FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HN/HYI/2023/0008 (1)
Property	:	The Chocolate Box, 8-10 Christchurch Road, Bournemouth BH1 3NA
Applicant	:	The Secretary of State for Levelling Up Housing and Communities
Representative	:	Ms Kerry Bretherton KC and Mr Alexander Burrell of Counsel instructed by Walker Morris LLP
Respondent	:	Grey GR Limited Partnership
Representative	:	Mr Alexander Hickey KC and Mr Lawrence Page of Counsel instructed by DAC Beachcroft LLP
Type of Application	:	Application for a Remediation Order Section 123 Building Safety Act 2022.
Tribunal Member(s)	:	Judge J Dobson Mrs J Coupe, Regional Surveyor Mr J Stead BSc (Hons) MSc (H-W)
Date of Hearing	:	4th, 5th, 8th and 9th April 2024
Date of Decision	:	14th May 2024

DECISION

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Summary of the Decision

1. **The Tribunal grants a Remediation Order pursuant to section 123 of the Building Safety Act 2022 and regulation 2 of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 in the terms of the Order accompanying this Decision.**

Background

2. The Applicant made an application for a Remediation Order [26] as an interested person pursuant to Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 ("the BSA Regulations") made under the Building Safety Act 2022 ("the BSA")- see further below- in respect of The Chocolate Box, 8-10 Christchurch Road, Bournemouth BH1 3NA ("the Building")

3. The Applicant is the Secretary of State at the Department for Levelling Up Housing and Communities ("DLUHC") and the Minister who introduced the bill which became the BSA into the House of Commons. The BSA 2022 was introduced in response to the Grenfell Tower fire in June 2017, when 72 people tragically lost their lives. The circumstances of that are well- known. The remediation in residential buildings of building defects which contributed to the tragedy has taken on understandable significance since that terrible event. The Applicant made the BSA Regulations under devolved powers.

4. The Applicant has issued similar applications against the Respondent in respect of other properties, including one mentioned below as "Vista Tower", heard the week before the first week of this case. For the avoidance of doubt, the Tribunal has not looked at the decision reached in that case. It understands that has been issued after a decision was reached in this case but before the issue of this document.

5. The Respondent is essentially the vehicle within what has been termed the "Railpen" group (which the Tribunal regards as a convenient term) by which the properties which form part of The Railway Pension Fund ("the Fund") are owned. However, the Tribunal understands that the Fund enables the acquisition of assets, including by the Respondent, which in practice form part of the Fund. Railway Pension Trustee Company Limited is one of three entities with significant control- the other two, Bella GP Limited and Bella GP 1 LLP, also falling with the group, one of which is dormant and with RPTC Limited being an officer of the other- is identified at Companies House as entitled to at least 75% of the assets. The Respondent and the Fund are inextricably linked. Where the Tribunal refers to the Fund, limited companies it owns and otherwise elements of the Railpen group, other than the Respondent specifically, it uses the term "Railpen" for convenience.

6. The Tribunal next sets out matters in respect of the development of the Building of relevance and as agreed between the parties.

7. The Building was built in or about the 1970s. The basement to second floors inclusive were leased to commercial organisations. The ground floor has been leased since 2015 to Topland (No.19) Limited and the first and second floors since 2016 and 2017 respectively to 4xAces Limited. Those 3 floors are referred in documents in this case as the "podium", a term adopted in this Decision. On top of that podium was built what was originally an office tower. There is a multi- storey parking area to the rear of the Building.

8. The Building was re-developed in or around 2016 and the storeys above the plinth were converted to residential use. At that time, the owner of the Building was Heron House Bournemouth Limited. In the course of the works, two additions were made to the accommodation. Firstly, a new 3- storey block was added which has been described in other documents as "Block A", a description which the Tribunal adopts. Secondly, a 2- storey upwards extension was built to the original 6-storey tower, which has been described as "Block B" and the Tribunal also adopts that description. There are now 59 residential flats in the Building, mostly situated in Block B. Those are the subject of leases from 2015 to 2018 or thereabouts.

9. As a result of the upwards extension to Block B, the Building now consists of 12 storeys (there is a basement floor) and comfortably exceeds 18 metres in height as measured pursuant to the provisions of the BSA, being approximately 33 metres tall. The Respondent purchased the freehold of the Building on 24th July 2018, with that purchase registered on 6th August 2018, title number DT57196 [385].

Procedural History

10. The history following issue of the proceedings has been set out in the various sets of Directions. It need not be repeated here at such length.

11. The application was received on the evening of 15th September 2023. Initial Directions [223] were given on 27th September 2023 and the case listed for a case management hearing on 19th October 2023, together with an application for dispensation, although the proceedings were not kept together thereafter. The Directions [229] given dealt with the parties' statements of case and provision of documents. They listed a further case management hearing to address subsequent matters.

12. That took place on 19th December 2024. The Tribunal dealt with expert and factual. Directions [238] were given to the final hearing and a date was set. A pre- trial review (as termed) was listed given that 4 days was provisionally allowed for the hearing, but it was difficult to identify at that stage whether that would be required, periods from 2 days upward being suggested. It was envisaged other issues would need addressing. A question had arisen regarding inspection of the Building on behalf of

the Applicant and plainly been the subject of some differences. In the event, that was quite simply resolved by permitting the parties, including the Respondent in control of the Building, to rely on expert evidence in the proceedings only if inspection facilities were allowed, so that both parties and their experts were on an equal footing.

13. The pre- trial review was held on 15th March 2024. Taking what was perceived then to be a rather cautious approach, the Tribunal left 4 days available for the hearing, although 3 was envisaged as most likely, with the fourth day available for the Tribunal to discuss the case. The Tribunal considered that it may wish to inspect, subsequently confirmed in the written Directions [251].

14. The most contentious matter between the parties related to the Applicant's desire to include in the bundle various documents from other proceedings, including with regard to a building known as The Taper in London and Vista Tower. The Tribunal permitted limited material to be included in the bundle. There was a later case management application on behalf of the Applicant, also strongly contested and considered in Directions dated 27th March 2024 (not within the bundle). It was directed that the documents could be placed in a supplemental bundle and was stated that the Tribunal would not read those in advance of the hearing and only in the event of reference to those documents by Counsel for the parties in submissions (no other reference being permitted). In the event, precisely no reference was made to any such documents by either party at any time in the hearing or in Skeleton Arguments and other written submissions. There will be no further mention of them found in this Decision.

15. The main bundle comprised 3231 pages, excluding a draft JCT added by the Respondent's Skeleton Argument of 145 pages. Whilst the Tribunal makes it clear that it has read the majority of the bundle, it was explained to the parties that it had only read those in approximately the second half of the bundle where referred to in a document in the first approximately half. In the event, the overwhelming majority of the second half of the bundle was not referred to, whether in any document or at the hearing (or much of the first half). In the absence of any such reference and so the purpose of the remaining documents, the Tribunal has not read them subsequently. The Tribunal has read all documents to which reference was made.

16. The Tribunal does not by any means refer to all documents read in this Decision, it being entirely unnecessary to do so. Where there is reference, that is by identifying the first page of the given document. Where the Court or Tribunal refers to PDF pages from the bundle, the Tribunal does so above and below by numbers in square brackets [ ]. It should not be mistakenly perceived that the Tribunal has ignored documents or pages to which the parties made reference but not specifically referred to in this Decision or has left them out of account.

17. There was in addition an authorities bundle provided by the parties, comprising a further 1815 pages. That includes statutes, regulations, caselaw, guidance and explanatory notes. Again, some of that was referred to, at least in terms of specific elements, but much was not. Where those are referred to, that is in the manner explained above, prefixed with "A" [A]. The Applicant subsequently also provided a Supplementary Bundle of Authorities of an additional 42 pages, where referred to prefixed by "SA" [SA].

The Law

18. As mentioned above, the Authorities bundle contained various statutes and regulations, amongst other documents, some 27 different ones and totalling some 700 pages. It is simply not practicable to do more than set out the most immediately applicable provisions and mention some others of the more significant remainder.

Building Safety Act 2022 ("the BSA")

19. Some, but not all, of the relevant provisions are contained in the BSA [A183]. The most relevant ones are set out in full below:

20. Section 123 of the Act provides as follows:

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.

21. There is above a description of what a Remediation Order is but no power is given for the making of one.

22. 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. Section 119 of the Act explains what a "qualifying lease" is and states that the "qualifying time" is "the beginning of 14th February 2022"- at first blush an odd phrase.

23. 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."

24. Section 122 of the Act identifies that Schedule 8 makes provision about remediation costs and provides that certain service charge amounts in a qualifying lease relating to relevant defects in a relevant building, including cladding remediation, are not payable, including specifically

if a relevant landlord is responsible for the relevant defect as defined. The detail of the section and Schedule do not require quoting fully.

Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 ("the BSA Regulations")

25. The provisions of the BSA have been supplemented by Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 [A425], which the Tribunal will term "the BSA Regulations". Those were made by the Applicant under devolved powers.

26. The relevant provisions for these purposes are contained in regulation 2. Firstly, regulation 2(1) prescribes the Secretary of State, so the Applicant or subsequent equivalent, as an interested person. The Applicant therefore gave himself the power to apply.

27. Regulation 2 (2) reads as follows:

> "The First-tier Tribunal may, on an application made by an interested person, make a remediation order under section 123 of the Act."

28. That therefore provides the Tribunal with the power to make a Remediation Order. The remainder of regulation 2 relates to the requirements for applications for a Remediation Order and what the Tribunal must do when it has made an Order.

Building Act 1984 and regulations

29. 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 Building 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.

30. The Building (Amendment) Regulations 2018 have subsequently been introduced, the requirements of which apply to works now undertaken and which, as mentioned above, ban the use of combustible materials in external walls in buildings over 18 metres in height.

Regulatory Reform (Fire Safety) Order 2005 ("FSO"- as termed below although the parties did not adopt that)

31. The FSO [A10] requires the responsible person as defined, for these purposes the owner, must undertake "such general fire precautions as may reasonably be required". There is a need to make and give effect to appropriate arrangements. Domestic premises as excluded from the FSO are those without common parts.

32. "General fire precautions" are referred to and defined as follows:

(a) measures to reduce the risk of fire on the premises and the risk of the spread of fire on the premises;
(b) measures in relation to the means of escape from the premises;
(c) measures for securing that, at all material times, the means of escape can be safely and
effectively used;
(d) measures in relation to the means for fighting fires on the premises;
(e) measures in relation to the means for detecting fire on the premises and giving warning in case of fire on the premises; and
(f) measures in relation to the arrangements for action to be taken in the event of fire on the premises, including—
(i) measures relating to the instruction and training of employees; and
(ii) measures to mitigate the effects of the fire."

33. There is a requirement to "make a suitable and sufficient assessment of the risks to which relevant persons are exposed for the purpose of identifying the general fire precautions he needs to take to comply with the requirements and prohibitions imposed on him by or under this Order. There are various provisions about equipment, escape routes and a good deal about enforcement measures. Part 3 of Schedule 1 sets out what are termed "Principles of Prevention", namely:

"The principles are—
(a) avoiding risks;
(b) evaluating the risks which cannot be avoided;
(c) combating the risks at source;
(d) adapting to technical progress;
(e) replacing the dangerous by the non-dangerous or less dangerous;
(f) developing a coherent overall prevention policy which covers technology, organisation of
work and the influence of factors relating to the working environment;
(g) giving collective protective measures priority over individual protective measures; and
(h) giving appropriate instructions to employees."

Fire Safety Act 2021

34. This Act amended FSO clarify that in properties with at least two domestic units the requirements of FSO apply to the structure and external walls of the building, including cladding, balconies and windows; and all doors between the domestic premises and the common parts. There is a requirement for fire risk assessments of buildings with two or more sets of domestic premises to be updated to take account of structure, external walls, and doors.

<u>Previous Decisions of the Tribunal cited</u>

35. This remains a new area of law. Previous decisions are limited and are decisions of the First Tier Tribunal, so providing no authority as precedents, although they command appropriate respect, and the Tribunal considered them carefully.

36. The parties referred to the first decision making a Remediation Order, namely LON/00AY/HYI/2022/0005 & 0016- *Waite and Other v Kedai Limited* ("*Kedai*") [A775]. That related to two blocks, one of former offices and converted: the other newly built at that time. The respondent was a company associated with the developer which had been dissolved. Reports had been obtained but no works undertaken. The Tribunal also addressed the question of Remediation Orders as compared to other types of order or requirements in other provisions but considered that whilst they may be informative but each "arises in its own circumstances, on its own terms and applying its own tests and criteria". There was detailed discussion as to whether defects should be remedied to a particular standard, but it was identified none was specified in the BSA. That Tribunal was persuaded that the remediation works must comply with the Building Regulations applicable at the time the remedial work is carried out; and 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. The property was eligible for an application to the BSF, although identified recently and no application had been made. Other features of *Kedai* are mentioned below.

37. The Tribunal was provided with, and is aware of, the decision in CHI/00HB/HYI/2023/0007 and /0012 Orchard House, 515-517 Stockwood Road, Bristol, *Culpin and Pring v Stockwood Land 2 Limited ("Orchard House")* [A822] made within this region, although not specifically referred to by the parties. The case involved another re-developed former office block. There was no engagement at all by the respondent. Hence, no points were argued and there was no suggestion of an intention to undertake works. An approach broadly akin to that in *Kedai* was taken as and where required. It was determined that a Remediation Order should be made in light of the findings of fact.

38. The Applicant also referred to the third decision, *Mistry v Wallace Estates Limited* LON/00AH/HYI/2022/0012 ("*Mistry*") [A833]. The Respondent changed its approach in the weeks before the hearing to accept that a Remediation Order ought to be made. The Tribunal recorded that even the differences as to the form of order were quite small, with the principal one being the level of specificity to be included in the order. It was said that the fact that the Respondent might ultimately seek redress from another party should not prevent the making of progress in carrying out the necessary remediation works.

39. During the hearing of the current case, the Applicant's Counsel identified the decision made in LON/00AP/HYI/2022/0017, *Lessees of flats at 419 High Road, Space Apartments, N22 8JS v Avon Ground Rents Ltd* [SA18 -37] ("*Space Apartments*"). A Remediation Order was granted, despite that Tribunal finding that the respondent was engaging with the process and willing to complete the works, a different scenario to the previous cases and identified as a key issue. The respondent argued justice could be done by adjourning the proceedings

with the ability to restore. Mention was made of the notes to the BSA which gave an example of a property where the landlord did not attempt to undertake the works. It was argued that there had not been undue delay. The Tribunal considered the balance of prejudice and is the only decision where a specific test has clearly been applied. The Tribunal weighed the prejudice which would be caused to the parties by, on the one hand, making an order and, on the other hand, not making an order, concluding that the greater prejudice would be caused to the lessees if no order were made. It was also said that funding (as regards timing of the works) was not generally a matter to be given any weight- the Tribunal noted no evidence was adduced that the Respondent would not be able to carry out the works without (external) funding. That Tribunal additionally concluded that it could make ancillary orders, considered necessary to make the Remediation Order effective and workable.

40. The Applicant's Counsel also cited a judgment of both the President and the Deputy President of the Upper Tribunal (Lands Chamber) in *Triathlon Homes LLP v Stratford Village Development Partnership and others* [2024] UKFTT 26 (PC)/ LON/00BB/HYI/2022/0018-22 ("*Triathlon*") [A892], although in the event sitting as Judges of the First Tier Tribunal and not the Upper Tribunal. Whilst in principle the decision has no precedent value any more than any other decision of the Tribunal, it must command particular regard. That is a detailed decision but related to Remediation Contribution Orders and so not directly the matters for consideration in this case. The Applicant's Counsel, however, specifically referred to paragraph 278, part of which says the following:

> "it is difficult to see how it could ever be just and equitable for a party falling within the terms of section 124(3) and well able to fund the relevant remediation works to be able to claim that the works should instead be funded by the public purse. We do not see that this point loses any of its essential force in circumstances where it is said that the public purse will eventually be reimbursed from the fruits of successful litigation against third parties............We agree...........that public funding is a matter of last resort, and should not be seen as a primary source of funding where other parties, within the scope of section 124, are available as sources of funding."

