tribunal's determination that the Kingspan insulation is now a relevant defect not only as part of a cladding system, but also by itself as an independent element. If it is revealed by further investigation and analysis by a suitably qualified consultant that reasonable alternative works will remedy this relevant defect, while retaining and re-using the Kingspan insulation, then Kedai Limited may apply to the Tribunal to vary its remediation order in this respect.

122. Once the Kingspan insulation is removed and it is replaced, the question arises: to which standard should any replacement be held? The answer is to the Building Regulations standard applicable at the time of the installation of the new insulation product, as per Mr Martin's expert opinion.

123. Although not addressing the solution, Mr Martin's evidence was that, although any alternative to Kingspan K15 would be thicker and heavier, it would "not likely present a problem for this building," and he also suggested that any alternative would be unlikely to place an unacceptable weight burden on the building. This was endorsed at the inspection, when the Tribunal assessed that there seemed to be enough of a cavity behind the rainscreen cladding to allow the installation of thicker insulation.

Fibre cement panels

124. Not only do several fibre cement panels currently on the blocks have missing corners, but a significant number have visible cracks at the corners and there may be many others not yet visible but weakened at the corners. Mr Martin suggested that (paragraph 124) that:

> "The pattern of cracking is similar across the building, which suggests a fundamental problem in the way they have been fixed. The manufacturer's fixing instructions require allowance for movement in the panels and it may be that this has not been adhered to. It is for a structural engineer to confirm the likely root cause of this cracking."

125. The purpose of the fibre cement panels is to protect the insulation underneath and the structure of the building from the elements and as a fire-resistant shield.

126. Mr Martin's report said that the cement fibre rainscreen panels in themselves do not present a route for fire spread between the upper storeys of both blocks, as such, and they were not a "relevant defect" in themselves; though, as part of an external wall system, they did constitute a relevant defect. However, in oral evidence, Mr Martin said that he was not confident that broken panels would perform as expected as a fire screen and, in reply to the Tribunal's questions, Mr Martin said that if there were a fire affecting the exterior of the building, the presence of broken panels would mean that the fire shield was compromised, those and the other cracked panels would break more easily and would fall away to the ground, at the same time exposing the Kingspan insulation to more fire. This would represent an unacceptable risk of fire *and* collapse of the exterior cladding (within the definition of "building safety risk" in section 120(5)), affecting people in the building and potentially people at ground level.

127. The Tribunal is satisfied that on current evidence, the risk of fire spread and collapse that may be caused by the broken and cracked fibre cement panels is unacceptable and constitutes a significant building safety risk. As such, the Tribunal determines that the fibre cement panels are a relevant defect; and they must be removed.

128. The Tribunal accepts that it may be possible to identify certain of the fibre cement panels which have, thus far, not been damaged by the manner of their fixing, which are sound and could be reused after remediation works have been carried out to the insulation and cavity barriers behind the rainscreen. Whether such re-use forms part of the remediation solution remains to be seen.

129. Mr Martin said a structural engineer would be needed to confirm the root cause of the cracking and any panels that may be reused would need to be re-fixed in accordance with the manufacturer's instructions. However, that last point may, of itself, create problems because no one has yet been able to identify precisely who the manufacturer of the cement fibre panels was. It was believed that these panels are Marley Eternit panels, but there are no visible markings to confirm this; and if their identity cannot be established, nor can the appropriate manufacturer's installation instructions.

Balcony soffits

130. In his report, Mr Martin described (paragraph 142) how "A fire starting on the balcony or one that starts inside the building and spreads to the balcony would attack the underside of the balcony floor above." So long as the underside or soffit of the balcony above is protected with a

suitable material, then the fire risk is acceptable.

