FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BG/HYI/2023/0022**
Property	:	**Canary Riverside Estate, Westferry Circus, London E14**
Applicants	:	**(1) Octagon Overseas Limited** **(2) Canary Riverside Estate Management Limited** **(3) Riverside CREM 3 Limited**
Respondents	:	**(1) Mr Sol Unsdorfer** **(2) Circus Apartments Limited** **(3) Leaseholders represented by the Residents Association of Canary Riverside ("RACR")**
Represented by	:	**Freeths LLP for the Applicants** **RACR for the leaseholders** **Norton Rose Fulbright LLP for Circus Apartments Limited** **Wallace LLP for Mr Unsdorfer**

Type of application	**:**	**For a determination of the principal accountable person under section 75 of the Building Safety Act 2022**
Tribunal	**:**	**(1) Judge Vance** **(2) Judge Nicola Rushton KC**
Date of Decision	**:**	**21 December 2023**

DECISION

Decision

1. The Tribunal's decision is summarised at paragraph 82 below.

Background

2. This decision concerns an application dated 4 October 2023, made by the above named Applicants seeking determinations under s.75(1) Building Safety Act 2022 ("BSA 2022") as to who:

   (a) is, or are, Accountable Persons ("APs") as defined in s.72 of that Act in respect of higher-risk buildings at the Canary Riverside Estate ("the Estate"); and

   (b) who is the Principal Accountable Person for the Estate.

3. Numbers in square brackets and in bold below refer to pages in the hearing bundle.

4. It is relevant, for reasons explained below, that the Applicants did not tick the box in the tribunal's application form asking for a determination as to the part(s) of the building(s) for which any AP is responsible **[10]**.

5. At the hearing before us it was agreed by counsel for all parties that the Estate contains five higher-risk buildings:

   (1) Belgrave Court ("Building 1");
   (2) Berkeley Tower ("Building 2");

(3) Eaton House ("Building 3");
(4) Hanover House ("Building 4"); and
(5) the self-contained block of 45 serviced apartments known as Circus Apartments ("Building 5"). It is common ground that the block is an "independent section" from the front half of Eaton House for the purposes of reg. 4 of the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023.

6. Octagon Overseas Limited ("Octagon") is the freehold owner of Buildings (1)–(5) under title number EGL359129. Canary Riverside Estate Management Limited ("CREM") is the long leaseholder of Buildings (1)–(4), as well as other parts of the Estate, under number EGL365354. Octagon is its landlord. Riverside CREM 3 Limited ("Riverside") is the long leaseholder of Building (5) under title number AGL462922. Octagon is its landlord, and its lease was created by transferring part of the land out of CREM's leasehold title. In this decision we refer to the Applicants, collectively, as "the Landlords".

7. Mr Sol Unsdorfer is the tribunal-appointed manager of the Estate. His appointment is made under s.24 Landlord and Tenant Act 1987 ("the 1987 Act"). The Management Order that sets out his functions and responsibilities first came into effect on 1 October 2016 and has been varied on multiple occasions after that date, the most recent substantial version being that dated 12 April 2019 **[228]**.

8. Circus Apartments Limited ("CAL") is the long lessee of Building 5 and holds its interest under a 999-year underlease. Riverside is its landlord.

9. This s.75 application was originally listed to be heard together with several applications made under s.24 of the 1987 Act which seek to vary and/or to extend the Management Order. The hearing was due to last eight days, commencing on 13 December 2023 ("the December Trial"). That listing decision was made at a Case Management Hearing ("CMH") on the s.75 application that took place on 19 October 2023. At para. 23 of its subsequent directions of 20 October 2023 **[106]** the Tribunal stated that whilst it noted the potential for overlap between the two sets of proceedings, it considered the most appropriate course of action was for the s.75 application to be heard at the same time as s.24 applications.

10. At the CMH on 19 October 2023, counsel for RACR informed the Tribunal, for the first time, that for personal reasons Ms Jezard, RACR's only witness and the person who had represented RACR throughout the long history of the s.24 applications, was unable to attend the December trial. It has since been confirmed that this for medical reasons.

11. A formal application was made by RACR dated 20 October 2023, in which it sought permission for Mr Kevin Bell, its Chairman, to "give evidence instead of Ms Jezard" at the December Trial. Permission was sought to "rely on a short witness statement from Mr Bell which adopted the evidence given by Ms Jezard in her three witness statements". RACR's application was refused in a decision by Judge Vance dated 16 November 2023, but RACR was given permission to submit a renewed application addressing the criticisms made in the decision. Judge Vance also expressed the view that it was very likely that the December Trial would have to be postponed, at least in respect of the s.24 applications, but invited the parties' representations on that question and whether there were any discrete issues that could be determined at the December hearing, such as the Principal Accountable Person ("PAP") application made under Section 75 of the Building Safety Act 2022.

12. In response to those directions CAL, RACR and the Manager argued that the December Trial should proceed, both in respect of the s.24 applications and the s.75 application. The Landlords contended that it should be postponed, but that two aspects of the s.75 application could be decided, namely: (a) whether Mr Unsdorfer is an Accountable Person; and (b) the effect of s.24(2E) of the 1987 Act, introduced by s.110 BSA 2022.

13. In a decision dated 22 November 2023 [**122]** Judge Vance postponed determination of the s.24 applications that were due to be determined at the December Trial, principally because there was insufficient time between that date and the trial for the Tribunal to determine the Landlords' intended application for a witness summons under Rule 20 of the of the Tribunal's 2013 Rules requiring Ms Jezard to attend trial so that they could cross-examine her (the application was subsequently made on 24 November 2023). Judge Vance also directed that the s.75 application would be determined, in full, over three days, commencing on 4 December 2023, followed by a CMH in the s.24 applications.

14. In emails received in the early evening of 22 November 2023, CAL and the Manager requested that the Tribunal reconsider the adjournment of the s.24 applications, the Manager contending that determination of the s.75 application would be problematic if dealt with separately from the s.24 application, because the issues for determination on who should be the PAP were inextricably linked with whether the management order should be extended.

15. The Landlords' solicitors, Freeths LLP ("Freeths") then wrote to the Tribunal on 27 November 2023, submitting that having now had the opportunity to consider the evidence filed by RACR (on 20 November 2023) and the Manager (on 21 November 2023) the Tribunal should

only deal with the legal issues of the s.75 application at the upcoming hearing, and not its discretionary element. In other words, whether it is possible for Mr Unsdorfer and/or CAL (in respect of Circus Apartments) to be an AP, but not who is the most "appropriate" person to be the PAP.