41. The above was not by a long chalk the entirety of the caselaw within the authorities bundle or other caselaw mentioned but the remainder did not involve the BSA or BSA Regulations.

<u>Relevant chronology of events following Respondent's purchase</u>

42. There are a number of features of the recent history relevant and asserted to one extent or another as particularly relevant by one or other party as set out below. There was what the Tribunal described in the hearing as a battle of chronologies, both leading Counsel providing a Chronology (indeed for the Respondent two) and each including or

omitting events which the other omitted or included, both putting their own slant on various of the entries.

43. The Tribunal does not seek to engage in that battle. It does not set out here each and every event described in one or other of the parties' chronology but rather the relevant portion of those. In particular, that approach has meant a significant reduction in entries about funding for reasons which will become apparent. Whilst degree of relevance and impact was the subject of dispute, the items themselves were not in dispute. The Tribunal has sought to list them in neutral terms. It is convenient to divide matters into events before and after the BSA.

Pre- BSA

44. From 2017 and onwards DLUHC issued various Advice Notes each seeking to give guidance on how to meet building regulations and other requirements. In December 2018, DLUHC issued updated Advice Note 14, including reference to inspection for non- ACM (Aluminium Composite Materials) cladding. The Building (Amendment) Regulations 2018 banning the use of combustible materials in external walls in buildings over 18 metres in height came into force.

45. In February 2019 the Respondent commissioned a risk assessment report from Cardinus Risk Management Limited [400], which assessed the hazard as low and the risk to life as tolerable.

46. In July 2019 DLUHC issued Advice Note 22 regarding High- Pressure Laminate Panels.

47. In October 2019 the Respondent obtained a report from White Hindle and Partners (surveyors) [423] which concluded there was a very low risk and expressed no concerns about the cladding system. An External Wall Fire Review Form was subsequently completed. No works were said to be required.

48. The Consolidated Advice Note (CAN) was introduced by the Applicant's department in January 2020 [A1079], replacing the series of previous Notes. That required the removal of all combustible materials from residential buildings. It referred to the intention of the government to introduce legislation but also stated as follows, amongst other things:

> 1.6............... We strongly advise building owners to consider the risks of any external wall system and fire doors in their fire risk assessments,
> irrespective of the height of the building, ahead of the planned clarification.
> 1.7................ We strongly advise that building owners should already be actively ensuring the safety of residents, and not wait for the regulatory system to be reformed.
> 2.2 Building owners are responsible for the safety of their buildings. They may currently be the 'Responsible Person' under the Regulatory Reform (Fire Safety)............ building owners should not wait for regulatory changes to take action to ensure the immediate safety of residents.

49. In July 2020, the Building Safety Fund established by the government opened for applications. That is administered on behalf of DHLUC by Homes England.

50. In September 2020 the Respondent's project managers, Tuffin Ferraby Taylor LLP ("TFT") proposed a design and build contract as most suitable for any works.

51. On 30th September 2020, a further report (following a desktop review) was written on behalf of the Respondent by Wintech Limited Façade Engineering Consultancy [462], instructed by TFT. That identified external façade fire defects- combustible materials- and cavity barriers were missing or insufficient. Hence the need for remedial works.

52. In October 2020, the Respondent commenced a tendering process. Four companies were invited to tender. In November and December 2020, reports were obtained from Jeremy Gardner Associates, identifying issues with cladding and other failures, recommending a waking watch pending installation of a fire alarm system [505].

53. In December 2020, a company named ADI Group (the only one of the four willing to proceed) was instructed to prepare a remedial scheme. In addition, an application was made to the BSF (which if successful would have resulted in a Grant Funding Agreement "GFA").

54. On 5th January 2021, the Respondent applied for planning permission, granted on 11th March 2021 [1066].

55. In March 2021, it was established that ADI could not proceed because of lack of suitable indemnity insurance. Also, TFT stated in emails that in consequence of some of the defects found, the Building had not complied with Building Regulations at the time of construction [210].

56. In April 2021, Homes England advised that the cladding scheme on the Building was eligible for BSF funding. The Respondent received a survey report from Dobson- Grey Limited [525]. In addition, the Fire Safety Act received Royal Assent, although not in force until May 2022.

57. In July 2021, the Respondent received a report from Tenos Limited [619] in respect of internal compartmentation. A report was also obtained from Envirochem Analytical Laboratories Limited [573] about asbestos with an expected need to decant the occupiers to undertake works.

58. In August 2021 fire alarm works were completed which enabled the policy of "stay-put" to be changed to full simultaneous evacuation should there be a fire event within the Building.

59. In January 2022, CAN was withdrawn, replaced by PAS9980:2022 Fire risk appraisal of external wall construction and cladding of existing

blocks of flats ("PAS") [A1127], a code of practice issued by The British Standards Institution in conjunction with DLUHC. PAS expressed some difficulties arising from previous approaches and talked of a risk-based approach. Fire Risk Appraisal External Walls ("FRAEW") reports were introduced and to be prepared following the methodology identified. It was said by the Applicant in a speech that CAN "has been wrongly interpreted and has driven a cautious approach to building safety in buildings that are safe that goes beyond what we consider necessary…"

60. On 30th May 2022, the Respondent submitted its second BSF application.

61. On 28th June 2022, section 123 and related provisions of the BSA came into force (other parts of the BSA having come into force on 1st April 2022 although not all did that year). The BSA regulations came into force on 21st July 2022.

Post- BSA

62. In July 2022, the Applicant's department wrote regarding CAN and PAS in the context of existing applications to the BSF [1775], including to the Respondent.

63. In August 2022, a FRAEW report was issued by CHPK [677] concluding medium or high risk of fire causing injury in relation to 2 of 5 identified wall types and the need for remedial works to those. Overall risk of fire spread in the external walls was assessed as high.

64. In October 2022, the Respondent withdrew the BSF application based on the CAN and issued a new one based on PAS.

65. On 11th November 2022, the Applicant's representative wrote to the Respondent's representative about various properties, including the Building.

66. In February 2023, Bournemouth Christchurch and Poole Council ("BCP" or "the Council") served an Improvement Notice under the Housing Act 2004 [1088]. The Notice described a number of hazards under the Housing Health and Safety Rating System published in 2006 and required the removal of the hazards. A revised FRAEW was also issued by CHPK Fire Engineering Limited [702] now identifying 3 relevant wall types.

67. New tender documents were prepared by TFT for issue in April 2023 and an invitation to tender was sent for pre- construction works [1099]. During May to July 2023, Lancer Scott Construction West Limited tendered [1101], it was agreed to proceed with that company and a pre-construction services agreement ("PCSA") appointment was made [1224] whereby Lancer Scott would prepare and agree a specification (stage 1) to resolve the identified fire safety issues.

68. There were further reports from Fire Consultancy Specialists Limited in May and June 2023 [735 and 882]. Also in May 2023 it was indicated that the 3 wall types were eligible for BSF funding, although not compartmentation as the FRAEW did not include it [1836].

69. On 1st August 2023, the Council served a varied Improvement Notice [1269] which required the works necessary for compliance with the Notice "the HHSRS works" to be commenced by 29th February 2024 and completed by 30th June 2025.

70. On 29th August 2023, the Applicant's representatives sent a letter before action [285], including reference to "recalcitrant parties". The Respondent sent a letter of response on 12th September 2023 [295]. On 15th September 2023, the Applicant submitted this application.

71. In November 2023 a 3rd FRAEW was issued by HPK [929] and on 4th December 2023, Lancer Scott gave a stage 2 tender price [1351] for the remedial works in the sum of £11,757,535 plus VAT. It proposed a 71-week programme to complete the HHSRS works.

72. On 29th December 2023, in a Decision in proceedings under case reference CHI/00HN/LDC/2023/0103, the Tribunal granted an application by the Respondent for dispensation from consultation requirements provided for by section 20 of the Landlord and Tenant Act 1985 in relation to the major works required by the varied Improvement Notice. In short summary, the Tribunal accepted that in consequence of the approach taken of a design and build contract and in light of the reasons advanced for that, it was effectively impossible to follow the consultation process required and no prejudice had been demonstrated by lessees as arising from lack of it.

73. During January 2024, as the Tribunal understands the matter, the occupiers of the Building were decanted to other accommodation and, the Tribunal surmises, agreements were reached for the Respondent's contractors to be able to access the residential flats and commercial units as required for the undertaking of works. In addition, a letter of intent was issued from the Respondent to Lancer Scott on 15th January 2024 [1384] for an anticipated contract sum of £12,521,779.82 plus VAT and extended in February 2024 and then in March 2024.

74. On 5th February 2024, Lancer Scott took control of the Building and subsequently works to the Building commenced with the erection of scaffolding. A further FRAEW and intrusive survey were produced. CHPK assessed risk from all 3 relevant wall types as high. 2 more wall types at low level were assessed as not relevant. An "appeal" regarding BSF funding was submitted including compartmentation [1893].

75. On 4th April 2024, Lancer Scott provided the signed Joint Contracts Tribunal ("JCT") contract with the Respondent for the works contained in the Improvement Notice to the Respondent in the sum of. The

contact was signed by a director of Bella GP Limited, one of the entities recorded at Companies House as having significant control.

76. The contract was in the sum of £12,575,875.00 plus VAT, so just over £15million including VAT. That figure included an allowance of approximately £1.5 million plus VAT for contingencies. Allowing for fees and other expenses, the total sum identified by the Tribunal for the project was in the region of £17.6 million (Mr Pemberton said in oral evidence- see below), subject necessarily to additional items of work being identified as required which went beyond contingencies.

Other key matters agreed and expert evidence

77. It was also agreed by the parties and relevant to the provisions of the 2022 Act as follows:

    i) The Building meets the definition of "relevant building" under section 117(2) of the BSA. No exclusions (section 117(3)) apply.
    ii) The Respondent falls within the definition of "relevant landlord" in section 120(5) of the 2022 Act.
    iii) Defects in the Building are a "relevant defect" as defined in section 120(2) (including arising from "relevant works" i.e., those to convert from office to residential use and the additions, within the "relevant period" and cause a "building safety risk" within the definition of section 120(5), so require remediation.

78. Accordingly, it was agreed that what have been termed by the Applicant "Gateway Criteria" although the Tribunal will term "threshold criteria", for reasons explained below, are met.

79. In addition, the Tribunal understood it to be common ground that at least some, even in the event not all, of the lessees' leases are a "qualifying lease" as defined by section 119(2) of the 2022 Act and lessees a "relevant tenant" for the purpose of section 119(4)(c). The Applicant is an "interested person" for the purpose of making an application for a remediation order, within the meaning of section 123(5) of the Act.

80. The parties had both instructed fire safety experts. The Applicant instructed Alistair Brown of HKA Global Limited. The Respondent instructed James Clarke of Hawkins & Associates Limited. A joint inspection had been undertaken on 7th February 2024 and a statement provided agreeing all matters [208]. The experts had regard to the "Scope of Works" [1621] and the "schedule of relevant defects" which had been identified. The experts agreed with the items in the schedule.

81. The relevant defects were agreed, identified in the Applicant's Skeleton Argument as:

    "(i) The presence of combustible materials in External Wall Type 1;
    (ii) The presence of combustible materials in External Wall Type 2;

(iii) Compartmentation issues in External Wall Type 5;
(iv) The absence of cavity barriers in several locations."

82. The experts provided further information about the wall types, which the Tribunal summarises as follows:

External Wall Type 1 [also referred as EW01 a & b] comprises High Pressure Laminate (HPL) Panels and "Xtratherm" insulation. Two types of sheathing boards and HPL panels were identified (one to Block A and the other to the extension to Block B), in the second of those the insulation applied on an Oriented Strand Board (OSB) which is combustible. There was only limited evidence which might support cavity barriers being installed behind the panels of Block A. There was some lack of clarity about the system installed to Block B but the experts were satisfied that was also a building safety risk.

External Wall Type 2 [also referred as EW02] applicable to the western elevation of Block A comprises Insulated Render Board, Xtratherm insulation and an OSB sheathing board. There was no evidence of cavity barriers.

External Wall Type 5 [also referred as EW05] comprises curtain walling that includes combustible spandrel panels, although the construction again differed between Block A and Block B. To Block A they were fabricated from aluminium sandwich panels containing polystyrene, whereas to Block B were painted glass with a mineral wool and fibreglass backing. It was considered likely that the system again included proprietary Xtratherm insulation with OSB sheathing board. There was some uncertainty as to EW05b but based on the JGA report identifying mineral wool installed loosely and lack of cavity barriers, it was concluded on balance that a safety risk existed.

83. In terms of compartmentation, the experts agreed that to be a building safety risk because they noted defects had been recorded in several locations, both in the common areas and individual flats.

84. It was agreed not only that matters require to be remediated but also, helpfully, it was agreed that the works to be carried out will address those matters. It was also agreed that External Wall Type 3 ('EW03')- rendered masonry- and Type 4 (EW04')- brickwork- are not building safety risks (although the CHPK report identified remedial works may be needed).

85. A building safety risk in relation to sprinklers was also identified. The experts noted the existence of a sprinkler system only in the top flats of Block B. The experts also identified the building safety risk from the Woodwool Stramit board installed to the underside of Block B above the car park and inside the escape stair's lobby is because that which combustible and a fire at the car park could affect the north staircase and loss of an escape route. However, those are not relevant defects for the purpose of the BSA (and not eligible for BSF funding).

86. As also discussed in the joint statement, the Tribunal records firstly, that the experts considered that construction of the roofs did not involve a building safety risk unless evidence demonstrated defective compartmentation. Secondly, the experts identified that there are balcony terraces which are mainly constructed from timber and resin-timber-effect boards, supported on a metal structure where the timber and resin boards are combustible, but the experts agreed that they were not a building safety risk in themselves.

87. The parties additionally agreed the appropriate timeframe for the completion of the HHSRS works, having instructed project management and programming experts, namely Huseyin Karanci of HKA Global Limited for the Applicant and Tim Ellis of MBM Consulting Limited for the Respondent, who also jointly inspected the Building on 7th February 2024 and produced a joint statement [217]. That is to say the works identified- necessarily any other works which may be identified in the course of undertaking the known works.

88. That timeframe was agreed to be 67 weeks, so taking matters from 5th February to 16th June 2025. That is to reach "Practical Completion". There was nothing else for these experts to address.

The Dispute

89. The dispute between the parties was on one level simple and narrow, namely should the Tribunal make a Remediation Order. The simplicity with which the dispute can be stated belies the complexities of the determination required and the extent of the arguments advanced.

90. The Applicant's position, as set out in its Statement of Case [36] and subsequently, in a nutshell was twofold. Firstly, that where the Building met the relevant threshold criteria under the 2022 Act and an application was made for a Remediation Order, the Tribunal was required to make such an order and that the only matter for consideration by the Tribunal was the terms of the order to be made. Secondly and in the alternative, that if the Tribunal had a discretion, the Tribunal ought to exercise that in the circumstances of this case in granting a remediation order.

91. The Respondent's position was that the Applicant's first argument was wrong and that the Tribunal had a discretion whether, or not, to make a Remediation Order where the threshold criteria for doing so had been met and so an order could be made. The Respondent argued that in all of the circumstances the Tribunal should exercise its discretion and not make an order, including in particular the fact of the Improvement Notice (for example in its Statement of Case [82]) and what was by the final hearing a signed JCT contract for the undertaking of the works, including BSA works, which it had commenced undertaking.