131. In the present case, the installed soffits of the balcony floors are formed using a gypsum-based plasterboard which, in Mr Martin's expert opinion, could provide a suitable degree of protection to the balcony floors. He then goes on to say:

> "144. However, I saw signs of deterioration in these boards where they were exposed to rain. In my experience, gypsum-based plasterboard is not suitable for long-term exposure to the elements. An inspection report form HCD Building Control (ref B14021071. 22 Jan 2016) shows that the boards used were a product called "Siniat Weather Defence". The manufacturer's brochure [23] advises that these boards may be exposed to the elements for up to 12 months.
>
> 145. The top surface of the balconies is formed from timber decking boards. The commentary to Clause 7 of PAS 9980 [22] recognises that a fire could occur on a balcony, especially one which has combustible decking, due to the use of a barbecue and that "*such a fire could give rise to direct flame impingement on the external walls or spread to other balconies.*"
>
> 146. There is a risk that a fire involving the balcony structure could spread to the cladding either through interconnected cavities or by direct flame contact. I did observe that the structural steel frame was providing a degree of separation between the cavities in the balcony construction and those in the main external walls of the property. If the cladding system is remediated as recommended in this report, the risk from fire spread would be no worse than a fire occurring inside one of the flats."

132. Therefore, in Mr Martin's expert opinion:

> "147. The balcony floors do not currently present an unacceptable risk from fire spread. However, the gypsum-based boards on the soffit of the balconies could deteriorate to the point where they cannot be relied upon to protect the balcony structure from fire. As such:
>
> 147.1. The soffit boards failed to comply with Building Regulations at the time of construction in that they were not appropriate for the circumstances in which they are used (see para. 20.1).
>
> 147.2. Works should be carried out to replace the balcony soffits with a material capable of protecting the floor and surviving long term exposure to rain (this is on the assumption that the cladding systems are remediated in line with this report (including the proper provision of cavity barriers))."

133. The Tribunal questioned Mr Martin closely and he agreed that future deterioration and the loss of fire resistance, leading to fire spread, was "intrinsic" in the use of the gypsum-based soffits. They will fail and will become a future building safety risk.

134. The Applicants sought to persuade us that the balcony soffits were a relevant defect that should be included in any remediation order. However, the Tribunal's view is that the gypsum-based balcony soffits currently provide certain protection by reason of their position on the building. Although their deterioration is inevitable, there is no known time span for this. The Tribunal finds that they are not a "relevant defect" at this time. However, given their anticipated lifespan and the future fire protection issue, it might be prudent for Kedai Limited to replace the soffits when the other remediation works are carried out.

Ceramic tiles

135. When arriving for the inspection at 10 a.m. on 10 July 2023, the Tribunal members came across a workman re-affixing numerous black ceramic tiles to the front of the building, at ground floor level. Mr Martin was not instructed to consider the ceramic tiles in his report and he declined to comment about them in his oral evidence.

136. In his skeleton argument, Mr Sawtell dealt with at these paragraphs 55 to 57. He said that the exceptional intervention into leasehold relationships effected by the BSA 2022, was for the narrow purpose of building safety risks, which had been tightly restricted to the risk of fire or structural failure or collapse. He said that the ceramic tiles did not raise any issue of fire safety, but even on the broadest interpretation of "building collapse" there was no expert evidence that could explain how the ceramic tiles could be said to achieve the threshold set by the BSA. He said the tiles were "low-rise and amount to a minor aesthetic issue" and they were outside the BSA.

137. It is not known why the ceramic tiles at the front of the building have become loose and have fallen onto the pavement. Perhaps it was poor fixing, or it may have been uneven expansion of the wooden backing board. Either way, the Tribunal does not consider that the ceramic tiles fall within section 123.

138. Looking at the purpose and intent of the BSA, this is aimed at serious building safety issues. Although the words "the collapse of the building or any part of it" in section 120(5)(b) are not delimited by the word "structural", we do not consider that decorative items such as ceramic tiles, falling occasionally, represent serious "collapse" as envisaged by Parliament when enacting the BSA.