16. The Landlords also drew attention to correspondence passing between the Department for Levelling Up, Housing & Communities ("DLUHC"), Mr Unsdorfer, and his solicitors regarding Mr Unsdorfer's application for Building Safety Fund ("BSF") funding regarding intended cladding-removal works. This correspondence had been exhibited to a witness statement from Mr Steven Unsdorfer filed in the s.24 Proceedings on 21 November 2023. The Landlords contended that this material should have been drawn to their attention, and to the attention of the Tribunal at a much earlier date as it evidenced DLUHC's clear view that Property Managers appointed by this Tribunal are no longer able to implement building safety projects relating to High Risk Buildings following the introduction of the BSA 2022.

17. In a letter from DLUHC to Mr [Sol] Unsdorfer dated 16 October 2023 **[199]**, the Department stated that it was in the course of amending BSF published online guidance to reflect that Property Managers in Mr Unsdorfer's position would no longer be accepted as an Applicant to the BSF and that this should be focused instead on the relevant AP or PAP for the building. Following receipt of that letter, the Manager's solicitors, Wallace LLP ("Wallace") sent a draft Letter Before Claim for Judicial Review to DLUHC's solicitors, Womble Bond Dickinson LLP ("WBD") on 7 November 2023 **[213]** challenging what he saw as the Department's decision that his application for BSF funding was rejected, or would not be progressed further, on grounds that a Tribunal-appointed Manager could not be an AP because of the effect of the 2022 Act and was therefore unable able to implement building safety projects relating to High Rise Buildings.

18. In WBD's response dated 17 November 2023 **[224]** DLUHC maintained its position that the impact of changes to the Landlord and Tenant Act 1987 established by s.110 of the BSA 2022 precluded Tribunal-appointed managers from undertaking and overseeing complex construction projects involving higher risk buildings, thereby rendering him unable to meet the legal eligibility criteria for BSF funding. It anticipated that the Tribunal would be determining: (a) whether Mr Unsdorfer should be regarded as having AP status; (b) whether he should be permitted to continue as a manager for the building; and (c) if so, the scope and duration of that role. The Department would then need to assess the tribunal's determinations before any further decisions could be made regarding BSF funding. The Department had therefore decided to pause any further decision-

making regarding the Manager's applications to the BSF, as well as the planned amendment to the BSF guidance, pending the Tribunal's determination as to whether the Manager may be regarded as a valid AP for the Estate.

19. One of the arguments made by the Manager in his request that the Tribunal reconsider the adjournment of the s.24 applications was that whilst a determination of whether the Manager was an AP/PAP would assist his currently stalled application for BSF funding, the Department also wanted to know if the Management Order was going to be of sufficient length to enable the intended remediation works to be completed.

20. By letter from the Tribunal dated 28 November 2023, Judge Vance directed that at the upcoming hearing the Tribunal would not determine who should be the PAP (if it was possible for either the Manager and/or CAL to be an Accountable Person) but, rather, that the following issues would be determined:

> " (1) who are the accountable persons in relation to each building?
>
> (2) what is the effect of s24(2E) LTA 1987 on the issues the tribunal has to determine? "

21. The reason Judge Vance gave for his decision was that having now had the opportunity to consider the evidence relied upon by the parties, it was clear that there was a very substantial body of evidence that was provided in the s.24 applications that was also being relied upon in the s.75 Application. He said that when he made his decision of 22 November 2023 to hear all aspects of the s.75 application at the hearing, the extent of this overlapping evidence was not apparent to him. Having subsequently seen CAL's schedule of evidence, he noted that the evidence it relied upon was contained in 28 separate witness statements, comprising about 176 pages of evidence in total. As such, he no longer considered it reasonable for that evidence, and the evidence of the other parties, to be considered in isolation in the s.75 application, and then again in the s.24 applications. To do so would, he said, place an unreasonable burden on both the parties, and the Tribunal, in terms of time and expense.

22. In the letter of 28 November, Judge Vance stated that as his direction had been made of the Tribunal's own motion any party could apply to vary it. That is what CAL's solicitors, Norton Rose Fulbright LLP ("NRF") did in a detailed letter to the Tribunal dated 29 November 2023 in which it asked the Tribunal to reverse its decision and have the entire s.75 application addressed in a three-day hearing commencing on 4 December 2023.

23. By letter from the Tribunal dated 29 November 2023, Judge Vance maintained his decision of 28 November 2023 to postpone the discretionary aspects of the s.75 application. He said that whilst CAL was correct to say that it was always understood that there would be substantial overlapping evidence with the s.24 applications, the sheer volume of that evidence was not evident until sight of the s.75 hearing bundle. In addition, having now seen the parties' submissions, the extent of the overlap between the discretionary exercise the Tribunal may have to carry out in respect of the s.75 application, and the discretion the Tribunal would have to exercise when considering the s.24 variation applications, was such that there was an overwhelming case for those two matters to be heard together.

24. In the Tribunal's letter of 29 November, Judge Vance directed that if all parties agreed that the entirety of the s.75 application should be postponed, to be heard alongside the s.24 applications, the Tribunal would order that postponement. If that was not the case, and any party opposed such a postponement, the Tribunal would hear oral argument on whether to do so at the start of the hearing on Tuesday 5 December 2023. If a postponement was refused, the Tribunal would then proceed to hear the legal elements of the s.75 application.

25. On 1 December 2023, RACR sent the Tribunal a copy of its letter to the Secretary of State for Levelling Up, Housing and Communities, the Rt Hon. Michael Gove MP dated 24 November 2023, and the Minister's reply dated 30 November 2023. Where relevant, we refer to the contents of this letter below.

The Hearing

26. The hearing of the s.75 application commenced on 5 December 2023 and concluded the following day. It was attended by: Mr Morshead KC and Mr Bates, counsel for the Landlords; Mr Rainey KC, Counsel for CAL; Mr Upton, counsel for RACR; and Mr Dovar, counsel for the Manager. Their respective solicitors also attended as did approximately 22 leaseholders on day one and 14 on day two. The hearing was a hybrid hearing, with some leaseholders joining by video (CVP) on day two.