92. Both sides accepted that funding of the relevant works was a feature of the case. The Respondent placed rather more significance on the applications to the BSF and funding from that than did the Applicant, contending in effect that the BSA and BSF were akin to two sides of the same coin. The Applicant placed greater weight on the duties it asserted had always existed in the Fire Safety Order.

93. Unless the Tribunal accepted the Applicant's first argument, the question for determining was, on the one hand, the manner in which the Tribunal should approach the exercise of its discretion, and, on the other hand, the outcome from that exercise. The supplemental matter, was the form of any order granted, including the timescale for work being completed.

94. As to the form of order, the Applicant's position was that was a relatively simple element, and the wording of the order need not be unduly involved. The Respondent's position was that the form of any order must be consistent with and not cause difficulty with the operation of the JCT contract entered into and similarly with the terms of BSF grant funding (provided of course that funding was granted before completion of the works).

<u>The Inspection</u>

95. The Tribunal inspected the Building on the second morning of the final hearing. The inspection plus safety briefing (by Lancer Scott, the contractor) in advance took approximately one hour, although adding travel and related in effect took almost the entire morning.

96. The Tribunal found the inspection extremely helpful in understanding the nature of the Building, the undertaking of the relevant fire safety works and in understanding the other works which would be required pursuant to the Improvement Notice, which the Tribunal found would inevitably impact on the undertaking of the fire safety works. The time spent was therefore worthwhile.

97. The Tribunal was accompanied at the inspect by junior Counsel and a solicitor for each side and the parties' fire safety experts. It merits recording that the experts had not previously seen some elements of the Building which were now visible following the decant of the occupiers and other works undertaken for the purpose of the fire safety and other necessary works. The Tribunal was able to see the three wall types listed in the application as relevant defects; as referenced and noted in the FRAEW [929].

98. The Tribunal was shown areas of the Wall Type EW01 to the front of Block A with access via erected scaffolding. Access was also provided via one of the apartments onto the balcony area to the rear of Block A. Access was facilitated to the side of Block A and to a side of Block B. The Tribunal saw that balcony floor structures had been removed. Those were agreed by the fire safety experts to have been of timber

construction. EW02 and EW05 were seen at points at which opening up had commenced.

99. EW02 was observed on the side of Block A, where the wall was predominantly an end construction of the building without windows. The Tribunal's Building Safety Expert member was able to inspect through a ventilation grille which had been removed for the inspection. It appeared a larger section had been opened up prior but was then protected by an infill panel to eliminate water ingress.

100. EW05 was seen on the rear elevation of Block B.

101. In Block A, given the opening of areas in common corridors the Tribunal was able to see that there was no evidence of fire compartmentation where services enter respective apartments. In Block B, the Tribunal saw the sprinkler system installed in the newer duplex apartments contained in the upwards extension to that block.

102. The Tribunal was shown the parking areas. The only matter to mention is that various locations were identified for the (100 tonne) water tank required for the new sprinkler system which is to be installed in the course of the works. The Stramit board was not inspected.

The Hearing and matters arising

103. The Applicant was represented by Ms Bretherton KC of Counsel, together with Mr Burrell. There were representatives of the Applicant's solicitors in attendance. The Respondent was represented by Mr Hickey KC, together with Mr Page. There were also representatives of the Respondent's solicitors in attendance. There were other attendees from the Applicant's department and from the Respondent, mostly in person but some remote. The attendance in person was reduced on the third day, in consequence of a train drivers' strike.

104. The hearing proceeded across 4 days, longer than expected, although the morning of the second day was predominantly taken up by the inspection and the hearing was concluded in approximately 2 hours on the fourth day. That facilitated the use of the remainder of that day for the Tribunal to consider the case and reach a decision.

105. The Tribunal explained on the first morning the parts of the bundle the members had read, explaining that if the parties wished the Tribunal to take specific account of any documents further into the bundle, the Tribunal would be happy to do so. As and where Counsel did refer to a relative few of the later approximately 1600 pages, the Tribunal read those in and/or when reaching its decision following the hearing.

106. Both leading Counsel produced lengthy Skeleton Arguments (70 and 62 pages, including chronologies and annexes). The Tribunal also received oral opening statements from both leading Counsel, which both were keen to provide. Accepting entirely Counsel's understandable desire to

do their best for their party's case and the eloquence of the statements, with the benefit of hindsight the statements did not add a great deal to the matters already apparent from consideration of the bundles and the Skeleton Arguments.

107. An issue was raised by the Applicant about the suggestion in the Respondent's Skeleton Argument that the proceedings were politically motivated and Counsel differed as to whether that ought to have been set out earlier. The Tribunal indicated that there was almost no prospect of the Tribunal being able to make a specific finding as to motivation, even if proved relevant, and so the matter should be left.

108. It was explained at the start of the hearing that Ms Aneta Wlecial could not attend. The Applicant asked that her written evidence be admitted: the Respondent objected. The Tribunal had read that evidence and admitted it but said insofar as anything might turn on any matter stated it would be mindful of the lack of opportunity for her evidence to be tested and that Counsel could address any weight to be given in closing submissions. In the event, the Tribunal gave limited weight. Ms Valerie Seward, who did give oral evidence on behalf of the Applicant and Ms Wlecial were amongst several leaseholders who had signed a letter to the Tribunal requesting a Remediation Order be made but the others were not witnesses and no lessee was a party. Whilst the Tribunal noted the contents- subject to matters then raised in cross- examination of Ms Seward- it approached those with caution, although nothing was affected by that in the event.

109. The Applicant's other witness was Mr Alistair Watters, Director, Building Remediation and Grenfell Directorate at DLUHC, on behalf of the Applicant. Mr Watters oral evidence was particularly notable for Mr Watters's reference mid- cross- examination to a document which he seemed to describe as a tool for identifying which freeholders had not progressed works to properties falling within the provisions of the BSA, Unsurprisingly, it was put to him by Mr Hickey KC that it had not been previously mentioned or produced. Indeed, no reference was made in Mr Watters' witness statement nor in statements of case or Skeleton Arguments and everyone else involved, most notably the Applicant's representatives, appeared entirely unaware of any such document.

110. That lead to a query from the Tribunal as to the lack of any identifiable document in the bundle of that nature. There was no immediate answer. The Tribunal was very troubled by reference to what could have been a significant piece of documentary evidence being first mentioned mid- oral evidence and where the parties had conducted a final hearing in Vista Tower the previous week without it apparently arising at all. If the document was significant to the Applicant's decision to issue these- and the Tribunal infers other- proceedings, it was unfathomable how it could have escaped previous mention.

111. On day two, the Applicant provided a document called "Programme Bench Summary" which it was suggested may be that to which Mr

Watters had referred. The Applicant did not rely on that. Ms Bretherton KC said that it was possible to perform a search on DLUHC's system. It was not, she asserted, a document as such. She described the system as providing a live feed, being constantly updated, and which could be frozen and produce a result, although precisely what Mr Watters may have looked at could not now be provided. Mr Hickey KC rightly described the situation as highly unusual. He did not object to sight of the document provided given it was not relied upon but expressed concern it was not apparent the search parameters applied.

112. The document simply stated the median period for the processing of funding applications to the BSF and did not obviously fit the description indicated by Mr Watters. There was no indication of how the Respondent was assessed, or indeed whether it was. Insofar as the Tribunal had understood Mr Watters' evidence to suggest there to have been analysis of the Respondent's progress with BSA works as compared to general rates of progress, the document did not address that at all. It was apparent that DLUHC did indeed possess a computer system which could generate reports or information, which the Tribunal considered ought to been mentioned during the case. The Tribunal considered that what it regarded as electronic documents from it could be produced. The Applicant's position remained unsatisfactory. There was sufficient to identifiably be gained to recall Mr Watters.

113. For completeness, albeit somewhat out of sequence, the Tribunal was sent by email dated 22nd April 2024 a different document. However, it was said that the Applicant also did not rely on that. A Note was provided from Counsel. The Respondent's representatives replied by emailed letter dated 24th April 2024 objecting to what was regarded as an attempt to adduce further evidence or to make further submissions and identified that the document was not what Mr Watters had referred to. They did nevertheless go to make comments about progress of applications. The Applicant's representatives then responded to that by email of 25th April 2024 explaining that the Applicant sought to "address a point of clarification and not to introduce new evidence". It was said that the lack of reference to the Building was deliberate.

114. The Tribunal did not understand why it was provided at that time, and after it had reached its decision, with a document to it which was said not to be new evidence and was not relied upon. The Tribunal looked very briefly at the document and communications and then put them out of its mind. The Tribunal has not revisited it determinations in consequence of the further document, or anything said about it.

115. Following receipt of the evidence, the Tribunal received oral closing arguments from both leading Counsel. It was intended that would be completed that day, including any supplemental arguments in response to any additional matters raised by the Tribunal. In the event, that was not possible and hence the fourth day of hearing. That was envisaged to be no longer than approximately an hour and so the Tribunal determined that the parties and representatives could all attend

remotely, although the Tribunal sat together again in person. However, as Ms Bretherton KC had plainly intended to deal with matters at greater length than had been practicable, the Tribunal permitted her to expand on any matters where she considered it necessary and gave Mr Hickey KC the opportunity to reply. Various other specific queries were also raised by the Tribunal.

116. The Tribunal is very grateful for the assistance provided by Counsel and the witnesses in this highly contentious and rather complex matter.

117. That said, the Tribunal expresses disappointment firstly, at the substantial extent to which pages in the large bundle were included but not considered to require referring to in any statements of case, witness statements or similar or at all in the hearing, leaving the reason for their inclusion and any purpose thought to be served unclear in the absence of identifiable reliance on them.

118. The Tribunal was also disappointed by the parties' approach to selection of witnesses and the content of their statements. The statements were very much written as if additional statements of case, involving witnesses of fact effectively making submissions. It is unsurprising that the statements were drafted by the legal representatives, but they did not sufficiently limit themselves to factual matters about which the particular witness could properly comment.

119. Mr Watters very much presented the departmental position and whilst Mr Hickey's reference a number of times to him commenting as "the man from the ministry" sought inevitably to make a point and may have over- emphasised matters, it was never far off the mark. In general, the evidence of Mr Watters was not compelling. That is even leaving aside the unexpected issue as to the document referred to above. Mr Watters had no particular knowledge about the Building.

120. Likewise, Mr Alan Pemberton, senior director and chairman of TFT and the sole witness for the Respondent, could comment on matters which his company had dealt with where he had knowledge of those and no more. Instead, the tone of his evidence was somewhat that of an advocate for his client's position. Mr Pemberton could offer little of assistance about the approach of the Respondent and Railpen.

121. The credibility of Mr Pemberton was also heavily damaged firstly by assuring at the start of his oral evidence that all matters in his witness statement were within his knowledge when it became abundantly clear that they were not. For example, he was asked about comments he had made about reports which it was established he had not seen until receipt of the bundle, somewhat later than the statement and so which he necessarily could not comment on from his own knowledge and no other source was identified. Whilst Mr Pemberton, subsequently sought to go back and provide some sort of explanation, he was unsuccessful in so doing. The statement also stated that the Respondent had to stop proceeding under CAN and pursue funding under PAS, but Mr

Pemberton's oral evidence was that he did not know that and did not take the decision. And that he did not know details of Railpen's resources despite his statement stating the Respondent could not "advance" pay for the works, which could not proceed without BSF funding. The distinct impression left was of a witness statement drafted by solicitors to suit the case not checking what the witness actually knew and of a witness who endorsed that case despite not knowing what the statement attributed. Secondly, by his return to other topics in his evidence maintaining in response to questions that wires had been crossed over answers to earlier ones. All that was regrettable given that otherwise Mr Pemberton made some proper concessions about other matters he could not explain.

122. Aside from anything else, the end result in both instances was therefore not particularly helpful for the parties calling the witnesses.

<u>Summary of the relevant witness evidence received</u>

123. The Tribunal is cautious about lengthening what was always likely to be long Decision by summarising evidence in addition to discussion of it when making findings of fact but on balance considers it useful to do so where that evidence is relevant to the decision (evidence not so relevant is omitted). This section briefly touches on written witness statements of the witnesses in addition to oral evidence.

124. Ms Seward gave very brief oral evidence further to her detailed witness statement (15 pages) [164]. In her statement, she sought certainty that the Respondent would undertake the BSA works. She commented on lack of action, a focus by the Respondent on funding and explained the financial and mental strain caused, which Ms Seward said had been exacerbated by service charge demands including costs of works from July 2020. Ms Seward referred to some of the correspondence sent to lessees. She said that she had expected works would have been finished by now and said that correspondence, including in 2023, did not explain when works would be completed, focusing on funding, she considered. Ms Seward also expressed concern at the lack of information about the defects which had been provided and relatively late notice of the need for the Building to be vacated by her tenants, who had found themselves other accommodation.

125. In oral evidence, Ms Seward was firm that her statement had not been written for her. She has not lived in the Building, save for the spending the odd night there between tenants. It was put to Ms Seward that the lessee's letter is almost identical to that written by lessees of Vista Tower, but she suggested was because the situations are probably similar, not wholly persuasively. It was established that not all of the contents were relevant to her. It was further put that correspondence received did not require lessees to pay for works but Ms Seward said only at that time, it did not say that they would never have to pay. She accepted it was said costs would be lower as and when funding was obtained. She reiterated she did not consider the lessees had been kept

well informed and said the information about vacating the Building had left a lot of questions but did accept that the lessees were told the start and end dates for the actual works.

126. Ms Wlecial [179] is the director of a limited company which owns 2 flats in the Building and in her statement identified her personal circumstances and additional stresses caused by matters related to the Building. She otherwise mostly dealt with the same sorts of matters referred to by Ms Seward. Ms Wlecial specifically mentioned questions she had asked about the works which had not been answered and expressed concern both about when the works would complete and the potential for slippage. Given the limited weight which can be given to the statement, the Tribunal does not find it necessary to add more.

127. Mr Watters provided a written statement [156]. That set out that the Applicant had applied because remediation is required, and progress had been very slow and so had come to DLUHC's attention. The Respondent had failed to remediate "with any vigour". He said that over 300 projects funded by the BSF had commenced (he did not refer to the size and scope of those) and he struggled to see why the Respondent, which he described as a large commercial organisation, had not been able to forward fund works (which is to say pay for works and be re-funded subsequently by the BSF (if successful with applying)). He suggested the works were only forward- funded once the final hearing of this application was listed. Mr Watters also considered that the BSF application could have been progressed more swiftly. Reference was made to other properties owned by the Respondent not the subject of this application.

128. It was identified in oral evidence that Mr Watters' primary responsibility relates to funding and dispersal of BSF funding. 950 properties are said to have applications for BSF funding. Mr Hickey KC put that only 27% had works started but Mr Watters said 54%. He said that DLUHC checks progress against timescales for particular phases and looks at properties falling outside of tolerance-, which lead to the queries about the lack of any such document discussed above and no mention during the hearing of the Vista Tower case the previous week. Mr Hickey KC unsurprisingly queried why that had not been produced to which Mr Watters said that he had "reflected" on his answers the previous week and how he could best answer. Mr Watters said that the internal document was not the single measure used to judge whether a party was "recalcitrant" (but did not provide any other measure). He could not say why the term recalcitrant came to be used about the Respondent. He said he used that as it had been used but said it was not necessarily his term- it was not clear what he meant. Whilst he accepted that funding was "woven into" the BSA, others had proceeded without funding put in place.