Applying the statutory test

139. Bearing in mind all of the above, the Tribunal is satisfied of the following matters, namely that:

(1) By reason of their leasehold interests in the Development, the Applicant leaseholders are each an "interested person": section 123(5)(d).

(2) Kedai Limited is a "relevant landlord": section 123(3), although this was conceded.

(3) Each block in the Development is a "relevant building": section 117(2), although this was also conceded.

(4) The defects at the Development specified above are a "relevant defect" within section 120(2), having arisen in connection with "relevant works", being works relating to the construction or conversion of the building within the relevant period of 30 years: section 120(3).

(5) The specified relevant defects have caused and continue to cause a "building safety risk": section 120(2) and (5), in that, in relation to the buildings, there is "a risk to the safety of people in or about the building arising from (a) the spread of fire, or (b) collapse of the building or any part of it", which was also conceded in respect of certain relevant defects, but not all.

140. Overall, therefore, the Tribunal is in a position now to make an order under section 123(2) requiring the relevant landlord, Kedai Limited, to remedy specified relevant defects.

Timing

141. The Applicants pressed the Tribunal to say that all remediation works must be completed within 18 months. Kedai Limited asked for 115 weeks (i.e. 26.5 months), providing a letter of the 7 July 2023 that set out its estimate of the time that each stage would take to design a remediation scheme, obtain approval and then carry it out. Mr Martin said in oral evidence that he thought there may be some leeway built into the Respondent's proposed timetable and Mr Bowker for the Applicants said that we should not permit the Respondent to have such "float" in the timetable, given the delays in Kedai Limited in grappling with these issues.

142. It is correct that Kedai Limited had known about the problems with cavity barriers since 2019 and had been alerted at that time to the need to have the aluminium cladding tested. While Kedai Limited had not done so, subsequent reports had been misleading in describing the aluminium cladding as the much safer PPC powder coated aluminium

cladding rather than ACM, something which was not apparent until after the inspection on 13 June 2022.

143. Although the Applicants pressed the Tribunal to say that the timescales for remediation works should be shorter, to reflect the delays by Kedai Limited to date, we are where we are. It will inevitably take time from this point on for a remediation scheme to be designed, approved and put into effect. The 115 weeks requested by the Respondent does not appear to be overly excessive in the Tribunal's view and, albeit that Mr Martin's experience of constructing a building is now quite old, his characterisation of the timescales as being "plausible" accords with the Tribunal's own view.

144. It follows that the Tribunal is willing to give the Respondent 115 weeks from the date of its solicitor's letter of 7 July 2023 to carry out any remediation works. The Tribunal order will therefore state that the remediation work must be concluded by 19 September 2025.

Order

145. The Tribunal's remediation order accompanies this decision. The Tribunal retains jurisdiction for so long as the relevant defects remain at the Development and there is a possibility of a variation of the remediation order, either as to scope or as to timing.

Other relief sought by the Applicants

146. Apart from seeking a remediation order, which was the greater part of their application, the Applicants sought various other heads of relief in their statement of case, which were resisted by Mr Sawtell. The Tribunal's comments and determinations on the relief sought are set out below.

147. The Applicants sought orders for:

(1) The landlord's detailed scope of works to be submitted to them for comment and/or agreement prior to commencement.

While the power to make a remediation order is very wide and not prescribed, the Tribunal does not consider in this case that it could or should make the Applicants' prior agreement a precondition to the commencement of remedial works outside of these proceedings. The Tribunal has wide discretion to determine the scope of remedial works in a remediation order, which can be exercised, and in this case has been exercised, in conjunction with both parties. However, once a remediation order has been made, and subject to any application to the Tribunal for variation, any power to agree or disagree with a detailed schedule of works will lie with building control, the planning authority and/or fire

brigade. Details of the proposed works and an opportunity to comment may be provided as part of an application for planning permission, if one is needed, and/or if there is a statutory consultation about major works, under section 20 of the Landlord and Tenant Act 1985 (for example, in relation to work not involving relevant defects).