The Postponement Application

27. At the start of the hearing, Mr Rainey stated that CAL's position remained as expressed in NRF's letter to the Tribunal of 29 November 2023, namely that if there could not be a hearing of the whole s.75 application, then there should be an adjournment. In summary, CAL's position was that:

(a) there had been no change in circumstances from 22 November 2023, when Judge Vance made his direction that the s.75 application was to be heard in its entirety and no reason to depart from that position;

(b) by acceding to the request contained in Freeths letter of 27 November 2023 the Tribunal had enabled the Landlords to create a "one-way bet", which they can win but the other parties cannot. This was that if the Landlords lost, and it was determined that Mr Unsdorfer or CAL could be an AP, there would be no determination that he/CAL was to be appointed a PAP. However, if they won, and only a Landlord company can be AP, then the Landlords would immediately say that the s.75(2) application could be disposed of summarily because CAL's position (and presumably that of RACR) would be that all the Landlord companies are Yianis Group companies in common control, and all are equally unsuitable to carry out any functions over the Estate. As such, the Landlords would say that it makes little difference to the leaseholders which of them is appointed;

(c) a determination on only the legal issues, without any actual decision on the PAP issue, would leave the Tribunal's own officer, Mr Unsdorfer, in an uncertain and deeply unsatisfactory position. It would mean that there would be no determination from the Tribunal about how s.75 determination was to co-exist with the Management Order, which currently prevents the Landlords from carrying out remedial work for which the Manager is responsible.

(d) The focus of DLUHC in its letter to Mr Unsdorfer of 16 October 2023 was not on the s.75 application, but the outcome of the s.24 applications, which reinforced the correctness of the Tribunal's original decision at the CMH on 19 October 2023 to hear all applications together. If the Tribunal were only to address the legal aspects of the s.75 application, there was a real risk that its decision could be misrepresented to the BSF and it would also be very likely to lead to further litigation including an inevitable appeal to the Upper Tribunal and consequential delay. It may also drive the Manager to pursue judicial review proceedings in relation to his BSF application. This might be avoided if the PAP application was heard in full alongside the s.24 applications, which would result in the Tribunal determining all three of the questions referred to in WBD's letter of 17 November 2023, as had been originally intended.

28. Mr Upton agreed with and adopted Mr Rainey's submissions, contending that the postponement of the s.24 applications was not a sufficient reason to depart from the original decision for all aspects of the s.75 application to be heard together. The Tribunal should not, in

his submission, determine the AP question in a vacuum, but should do so in the context of changes to the 1987 Act made by s.24(2E) and with the benefit of evidence on what this means in practice in terms of the Manger's ability to carry out works and obtain BSF funding. Mr Upton saw no practical benefit in determining the AP question as a preliminary issue and agreed with Mr Rainey that it could be misconstrued and misapplied in the context of the BSF funding application. Mr Dovar agreed that just determining the legal aspects of the s.75 application may lead to further conflict. He shared some of Rainey's concerns and he could not see much advantage in determining the legal aspects in isolation.

29. Mr Morshead opposed the postponement request. In his submission, his opponents had not identified any factual matters in the s.24 applications that affected the outcome of the AP question. That, he said, was a question that needed to be determined as soon as possible given that his clients consider themselves to be APs and therefore subject to regulatory responsibilities. To do so would amount to effective case management, in accordance with the overriding objective in the Tribunal's 2013 Rules. If the decision was postponed the potential for an appeal remained and the cladding works would still be delayed. The real issue, in his submission, was whether the Manager could be an AP, and nobody gained from not knowing the answer to that question.

30. We declined to postpone the hearing for the following reasons:

    (a) the issue to be determined was a discrete legal issue where all relevant background factual issues were either agreed, or could be readily resolved by consideration of the documents before the Tribunal;

    (b) all parties were present, at considerable cost, and were prepared to argue the points in issue;

    (c) there were practical advantages to all parties in proceeding to determine who is or are the APs for the buildings and whether the Manager is one of them. Given that the Manager's BSF application is currently on hold pending determination of this question (and possibly also pending determination of the s.24 applications) we considered that our decision was more likely than not to assist in progressing that application, either in the Manager's favour or against;

    (d) even if we were to determine that the Manager cannot be an AP it nevertheless leaves open for argument at the hearing of the s.24 applications the question of his repairing obligations as defined in

the Management Order, and whether any variations are required given the introduction of the BSA regime and the interaction required with the entity appointed as the PAP;

(e) we agreed with Mr Morshead regarding the importance of effective case management, and that this gravitated towards determining the issues in question now;

(f) we did not accept that proceeding to do so meant that further litigation was inevitable, and that even if an appeal against the decision was very likely, that was not a reason to refrain from making a determination;

(g) as to the concerns about the Manager being compelled to initiate judicial review proceedings, we indicated that we would make it clear in our decision that we will not be deciding who the PAP is, or who should make any BSF application, and that any question of who will have practical control of Building Safety matters is an issue for final determination of the PAP and s.24 applications.

31. We add that we do not agree with Mr Rainey's suggestion that this created a "one-way bet" . Clearly there will be litigation consequences that flow from our determination, but that is often the case when a court or tribunal determines a preliminary issue. One party may well benefit from the determination of the issue, and another may be disadvantaged.

32. We therefore decided to proceed to determine the question of who is, or are, the APs for each of the relevant Buildings. However, we agreed with submissions advanced by Mr Rainey in his skeleton argument that the effect of s24(2E) on that question should not be treated as an independent issue. We agreed with his suggestion at para. 11 of his skeleton argument that determination under s.75(1) is not a determination about the meaning of s.110 BSA/s.24(2E). We also agreed with the submissions made by Mr Morshead and Mr Bates at para. 2 of their skeleton argument, that the possible significance of s24(2E) is the light it sheds on a true interpretation of the effect of the provisions in s.72, which identify the "accountable persons" in relation to a higher-risk building.

33. We therefore made it clear at start of the hearing that we are not making a declaration regarding the effect of s.24(2E) but that its introduction may be relevant as an aid to interpretation when considering who can be an AP. We also made clear that we would not be making any decisions about the consequences of our decision, what practical issues may arise regarding the Manager's continuing day to day responsibilities, how they interact with building safety obligations,

and whether any consequential variations should be made to the Management Order. These are all questions for the hearing of the s.24 applications and the remainder of the PAP application.

The Legal Framework

34. Section 72(1) of the BSA 2022 provides as follows:

> "(1) In this Part an "accountable person" for a higher-risk building is—
>
> (a) a person who holds a legal estate in possession in any part of the common parts (subject to subsection (2)), or
>
> (b) a person who does not hold a legal estate in any part of the building but who is under a relevant repairing obligation in relation to any part of the common parts."

35. What constitutes "common parts" in relation to a building is defined in subsection (6) as:

> (a) the structure and exterior of the building, except so far as included in a demise of a single dwelling or of premises to be occupied for the purposes of a business, or
>
> (b) any part of the building provided for the use, benefit and enjoyment of the residents of more than one residential unit (whether alone or with other persons);

36. Subsection (6) also provides that "a person is under a relevant repairing obligation in relation to anything if the person is required, under a lease or by virtue of an enactment, to repair or maintain that thing" and that reference to "possession" does not include the receipt of rents and profits or the right to receive the same.