129. There were questions and answers about continuing under CAN or adopting PAS and the BSF application. Mr Watters accepted writing the July 2022 letter. He essentially said new applications needed to be

under PAS, not existing, and that in some instances a move to PAS sped matters up whilst in others it slowed progress. It was clarified that in the region of 10 to 15% of applicants for funding had withdrawn and re-submitted but he said the applications were at an early (implicitly earlier) stage. Most applications are still ones based on CAN. Mr Watters asserted some knowledge about the particular BSF application and said the documents submitted by the Respondent were rarely complete. Progress depended on how good the information provided was. However, it was apparent much of the information received by him had been provided by colleagues and he had spoken to Homes England. He did not accept that a funding agreement produced difficulty, pointing to other owners proceeding with works. He also referred to owners undertaking works and applying at other stages. Mr Watters contended the proceedings were necessary, citing other properties where work had started and then stopped and citing the effects on lessees.

130. Mr Watters also confirmed that the Building is eligible for BSF funding but not in respect of all of the works. There is no means- testing of owners. He expressed the view in response to re- examination that the change in applying under PAS had caused delay and thought the application would otherwise now be complete.

131. Mr Alan Pemberton's statement [189] explained he is senior director and chairman of TFT and a Fellow of the Royal Institution of Chartered Surveyors, although did not give expert evidence. He describes specialising in development management, project management, project co-ordination and contract administration for new construction, refurbishment and alteration works and says that over the last 6 years he has worked with various clients on implementing complex cladding remediation and associated fire safety improvement works, including 12 for the Respondent. TFT were instructed in or around August 2020. Mr Pemberton described hesitancy from contractors and professionals in respect of fire safety works and issues with them obtaining insurance. He discussed the investigations and tendering and TFT's involvement in seeking BSF funding, expressing the view that the Applicant and its partner organisations have been kept up to date. He also says that the opportunity to obtain funding was "extremely important" to the Respondent. It was also said that the Respondent is not able to pay for the works. Mr Pemberton suggests these proceedings have involved spending time better spent on the remedial works.

132. Mr Pemberton was cross- examined at length and then gave oral evidence on behalf of the Respondent for the remainder of the afternoon of 5th April and then most of the morning of 8th April. In oral evidence, Mr Pemberton could not say why he was the only witness for the Respondent and why no-one from the Respondent or the wider group was a witness. He had not asked. Mr Pemberton did not accept that much of his statement was anecdotal. He had not been involved in the Respondent's decisions and had essentially been involved in meetings about works. There were occasions when he was compelled to

say he could not answer about what the Respondent had or had not done, or why. The Respondent was one of TFT's top 5 clients. Mr Pemberton denied that there was anything other than a coincidence that the JCT contract was signed in time for the hearing and no headway was made with that. It was confirmed that BSF funding would relate to some of the works but not others of them, in particular the sprinkler system and the initial and ongoing costs of the decant. Whilst there was questioning about water tanks and sprinklers, nothing requires specifically noting. Mr Pemberton did not, and perhaps he might with reflection, accept the reference to "eventually" with regard to the grant of planning suggested delay and amounted to advocacy not fact- the Tribunal found it an entirely inappropriate description. He accepted that he did not know about the resources of Railpen notwithstanding the comment in his statement about its inability to fund the works.

133. Mr Pemberton accepted that at the time of the conversion there had been breaches of the Building Regulations and that JGA had identified that in an email exchange with his colleague Harry Thomas. (The relevant parts read "Were any of the defects a breach of the building regulations that were in place at the time of construction? - The use of some combustible materials including the HPL, foam insulation and insulated render did not comply with Building Regulations guidance at the time of construction. The omission of cavity barriers did not comply with Building Regulations guidance at the time of construction. Are any of the issues/defects at the property caused by a defect in the design, workmanship, material or components of the structure?- Cavity barriers were incorrectly installed." [3059]) in 2021. Mr Pemberton was not aware of steps to comply with FSO or seek advice in 2018 or 2019. Mr Pemberton was asked a lot of questions about knowledge of FSO and review of reports obtained prior to the instruction of TFT but nothing came out of note. There were questions about delay in the BSF funding application and CAN, the notable part of which his view that if works had been undertaken on the basis of what was known about the Building in 2020, combustible elements would have remained, for example the whole wall would now be addressed not just cladding and insulation. Mr Pemberton was not able to answer the assertion that removal of cladding and related was necessary to comply with FSO. He said it had not been his decision whether to proceed with funding under CAN or re-submit under PAS. He did assert that the change required a re- appraisal of how to undertake works, although could not explain what practical change had arisen and was not able to identify any assessment having been undertaken. Otherwise, he re-iterated what was known now and being done now in response to Ms Bretherton KC pressing Mr Pemberton about the lack of works to meet responsibilities arising under FSO, although conceded that risk was known by late 2020.

134. Mr Pemberton accepted some matters could probably have been dealt with quicker and a 9- month period in 2022 when nothing obviously progressed and could not explain other delays. There had been meetings with BCP and the Fire and Rescue Service following the

original Improvement Notice, including about the works and timescale. Questions were also put about how slippage in progress would be controlled/ avoided. The Tribunal asked how TFT would avoid the non-BSA works delaying. The answer was principally intensity of project management close work so far with programmers and different works being undertaken simultaneously where possible. Mr Pemberton accepted that things could change, he identified there may for example be issues with the concrete walls identified when cladding was removed. The provisional sums in the JCT contract were for matters such as fire doors and fire stopping. Expenditure would be split between works eligible for BSF funding and not but he did not know beyond that. Mr Pemberton said that the Respondent would forward – fund. There had been a recent meeting with Homes England.

135. The Tribunal heard from both fire safety experts Mr Brown and Mr Clarke immediately following the inspection and on re- commencement of the hearing. Questions were put to both, and answers given in turn. Mr Brown and Mr Clarke explained that they had been able to see more at the inspection than when they had previously attended the Building, as mentioned above. There were new compartmentation issues seen. There was clearer indication as to the make up of EW02, including lack of cavity barrier. There was now no concern about the board. There was no change to the remediation works. The change to scope of the works was small and discrete and would not affect the timescale for completion. The experts both identified that compartmentation had been covered in the Tenos report and they inferred that the problems revealed were replicated in other areas.

136. For the avoidance of doubt, the Tribunal did not hear from the project management experts, who were not present, given that there was no dispute between them or other identified need for oral evidence.

The Lease

137. There was a dispute as to the effect of provisions in the Lease. As there was said to be some bearing on the appropriateness of the Respondent's approach, the matter ought to be dealt with in advance of moving to address that.

138. Only one sample lease of a residential lessee was included in the bundle ("the Lease") [328] dated 19th February 2016 and granting a term of 125 years. The Lease is in a modern form and in general contains the sorts of provisions to be expected. Nothing turns on contents of the overwhelming majority of the provisions of the Lease, which do not therefore merit comment. The parties differed as to the construction of the Lease in respect of whether the terms allowed the Respondent to recover service charges against the lessees in respect of the BSA works. That was said to be relevant to the approach the Respondent had taken.

139. It is important to identify, as the Respondent did, that the BSA is in force and considerable protections in place for lessees are provided.

However, it was not always so. Prior to June 2022, there was no such protection and where a lease permitted a landlord to recover the costs of what would become BSA works as service charges, such charges could be levied. Hence the well- publicised concern from lessees in many buildings as to the potential charges (including suggested in this Building by service charges demands made in May 2021) and the significant problems which may be caused to them in consequence.

140. The Respondent contended that it is permitted by the Lease (although no longer by the BSA) to recover the cost of the BSA from lessees. Hence, it was particularly important to pursue the applications to the BSF rather and it had been appropriate not to seek to undertake works, at the lessees' cost, in advance of BSF funding being resolved. The Applicant contended that the Lease did not permit the Respondent to recover the costs of the BSA works from the lessees, BSA in force or not. The Applicant first raised the point in the Skeleton Argument, and it said (in a later Note) that it did so because the previous week in the hearing of Vista Tower, the Respondent had contended as above.

141. There was some debate between Counsel about whether the point ought to have been specifically identified in the Applicant's case. The Tribunal was not taken with the argument on behalf of the Applicant that the Applicant was responding to a late point taken by the Respondent, not least where that was in other proceedings. However, the formality of pleadings and related does not entirely translate to the Tribunal and both sides were plainly able to deal with the matter and it was a matter of a degree of relevance, such that the Tribunal determined that it was appropriate to consider it.

142. The land and buildings are defined by the Lease as "the Block". The demise set out in the First Schedule includes service media serving the flat alone and any balcony or terrace. It excludes the roof of the Block and the boundary walls; window frames and entrance door; all common service pipes cables, drains and conduits, all structural elements and the roof and air space above the flat (which includes any balcony or terrace included in the demise). The lessees are given the rights of support and quiet enjoyment, amongst other usual ones. The Fifth Schedule sets out in detail and across some 14 pages the service charges which may be demanded for compliance by the Respondent with its obligations and providing a reserve fund, including on account service charges, and related matters.

143. The relevant provisions for the purpose of the dispute in this case are to be found in the Sixth Schedule, Part 1 "Block Service Charge", setting out the Respondent's responsibilities which charges can be demanded in relation to the cost of as follows:

"1. <u>Repair</u>

To maintain and keep in good condition and substantial repair and condition (including renewal) all parts of the Block as are not intended

to be the responsibility of the Tenant or any other tenant of part of the Block including (but without prejudice to the generality of the foregoing0 the foundations the roof the balconies and terraces the gutter and rain water pipes the structure and all external and structural walls of the Block the external glass of the windows and each and every part thereof together with works associated therewith.

4. Statutory Requirements

To comply with all orders notices regulations or requirements of any competent authority pursuant to any statute requiring any alteration addition modification or other search work on or two the block or any part thereof other than as are intended to be the responsibility of the Tenant or any other tenant of part of the Block and save for any work as may be required (or may have been so) as a consequence of any conversion or refurbishment or not of the block or any part there of not having been carried out in accordance with all statutory requirements

AND PROVIDED FURTHER that it is agreed and declared that the intention of the Landlord and the Tenant in relation to the Block Service Charge provision in this part of the Schedule is that all costs expenses and other liabilities which are incurred by the Landlord shall be subject of reimbursement recoupment or indemnity by the tenants using the Block so that no residual liability for any such costs expenses or liabilities shall fall upon the Landlord."

144. It is well- established law that the Lease is to be construed applying the basic principles of construction of such leases, where the construction of a lease is not different from the construction of another contractual documents, as set out by the Supreme Court in *Arnold v Britton* [2015] UKSC 36 in the judgment of Lord Neuberger (paragraph 15):

"...... the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words ....in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

145. Context is therefore very important, although it is not everything. Lord Neuberger went on to emphasise (paragraph 17):

"the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision

involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

146. The Tribunal agrees with the Applicant that the wording of the final quoted provision is an aid to interpretation of the provisions in the previous paragraphs of Part 1 and not a free-standing obligation, or an extension of the other obligations. Neither is it what was termed a "sweeper clause"- a clause which would identify other expenditure which the Respondent may incur and charge as service charges but not explicitly detailed in other provisions. The Tribunal construes the Lease as providing that where the Block Service Charge provision enables the Respondent to charge for works, that is all of those works, with no portion of the works being payable by the Respondent. However, where works fall outside and hence cannot be charged for, that is that.

147. The Tribunal determines that the BSA works are not works of maintaining the Building or keeping it "in good condition" or of maintaining the Building or keeping it in "substantial repair and condition" (it is not wholly clear what "and condition" seeks to add to the remainder of the phrases but nothing turns on that). The works do not arise from any part of the Building falling into disrepair and being repaired- the Tribunal is well aware of the authorities of well- known and long- established authorities of *Quick v Taff Ely Borough Council* [1986] QB 809 CA (Civ) and *Post Office v Aquarius Properties Limited* [1986] 54 PA&CR 61, about which it does not consider there is a need for discussion or quotation. The works are not required to keep the condition of the Building. Rather they are to change elements of the construction as re- developed.

148. The works do arise from statutory requirements, but they fall within the provision "and save for any work as may be required (or may have been so) as a consequence of any conversion or refurbishment or not of the block or any part there of not having been carried out in accordance with all statutory requirements". The conversion was accepted as not carried out in accordance with the statutory requirements applicable at the time.

149. It follows that the Tribunal determines that the BSA works have never been chargeable as service charges.

Findings of Fact

150. The Tribunal sets out its findings of fact about matters not accepted by both parties to the extent it considers there are matters relevant to reaching its determination. There were many more matters not accepted by both parties but which the Tribunal considered not directly pertinent to its Decision and so did not require findings.

151. The Respondent had no connection with the developer of the Building in 2016. It was not responsible for the defects with the Building. Given the comments about the BSA's focus on developers responsible for unsafe construction, it is appropriate to note those matters. There is no suggestion the Respondent was aware of the condition of the Building as now known: the Tribunal finds that it was not. It acquired a property but with the defects now known, which legislation now requires it to pay a substantial sum to put into acceptable and safe condition.

152. The Respondent's purchase of the Building may not have been a wise one with the undoubted benefit of hindsight. The Applicant has not demonstrated that the Respondent gained any apparent commercial advantage at the time as alleged (and the finding mentioned out of context that it is likely to have done in a decision of a different nature about a different property is not found of assistance)- still less that the advantage could have been relatively high.

153. It was reasonable for the Respondent to seek reports in relation to the Building in 2019 and to treat the contents of those reports received as correct. It is abundantly clear, and very troubling, that the reports were not remotely correct but there is no indication that the Respondent was aware of that or why it ought to have been. It was also reasonable on receipt of the Wintech report in July 2020 to undertake further investigations and the Respondent undertook other appropriate investigations. However, the Tribunal finds not at pace, even accepting the extent and scope of the works inevitably rendered the process not a simple and swift one.

154. The Tribunal finds that there was a shortage of expert companies willing to undertake of fire safety work and that there was considerable demand for their services during the relevant time- the Tribunal has encountered such issues on suffice occasions that it would take judicial notice of that but in the event accepts Mr Pemberton's specific evidence on the matter. The Tribunal accepts that experts would not be available immediately and reports would take time. Whilst it is plausible that from July 2020 to April 2021 it may have been possible to obtain reports more swiftly, there is a danger of applying an excess of hindsight and looking from the perspective of today and the Tribunal does not find that there was undue delay during that period.

155. The Tribunal finds on the evidence that the Respondent did not seek to make adequate progress with works during the next twenty- two-month period until the original Improvement Notice in February 2023. The majority of identified steps taken related to BSF funding and not works. The Tribunal notes provision of reports and alarm works in Summer 2021 but the gap of almost a year from the Tenos report to the CHPK FRAEW late summer 2022 and then almost 6 months for a revised FRAEW, by which time the Improvement Notice has been issued. That delay goes far beyond issues from any limited number of contractors and their other commitments Summer 2021 onward.

156. Following the establishment of the BSF in 2020, it was additionally reasonable to look at applying to that fund. Notwithstanding the assets of Railpen, it is entirely understandable that seeking available funding from the BSF would be attempted. However, none of the matters which arose in respect of the funding application are adequate to justify the lack of any works being commenced until as late as February 2024.

157. The BSA works are not works of repair. The Building was not by way of the relevant defects in a state of disrepair. The Building has been in a dangerous condition but that is in consequence of the re- development of it, including construction of new parts. It has always been in that condition since the re- development. There is nothing identifiable which is in a state of disrepair as compared to the condition at the time of conversion and development which gives rise to BSA works. (see also paragraph 147 above).

158. The Respondent did not seek or sufficiently seek and/ or did not consider or sufficiently consider, the construction of the Lease and the question of whether it could recover the cost of the BSA works as they would become from the lessees (the Tribunal received no evidence of the Respondent taking those steps at all). The Respondent presented the situation to the lessees prior to the BSA as one in which the lessees would be required to meet the costs of the BSA works, but they were not. (No finding is made about any other works.)

159. The Respondent and its associated entities failed to give sufficient weight to the inevitable concerns of lessees both about occupation of the Building by the occupiers and its safety. Whilst the Tribunal can understand a desire not to incur expenditure, that ought not to have been the over- riding consideration. The Respondent did not between 2021 and 2023 sufficiently focus on and act upon the obligations placed on it to remedy matters giving rise to fire safety risks, that is to say once those had been identified.