(2) Kedai to obtain an independent report upon completion to evidence that the fire risk to the external wall cladding is sufficiently reduced so that no further remedial works are required and that the building complies with Building Regulations.

Mr Sawtell resisted this on the basis there is no power under section 123 to order Kedai to obtain reports into a remediated building that does not have building safety defects. That may be true but, until the Tribunal knows whether the relevant defects in its remediation order have been remediated, it still retains jurisdiction over any relevant defects that remain. However, in this case, appropriate supervision of the remediation works is likely to be carried out by the local authority and/or fire brigade, who have shown interest in the building by joint inspection resulting in the service of improvement notices; and any works are likely to be subject to approval by the local authority's building control department. In this case, the Tribunal has made it a term of the remediation order that works comply with Building Regulations applicable at the time the remedial work is carried out, and that a post-Works Fire Risk Appraisal of External Walls (FRAEW) pursuant to PAS 9980:2022 should not prevent a satisfactory Form EWS1: External Wall Fire Review from being issued. It is not proportionate to order a further report at the completion of remediation works; but any remaining relevant defects may be the subject of a fresh application to the Tribunal.

(3) A determination that they should not be liable for the costs of remediation, including any legal and professional services.

The application under section 123 of the Act is not an application for a determination of whether or not the costs of the major works are payable as service charges under section 27A of the Landlord and Tenant Act 1985. The Tribunal does not have jurisdiction to deal with such costs or to make the declaration sought in these proceedings. Any challenge to service charge costs must be made as a fresh application. However, through Mr Sawtell, Kedai has indicated an awareness of the effect of paragraphs 2, 8 and 9 of Schedule 8 to the BSA 2022 (which are set out above under the Statutory Provisions) and it does not seek to recover costs which are prohibited by this regime.

(4) Payment of their costs in pursuing the remediation order.

The Tribunal is a "no costs" jurisdiction, save where a party has acted unreasonably in the conduct of proceedings. The threshold for making a costs order for unreasonable conduct under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) 2013 is high and there appear to be no grounds upon which it could be said the Respondent has acted unreasonably in defending or conducting the proceedings. On the contrary, its conduct has been characterised as being one of active co-operation.

(5) An order for compensation for all losses suffered by the Applicants by being unable to sell, including any devaluation of the leases "because of the Landlord's procrastination in rectifying the Relevant Defects over the past 6 years".

There is no power for the Tribunal to award damages in the form sought.

(6) An order requiring Kedai to obtain a satisfactory EWS1 certificate once the relevant defects are rectified.

With regard to this, Kedai submitted that "the Tribunal does not have the jurisdiction to make an order for a mandatory injunction in the form sought" While the Tribunal has discretion as to the scope of work included within a remediation order, it is unclear that section 123 of the BSA permits the Tribunal to order post-works reports or the obtaining of a satisfactory EWS1 form. Be that as it may, subject to its primary submission that no remediation order can be made at this time, the draft remediation order proposed by the Respondent included a paragraph linking the remedial works to the desired outcome, namely that the specified defects no longer prevent a satisfactory EWS1 form assessment pursuant to PAS 9980:2022, and the Tribunal's remediation order reflects that.

(7) Confirmation that Kedai is pursuing funding from third parties.

The Tribunal agrees with Kedai that the question of whether the Respondent is seeking to obtain funding or redress from a third party is irrelevant to the exercise of the jurisdiction under section 123 in this case. Whether it has relevance in any future case is not for this Tribunal to decide.

(8) An order that the landlord should keep the Applicants updated monthly as to the progress of works.

It is highly desirable that Kedai should keep the leaseholders informed of progress in the rectification of the relevant defects

and, insofar as they impinge on fire safety arrangements at the Development it is necessary to do so. The Tribunal recommends and encourages the Respondent to keep leaseholders informed of progress on a regular basis. This is consistent with the provisions of the Developers Remediation Contract in which, by clauses 8.3 and 8.4, the Participant Developer and Responsible Entity have obligations to share information with leaseholders, residents, occupiers and other users of the Building, and, by clause 8.1(D), the Participant Developer must establish effective processes to receive and promptly respond to communications from any of the leaseholders, residents, occupiers and other users.