37. Section 72(2) disqualifies persons who would otherwise qualify as an AP under 72(1)(a) in certain circumstances, but these do not arise in the present case.

38. Sections 72(3) and (4) provide as follows:

> " (3) Subsection (4) applies where—
>
> (a) under a lease, a person ("the estate owner") holds a legal estate in possession in the common parts of a higher-risk building or any part of them ("the relevant common parts"), and
>
> (b) a landlord under the lease is under a relevant repairing obligation in relation to any of the relevant common parts."

(4) For the purposes of this section and section 73—

(a) the legal estate in possession in so much of the relevant common parts as are within subsection (3)(b) is treated as held by the landlord (instead of the estate owner), and

(b) if (and so far as) the landlord's actual legal estate in those common parts is held under a lease, the legal estate in possession mentioned in paragraph (a) is treated as held under that lease (and, accordingly, subsection (3) and this subsection may apply in relation to it).

39. Sections 72(3) and (4) are not easy to disentangle, but we agree with the analysis advanced by Mr Morshead and Mr Bates in their skeleton argument, paras. 14-15. This is that they are designed to do what the Explanatory Notes say they were intended to do, namely:

> "620. Subsections (3) and (4) identifies the person with the relevant repairing obligation for the common parts of the higher-risk building as an Accountable Person where the ownership arrangements consist of a complex chain of leases. This may occur when for example, a person who holds a legal estate in possession in any of the common parts has a superior landlord or landlord who has agreed, in a superior lease, to keep the common parts of the building in repair [.....]
>
> 621. Where this is be (*sic*) the case, the superior landlord or landlord will be an Accountable Person for those parts of the building, instead of the person who holds a legal estate in possession of those common parts."

40. In summary, s.72(1) specifies two tests by which one or more of the parties in this case might be an AP, namely:

(a) If they hold a "legal estate in possession" (but not including receipt of rents or profits, or the right to receive the same) in part of the common parts; or

(b) If they do not hold a legal estate in any part of the building but are under a relevant repairing obligation in relation to any part of the common parts.

41. Situations where there is more than one AP for a building are addressed in the Higher-Risk Buildings (Key Building Information etc) (England) Regulations 2023 which provide, so far as is relevant, that:

"27. If a higher-risk building has more than one AP, the parts of the building for which an AP is responsible is determined by reference to regulations 28 to 30.

28. An AP is responsible for the part of the common parts of the building for which they hold a legal estate in possession or a repairing obligation.

29. An AP who holds a legal estate in possession in or a repairing obligation in relation to any part of the exterior of the building, is responsible for any balcony attached to that part of the exterior.

30. (1) If an AP has the right to let or (excluding a residential unit let on a long lease) lets a residential unit in the building, the AP is responsible for that unit.

(2) If a residential unit is let under a long lease, the AP responsible for the unit is—

(a) the lessor in relation to the long lease, or

(b) where, by virtue of section 72 of the 2022 Act, the lessor in relation to the long lease is not an AP, the AP responsible for the part of the common parts that adjoins or is nearest to the main entrance door of the unit.

(3) For this regulation, the residential unit is treated as including any garden, yard, garage, outhouse, or other appurtenance that is—

(a) within the higher-risk building,

(b) for the use, benefit and enjoyment of a resident of that unit, and

(c) not a part subject to regulations 28 and 29."

42. Section 110 of the BSA 2022 came into force on 6 April 2023 as a result of the Building Safety Act 2022 (Commencement No. 4 and Transitional Provisions) Regulations 2023/362, reg.3(1)(z9). It amended s.24 of the 1987 Act by inserting after subsection (2ZA)

"(2ZB) Subsection (2)(a) does not apply in respect of a breach of a building safety obligation by an accountable person for a higher-risk building.

(2ZC) In this section—

"accountable person" has the meaning given in section 72 of the Building Safety Act 2022;

"building safety obligation" means an obligation of an accountable person under Part 4 of the Building Safety Act 2022 or regulations made under that Part;

"higher-risk building" has the meaning given in section 65 of the Building Safety Act 2022."

(3) After subsection (2D) (inserted by paragraph 8(3) of Schedule 7) insert—

"(2E) An order under this section may not provide for a manager to carry out a function in relation to a higher-risk building where Part 4 of the Building Safety Act 2022 or regulations made under that Part provide for that function to be carried out by an accountable person for that building."

Statutory Interpretation

43. There was consensus with the propositions advanced at paras. 4 – 7 of the Landlords' skeleton argument regarding the relevant legal principles of statutory interpretation. There was no dissent from the suggestion that the task for the Tribunal is to "seek… the meaning of the words which Parliament used" and that this requires it to "identify the meaning borne by the words in question in the particular context". That context comes primarily from a consideration of the Act as a whole, but resort may be made to external aids, including Explanatory Notes, as secondary material, which "disclose the background to a statute and… identify… the mischief which it addresses [and]… the purpose of the legislation" so as to allow a purposive interpretation (*R(O) v Secretary of State* [2022] UKSC 3 at [29-31]).

44. We agree with Mr Upton's summary in para. 17 of his skeleton argument that: (i) the focus is on the meaning of the words in question in the particular context; (ii) the context includes the section as a whole and the wider context of a relevant group of sections; (iii) context may also include other provisions in the Act and the Act as a whole; (iv) explanatory notes may identify the mischief which the legislation addresses and the purpose of the legislation but do not displace the meanings conveyed by the words of a statute that are clear and unambiguous and which do not produce absurdity; (v) Parliamentary materials (e.g. Hansard) are not admissible unless all three conditions in *Pepper v Hart* are satisfied.

45. We also agree with Mr Rainey that external material should be approached with caution. Explanatory notes are not, as he submitted, produced by Parliament, but by the sponsoring department and are

produced initially when a Bill is presented. They may not properly reflect the final wording of the Act. We also agree with him that assertions by civil servants in correspondence as to meaning of a statute are not a useful aid to construction as the writer may well be wrong (skeleton, para.44).

Is the Manager an AP?

46. It was common ground that as Mr Unsdorfer does not hold a legal estate in any part of the Buildings, he can only be an AP if he satisfies s.72(1)(b) and is under a *relevant* repairing obligation in relation to any part of the common parts. As Mr Morshead agreed, he is clearly under a repairing obligation in relation to the common parts, by reason of paragraphs 4(e) and 5(b) of the Management Order **[231,234]**. The question is whether he is under a "relevant" repairing obligation as defined in s.72(6). To meet that definition, he would need to be required *under a lease, or by virtue of an enactment*, to repair or maintain any part of the common parts.