160. Rather the Respondent focussed too much on obtaining funding from the BSF, to the extent available, and on potential avoidance of expenditure from the resources of Railpen. The Applicant has quoted the Respondent's documentation [2117, 2118, 2150] as follows:

> "Protecting the [pension] scheme and safeguarding the assets is a priority. We take our responsibilities to manage and administer the Scheme extremely seriously. We are applying for grants through the Government building safety fund..."
> "We also have a duty to protect pension scheme members and ensure we pursue all possible means such as Government grant programmes..."
> "Throughout the process Railpen has sought to ensure all available funding avenues are maximised to reduce the burden on member capital..."

161. The Tribunal finds those, Mr Pemberton's statement of the importance to the Respondent of external funding and comments in

correspondence of the Respondent's representatives [e.g., 260], reflect the Respondent's position, namely that its aim was to protect the Fund. Whilst that is entirely understandable as an overall objective and plainly those whose pensions depend on the fund will in general terms be keen to ensure the fund is in good shape and the money and assets not dissipated, the Tribunal does not accept that that it was correct, or an appropriate approach, that the Respondent "must secure funding under the BSF" or that it "cannot simply commit its own funds as it has a fiduciary duty to safeguard those funds on behalf of its members".

162. The Tribunal considers that the Respondent failed to properly balance that with its vitally important responsibilities to the lessees of the Building to address the fire safety risks to them. The first priority was- and ought to have been for the Respondent- the safety of occupiers. Too much weight was given by the Respondent and it's connected entities to the secondary matter of funding over and above over the primary one.

163. The Tribunal does not find the Respondent to have delayed progress with the BSA works in order to financially protect the lessees. The Respondent has failed to provide sufficient evidence of doing that, save for any reference in correspondence. (Even if the Tribunal is wrong about that, the evidence would not support that being more than a modest factor set against the Respondent's desire for protection of the Fund.) The Tribunal also finds, albeit considered this ultimately only of modest relevance in respect of the making of a Remediation Order in this case, that the Respondent did less well than it ought in explaining the position to the lessees.

164. Given the lack of witness evidence from anyone from the Respondent, the Tribunal cannot find whether the Respondent specifically knew at the time that it could have continued under the CAN approach or believed it had to change to proceeding under PAS. However, the Tribunal finds on balance that the Respondent believed that it was taking a reasonable approach when it withdrew the first application for BSF funding, whether that was right or wrong looking back now. There is just enough to support that between various documents and the evidence of Mr Pemberton and no contrary evidence. The Respondent did not withdraw with the purpose of delaying funding or delaying progress with the works to the Building (there is not the evidence on which to find such or sufficient basis to draw an inference).

165. The Tribunal finds it more likely than not that the BSF funding application would have been concluded more swiftly if the first application had not been withdrawn, although cannot make a finding as to what extent. If funding had been granted early on and works undertaken only as known about in 2020/21, the net effect would have been that less work would have been carried out, remedying fewer defects- Mr Pemberton was correct about that. There had been fewer investigations and funding was not sought for everything for which it is now sought (although that is BSA works and not all HHSRS works).

166. Whether funding would have granted at that stage and whether the funding would have, in the long run, covered the same extent of works as it will now cover if granted contains too many unknowns to permit any determination. The Tribunal cannot know what would have been revealed as works were undertaken and whether that would have been all now known (much as the Tribunal finds that some works would undoubtedly have identified as additionally required and at least possibly everything now known about). Similarly, the Tribunal cannot know what "appeals" (that is to say applications for variation) would have been submitted or the outcome. It certainly does not follow as a matter of course that earlier progress with the funding application would necessarily have resulted in fewer defects identified in the end. Too much speculation is involved for the Tribunal for other findings.

167. The Tribunal rejects the Respondent's contention that delays as to BSF funding are the fault of the Applicant and finds that the Applicant's assertions that there were failings with documents submitted, which the Respondent failed to refute, are made out.

168. Whilst the parties devoted a good deal of effort to the Respondent having applied when the relevant guidance was under CAN and with PAS later being introduced, the Tribunal considers that the above are the relevant points and nothing beneficial would be added by other findings. Given that attempt to obtain funding, whilst not unreasonable in itself, should have been a distant second to dealing with the BSA works, any twists and turns in respect of BSF funding are ultimately of only limited relevance.

169. The Tribunal cannot say in terms that BSF funding will be granted or when. That is in effect the only finding it can make about that aspect. There is no outcome to the Respondent's application for BSF funding and no GFA entered into. The Tribunal finds that the BSF will probably, and can put it no higher, pay for the BSA works: it will not pay for the other HHSRS works. The undertaking of those will remain contingent on other funding from the Respondent or otherwise.

170. The assets of Railpen are considerable- the Applicant's Skeleton Arguments states some £37 billion and that figure was not challenged, so the Tribunal infers it to be correct. The Tribunal has no doubt that if it were incorrect to an extent relevant then that challenge would have been mounted.

171. Given that in effect, Railpen and the Respondent are one and the same where the Respondent is the vehicle used by the Respondent for acquiring and holding properties, the Tribunal finds that the assets of Railpen are available to the Respondent for the purpose of undertaking works and related cost. The Respondent either has or has access to ample financial resources. The Tribunal finds ample support for that from the ability of the Respondent to enter into the JCT contract with Lancer Scott for multi- million-pound construction work, including the

Tribunal infers having satisfied those undertaking due diligence for Lancer Scott that payment will be received by it. The accounts contained in the bundle [e.g.,2079]) also indicate sufficient funds. The Tribunal heard nothing about the process of funds passing from elsewhere in Railpen to the Respondent, the Respondent not having provided any evidence and the Tribunal not enquiring with Mr Pemberton given that he was from TFT and could have no first- hand knowledge. It sufficed that funds had been provided for works to date.

172. Railpen, and hence the Respondent, is amply capable- and has always been at any relevant time- of funding the BSA works and the works required in respect of the Improvement Notice as a whole. The Respondent might sensibly prefer to receive external funding for any works possible: it does not need to. BSF funding received for BSA works will reduce the overall cost to Railpen but that is separate.

173. The Tribunal finds that matters would have drifted on an ongoing basis with the Respondent continuing with the BSF application but not undertaking any works if the Improvement Notice had not been issued and the Respondent had not thereby been forced to focus on a need to undertake works in the absence of which there would be legal consequences. That Improvement Notice was, for want of a better phrase, the game- changer.

174. The Tribunal rejects the Applicant's argument in the Skeleton Argument that the Respondent "has only been spurred into taking this action (forward funding), because of these proceedings" and that it has commenced work only for that reason. The Tribunal finds on the documentary and witness evidence presented that the reason for starting works is not because of commencement of these proceedings or the listing of a final hearing in these proceedings.

175. The reason is because of the service of the Improvement Notice and the timescales in respect of that as varied. Key to that was the requirement to commence the HHSRS works before the end of February 2024.

176. The Tribunal accepts that from the latter part of 2023 to February 2024, the Respondent was progress matters to be in a position to commence the works and took appropriate steps in a manner of which there cannot be obvious criticism. Indeed, the Applicant failed to demonstrate that the position from Autumn 2023 to date would have different or at least appreciably different if the Applicant had not issued these proceedings at all. The Tribunal finds that the Respondent would still have done that which it did because of the Improvement Notice.

177. As one of a number of matters it considered, the Tribunal has had regard to the fact of correspondence on behalf of the Applicant in 2022 and the publicised "first step in legal action". It is not apparent that produced a seismic shift in the Respondent's approach and the Tribunal perceives was too unclear as to likelihood and timescale of other action for it to carry significant weight. There was plainly ongoing

correspondence thereafter. By the time the Applicant advanced to sending the equivalent of a letter before action, the Tribunal accepts that the Respondent had negotiated a timescale for the HHSRS works starting with BCP and was working towards that. The Tribunal finds that it continued to do so. In the event, the works had commenced in advance of the final hearing of this case. The Tribunal finds that the date of the final hearing was essentially incidental.

178. The Respondent had, the Tribunal finds, been recalcitrant from mid-2021 until mid- 2023. It had, although belatedly, made progress of an appropriate nature thereafter and so the description is not apt during mid- 2023 onward specifically, although that period cannot be taken in isolation in considering the case as a whole. The various above findings are not without quite some significance.

179. The Tribunal repeats that it found it very odd that if a benchmarking exercise had been caried out by the Applicant and particularly if that was said to form part of the reason for proceeding against the Respondent- for which there would be logic- there had been no previous mention of that in the witness statement of Mr Watters or at any other time in the extensive paper cases. The Tribunal could not find such an exercise had been undertaken on the evidence presented. Given that it was common ground that there are a substantial number of properties with relevant defects which have not been remedied, the Tribunal was left unclear as to why the Applicant had chosen to proceed against this Respondent in several instances (7 of 11 sets of proceedings the Applicant has issued) of all of the many possible respondents in respect of all of the many possible buildings.

180. The Tribunal was also unclear why the Applicant issued these proceedings at the time that it did so, when the varied Improvement Notice was in place and the Respondent working towards compliance.

181. The Tribunal noted with some concern that the Applicant's letter before action was dated only just over a fortnight before issue of this application and also contained the following:

> "We understand that you may have provided estimated dates to start on site and commence the necessary works, however, in the absence of the necessary assurances and binding commitments that the building will be fully and expeditiously remediated, and that you will agree a start on site date of no later than first quarter of 2024, we are instructed to issue an application to the First Tier Tribunal (Property Chamber) (the Tribunal) pursuant to section 123 off the act for a remediation order..............".

182. As identified above, the Respondent was already required to start the work by February 2024 and the Tribunal infers that the Applicant identified the timescale to which it referred because the Improvement Notice required it. It is not apparent what the Respondent needed to provide to the Applicant beyond stating that it would comply with the

Improvement Notice and the Tribunal finds that what it did say in response was not unreasonable.

183. However, the Tribunal determined that no finding could be made to answer the question "why?" on the evidence received and no inference could safely be drawn, where there was also no need to do so, for the reasons explained below.

184. In the event, nothing turned on the Applicant's particular motivation, much as possible allegations by the Respondent had troubled the Applicant. No specific finding was made by the Tribunal and the particular matter was safely left as simply unclear and not determinative of anything in this instance.

185. The JCT contract contains detailed provisions as between the Respondent and its contractor. It provides no remedies for the Applicant or the lessees, who are not parties and are given no rights.

186. At least some of the lessees, including ones who signed the joint letter referring to "our homes" do not live in the Building. That includes both of the lessee witnesses. The Tribunal cannot find how many of the lessees do live in the Building- there was no evidence. At least some of the flats were in practice let on short- term tenancies.

187. The identification of building safety defects has had an effect on value of the flats and caused concern about being required to pay for the cost of remediating those. It has caused practical problems both to occupying lessees and non- occupying lessees, although the Tribunal finds the concerns about safety will have been greater for those occupying- and short- term tenants- than others.

188. The Respondent will incur considerable cost arising from the decant of the occupiers, storage costs and related expense, irrespective of other costs of works which will not be covered by the BSF and are not recoverable. Those costs will increase the longer the occupiers are absent from the Building and accumulate until the occupiers return.

<u>Construction of the BSA and BSA Regulations</u>

189. The word "may" is both short and, at first blush, simple. That did not prevent extensive argument as to its meaning in the context of the BSA and the BSA Regulations.

190. For the avoidance of doubt, the fact that Ms Bretherton argued the wording of the BSA and BSA Regulations on behalf of the party at the heart of those, did not make that the appropriate way in which to construe the words. There have been differences of opinion as to whether statutory construction, or interpretation as sometimes termed, should be approached in the same manner to the construction of other documents. The Tribunal considers, although in the event nothing specific turns on this, that there are differences.

191. The Tribunal considers that in construing the BSA and BSA Regulations, it should discern the interpretation of the words in light of the purpose of the statute and in the context of the statute as a whole and the context of its enactment. The is consistent with the usual modern approach. The Tribunal has not cited any specific authority in respect of statutory construction or interpretation, considering the appropriate approach sufficiently well– established and uncontroversial to render that unnecessary. None was cited to it. The Tribunal was mindful that it should be expected that Parliament would take considerable care over the wording of a provisions applicable to an order compelling the undertaking of building safety works in the high-profile legislation enacted.

192. Mindful of that, the Tribunal queried with Counsel that no reference had been made to Hansard by way of assistance with statutory construction (and to that extent applying the principles in *Pepper v Hart* [1992] UKHL 3) and the three conditions laid down being satisfied). The Applicant's position was that the legislation is clear and hence no such reference was appropriate in any event. That might be regarded as an optimistic take where leading Counsel were instructed on both sides and made detailed submissions in respect of construction, with a significant amount of hearing time being devoted to the point.

193. In any event, it was agreed that there was no material which might be permitted by *Pepper v Hart* to be considered which was available. There had apparently been no relevant debate. It might be that reflects s123 having not identified how an order from the Tribunal might come about and the word "may" arising from the exercise of devolved powers, but the Tribunal simply does not know.

<u>Must an order be made is the threshold is crossed?</u>

194. The Applicant's first line of argument, as identified above, was that where the circumstances met the relevant requirements for a Remediation Order set out in section 123 of the BSA and an application for a Remediation Order was made, the word "may" in the BSA Regulations was required to be read as "must". Hence, an order must be made. The Respondent unsurprisingly did not accept that.

195. It was argued on behalf of the Applicant that Remediation Orders are not concerned with fault but rather the goal of protecting residential occupiers from death or injury from fire. The focus was said to be the occupants and not the landlord. The Tribunal was reminded that the power to make a Remediation Order is new and, it was said, distinct. The Applicant relied on the Court of Appeal judgment in *Willingale v Global Grange Ltd* (2001) 33 H.L.R. 17 ("*Global Grange*"). Ms Bretherton KC also argued in her Skeleton Argument that the BSA contained no power for the Tribunal to reject an application where the threshold criteria was met.

196. The Tribunal rejected the argument.

197. The Tribunal did not find the judgment in *Global Grange* of assistance in this case. In *Global Grange*, the lessee had applied for leasehold enfranchisement pursuant to the Leasehold Reform, Housing and Urban Development Act 1993, issuing proceedings having served a notice and there having been no counter- notice. The Tribunal is familiar with the judgment from its enfranchisement jurisdiction.

198. The Court of Appeal is regarded in *Global Grange* as having concluded that "may" effectively meant "must" for the purpose of the particular provision- there was no discretion to refuse an application if the statutory conditions were met. The Tribunal finds the outcome of *Global Grange* entirely understandable where the lessee had been required to serve a notice and the landlord was able to object but failed to, and notes there remains a protection for landlords where the notice contains an unrealistically low price, which will prevent significant injustice, albeit that falls a long way short of there being any wider discretion for the Tribunal to exercise.

199. The Tribunal determined a considerable contrast between that situation and the position under the BSA. The Tribunal noted that In Global Grange it was accepted that the meaning of "may" in a particular statute will depend on the terms of that. There are many statutes which use the term may- the Housing and Planning Act 2016 being, purely by way of example, one commonly encountered by the Tribunal and containing powers to make orders more like, albeit different to, Remediation Orders. The Tribunal considered that the situations are too distinct and determined the extent of the distinction to preclude application of *Global Grange* or a similar approach to that taken in that case. There is no requirement under the BSA for any notice to be served by an applicant and no response is required from a respondent. A respondent cannot create the conditions that an applicant is entitled to an order on the terms sought by it by way of failing to reply. The Tribunal is also aware that even within the confines of the particular Act, it has been said the effect of *Global Grange* is limited to the particular section of the particular Act- see *Majorstake Limited v Curtis* 2008 AC 787 per Lord Scott. (That case was not cited by the parties but the particular limit it places is not determinative here and so the Tribunal does not consider specific submissions to be required).