Section 20C order

148. The Applicants applied for an order under section 20C of the Landlord and Tenant Act 1985, which, if made, would prevent the landlord passing any of its costs relating to the proceedings through the service charge.

149. The discretion given to the Tribunal is to make such order as it considers just and equitable. In *Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000, which concerned an application for the appointment of a manager under section 24 of the Landlord and Tenant Act 1987 and in which the Applicant tenants had been successful, the Lands Tribunal (Judge Rich QC) made the following remark:

> "28. In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise."

150. In *Conway & Others v Jam Factory Freehold Limited* [2013] UKUT 0592 (LC), which was a case involving a tenant-owned management company, Martin Rodger QC, Deputy President of the Upper Tribunal (Property Chamber), said that:

> "75. In any application under section 20C it seems to me to be essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make."

151. Mr Sawtell dealt with this at paragraphs 97 to 100 of his skeleton argument. The Tribunal is satisfied that the lease does allow recovery of the landlord's costs of Tribunal proceedings: see the Eighth Schedule, paragraph 4 [814], which is the Tenant's covenant "To pay all costs… incurred by the Landlord… in the conduct of any proceedings before a

Court or Tribunal" and, potentially, the Sixth Schedule, paragraph 37 [812], which expands the definition of Maintenance Expenses to include "All other expenses (if any) incurred by the Landlord in and about the maintenance and proper and convenient management and running of the Development including… any legal or other costs reasonably and properly incurred by the Landlord and otherwise not recovered in taking or defending proceedings… arising out of… any claim by or against any transferee or tenant thereof or by any third party against the Landlord as owner or occupier of any part of the Development".

152. By paragraph 2 of Schedule 8 to the BSA, no leaseholder (that is, whether qualifying or not) is required to pay a service charge in respect of a "relevant measure" relating to a relevant defect, if the relevant landlord is responsible for the defect or is associated with a person responsible for a relevant defect. It is accepted that Kedai Limited is a relevant landlord and is associated with the original developer. Therefore, all leaseholders benefit from this protection, which by paragraph 1 extends to "a measure taken (a) to remedy the defect, or (b) for the purpose of (i) preventing a relevant risk materialising, or (ii) reducing the severity of any incident resulting from a relevant risk materialising".

153. By paragraph 9(1) of Schedule 8 to the BSA, no qualifying leaseholder has to pay for the landlord's costs of legal or other professional services relating to its liability incurred as a result of a relevant defect, which expressly includes obtaining legal advice or any proceedings before a court or tribunal. That means that none of the qualifying leaseholders (which includes the Ms Waite and Ms Martensson) has to pay any of the Respondent's costs in relation to this application.

154. However, non-qualifying leaseholders potentially may have to contribute to those costs through the service charge. Mr Sawtell sought to say that it was not appropriate or proportionate for an order under section 20C to be made. He argued that Kedai Limited had acted reasonably and expeditiously throughout.

155. The Tribunal will agree with him so far as the ACM cladding is concerned, because the existence of this combustible cladding was not identified by professionals until after the inspection on 13 June 2022. However, the Tribunal does not agree with this analysis insofar as there have been problems with the cavity fire barriers and fire-stopping, which were known about by the landlord since the report of 2019.

156. Even regarding the ACM, Kedai Limited knew from June 2022 that this was a serious fire risk. Thereafter, it did nothing until it was ordered to obtain a fire safety engineer's report at the Tribunal's case management conference on 11 November 2022; and it did not instruct Buro Happold or Delta Architects until almost a year since it gained that knowledge.

157. While the Tribunal acknowledges that the identification of ACM cladding in June 2022 involved a step change, even then, Kedai Limited had still not acted as quickly as it could or should have done, given the implications for fire safety and the potential risk to life.