Under a lease

47. We agree with the Landlords that Mr Unsdorfer has no obligations "under a lease" because his powers and duties derive from the Management Order and not under a lease. Support for that proposition can be found in *Maunder Taylor v Blaquiere* [2003] 1 WLR 379, where at para.38 Aldous LJ said:

> "38. In my view Mr Fancourt is correct in his submission that the purpose of Part II of the Act is to enable the Tribunal to appoint a manager, who may not be confined to carrying out the duties of a landlord under a lease. The Tribunal is enabled under subsection (1) to appoint a manager to carry out in relation to any premises to which Part II applies "such functions in connection with management" of the premises as the Tribunal thinks fit. It is to be noted that the premises may be two or more (see section 21(4)) and that the manager will carry out functions of management. As subsection (11) makes clear, that includes repair, maintenance or insurance. There is no limitation as to the management functions of the manager; in particular the functions are not limited to carrying out the terms of the leases. That is not surprising as the manager will need to obtain estimates and do repairs. He need not use the landlord's surveyor as required by the lease in this case.

48. At para. 41 he said:

> "41. In my view the purpose of Part II of the 1987 Act is to provide a scheme for the appointment of a manager who will carry out the functions required by the court. That manager carries out

those functions in his own right as a court-appointed official. He is not appointed as the manager of the landlord or even of the landlord's obligations under the lease. That being so, Mr Maunder Taylor was a court-appointed manager appointed to carry out those duties required by the order appointing him. He did not carry on the business of Guernsey. His claims were made in his capacity as manager.

49. And, at para.42:

> "42. As I have said, Mr Dowding relied on the wording of the order appointing the manager. He submitted that it made it clear that the manager was acting as receiver of the monies due to Guernsey and as a manager to carry out the duties of Guernsey under the lease. That submission is, I believe, inconsistent with the scheme of Part II and in particular the effect of section 24 of the 1987 Act. The manager acts in a capacity independent of the landlord. In this case the duties and liabilities laid down in the order are defined by reference to the lease, but do not alter his capacity. In my view Mr Maunder Taylor's right to the money claimed arose from his appointment not from the lease. It follows that there was no mutuality between his claim and that of Mr Blaquiere. That being so, set off is not possible.

50. It is the Management Order, and not a lease, that imposes functions and responsibilities, including repairing obligations, on Mr Unsdorfer. He carries out those functions, in his own right, as a court-appointed official and not by virtue of the landlord's obligations under the lease.

51. Mr Rainey, Mr Upton and Mr Dovar all submitted that where, as in this case, a s.24 manager is directed in a management order to carry out repairing obligations as set out in a lease, they carry out those obligations both under order and the lease. Reliance was placed on the analysis in *Chuan-Hui v K Group* [2021] 1 W.L.R. 5981 where Henderson LJ said:

> "56. The remaining point which I need to consider under this heading is the Lessees' challenge to the Upper Tribunal's conclusion at [53] that "Although the charges are *recovered* under the Management Order, they are paid under the lease" (emphasis in the original). In his oral submissions, Mr Upton developed this into a broader argument that the service charges cannot properly be regarded as paid under the lease, when the manager's right to recover them derives solely from the tribunal's order. To my mind, however, this is not a helpful way of looking at the problem, because the point is basically a semantic one. It is true that the manager's right to recover the charges is dependent upon the order made under section 24, but in a case (such as the present) where the

> manager is directed to operate the service charge machinery in the lease, it also remains true to say that the charges are paid under the lease. The important point, in my judgment, is that the provisions contained in an order made under section 24 of the 1987 Act are superimposed on the existing contractual framework of the lease, but the underlying contractual rights and obligations of the parties remain in place, subject to the terms of the management order, and they are not permanently disapplied or modified. The Upper Tribunal was in my view substantially correct to say, at [53]: "The imposition of a Management Order does not displace the lease covenants and the lessees remain bound by them." This sentence must, however, be read subject to the proviso that it refers to the underlying contractual framework, which remains in place subject to the terms of the management order. Plainly, to the extent that the terms of the order are in conflict with the underlying contract, the former must prevail while the order remains in force."

52. The Respondents' contention is that if it is correct that charges paid to a manager, who has been directed to operate service charge machinery contained in a lease, remain charges paid under the lease then, by parity of reasoning, where a manager is required to carry out repairing obligations under a lease, their obligations are contained in *both* the order made under s.24, and the lease itself.

53. We do not agree with that analysis. It is true that the Management Order at paragraph 5(b) **[234]** orders the Manager to manage the Premises in accordance with "the respective obligations of all parties – landlord and tenant – under the Leases", including in respect of repair. However, we agree with the Landlords' submission that what was said at paras. 41 and 42 in *Maunder Taylor* is clear and directly on point. The rights and obligations, including his repairing obligations, are imposed on Mr Unsdorfer by the Management Order, and not under any of the relevant leases.

54. We do not consider that conclusion to be inconsistent with what was said in *Chuan-Hui*. At para. 37, Henderson LJ quoted paras. 38 to 43 of *Maunder Taylor* and, at para 39, concluded that the case was clear authority for the proposition that a s.24 manager "is a court-appointed official who is not necessarily confined to carrying out the duties of the landlord under the lease, and who performs the functions conferred on him by the tribunal in his own right. That is so even if the order appointing the manager defines some (or even all) of his duties and obligations by reference to the lease as do paragraphs 3 and 5 of the 2011 Order in the present case."

55. It is therefore the tribunal, through its management order, which imposes functions and duties on the manager, and in performing those

responsibilities the manager does so on behalf of the tribunal, as a tribunal-appointed official. When a management order is made which transfers responsibility for the performance of existing rights and obligations of the parties under a lease to a manager, those rights and obligations under the lease are suspended for the duration of the management order. Where, as in this case, the Management Order requires the manager to manage the Premises in accordance with the parties' obligations in the Leases, including the Landlords repairing obligations, the Landlord's obligation to repair is suspended whilst the Management Order is in place, and those obligations fall to be carried out by the Manager instead.

56. This does not mean that the Manager's obligations arise under the Leases, even though the scope of those obligations is framed by the terms of the Leases. Nor does the manager step into the shoes of the landlord or take on their contractual obligations, even though what is required of them may be defined by the reference to the Leases. Those contractual obligations are not permanently displaced but are suspended where the management order confers responsibility for their performance on the Manager. This, in our view, is what Henderson LJ was referring to at para. 56 of *Chuan-Hui* when he described the provisions of a management order as being superimposed on the existing contractual framework of the lease, which remained in place subject to the terms of the management order.