200. Ms Bretherton KC additionally cited *Kedai,* quoting from paragraph 81 as follows:

> "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."

201. The Tribunal accepts that statement was made in the particular decision and has had respectful regard to it but the decision provides no binding authority. Even if the statement made intended to suggest

that “may” means “must”- which the words used can be read in isolation to imply but do not state- the written decision indicates that there had been considerably less argument than heard by this Tribunal. The Tribunal considers that it can and should consider the question with the benefit of the far fuller arguments in this case and that it can- and does- reach a different conclusion.

202. However, the Tribunal also does not read the words in isolation. Rather it notes that in paragraph 78 of its Decision the Tribunal in Kedai said “The Tribunal has been given a very wide power” and in paragraph 69 said, “.................This Part of the Act and section 123 in particular are drafted very broadly indeed and give wide power to the Tribunal”. That does not fit with the Applicant’s assertion that the Tribunal is given a relatively limited power- in respect of the specifics of an order where it must make one- and that the Tribunal intended to convey that. Paragraph 81 follows a sub- heading “Burden of proof”: the comments about a wide power come under a sub- heading “The Tribunal’s approach to Part 5 of the BSA”. The Tribunal finds those significant. The Tribunal does not find the Decision in *Kedai* to support the Applicant’s argument irrespective of this Tribunal’s ability to depart from it even if it had.

203. Ms Bretherton KC advanced two other- and somewhat related- arguments. The first is that she contended that it is only when the threshold criteria are not met that the Tribunal “may” refuse an order. The Tribunal was not persuaded.

204. The Tribunal cannot make an order unless the threshold criteria are met and that is that. It is not a case of the Tribunal being able not to make an order. The power to make an order has not arisen.

205. The Tribunal also does not accept the second argument that the lack of a specific power not to make a Remediation Order means that the Tribunal has to make one. The Tribunal would find that outcome an odd result of interpretation of the words used and considers that explicit expression of that would be required if indeed Parliament sought to impose such an outcome.

206. The Tribunal did not find that the purpose of the statute as a whole or the context of other provisions- see below- being expressed in a different manner supported “may” in effect amounting to “must”. To that extent, the Tribunal considers a description of “Gateway Criteria” as adopted by the Applicant’s case, may suggest an effect of the criteria applying is that there will then be an order. In contrast, “threshold” it is hoped better suggests something to cleared before an order is possible but without indicating one will then be made.

207. The Tribunal was, having rejected the above various arguments, therefore left with the Tribunal being given a power. Provision in the BSA Regulations is permissive- the Tribunal is able to make a Remediation Order provided the threshold criteria are met- by the simple word “may”.

208. The word is not uncommonly used or obscure. The Tribunal identifies nothing within the BSA or BSA Regulations to indicate that Parliament intended the word to be given anything other than its ordinary and natural meaning or that the BSA and BSA regulations enable it to be given anything other than its ordinary and natural meaning.

209. Whilst the Tribunal can identify the merit of the ability to deal with such cases in the simple fashion Ms Bretherton KC commended- on the basis that if the threshold criteria are met an Order will follow and so there is only the form of order to argue about, considerably less time and cost will be involved than in cases where there is a discretion to exercise and ample scope for argument whether it should- the Tribunal cannot accede to the invitation to approach matters in that manner where incorrect on its construction of the relevant provisions.

The nature of the discretion

210. The Tribunal considers that "may" alone gives no steer as to when the Tribunal potentially should then make a Remediation Order.

211. The BSA or the Regulations could have set out in detail the factors to be considered and the nature of the discretion. They might have said that an order shall be made unless certain features applied. They could have provided that certain factors were of particular prominence and should be given particular weight. They do not do any of that.

212. The Tribunal determines that Parliament considered that it would leave to the expertise of the Tribunal the question of whether to make an order, taking into account in the exercise of its discretion such factors as the Tribunal considered to be relevant and giving them such weight as the Tribunal considered to be appropriate, whilst not taking account of such factors as the Tribunal considered not to be relevant at all and should not be given any weight.

213. The Tribunal agrees with the Tribunal in *Kedai* that "This Part of the Act and section 123 in particular are drafted very broadly indeed and give wide power to the Tribunal". The power to make a Remediation Order and the discretion to be exercised is indeed expressed in effectively the widest terms it possibly could be. Necessarily, the discretion must be exercised in a judicial manner.

214. The Tribunal noted that there are a great many statutes and statutory instruments which require it to exercise discretion. Some of those provide guidance as to relevant considerations but not all. The Tribunal is not aware of any suggestion that it is incapable of proper exercise of discretion where there is no specific statutory or similar guidance as to how to approach that. The Tribunal does not consider it necessary or appropriate to read into the BSA or BSA regulations words which would limit its discretion and of which there is no hint.

215. Mr Hickey KC argued that principles relevant to broadly similar types of remedy, such as the grant of mandatory injunctions and orders for specific performance. Included within that is that the Tribunal ought to determine whether the making of a Remediation Order was "just and convenient." The Respondent's case also used another phrase [99] of "necessary and appropriate" and Mr Hickey referred to the need for an order to be necessary in his Skeleton Argument, in the sense that "necessary because, unless compelled by a Remediation Order, the landlord/freeholder will not carry out the necessary remediation works within a reasonable period or at all". He also referred to "necessary and desirable".

216. It is only right to record that the Tribunal did not interrogate the meaning of "necessary and appropriate" or other like phrases, given their relatively fleeting appearance in the Respondent's case and lack of submission at the hearing of its application indicated that the Respondent did not rely on that phrase as identifying the relevant test and the Tribunal considering it far from the correct approach to take. For completeness, the Tribunal considers that a test of "necessary and appropriate" and similar phrases including "necessary" suggests a higher bar than "just and convenient" or similar.

217. Ms Bretherton KC submitted that there were important differences between Remediation Orders and other remedies, specific performance being an equitable remedy where an award of damages would not adequately compensate (such an award not being applicable here) and injunctions being made under similarly well- established powers but where no reference to injunctions was made in the relevant provisions.

218. The Tribunal agrees that whilst an order for specific performance is an order requiring a party to take positive steps, as is a Remediation Order, there is otherwise too much of a difference between the particular circumstances in which specific performance will be granted and the position under the BSA for the principles applicable to specific performance to dictate the approach, although some assistance may be offered. The Tribunal has carefully noted and had regard to the comment in *Triathlon* about Remediation Orders being "in the nature of orders for specific performance of [the landlord's statutory or contractual repairing obligations in respect of the relevant defect(s)]" which ought to be uncontroversial. In broad terms they are and so the short, general description is accepted by the Tribunal as entirely correct. However, that short and general nature of the comment in case not about Remediation Orders ought not, the Tribunal considers, to be taken any higher. In a similar vein, whilst a mandatory injunction is also an order requiring a party to take positive steps and may apply in a wider range of circumstances and so there could be merit in considering the approach applied in a factually- similar case in the course of the Tribunal approaching the exercise of its discretion, the Tribunal considers that is the high point.

219. Ms Bretherton KC submitted that there is an obvious contrast between s123 (and the BSA Regulations) and the requirement that for a

Remediation Contribution Order under s124 or a Building Liability Order under s130 of the BSA the Tribunal or High Court respectively must be satisfied that it is "just and equitable" to make an order. She pointed to the specific use of the phrase in those other sections in direct contrast to the lack of it in section 213 (or more pertinently the BSA Regulations, s123 using no phrase at all). Some of that submission sought to support the premise that only the threshold criteria needed to be established but it remains useful to consider it here.

220. "Just and equitable" arises in other contexts. The fact that who foots the bill and what part of the bill for remediation work as between two or more parties who could do so is to be determined pursuant to section 124 on that basis by no means demonstrates that the test is limited to such cases about money. The fact that the same test is identified in section 130 to be applied by the High Court in relation to Building Liability Orders supports the point. The Tribunal also identifies that "just and convenient" as submitted by Mr Hickey KC is wording which it encounters in other statutory provisions and can be appropriate in matters of significance beyond pure financial matters. An example is the appointment of a manager for a property pursuant to section 24 of the Landlord and Tenant Act 1987. In such instances, the appointment involves an interference with the property rights of the freeholder and so is not a step to be taken lightly. "Convenient" and "equitable" are subtly different, although they have similarity.

221. A test of whether a Remediation Order is just and equitable (or perhaps less likely some other form of words) is one which Parliament might well have quite reasonably applied. The Tribunal is not persuaded that the application of that specific test is appropriate, where Parliament did not provide for it and neither do the BSA Regulations. The Tribunal considers that it is appropriate to adopt the position that if Parliament had intended the test under section 213 to be the same as the test under section 124 in respect of Remediation Contribution Orders and under section 130 in respect of Building Liability Orders, it would have said so. Likewise, the Secretary of State would, in making the BSA Regulations, have said so. Therefore, the lack of the phrase in section 213 and regulation 2 must be regarded as deliberate. The Tribunal identifies no basis at all for applying a higher test of "necessary and appropriate" or any similar bar higher than just and equitable would indicate, being confident that if Parliament had intended a higher bar for Remediation Orders than the other forms of order in section 124 and 130 it would have explicitly said so. The only logical outcome of that is that the Tribunal is not to apply a test of whether the making of a Remediation Order is just and equitable specifically.

222. The Tribunal has considered the fact that section 213 says nothing at all about the making of Remediation Orders. In contrast to the relevant provisions being contained in the BSA itself in respect of Remediation Contribution Orders and Building Liability Orders, section 213 simply provides a definition of what a Remediation Order is, no more and no less, leaving it to regulation 2 to say what little else is said. However,

the Tribunal identifies no reason why it should consequently depart from the usual approach to construction.

223. The Tribunal also did not adopt the approach taken in *Space Apartments* of considering the balance of prejudice. The balance of prejudice is, in the Tribunal's experience, encountered in relation to limitation and procedural matters rather than for a final order of this broad nature and is mindful of the nature of the subject matter. The Tribunal also identified two particular differences between that case and this- that the application there was made by the lessees and that the process of undertaking work (and if relevant of seeking funding) was at a much earlier stage. The decision in *Space Apartments* has not been challenged and no doubt the outcome was appropriate in the context of the particular case. However, the reason for the adoption of the particular approach is not discussed, nor whether it might be applied only to an application by lessees or also one made by others.

224. It was not clear to the Tribunal how the approach taken would operate in the latter type of case, including given that applicants such as this Applicant have no immediate involvement in the particular property, for example no relevant title, and could not obviously suffer prejudice. Interested persons as originally provided for by the BSA such as local authorities and fire authorities may be in similar positions. The test does not, the Tribunal considers, work for those cases. The Tribunal identifies no reason to consider that Parliament meant there to be a different test depending on who applies- as opposed to different considerations potentially arising in respect of the same test. This Tribunal therefore does not consider it should adopt balance of prejudice as the appropriate consideration.

225. Notwithstanding the above, "just and equitable" is, the Tribunal considers, the most common basis on which a court or tribunal approaches exercise of discretion. The approach to exercise of the discretion cannot be far from "just and equitable". It stands to reason that the Tribunal will not make a Remediation Order unless it considers it "just" to do so. Given that "equitable" essentially means fair, the test cannot be far from one of justice and fairness. It may not be a simple task to identify the difference in outcome from applying a test of just and equitable (or arguably just and convenient or perhaps balance of prejudice) or an exercise of discretion in a wide sense not adopting such specific phrases.

226. It was additionally mentioned in the Applicant's Skeleton Argument when talking about the basis for a Remediation Order and assuming other arguments were not accepted that "there must be a good reason for not making an RO notwithstanding relevant defects". That was not expanded on. It was not clear to the Tribunal that the intention was to advance another line of argument. The making of a Remediation Order unless there is a good reason not to would fall somewhere between "must" and a wide discretion. The Tribunal briefly indicates it does not

find any suggestion in the wording of the BSA or BSA Regulations that such a test applies.

227. The Tribunal concludes that it should adopt the approach set out above of taking into account in the exercise of its discretion such factors as the Tribunal considered to be relevant and giving them such weight as the Tribunal considered to be appropriate, whilst not taking account of such factors as the Tribunal considered not to be relevant at all and should not be given any weight and should make a Remediation Order or not as it determines appropriate- in the absence of a better word- having considered those matters. That will, inevitably, involve a balancing exercise. That exercise is to be undertaken against the background of the purpose of the legislation. That background carries significance in the undertaking of the exercise.

228. Insofar as Ms Bretherton KC made references to the assessment not being fault- based and there being "almost a no- fault jurisdiction" as she stated it in opening, the Tribunal finds the question of fault not to be determinative but that it is one of many factors which a Tribunal may determine it appropriate to consider in the exercise of its discretion.

229. It also merits mentioning, perhaps only for completeness, that the Tribunal queried with Counsel whether the provisions of the BSA and BSA regulations may permit the Tribunal to make a suspended Remediation Order if it considered that appropriate. Counsel submitted that the Tribunal was not permitted to make such an order. Ms Bretherton KC and Mr Burrell specifically provided a Note and extracts of legislation with regard to the making of orders for possession which are suspended and the specific provisions permitting that. That contrasted with the lack of mention of equivalent power in respect of Remediation Orders. They argued the lack of reference to suspension demonstrated that Parliament did not intend to confer such a power.

230. The Tribunal agreed that the BSA and BSA Regulations could not be construed as giving a specific power to suspend a Remediation Order. The Tribunal is well aware that it is a creature of statute and has the powers given to it. It construed no provision as giving the power but also none precluding it. The Tribunal was not persuaded that the Tribunal was necessarily precluded from making a Remediation Order but suspending its operation on given terms, amongst the wide powers to determine the appropriate form of order. However, as the Tribunal determined that suspension was not appropriate in any event in this case, the Tribunal did not consider the particular matter any further.

<u>Application of the facts and law</u>

231. The Tribunal determined that a Remediation Order should be made.

232. The Tribunal accepted that the Applicant is an "interested person"; the Respondent is a "relevant landlord"; the Building is a "relevant building"; the defects agreed as a "relevant defect" are, having arisen in connection

with “relevant works”; the specified relevant defects have caused and continue to cause a “building safety risk” 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.” The power to make a Remediation Order has arisen.

233. On the Tribunal’s construction of the legislation, the Tribunal was not required to grant a Remediation Order. The Tribunal was however very much mindful of the legislative purpose behind the BSA, which might be summarised as ensuring the remediation of defects with residential buildings and protecting the safety of the occupiers. As indicated above, the Tribunal considers that the exercise of the discretion it determines it has must be undertaken against that background.

234. The relevance of the chronology in the Tribunal’s view was particularly with regard to whether there was what Ms Bretherton KC termed culpable delay. That is to say culpable delay in respect of BSA works. The Respondent had argued not (save to any extent it might suggest delay to be the fault of those administering the BSF, which the Tribunal did not find). The Tribunal considers that in contrast any delay with BSF funding- including any caused by withdrawal of the first application and submission of the second- has only minor weight in the overall context of this case.

235. The Respondent’s argument as expressed in the Skeleton Argument was that the proceedings are not necessary to bring about the remediation of the Building. That was because of the Improvement Notice and the steps taken to commence works now commenced. The Tribunal accepts there is merit in that argument. The Tribunal bore in mind that by the date of hearing, there had been considerable progress in that works on site had started, at least in terms of scaffolding and some opening up having taken place, and there was a contract in place for the works, including the BSA works, to be undertaken. The fact that the Respondent demonstrated willingness to undertake the works was far from irrelevant. In addition, the commencement of works was a notable distinction between this case and the previous cases in which a Remediation Order was made.