158. Mr Sawtell also said that Kedai Limited had responded constructively and appropriately throughout the course of the proceedings, obtaining the expert evidence upon which the Applicants rely. The Tribunal accepts this and confirms that a lot of the Respondent's expert evidence was very useful to the Applicants and to the Tribunal; but also, for that matter, to the Respondent itself, by giving clarity about the defects at the Development, the risks arising from them and the steps necessary to remediate them.

159. The Tribunal notes that the Applicants have been successful in obtaining a remediation order, which cover most of the items they sought. Although Mr Sawtell says that it would be unfair to make an order under section 20C and that, if the Tribunal did so, the effect would be that one would be made in almost every remediation order case, the Tribunal does not agree. The Tribunal does not accept that a section 20C order will be made in every case. Every case will be decided upon its own facts; and, in some, landlords and developers will have acted swiftly, and, in others, they will not have done so.

160. Mr Sawtell also sought to say that the Schedule 8 to the BSA should be taken as the starting point as to whether the landlord's costs of dealing with the remediation order applications were recoverable through the service charge. By limiting the protection against paying for legal costs in paragraph 9 to qualifying leaseholders, Parliament had intended that non-qualifying leaseholders should contribute; and had Parliament intended section 20C still to have effect it would have said so.

161. The Tribunal disagrees with this. It is correct to say that paragraph 9 of Schedule 8 protects qualifying leaseholders against having to pay a service charge in respect of legal and other professional services, including the landlord's costs of obtaining legal advice and any proceedings before a court or tribunal. That protection necessarily does not include non-qualifying leaseholders, who are therefore potentially at risk of having to contribute to such costs through the service charge. However, Schedule 8 does not exclude the operation of section 20C: it would say so if that was intended. In the Tribunal's view, non-qualifying leaseholders may still benefit from protection under section 20C, if appropriate, insofar as a service charge may become payable in respect of the landlord's costs of these proceedings.

162. This is a straightforward section 20C decision. Schedule 8 of the BSA does not remove the protections from non-qualifying leaseholders, it merely extends leaseholder protections to qualifying leaseholders.

163. The emails show that the Applicants, especially Sarah Waite, had made numerous attempts to get information about remediation works from Kedai and its managing agents, but that they had been unsuccessful in doing so. The Applicants were fully justified in making their application for a remediation order. They were largely successful. The Tribunal must and does acknowledge that Kedai Limited, within the proceedings, has been very cooperative and helpful, not least in the obtaining and releasing of reports but also in obtaining the fire safety engineer's report from Mr Martin and arranging for him to attend the Tribunal hearing.

164. The Tribunal accepts that these steps in the proceedings are not cheap. However, the Respondent landlord is associated with the original developer responsible for the relevant defects; and it is incumbent upon the Respondent to remedy them, largely at its own cost. That is the whole intention of the BSA. Therefore, in the Tribunal's view, a fair outcome is an order that 80% of the landlord's costs of proceedings shall not be passed on to non-qualifying leaseholders through the service charge. Of course, none of the landlord's costs can be passed to qualifying leaseholders by reason of paragraph 9 of Schedule 8 to the BSA.

Tribunal:	Judge Timothy Powell & Mrs Helen Bowers MRICS	**Date:**	9 August 2023

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

LON/00AY/HYI/2022/0005 &
LON/00AY/HYI/2022/0016

IN THE MATTER THE BUILDING SAFETY ACT 2022

B E T W E E N:

(1) Ms Sarah Waite
(2) Karin Ida Christina Martensson &
(3) Other leaseholders

Applicants

-and-

Kedai Limited

Respondent

REMEDIATION ORDER

In respect of Block A (North Block) and Block B (South Block), 2-4 Leigham Court Road, London SW16 2PG

Upon considering the applications, evidence and submissions in this matter, and upon considering the provisions of the Building Safety Act 2022, and for the reasons set out in its decision of 9 August 2023, the Tribunal orders that:

1. Kedai Limited (the relevant landlord) shall remedy the relevant defects specified by and in accordance with the attached Schedule (the "**Works**") in Block A (North Block) and Block B (South Block), 2-4 Leigham Court Road, London SW16 2PG (the specified relevant building) (the "**Blocks**") by the time specified in paragraph 2 below.