57. It is also important to note what that what was in issue in *Chuan-Hui* was whether sums paid by leaseholders to a manager during the period a management order was in force retained their characteristic of being service charges for the purposes of s.18 Landlord and Tenant Act 1985. This was, therefore, a narrow question regarding the nature of such payments and should not, in our view, be interpreted in the wider manner being advanced by Mr Rainey, Mr Upton and Mr Dovar. It is the decision in *Maunder Taylor* that provides the wider context in clear and unambiguous terms. That this was the focus in *Chuan-Hui* can be seen from para. 53, where Henderson LJ said:

> "53. Nor can I accept that there is anything in *Maunder Taylor* which even arguably supports the conclusion for which Mr Upton contends. In the first place, the issue in that case was entirely different, namely whether it was possible for a tenant who owed sums to the manager to set off against that liability a claim by way of damages from the landlord. The court was not required to consider whether the sums recovered by the manager from the tenant were service charges within the meaning of the 1985 Act, or the precise character which such sums had in the hands of the manager. Secondly, such indications as may be found in the judgments of Aldous LJ and Longmore LJ clearly envisage that a manager appointed

> under Part II of the 1987 Act may be authorised to collect service charges due from the tenants and use the money so obtained for repair of the premises. This appears most clearly in the judgment of Longmore LJ at [50], but see too the judgment of Aldous LJ at [38], where he recognised that the functions of a manager "are not limited to carrying out the terms of the leases", and [39], where he relied on the width of the jurisdiction under section 24 as suggesting "that the tribunal is concerned to provide a scheme of management not just a manager of the landlord's obligations." To the extent that the manager's obligations reflect the terms of the lease and the service charge obligations which it contains, it would in my opinion be wrong to read anything which Aldous LJ said in [41] and [42] as implying that sums previously paid as service charges somehow lose their character as such upon the manager's appointment. The manager's claims to recover those sums would now be made by him in his capacity as manager, but the character of those sums as service charges for the purposes of the 1985 Act would in my judgment remain unchanged. The reason for that, as I have sought to explain, is that the definition of "service charge" in section 18 of the 1985 Act is still satisfied, because of the extended meaning given by section 30 to the term "landlord".

<u>By virtue of an enactment</u>

58. In Mr Morshead's submission, no legislation requires Mr Unsdorfer to "repair or maintain" anything. He is not required to repair or maintain the common parts by virtue of any primary or secondary legislation.

59. The only authority Mr Morshead referred us to on this question was *General Medical Council and others v Michalak* [2017] UKSC 71 in which the Supreme Court considered whether judicial review proceedings became proceedings "by virtue of an enactment" on the coming into force of the Senior Courts Act 1981. It held that judicial review is not a procedure which arises by virtue of any statutory source as its origins lie in the common law. *Michalak* is in our view, of limited assistance in our case given that we are not concerned with the question of inherent rights or obligations. However, some assistance can be found at para. 33 where Lord Kerr agreed with what Moore-Bick LJ had said below in the Court of Appeal at para. 53, namely:

> "the words by virtue of an enactment in section 120(7) are directed to cases in which specific provision is made in legislation for an appeal, or proceedings in the nature of an appeal, in relation to decisions of a particular body, as, for example, in *Khan v General Medical Council* [1996] ICR 1032. They are not . . . intended to refer to the general right to seek judicial review merely because, since 1981, that happens to have been put on a statutory footing."

60. At para 40 of their skeleton argument, Mr Morshead and Mr Bates submitted that this aspect of the definition targets scenarios where a lease is relevantly silent, but legislation has stepped in by imposing a requirement on someone to "repair or maintain" a building or its common parts. He gave four examples of covenants implied by the Landlord and Tenant Act 1985, including the implied covenant on a landlord under s.11 to repair the structure and exterior of a dwelling. We agree with Mr Dovar that these examples are limited assistance because they all concern covenants that are implied into a lease and can therefore be more easily characterised as obligations that arise under a lease.

61. The fifth example given by Mr Morshead is, however a much stronger one. This is the Management of Houses in Multiple Occupation (England) Regulations 2006, reg. 4, which imposes duties on a manager to take safety measures in respect of a House in Multiple Occupation ("HMO"), including to maintain it in good order and repair. We agree that reg. 4 imposes direct statutory obligations on a manager of a HMO, and those duties are clearly imposed by virtue of an enactment.

62. Mr Dovar questioned why the words "by virtue of an enactment" should be construed so narrowly as to require a direct statutory obligation. He referred us to s.24(11) of the 1987 Act which states that references in Part II of the Act to the management of any premises include references to the repair, maintenance, improvement, or insurance of those premises. In his submission, it is not too much of stretch to say that when a s.24 management order imposes repairing obligations on a manager, those obligations are imposed by virtue of s.24, and therefore under an enactment.

63. Section 24 grants the tribunal the discretion to make a management order and subsection (11) makes it clear that the terms of such an order can include obligations in respect of repair and maintenance. The question for us is whether the words "by virtue of an enactment" refer solely to a direct requirement imposed by legislation or whether they can also include obligations imposed under an order that is itself made under an enactment. In other words, should the words be interpreted so broadly as to include a situation where the 1987 Act has given the tribunal the power to make a management order requiring someone to carry out maintenance or repair?

64. Mr Rainey suggested that there was no ambiguity in ss.72-75 which justified resort to Hansard or the Explanatory Notes to the Act. We do not agree. In our view, the answer to the question posed in the previous paragraph is not immediately obvious from the specific words used in

s.72(6). We consider the words used to be ambiguous, and for that reason when construing their meaning, we consider it permissible to consider them in the wider context of the Act as a whole (specifically s.110) as well as the Explanatory Notes to s.110 and Hansard.

65. In Mr Morshead's submission it was clear that with the BSA 2022 Parliament made a deliberate policy choice that managers under s24 of the 1987 Act were not to deal with building safety matters, and that its intention was for these to be exclusively within the remit of the new Regulator. This, he said, was clear from s.110(3) of the Act which amends the 1987 Act by introducing s24(2E) and which makes it clear that a s.24 order cannot provide for a manager to carry out building safety functions in relation to a higher-risk building where Part 4 of the BSA 2022, or regulations made under that Part provide for those functions to be carried out by an AP.