236. The Tribunal has noted paragraph 997 of the Explanatory Note to the BSA states that: “Remediation orders will ensure that essential remediation work needed to remedy relevant defects can take place, especially where landlords are not fulfilling their obligations as regards the safety of the building…” and that the use of “especially” does not suggest a limit to cases whether obligations are not being fulfilled. However, neither does the Tribunal consider that the paragraph takes matters much further for its purposes- a decision is still required considering all relevant circumstances of this case.

237. The more pertinent matter is that it has taken a considerable time to reach the point of a JCT contract and commencement of works, including insofar as relevant progress with potentially obtaining BSA

funding, and where the Respondent had failed to demonstrate a sound belief that the costs of the BSA works were ever payable by the lessees. That considerable time is some 3 ½ years since the Wintech report identified relevant defects. In contrast, the Tribunal has found that the Respondent, as the vehicle of Railpen, always had access to ample funds to be in a position to undertake the works. There was never a need to await the grant of funding under the BSA- the Tribunal rejects the written evidence of Mr Pemberton to the contrary, reminding itself that he is not from the Respondent or Railpen and lacked enough knowledge to comment. The Respondent has been able to commence works without BSF funding and enter into a contract for very substantial works without BSF funding. There had been no marked financial change.

238. The Tribunal noted the point in the Applicant's Skeleton Argument that the BSF was set up to meet costs where owners were "unwilling or unable to afford to do so" [1793], whereas the Respondent denied the former applied and the latter did not apply. However, the Tribunal did not find the specific matter advanced the position. The Respondent remained able to apply as it had done. However, that ability did not alter the fact that it had not done all that it could reasonably be expected to in order to alleviate the fire safety risks to the Building and occupiers within a reasonable time taking account of the nature of the risk.

239. The Respondent's responsibility is to attend to the works and as a distant second may organise external funding, if it can, to pay for that. The former is not contingent on success with the latter. The Tribunal notes its determination to that extent to be consistent with the sentiments expressed in *Triathlon* and *Mistry*.

240. The Tribunal accepts that the BSA (and the rest of the) works impose a substantial financial burden on the Respondent which it cannot recover from the lessees and could not following the BSA in any event, the latter being a development since its purchase. However, the Tribunal considers the latter cannot be a factor of significance, being an inevitable consequence of the BSA and plainly intended by Parliament.

241. The Tribunal rejects the Respondent's argument that the regulatory framework has been in a state of flux and made it difficult for the Respondent to proceed, as alleged by the Respondent. Whilst there was the change from PAS to CAN, that did not alter the essential legal obligations, merely provided a different process for determination of the steps required in order to fulfil those, much as there was potential for a reduction in work because of the risk- based approach, which did not necessarily involve the remediation of all defects and so might require less work than required under CAN (although any reduction in work has not been demonstrated in the event). The BSA did not fundamentally change the basic obligations. The requirement to resolve the fire safety issues has continued for a significant time, including under FSO. Whilst the Tribunal accepts that it has referred to "BSA works" that is merely shorthand to describe the works which are

relevant defects under the provisions of the BSA for the purpose of the provisions of the BSA, including the making of a Remediation Order.

242. The Tribunal has found above that the commencement of works is not a consequence of these proceedings but rather of the service of the Improvement Notice. It has been found that it was the service of the Improvement Notice which focussed the mind of the Respondent on the need to undertake work and not to devote most of its energies to the question of BSF funding. It has been found that the Respondent did attain focus at that point, that the Respondent was very much aware of the required start date for works and that it worked towards that. Indeed, it achieved that. It is also a notable feature that the BSA works were just some of the works, albeit significant, required to be undertaken by the Notice.

243. However, the Tribunal identified that the Housing Act 2004 and the BSA, whilst they both seek to ensure the safety of residential occupiers, are not the same. The BSA is a more specific piece of legislation seeking to address more specific issues and issues identified of a particularly important nature. Parliament cannot have intended the BSA to simply reproduce requirements and effects of the Housing Act. The BSA makes no reference to the Housing Act and is not expressed in the same terms. The test for the issue of an Improvement Notice and for the making of a Remediation Order are different- so the fact that one is appropriate does not of itself mean that so too is the other- but the Tribunal does not consider that greatly assists in determining making such order.

244. The Tribunal considers that the existence of an Improvement Notice cannot here be irrelevant- not least given the finding that it is the reason for commencement of works. The Improvement Notice was a factor to which the Tribunal had careful regard. The Tribunal was mindful that in *Kedai*, that Tribunal had said that the notices served for that building were not relevant to its decision but that was a different case and with facts different to these. In *Kedai* it was said that the notices may be appealed: here there is no suggestion of that and indeed the Respondent has taken steps to comply. The Tribunal notes that the question arose in Kedai in the context of potential adjournment to hear both cases together- not relevant here- and considers that Tribunal approached matters from a different angle. In any event, the arguments heard in this case about the making of a Remediation Order were very different to those in *Kedai* and those differences weigh heavily.

245. The Tribunal determines that whilst it is the Improvement Notice which resulted in the works being undertaken and that the same works might have undertaken in the same manner application for a Remediation Order or no, that is not itself a complete answer to the application for a Remediation Order or of itself a reason to refuse to make a Remediation Order where the threshold criteria have been met and there is sufficient merit in making a Remediation Order.

246. What is that merit? In summary it is as follows. It is because of the various concerns expressed about the approach of the Respondent to date, not least the prioritisation of avoiding cost to the Fund above occupiers' safety; because the Improvement Notice and steps to comply with are not in themselves sufficient to prevent the appropriateness of an Order- although they make the balance a finer one; because of the impact that those matters have and the concerns the Tribunal holds with the Respondent' perspective on funding, including the BSF funding, and the JCT contract and the risk that progress will be impacted when it ought not; because of the very considerable importance of ensuring firm focus on completing the BSA works and ensuring that completion within a realistic timescale such that the Building is free from identified risks and the occupiers can return. The fact that the application may not have added to progress to date, does not mean an Order will not ensure building safety in the future.

247. The fact that the Respondent failed to progress the undertaking of the works from 2020 to February 2024 and effectively needed to be compelled to do so by an Improvement Notice does not inspire confidence that the Respondent will make every effort in the future to ensure works are undertaken as swiftly as practicable. Rather, the Respondent has created by its approach from 2020 to late 2023, the real and significant concern that it may not ensure as much progress as it ought and may be too willing to be waylaid by resolvable disputes and by additional works identified. The Tribunal is not confident that the Respondent would retain the necessary focus on the BSA works being completed without avoidable delay.

248. The Tribunal touches upon the statement in the BSF application guidance [1789] that the BSF will meet the cost where owners are "unwilling or unable to afford to do so". The Respondent referred to the fact that it was not "unwilling" as demonstrated by the works and the Tribunal considers implicitly accepted that it was not, contrary to previous assertions, "unable". The statement is made in a guidance document about funding- so aside from only providing guidance, is not about the BSA per se. The Tribunal does not find it of much assistance.

249. Reference was also made on behalf of the parties to the wording of the Explanatory Note in relation to the BSA issued and the phrase used in paragraph 997 that, "Remediation orders will ensure that essential remediation work needed to remedy relevant defects can take place, especially where landlords are not fulfilling their obligations as regards the safety of the building...". The Applicant essentially argued that "especially" indicated that orders were not reserved for cases in which landlords were not fulfilling obligations and can be made even where landlords are. The Respondent argued that the words indicated focus on instances where landlords are not fulfilling obligations, whereas it argued that it was- having commenced works and taken related steps. The Tribunal construes the words as indicating that there may be greater weight to be given to instances where landlords are not undertaking works or actively progressing being able to than cases where landlords are not

but equally that is no great revelation. It is a factor always likely to have bearing to whatever degree the particular Tribunal considers appropriate when exercising its discretion. The wording being set out in an Explanatory Note and not the BSA itself and the Tribunal's construction and view of it, is such that the Tribunal does not consider that wording to take matters further.

250. The Tribunal also accepts that the fact that the occupiers have been decanted from the Building and fact that the Respondent is incurring costs day on day whilst that continues is a powerful incentive for the Respondent to avoid delay. Insofar as the Applicant relies on the asserted desire of the Respondent to avoid cost, the inevitability of such cost following the decant arguably detracts from the Applicant's case. Now vacant, the Building no longer caused a risk to occupiers. The Tribunal has given those features careful consideration. However, the Respondent incurring increasing cost the longer the works take and the Building is vacant whilst a factor to be given weight, does not add sufficient weight against a Remediation Order being made.

251. Without wishing to address specifically the motivation of the Applicant in this case, not least having made no finding, it is not entirely without note that the Applicant applied after the variation of the Improvement Notice and when the Respondent was actively seeking to comply with that, and indeed only shortly after the letter before action in response to which the Respondent explained that. The Tribunal considered that the reason why an applicant had issued an application might possibly be one relevant factor bearing on the making of a Remediation Order in an appropriate case but very much subject to the other factors relevant. Given the Tribunal's wide discretion, it must follow that the Tribunal can consider the relevance, or otherwise. However, before it would get to the point of exercising its discretion as to whether to make a Remediation Order, all of the threshold criteria must have been met, including there being relevant defects creating risk to occupiers requiring relevant works, and remediation work must be outstanding, not only when that application was made but also by the time of the decision. It would take a lot for an applicant's motivation to be so base that it would weigh significantly such as to prevent the making of an order otherwise likely to be made. As there is no finding of such in this case, there is no need to go further.

252. The Respondent placed heavy emphasis on arguments that a Remediation Order might cause other difficulties and so be counter-productive but the Tribunal does not agree. The Tribunal does not consider that the matters raised by the Respondent make it not appropriate to make a Remediation Order. Nevertheless, it is appropriate to identify the Respondent's arguments and to explain why the Tribunal did not accept them.

253. Firstly, the Respondent asserted that a Remediation Order could in effect get in the way of the undertaking of works under the JCT contract governed by the Housing Grants Construction and Regeneration Act

1996. The Tribunal accepted that there was a need for realism in the provisions of any order in recognition of the fact that there was the JCT contract and that matters might arise which extended the timescale of the works contracted for- albeit not all of those were works were BSA works. However, it was scarcely a revelation that the Respondent would need to enter into such a contract or that it would contain the sort of provisions which those contracts do contain. BSA works here not only here but always be in any case, are of a construction nature.

254. The Tribunal found it inconceivable that the BSA would have provided for making Remediation Orders as a key plank of its provisions and done so where the making of such an order might be expected to cause difficulties with just the sort of contract that would be effectively bound to be entered into. The Tribunal concluded that whilst account would need to be taken of realities of such a contract, it must be possible to make a Remediation Order which does not cause undue difficulties with rights, remedies and other provisions under such a JCT contract. Consequently, the Tribunal determined that the entry of the Respondent or a party in like position to the Respondent to a JCT contract could not preclude the making on order.

255. That does not ignore the fact that the actions of the Respondent, including entry into a JCT contract as part of the process of undertaking works, are relevant to the exercise of the Tribunal's discretion. It may be in a given case that matters have progressed to such extent that in exercising its discretion, the Tribunal concludes that it ought not to make an order, but such a contract be unlikely to give any rights to persons or bodies not parties to the contract and that is also likely to be a significant consideration (although the Tribunal does not consider it appropriate to go beyond those general observations). The Tribunal does not consider that the entry of the Respondent into the JCT contract is sufficient alone or in conjunction with other factors to outweigh the making of an order, not least where the contract had only just been entered into at the date of the hearing, the works were in their infancy and there was a long way yet to go. The Applicant's argument that the contract is an agreement to undertake the works whereas a Remediation Order provides for an outcome- the completion of the BSA works and removal of the risks- is also relevant.

256. The Tribunal took a similar view in relation to BSF funding. The Tribunal had little doubt that it was envisaged that BSA works would commonly be funded from the BSF and so it is right to say that BSF funding is relevant. Indeed, the Tribunal considers that the majority of works were probably envisaged to be funded that way.

257. That cuts both ways. On the one hand, it was not unreasonable by any means for the Respondent to pursue such funding, but it does not provide an answer to lack of undertaking of works and funding is not yet resolved. Equally, it must be possible to make a Remediation Order which does not cause undue difficulties with rights, remedies and other provisions under such funding and the funding agreement which would

be entered into. Parliament cannot, the Tribunal determines, have provided for an ability to make a Remediation Order without appreciating the existence of the BSF. There cannot have been a lack of awareness that the grant of funding would require a formal agreement and that would contain various provisions. It cannot have been intended that the making of a Remediation Order might cause difficulties with the provision of funding designed to pay for just the works which a Remediation Order would require to be undertaken.

258. There is no BSF funding currently, in contrast the Tribunal notes to the indicated position with Vista Tower, and so nothing certain which could affect the making of a Remediation Order. The Tribunal accepts that there would be legal obligations imposed on the Respondent and it can infer those will of a similar nature to those for Vista Tower, if and when funding is granted. Until then the funding is only probable funding and any terms on which it may be granted are only matters which at most could potentially be relevant if in due course they operate.

259. More generally, the Tribunal determines that the obligation on a landlord to undertake BSA works is just that. It is not an obligation which only arises on receipt of BSF funding. Indeed, there is no hint in the statutory provisions that funding plays any part. The finding made that the Respondent gave too great a priority to seeking BSF funding is therefore significant because it identifies that the Respondent failed to focus on its responsibilities sufficiently and it failed to make the progress which it could have made with the BSA works. That weighs heavily. It also creates the identified significant concern that in the absence of a Remediation Order, the Respondent may find itself too easily waylaid by any BSF funding issues, by other developments and otherwise may not focus sufficiently on the BSA works being completed without any available further delay.

260. For completeness, the Tribunal determined that it would not have been appropriate to suspend the operation of a Remediation Order in this instance, even if the power to do so exists. Hence a lack of need to debate further whether the power might be encompassed within the statutory provisions. The Tribunal observes that a power to suspend a Remediation Order may not be without potential merit and there may be circumstances in which an order including that provision might be appropriate. However, in the circumstances, the Tribunal leaves matters there.

261. The Tribunal does address an argument advanced by the Respondent in the Skeleton Argument and orally that the Tribunal could, as an alternative to suspending the operation of a Remediation Order, adjourn or stay the application generally with permission for a party to apply to restore the proceedings. Hence no order would be made but the Respondent could face one later if it did not appropriately progress the BSA works. The Respondent submitted that the case management powers of the Tribunal enable that approach. The Applicant of course argued the contrary, asserting that case management powers cannot be

extended to the making of what would effectively- subject to a successful application to restore- be a final order.

262. The Tribunal determined that it was appropriate to make a Remediation Order as explained, such that there was not- and there was not need for- careful consideration of whether the Tribunal may have the power to adjourn an application for a Remediation Order generally with the ability for it to be restored in an appropriate, and other, case. The Tribunal is tentatively inclined to the view that if it considered a Remediation Order to be appropriate it should make one, whereas if it did not then the application should be dismissed, thereby ending the proceedings one way or another. To that extent, the Tribunal considers that the making of a suspended order, in the event of the power to do so, is somewhat different to a general adjournment.

263. However, the Tribunal received relatively limited submissions on the particular question and hence considers it appropriate not to say more but rather to leave the issue to another case in which the point is more central, in the event of one in due course.

264. So, taking matters overall, the weight was not overwhelmingly in favour of the Applicant. The Improvement Notice and the Respondent acting on that as varied and commencing works were significant features of the situation. If this case had been heard in summer 2023, the decision is unlikely to have been a difficult one: by April 2024, matters were rather more nuanced. However, given the Tribunal's determination about the Respondent's approach, both to date and including the risk of it allowing progress with work to be derailed, and also given the purpose of the BSF- identified as ensuring works completed for the safety of the residential occupiers- the overall balance of relevant factors weighed firmly in favour of making a Remediation Order.

<u>The Form of Remediation Order</u>

265. The parties differed substantially as to the form of Remediation Order to be made, of course in the case of the Respondent if the Tribunal exercised its discretion to make an order at all.