2. Kedai Limited shall complete the Works by no later than 19 September 2025.

3. The parties have permission to apply in relation to paragraphs 1 and 2 and the attached Schedule. In particular, Kedai Limited has permission to apply:

   (1) to be permitted to undertake different Works to those specified by this Order, if it is revealed by investigation and analysis by a suitably qualified consultant that reasonable alternative works will remedy the relevant defects; and
   (2) to extend the time for compliance with this Order.

4. Any such application must be made using the Tribunal's Form "Order 1". The application must be supported by detailed evidence explaining the reason for the application and a proposed draft order setting out the variation sought. There is permission to the parties to rely on relevant expert evidence in support of the application. The application must also include a realistic time estimate for the application to be heard.

5. Kedai Limited must notify the Tribunal, the Applicants and Lambeth Council that it has complied with this Order, within one month of the certified date of practical completion of the Works.

6. By section 123(7) of the Building Safety Act 2022, this Order is enforceable with the permission of the county court in the same way as an order of that court.

Tribunal:	Judge Timothy Powell & Mrs Helen Bowers MRICS	**Date:**	9 August 2023

Attached: Schedule

Schedule of Specified Relevant Defects & Works Required to Remedy Them

In respect of Block A (North Block) and Block B (South Block), 2-4 Leigham Court Road, London SW16 2PG

By 19 September 2025, Kedai Limited is required to remedy the relevant defects in Block A and Block B, 2-4 Leigham Court Road, London SW16 2PG as specified below:

1. The Aluminium Composite Material ("**ACM**") is to be removed from the façade of both Blocks and replaced with suitable rainscreen cladding which adequately protects the insulation from the spread of fire.

2. The Kingspan K15 insulation is to be removed from the external wall systems of both Blocks and replaced with suitable non-combustible insulation.

3. The fibre cement panels are to be removed and replaced with panels that are not broken or cracked and properly installed in accordance with their manufacturer's instructions which adequately protect the insulation from the spread of fire.

4. The fire stopping, cavity barriers and internal compartmentation are to be remediated in the following locations so that the Blocks are compliant with the Building Regulations current at the time that the works are carried out:

    (1) Blocks A and B, ensure that cavity barriers are properly installed in accordance with manufacturer's instructions:

        (i) Horizontally in line with each floor;

        (ii) Vertically in line with internal compartment walls;

        (iii) Around openings;

        (iv) At the edges of the cavity.

    (2) Ground floor Block A stairway:

        (i) Extend plasterboard partitions to the floor slab and seal with suitable fire-resisting sealant or bolstered by suitable

fire-stopping systems so as to allow for 60-minute fire resistance;

(ii) Remove polyurethane ("PU") foam and fire batts and replace with suitable fire- stopping systems so as to allow for 60-minute fire resistance;

(iii) Protect all penetrations to fire resisting partition fire-stopping systems so as to allow for 60-minute fire resistance.

(3) 1st to 4th floor Block A electrical cupboards:

(i) Protect door frames internally so as to allow for 60-minute fire resistance;

(ii) Remove PU foam and replace with suitable fire-stopping systems so as to allow for 60-minute fire resistance;

(iii) Ensure all joints between plasterboards are adequately taped and sealed;

(iv) Infill lateral breaches allowing for building services to pass from electrical risers to the plenum ceiling with appropriate fire stopping materials.