66. Mr Morshead also relied upon the Explanatory Notes to s.110 which read as follows (his emphasis added):

"Section 110: Managers appointed under Part 2 of the Landlord and Tenant Act 1987

Effect

858 This section makes amendments to section 24 of the Landlord and Tenant Act to ensure that building safety is kept discrete from other management functions and that any failings on the part of an Accountable Person are dealt with via the Building Safety Regulator. Accordingly, this section provides that a tribunal cannot appoint a manager under section 24 where the breach of obligations complained of by tenants is a breach of the Accountable Person's building safety obligations. It further provides that when appointing a manager under section 24 the tribunal cannot confer upon that manager any building safety functions which are due to be carried out by an Accountable Person."

Background

859 Section 24 of the Landlord and Tenant Act 1987 allows tenants to apply to the tribunal for appointment of a "manager" of their choosing to take over management functions where a landlord has failed to comply with its obligations. If that principle were to be carried through into building safety, it could compromise the authority of the Building Safety Regulator. The amendments to section 24 ensure that the new regime is compatible with existing legislation and provides clarity as to avenues of redress for breach of obligations. Under the Act, redress should be

sought through the residents' complaints mechanism to the Building Safety Regulator who can arrange for the appointment of a Special Measures Manager if there have been persistent breaches of building safety obligations by the Accountable Person.

Example

If the residents of a building are unhappy with their Accountable Person, they will be unable to circumvent the regulator by going to the Tribunal to obtain the appointment of their own manager, whose responsibilities would then overlap with those of the Accountable Person. In the event that there are breaches of the implied building safety terms, it will be for the Building Safety Regulator to take enforcement action and/or make arrangements for the appointment of a Special Measures Manager, as it deems appropriate."

67. The reference to a Special Measures Manager is to the provisions of s.102 and Sch.7 of the 2022 Act which allow for such a manager to be appointed to undertake duties under Part 4 of the Act in place of an accountable person. These provisions are not yet in force but when that occurs, they will enable the Regulator to apply to this Tribunal seeking the appointment of a Special Measures Manager and to determine the terms of their appointment (Sch.7, paras.2 and 4). Schedule 7, para. 8(3), inserts a new s.24(2C)–(2D) into the 1987 Act and reads as follows:

"(2C) Where a special measures order relating to the building is in force, an order under this section may not provide for a manager to carry out a function which the special measures order provides is to be carried out by the special measures manager for the building.

(2D) In this section—

"special measures manager" means a person appointed under paragraph 4 of Schedule 7 to the Building Safety Act 2022;

"special measures order" means an order under paragraph 4 of Schedule 7 to the Building Safety Act 2022."

68. Mr Morshead submitted that the Special Measures Manager regime reflected the policy objective of the BSA 2022 that managers under s.24 LTA 1987 were not to deal with building safety matters. He said that support for that submission can also be found in Hansard when the Minister (Eddie Hughes MP) introduced the amendments which would later become s.110 on 19 October 2021 (his emphasis added):

> "We recognise the need to ensure that the building safety regime is compatible with existing legislation and provides clarity as to the avenues of redress for any breaches of building safety obligations. Clause 119 makes amendments to section 24 of the Landlord and Tenant Act 1987 to ensure that the new building safety obligations, as set out by the Bill, are kept separate from other general management functions for buildings.
>
> The clause makes amendments that provide that a tribunal cannot appoint a manager under section 24 where the breach of obligations complained of by a resident is a breach of the accountable persons building safety obligations. This means that where a manager is appointed under section 24, the tribunal cannot confer upon that manager building safety functions, which are to be carried out by an accountable person."

69. We are satisfied that it is appropriate to admit that extract from Hansard as an aid to construction of what is meant by the words "by virtue of an enactment" in s.72(6) because: (a) the words are ambiguous; (b) the material relied upon is a statement by a Minister and promoter of the bill; and (c) the statements relied upon are clear.

70. Mr Morshead also argued that the Landlords' view about how the 2022 Act operates accorded with views expressed by DLUHC in correspondence from WBD **[200, 224-227]**.

71. In Mr Rainey's submission the prohibition in s.24(2E) preventing a management order from directing a manager to carry out functions in relation to a high-risk building was strictly limited and concerned only statutory obligations created by the BSA or Regulations, not repairing covenants. He suggested that this interpretation was supported by para. 632 of the Explanatory Notes which refers to an AP having statutory obligations to maintain the fire and structural safety of the building. He also submitted that the Special Measures Manager regime in Schedule 7, including the introduction of ss.24(2C)–(2D) were intended to prevent overlap between the roles of a tribunal appointed manager and a Regulator-appointed Special Measures Manager. That overlap, he suggested, can only arise if a tribunal appointed manager can have functions of an AP in the first place. He also contended that nothing in s.24(2E) prohibits a s.24 manager from being ordered by a tribunal to fulfil the practical aspects of compliance with an AP or PAP's functions.

72. Mr Upton agreed with Mr Rainey that there is no reason in principle why a tribunal appointed manager should not carry out the duties or 'functions' of an AP . In addition, where a landlord has failed to comply

with its obligations, and the functions of a tribunal-appointed manager include repairing the structure and exterior of a building or other common parts, the manager is, said Mr Upton, much more likely than the at-fault landlord to meet the safety obligations imposed by the BSA 2022. Furthermore, it was clearly desirable for such a manager to be responsible for managing building safety risks because a division of management functions between different individuals was likely to lead to confusion and may result in conflicting views as to what works, if any, should be carried out. Mr Upton's position, with which Mr Dovar agreed, was therefore that whilst s.24(2E) precludes a management order from imposing the statutory obligations of an AP on a manager, it does not preclude a s.24 order imposing general management functions which may include a "relevant repairing obligation". As such, it does not prohibit a manager from being an AP and thereby, *inter alia*, responsible (in his capacity as an AP) for managing building safety risks. Mr Dovar submitted that in such a scenario, the manager would have those functions through the BSA 2022 and not through the s.24 Order.

73. In our determination, no primary or secondary legislation obliges Mr Unsdorfer to repair or maintain any part of the common parts. As such, he is not required to do so by virtue of any enactment. We respectfully agree with what was said by Moore-Bick LJ in the Court of Appeal in *Michalak*, namely that the words "by virtue of an enactment" are directed to cases in which specific provision is made in legislation. In other words, cases where a direct requirement is imposed by legislation, an example being the duties imposed on a manager of a HMO under the Management of Houses in Multiple Occupation (England) Regulations 2006, reg. 4. We therefore reject Mr Dovar's submission that a manager's repairing obligations under a management order are imposed by virtue of s.24, and as such, under an enactment. They are not. It is the Management Order that requires imposes those obligations, and not legislation.