266. The Applicant sought a relatively simple form of order but with a schedule of works required attached. Broadly speaking, the Applicant asked the Tribunal to make an order in the sort of terms adopted in *Kedai*. The Respondent submitted that the form of order should be considerably more detailed but sought the description of works simply to be those identified in the fire experts' joint statement.

267. The Tribunal considered that there is something of a difference between the previous decisions of the Tribunal and this case. In the previous cases, no works had been undertaken and limited, where any, attempt to even move towards the undertaking of the works. In *Space Apartments*, there had been some progress but where the process of commencing works (and of rather less import seeking BSF funding)

was far less advanced than in this case. A notable feature of the above cases was the making of an order that the remediation of the defects be achieved. The Tribunal had not sought to project manage the works. Whilst a JCT contract was not in place in those cases and so an order similar to that sought by the Respondent could not have been made even if the given Tribunal had wished it to be, it was amply clear that the orders had been focussed on the end result and not the precise means by which it was achieved. This Tribunal agreed that to be the appropriate way in which to approach the terms of a Remediation Order.

268. The Tribunal reminded itself that the definition in s123 is an order "requiring a relevant landlord to remedy specified relevant defects in a specified relevant building by a specified time". Hence the Order needs to identify the defects and provide a timescale. The Tribunal was not persuaded that simple reference to the expert's statement, which also referred to a Scope of Works and to other documents and referred to defects causing risks outside the scope of the BSA was appropriate. Section 123 does not identify a need for the Tribunal to set out any specific works to remedy those specified relevant defects. On balance the Tribunal has adopted the form of the schedule asked for by the Applicant but emphasises that it does so without detracting from the essential point that the Order requires an end result, that the defects be remedied. The works listed are simply a manner of achieving that end. The defects for which the Applicant sought the Order and stated in the Applicant's Skeleton Argument are those for which the Order has been made, adopting the descriptions which the Applicant provided.

269. Given that there were specific disputes as to whether the requirement on the Respondent should be to remedy, or to procure the remedy of, the Relevant Defects and whether the Applicant should be required to show an extension of time to be unreasonable, the Tribunal briefly addresses those, regarding that brevity as sufficient in this instance. The Tribunal finds the first point simple. It is for the Respondent to undertake the remedial works. The Tribunal realises that in practice it will employ contractors for that purpose. That does not render it appropriate to provide for it to "procure the remedy" of defects and hence the Order made provides for it to remedy them. The Tribunal agrees with the Applicant that the wording proposed by the Respondent could go to "water down" the obligations, which is not appropriate.

270. In respect of the second, the Remediation Order is an order of the Tribunal. The Applicant applied but it is not the Applicant's order. If the Respondent seeks an extension of time, it is for the Respondent to demonstrate that the Tribunal should vary its order. The Applicant may object or may not but that is unlikely to the determinative feature. The Tribunal will consider any application for an extension on its merits irrespective of the position adopted by the Applicant.

271. Neither party argued for the Order including any mechanism for verifying the undertaking of the BSA works in the manner dealt with in,

for example *Kedai* and *Space Apartments*. The Tribunal has noted that the JCT contract requires Lancer Scott to provide a FRAEW report once the works are said to be complete but considers that is not of itself directly relevant to whether the Tribunal should include such a requirement in the Order. Nevertheless, the Tribunal considers that it is appropriate to include that the Respondent obtains a FRAEW report and provides that to appropriate interested parties.

272. The Tribunal queried with both Counsel on the fourth day as to whether Counsel considered any issue might arise with their proposed form of order in respect of enforcement in the County Court. It was not apparent from the responses or from the parties' cases generally that was a matter to which particular consideration had been given. The Tribunal is mindful that in cases involving injunctions and equivalent remedies, the Courts need to be sufficiently clear as to the requirements that they can identify whether there has been a breach and hence whether enforcement action is appropriate and in what manner.

273. There has not yet been a need for a party to enforce a Remediation Order and so the question of the approach of the Court has not arisen. The Tribunal considered that it was unhelpful to attempt to second guess what the approach of the Court might be in circumstances which have not arisen and having heard evidence and submissions not yet received. The Tribunal has nevertheless made its Order mindful of the potential need for enforcement in the County Court and has endeavoured to make the terms as clear as possible for the benefit of not just the Court but also the parties.

274. The Tribunal records, as it notes other decisions have done and for the avoidance of doubt, that the Tribunal retains jurisdiction for so long as the relevant defects remain at the Property and there is a possibility of a variation to the order, either as to scope or as to timing.

Timing

275. The dispute between the parties extended to the time for the undertaking of works.

276. There was no dispute as between the relevant experts about the timescale for the known works, agreement having been reached of a Practical Completion date of 16th June 2025. Likewise, BCP was plainly content that the HHSRS works would take until June 2025 to be completed, given the varied Improvement Notice. If all goes to plan, the Tribunal is entirely content with June 2025 as the relevant date for completion of all known works. That is not the whole story.

277. The Applicant proposed- and its draft order contained- an additional period of 2 months beyond the date provided for compliance with the Improvement Notice, although there was no strong argument advanced against a longer time being allowed. It was not clear to the Tribunal

how the Applicant arrived at that suggested additional time, not least as compared to any other period.

278. The Tribunal considered the timescale for works required pursuant to the Improvement Notice, although it was mindful of the fact referred to a number of times in this Decision that the BSA works are only a portion of those works. Considering those works, in principle the BSA part of the works could plausibly to be completed more swiftly than June 2025 if nothing happens to delay them. However, the Tribunal was very much aware that the works are being undertaken as a whole and it is very difficult to extract the BSA works from that and so give a different timescale for those. Equally, any complications or additional items discovered to require remediation which may delay the works as a whole are likely also to delay the BSA works being completed.

279. The Tribunal finds a likelihood that additional matters will be identified in the course of the works, not least noting that to date more and more intrusive investigations have revealed additional matters, which require to be attended to. The probability is that the overall timescale for works, and with that the timescale for BSA works, will be greater than currently intended and hence some allowance for that should be built in. The Tribunal accepts that issues may arise pursuant to the JCT contract which have to be resolved and that may also impact on progress, although considers that the Tribunal should not facilitate unnecessarily protracted dispute or the parties to the contract potentially reaching an agreement to extend time which suits them but runs contrary to resolution of the works without avoidable delay. If certain aspects experience delays, the Respondent should consider which elements can progress and seek to ensure that any do.

280. It is important to retain focus on resolving issues and the works progressing, to ensure the safety of the Building and enable the re-occupation of the residential flats as soon as can practically be achieved. The Tribunal determined that it is appropriate to allow a portion of additional time before the Applicant would be in breach of the Remediation Order and appropriate action would follow. The Tribunal is not troubled by any issues which may arise with the BSF or any terms of any grant which may be given. The Tribunal has explained the difference between responsibility to undertake the BSA works and any funding obtained and sees no need to labour that.

281. Overall and having considered possible timescales, the Tribunal has concluded that the appropriate approach is to allow a period of six months beyond the date provided for in the Improvement Notice.

282. The Tribunal considers that allows amply for any issues which may genuinely arise and delay to the BSA works and so enables achievement with compliance with the Order and avoidance of costs of applications, whilst not over- doing so. Given that the undertaking of the BSA works is to be encouraged and enforcement action only to be required if necessary, the Tribunal has determined that erring on the cautious side

and giving a greater rather than lesser time than might have been allowed is the appropriate one. The Tribunal emphasises the date to be a cut-off date, following which the Respondent will be in breach of the Remediation Order. It is not intended to negate the terms of the Improvement Notice (not that it could) or to otherwise suggest that the timescale for completion of the works ought to slip to that cut-off date without unavoidable reason. The date should not become the completion date unless unavoidable.

283. If it transpires that even the date provided for in the Remediation Order is unlikely to be met and for demonstrable good reason, the Respondent may apply to the Tribunal and seek to persuade it to vary the terms of the Order, as explained above. Noting that the Respondent can apply does not amount to encouragement for an application to be made, which the Respondent should firmly aim to avoid.

Decision

284. The Decision of the Tribunal is therefore that a Remediation Order should be made in the terms of the Order accompanying this Decision.

Costs and fees

285. In relation to any applications with regard to costs and fees, the Tribunal received some written submissions within the Skeleton Argument of Mr Hickey but premised on the Tribunal not making a Remediation Order. The Tribunal has not received other submissions. The Tribunal will therefore issue separate Directions in respect of any applications within the next few days.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28- day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HN/HYI/2023/0008
Property	:	The Chocolate Box, 8-10 Christchurch Road, Bournemouth BH1 3NA
Applicant	:	The Secretary of State for Levelling Up Housing and Communities
Representative	:	Ms Kerry Bretherton KC and Mr Alexander Burrell of Counsel instructed by Walker Morris LLP
Respondent	:	Grey GR Limited Partnership
Representative	:	Mr Alexander Hickey KC and Mr Lawrence Page of Counsel instructed by DAC Beachcroft LLP
Type of Application	:	Application for a Remediation Order Section 123 Building Safety Act 2022.
Tribunal Member(s)	:	Judge J Dobson Mrs J Coupe, Regional Surveyor Mr J Stead BSc (Hons) MSc (H-W)
Date of Hearing	:	4th, 5th, 8th and 9th April 2024
Date of Order	:	14th May 2024

REMEDIATION ORDER

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UPON considering the applications, evidence and submissions in this matter and the provisions of the Building Safety Act 2022

AND for the reasons set out in its Decision dated 14th May 2024

THE TRIBUNAL ORDERS THAT:

1. The Respondent Grey GR Limited Partnership (the relevant landlord) shall remedy the following specified relevant defects:

    i) The presence of combustible materials in External Wall Type EW01;
    ii) The presence of combustible materials in External Wall Type EW02;
    iii) Compartmentation issues in External Wall Type EW05;
    iv) The absence of appropriate cavity barriers.

2. The Respondent shall do so in accordance with the attached Schedule of Works or such other means as shall effectively ensure the remediation of the defects (the "BSA Works") in The Chocolate Box, 8-10 Christchurch Road, Bournemouth BH1 3NA (the "Building").

3. The Respondent shall do so in compliance with the Building Regulations applicable at the time the remedial work is undertaken, so that the relevant defects no longer exist and such that, 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. The Respondent shall obtain a FRAEW.

4. The Respondent shall complete the BSA Works and make good any damage caused to the Building on account of the BSA Works, by no later than 16th December 2025.

5. The parties have permission to apply in relation to paragraphs 1 and 3 and the Schedule of BSA Works overleaf. In particular, the Respondent has permission to apply to extend the time for compliance with this Order.

6. Any application must:

    i) be made using the Tribunal's Form "Order 1";
    ii) be supported by detailed evidence explaining the reason for the application and a proposed draft order setting out the variation sought;
    iii) be served on the lessees of the residential apartments in the Building and
    iv) include a realistic time estimate for the application to be heard.

7. The parties may rely on relevant expert evidence in support of the application if so wished.

8. The Respondent must notify the Tribunal, the Applicant, Bournemouth Christchurch and Poole Council and the lessees that it considers it has complied with this Order, within one month of the certified date of practical completion of the Works, providing a copy of the FRAEW.

Pursuant to 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.

SCHEDULE OF BSA WORKS

- The Chocolate Box, 8-10 Christchurch Road, Bournemouth, BH1 3NA

For the purposes of this Order, any reference to "Building Regulations" means the current Building Regulations (including schedules to the Regulations) at the time of this Order or such equivalent provisions as are applicable at the time the works are undertaken.

1. WALL TYPE EWO1- High Pressure Laminate

1.1. The combustible insulation between the sheathing board and the HPL cladding should be removed and replaced with an insulation which is compliant with the Requirements set out in the Building Regulations (including any schedule).

1.2. The external cladding should be removed from the facade of the Building and replaced with suitable external wall cladding system which is compliant with the Requirements set out in the Building Regulations.

1.3. Where sheathing board panels are damaged, they are to be removed and replaced with panels that are not broken or cracked and properly installed in accordance with the manufacturer's instructions.

1.4. All fire stopping, cavity barriers, fire barriers and internal compartmentation are to be remediated in the locations set out below, so that the Building is compliant with Requirements set out in the Building Regulations.

1.5. Fire barriers or cavity barriers are to be properly installed, in accordance with the manufacturer's specified details and instructions:
   a) Horizontally in line with each floor;
   b) Vertically in line with internal compartment walls;
   c) Around openings (including doors, windows and service penetrations); and
   d) At the edges of the cavity.

2. WALL TYPE EWO2 – Insulated render

2.1 The external render board and combustible insulation is to be removed from the facade of the Building and replaced with suitable external wall cladding system which is compliant with the Requirements set out in the Building Regulations.

2.2 The combustible foam insulation (situated behind the Insulated Render Board) is to be removed from the facade of the Building and replaced with suitable external wall cladding system which is compliant with the Requirements set out in the Building Regulations.

2.3 Where sheathing board panels are damaged, they are to be removed and replaced with panels that are not broken or cracked and properly installed in accordance with the manufacturer's instructions.

2.4 All fire stopping, cavity barriers, fire barriers and internal compartmentation are to be remediated in the locations set out below, so that the Building is compliant with Requirements set out the Building Regulations.

2.5 Fire barriers or cavity barriers are to be properly installed, in accordance with the manufacturer's specified details and instructions:
a) Horizontally in line with each floor;
b) Vertically in line with internal compartment walls;
c) Around openings (including doors, windows and service penetrations); and
d) At the edges of the cavity.

3. WALL TYPE EWO5 - CURTAIN WALLING SYSTEM AND SPANDRELS

3.1 The curtain walling system, (where it contains combustible spandrel panels or has compartmentation defects including cavity barrier and fire barrier defects) should be removed from the facade of the Building and replaced with suitable system which is compliant with the Requirements set out in the Building Regulations.

3.2 All fire stopping, cavity barriers, fire barriers and internal compartmentation are to be remediated in the locations set out below, so that the Building is compliant with Requirements set out in the Building Regulations.

3.3 Fire barriers or cavity barriers are to be properly installed, in accordance with the manufacturer's specified details and instructions:
a) Horizontally in line with each floor;
b) Vertically in line with internal compartment walls;
c) Around openings (including doors, windows and service penetrations); and
d) At the edges of the cavity.

4. GENERALLY

4.1 All insulation and other materials installed during the remediation must satisfy Regulation 7(2) of the Building Regulations 2010 as amended 2018, and not covered by the exceptions in Regulation 7(3), where (or equivalent specific regulation):
"building work shall be carried out so that materials which become part of an external wall, or specified attachment, of a relevant building are of European Classification A2-s1, d0 or A1, classified in accordance with BS EN 13501- 1:2007+A1:2009 entitled "Fire classification of construction products and building elements. Classification using test

data from reaction to fire tests" (ISBN 978 0 580 598616) published by the British Standards Institution on 30th March 2007 and amended in November 2009".

4.2 All proprietary fire stopping products, fire barriers and cavity barriers should be installed in accordance with the manufacturer's instructions in accordance with design details supported by fire testing and or certification under a scheme which is adequate for the purposes of the Building Regulations.

4.3 All works should be documented, and all relevant information provided in accordance with Regulation 38 – Fire Safety Information of the Building Regulations (or equivalent specific regulation).

5. INTERNAL COMPARTMENTATION

5.1 All internal compartmentation should be remediated to provide the fire resistance required by Building Regulations as set out within the report of Tenos Limited- Sample Intrusive Compartment Surveys- dated 2nd September 2021.

5.2 All proprietary fire stopping products, fire barriers and cavity barriers should be installed in accordance with the manufacturer's instructions in accordance with design details supported by fire testing and or certification under a scheme which is adequate for the purposes of the Building Regulations.

5.3 All works should be documented, and all relevant information provided in accordance with Regulation 38 – Fire Safety Information of the Building Regulations.