(4) 1st to 4th floor Block A water/ mechanical riser cupboards:

(i) Protect door frames internally so as to allow for 60-minute fire resistance;

(ii) Remove PU foam and fire batts and replace with suitable fire- stopping systems so as to allow for 60-minute fire resistance;

(iii) Ensure all joints between plasterboards are adequately taped and sealed;

(iv) Infill lateral breaches allowing for building services to pass from electrical risers to the plenum ceiling with appropriate fire stopping materials.

(5) All floors Block A water / mechanical riser cupboards and means of escape:

(i) All water damaged areas of plasterboard to be inspected and where appropriate remediated.

(6) 3rd and 4th floor Block A water/ mechanical riser cupboards and means of escape:

(i) Remove PU foam and fire batts and replace with suitable fire- stopping systems so as to allow for 60-minute fire resistance;

(ii) Protect exposed insulation at ceiling height within the fourth-floor riser with appropriate fire-resisting products.

(7) 5th floor Block A electrical cupboard:

(i) Infill lateral breaches allowing for services to pass from the fifth electrical riser through the plasterboard construction with appropriate fire stopping materials;

(ii) Remove PU foam and replace with suitable fire-stopping systems so as to allow for 60-minute fire resistance.

(8) Ground to 6th floor Block B electrical cupboards:

(i) Protect door frames internally so as to allow for 60-minute fire resistance;

(ii) Remove PU foam and fire batts and replace with suitable fire- stopping systems so as to allow for 60-minute fire resistance;

(iii) Ensure all joints between plasterboards are adequately taped and sealed;

(iv) Infill lateral breaches allowing for dry rising main outlets to the stair core with appropriate fire stopping materials.

(9) Ground to 6th floor Block B water/ mechanical cupboards:

(i) Protect door frames internally so as to allow for 60-minute fire resistance;

(ii) Remove PU foam and fire batts and / or uncertified mastics and replace with suitable fire-stopping systems so as to allow for 60- minute fire resistance;

(iii) Ensure all joints between plasterboards are adequately taped and sealed.

(10) 6th floor Block B smoke shaft:

(i) Protect frames to smoke shaft vents internally so as to allow for 60- minute fire resistance;

(ii) Ensure all joints between plasterboards are adequately taped and sealed;

(iii) Infill lateral breaches allowing for automatic fire detection cabling to the means of escape with appropriate fire stopping materials.

(11) 7th floor Block B combined services cupboard:

(i) Remove PU foam and replace with suitable fire-stopping systems so as to allow for 60-minute fire resistance.

(12) 1st to 4th floor Block B plenum ceiling:

(i) Inspect and where appropriate remediate.

(13) All floors Blocks A and B escape corridors:

(i) Inspect and where appropriate remediate the vents in the ceilings either (where not vital for building serviceability) by removal and infilling or (where they are so vital) by replacement with reactive vents.

(14) Ground floor external electrical meter room:

(i) Inspect soil pipes as to whether they are protected by concealed intumescent pipe closures;

(ii) Where appropriate, install suitable system to prevent combustion spread.

(15) Ground floor external meter room:

(i) Inspect and where appropriate remediate the vent providing air circulation either (where not vital for building serviceability) by removal or (where they are so vital) by replacement with reactive vents.

(16) Ground floor external gas meter room:

(i) Remove PU foam and fire batts and replace with suitable fire- stopping systems so as to allow for 60-minute fire resistance (including suitable pipe closure).

(17) Ground floor commercial unit:

(i) Inspect and where appropriate remediate.

5. Carry out the Works and remedy the specified relevant defects in compliance with the Building Regulations applicable at the time the remedial work is carried out, so that the relevant defects no longer exist.

6. At the very least, a post-Works Fire Risk Appraisal of External Walls (FRAEW) pursuant to PAS 9980:2022 should not prevent a satisfactory Form EWS1: External Wall Fire Review from being issued.

7. Make good any damage caused to the Blocks on account of the Works.

Tribunal:	Judge Timothy Powell & Mrs Helen Bowers MRICS	**Date:**	9 August 2023