74. We agree with Mr Morshead that support for such an interpretation can be found when one considers the wider building safety regime envisaged by the BSA 2022. In our view, s.24(2E) follows through on what s.72 is intended to achieve, namely that a s.24 manager is not to carry out any function in relation to a high-risk building where Part 4 of the BSA 2022 or regulations made under that Part, provide for such functions to be carried out by an AP. We also agree with him that the Special Measures Manager regime also reflects that policy objective. Support for that interpretation can be found in the underlined passages of the Explanatory Notes and the extract of Hansard relied upon by Mr Morshead. Although they appear to concur with our analysis, we do not attach any weight to the views of DLUHC in the correspondence

sent by WBD. We agree with Mr Rainey that the views of civil servants as to the meaning of a statute are not a useful aid to construction.

75. Counsel for all the Respondents argued that that if Parliament had intended that a s.24 manager should not be an AP it would have said so in express terms and not through opaque language as used in s.24(2E). We do not accept those submissions. The lack of an express exclusion is not determinative. What is required is to consider the express terms of the statute and its relevant context . In our view, the 2022 Act sets out a coherent regime whereby s.72(2) and s.110 prevent a s.24 manager from being an AP. The amendment to s.24(2)(a), introduced by s.110(2) through the insertion of s.2ZB, means that a tribunal cannot make a management order on grounds that a relevant person is in breach of building safety obligations owed by an AP for a high-risk building. That separation between the duties of a s.24 manager and an AP are reflected in s.24(2E) which envisages that the duties of a s.24 manager will run in parallel with the building safety duties owed by an AP in respect of a high-risk building.

76. We agree with Mr Morshead's submission that under the new regime s.24 managers are kept separate and insulated from building safety obligations imposed on APs under the BSA 2022. We therefore reject Mr Rainey and Mr Upton's submissions that a tribunal can order a s.24 manager to carry out functions that include repairing obligations falling within the remit of an AP, with the result that a manager can be an AP. As a tribunal cannot make a s.24 order on grounds relating to breach of building safety obligations owed by an AP, and as s.24(2E) prevents a s.24 manager from carrying out functions in relation to a high-risk building that are to be carried out by an AP, it would be inconsistent and incoherent nevertheless to conclude that a Manager can be an AP.

77. On the contrary, s.72, and the amendments made to s.24 by s.110 of the BSA 2022 prohibit a s.24 manager from being an AP, and a tribunal cannot order a s.24 manager to carry out building safety responsibilities that Parliament has decided should fall outside the s.24 regime and which should be the responsibility of an AP. Mr Upton suggested that such an interpretation would be a most surprising result as the purpose of the BSA 2022 was to confer additional statutory protection on leaseholders, not to remove or weaken their existing statutory rights. Surprising as it may be, we are satisfied that this is the regime that has been introduced by the BSA 2022 and the amendments made to s.24 of the 1987 Act.

78. We accept that this conclusion is likely to have significant practical consequences for Mr Unsdorfer in carrying out his functions under the Management Order. We accept too that there is a risk of disagreement between him and the PAP as to how the cladding-removal works should

be progressed. These practical considerations are not for us to address in this application but may be relevant when the time comes for us to determine what variations are required to the Management Order. Furthermore, Mr Rainey may well be correct to say that there is no reason why whoever turns out to be the PAP could not instruct Mr Unsdorfer to carry out the cladding-removal works as their agent. This too, is not a matter for us to consider in this application.

79. Turning to the letter sent by the Secretary of State to RACR dated 30 November 2023, the contents of that letter have no bearing on the question of whether Mr Unsdorfer can be an AP. The Secretary of State suggests that there is no reason why Mr Unsdorfer could not be appointed as a Special Measures Manager, and then fulfil both the functions of a s.24 manager and a Special Measures Manager. However, that is not an issue in this application and, as stated above, the Special Measures Manager provisions of s.102 and Sch.7 are not yet in force.

80. Finally, we should address the submission made by Mr Upton that even if the Landlords' interpretation regarding s.24(2E) is correct, it does not affect existing management orders. In other words, it does not have retrospective effect. We do not accept that submission. Nothing in s.24(2E) suggests that it only prohibits new s.24 orders from requiring a manager to carry out building safety risk functions which are functions of an AP. We agree with Mr Morshead and Mr Bates that there was no need for express provision to be made for s.24(2E) to take retrospective effect because the duties in Part 4 of BSA 2022 Act did not subsist before its enactment, and so cannot have featured in any extant management order.

Who are the accountable persons for the Buildings?

81. At the hearing it was common ground that:

(a) Octagon is an AP for Buildings (1) – (5) under s.72(1)(a). This is because even though its legal estate in the common parts is not "in possession" it, as a landlord under its lease to CREM, is under a "relevant repairing obligation" imposed by clause 7.1.2 of the lease **[288]** in relation to "relevant common parts", namely the "Shared Structural Elements…" of the Buildings as defined at clause 9.1 z(aa) **[303]** and which concern the foundations of the Buildings. As such, by operation of sections 71(3) and (4) Octagon is treated as being an AP in respect of the Shared Structural Elements, despite not having a legal estate in possession;

(b) CREM is an AP for Buildings (1) – (4) under s.72(1)(a) because it has a legal estate in possession in the remainder of the common parts of Buildings (1) – (4);

(c) Riverside is an AP for Building (5) under s.72(1)(a) because it has a legal estate in possession in the common parts of the Building; and

(d) CAL is an AP for Building 5 because it has a legal estate in possession in common parts of the Building by virtue of its 999-year underlease. The Landlords agreed this was the case in relation the internal common parts of the Building, and in relation to the 45 serviced apartments. It disagreed with CAL's suggestion that its legal estate in possession also includes parts of the exterior, including the airspace over the balconies (clause 1.36.8), external doors (clause 1.36.1), and external plant. However, as we have not been asked to determine the parts of the Building for which any AP is responsible, determination of this question is outside the scope of this application.

82. We agree with the analysis in the previous paragraph and therefore determine that:

(a) Mr Sol Unsdorfer is not an AP of any of the Buildings;

(b) Octagon is an AP of Buildings (1) – (5);

(c) CREM is also an AP of Buildings (1) – (4);

(d) Riverside is an AP for Building (5); and

(e) CAL is an AP for Building (5).

83. We make no determination over the parts of the Buildings for which any AP is responsible. If, following this decision, the question remains in dispute, then an application can be made for its determination at the same time as the tribunal determines who is to be the PAP of the Buildings.

Amran Vance
21 December 2023

Appendix - Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).