FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/BSA/2024/0004**
Property	**:**	**8 Artillery Row, London, SW1P 1RZ**
Applicants	**:**	**(1) Li Jing (Apartment 103)** **(2) Yang Xiao (Apartment 203)** **(3) Nigel Harris (Apartment 301)** **(4) Divine Heritage Limited (Apartment 302)** **(5) Nick Chism and Debbie Chism (Apartment 303)** **(6) Hingwan Cheung (Apartment 403)** **(7) Albert Abutaliev and Regina Arsentyeva (Apartment 601)** **(8) Lucia Granozio (Apartment 602)** **(9) Judy Chun (Apartment 603)** **(10) Jimmy Hidayat under a Power of Attorney for Julian Alexander (Apartment 701)** **(11) Yu-Yu Lin (Apartment 702)** **(12) Khalid Al Jassim (Apartment 703)** **(13) Raymond Gubbay CBE (Penthouse)**
Representative	**:**	**David Sawtell (Counsel) instructed by Edwin Coe LLP**
Respondent	**:**	**Avon Ground Rents Limited**
Representative	**:**	**Robert Bowker (Counsel) instructed by Scott Cohen**
Type of application	**:**	**For a remediation order under section 123 of the Building Safety Act 2022**
Tribunal	**:**	**Robert Latham** **John Stead BSc (Hons) MSc (H-W)**
Dates and Venue of Hearing	**:**	**30 September, 1 and 2 October 2024 at 10 Alfred Place, London, WC1E 7LR**
Date of Decision	**:**	**18 November 2024**

DECISION

Summary of the Tribunal's Decisions:

(i) The Tribunal makes a remediation order in respect of 8 Artillery Row, London, SW1P 1RZ in the terms of the Order that accompanies this decision.

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

(iii) The Tribunal determines that the Respondent shall pay the Applicants £300 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicants.

(The Tribunal refers to documents in the following bundles: (i) the main bundle (p.1-1365); (ii) the ancillary bundle (p.1366-1835); (iii) the supplementary bundle (p.1836-1944); (iv) email chain 2022 (prefixed by "EC1.___"; and (v) email chain 2024 (prefixed by "EC2.__").

Introduction

1. This is an application for a remediation order under section 123 of the Building Safety Act 2022 ("**the BSA**") in respect of 8 Artillery Row, London, SW1P 1RZ ("**the Building**"). The Applicants are leaseholders of 13 of the 22 apartments in the Building. The Respondent is the freeholder/landlord.

2. The Building had been used for offices. In 2015, it was reconstructed to create retail units on the ground floor and 22 apartments on the upper floors. In 2017, the Respondent acquired the freehold from Victoria Holdings Limited. The Building has been managed by Y&Y Management Limited ("**Y&Y**"), a company closely associated with the Respondent.

3. Part 5 of the BSA deals with "Other Provision about Safety, Standards etc" and, within Part 5, sections 116 to 125 deal with the "Remediation of certain defects". Schedule 8 of the BSA is concerned with "Remediation costs under Qualifying Leases etc" and contains leaseholder protections in respect of service charge costs arising from certain remediation works. Section 123 of the BSA provides for applications to be made to the Tribunal for a Remediation Order in respect of relevant defects in a relevant building. Section 120 contains definitions and defines a "relevant defect" by reference to a "building safety risk". The relevant

provisions are set out in full later in this Decision.

The Application

4. On 28 February 2024 (at p.6-24), the Applicants issued their application for a remediation order. They were unrepresented at the time. Their concern was that the EWS1 rating for the Building was B2. This was based on an assessment that the primary materials of the external walls are considered not to be of limited combustibility as defined within BS 9991:2015 as (i) Phenol formaldehyde (Phenolic) (wall type 3) was found to be combustible; (ii) Polystyrene (wall type 1) was found to be both combustible, flammable and produced droplets of molten polymer; (iii) Intrusive investigation and survey established inconsistencies with fire cavity barriers behind the facing brickwork (wall type 3). It was therefore clear that the potential risk for unseen fire spread through an extensive void, breaching compartment lines might be possible; (iv) the Massaranduba timber decking installed over a treated pine subframe to the inset balconies. They stated that they had issued the application as it was "imperative that the freeholder immediately commence the removal and replacement of problematic materials, adhering to the legislative mandates to seek funding through the established channels without causing undue delays or placing leaseholders in harm's way". They sought a remediation order requiring the Respondent to commence works within four months and complete the same by 30 November 2025.

5. On 1 March 2024 (at p.71-74), Judge Martynski issued Preliminary Directions. The Respondent was directed to provide a brief Statement of Case addressing the following issues: (i) Whether the building is at least 11 metres high, or has at least 5 storeys (and, if so, whether it is a "relevant building" as defined by section 117 of the Act); (ii) Whether the leases are qualifying leases, and the parties are relevant landlords and relevant tenants within the meaning of the Act (sections 119 to 123); (iii) Whether the works said to be necessary are in respect of relevant measures and/or defects (section 120) and, if so, whether the respondent as relevant landlord is responsible for the works (section 123); and (iv) Whether the scope of the orders sought by the Applicants is accepted. The application was set down for a Case Management Hearing ("**CMH**").

6. On 9 April 2024 (at p.75-79), Judge Martynski held a CMH. The Applicants appeared in person. Mr Bowker (Counsel) appeared for the Respondent. The Tribunal was informed that (i) a Fire Risk Assessment had been carried out on the building and a report made in or about August 2023. The Applicants had not been sent a copy of this report and it was not made available to the tribunal at the CMH; (ii) no Fire Risk Appraisal of External Wall ("**FRAEW**") assessment had been carried out[1]; and (iii) the Respondent was in the process of making an application to the Building Safety Fund ("**BSF**') for Pre-tender Support

[1] It has now become apparent that the Respondent had failed to instruct their Counsel that a FRAEW report had, in fact, been carried out on 18 October 2022.

("**PTS**") funding. It was anticipated that once funding had been approved, the Building would be inspected (with intrusive investigation, particularly to the brick façades) and a works design and tender drawn up with an application for further funding for the works. A timeline spreadsheet supplied by the Respondent indicated various dates, some of which appeared to contradict others. There were dates in October 2024 for the report and design to be tendered, to be sent to the Building Safety Regulator, but other dates in June 2024 for a contract for works to be entered into, and in September 2025 for a start of the works with a completion date of August 2027, but with other dates suggesting a completion date of August 2026 (but only for first stage works).

7. Judge Martynski set the matter down for a further CMH and directed the Respondent to provide the following: (i) a copy of the Fire Risk Assessment carried out in or about August 2023; (ii) copies of correspondence with, and the application to, the BSF regarding the application for funds in respect of the pre-tender investigations and reports; (iii) The identity of the "responsible person" and the "accountable person". The Judge stated that the Tribunal would consider, if a Remediation Order were to be made, whether the 'relevant defects' could be identified with sufficient precision by the Summer of 2024 and whether a date for completion of remediation could or should, be set with the information likely to be available at that time.

8. On 28 May 2024 (at p.82-86), Judge Martynski held a second CMH. The Applicants again appeared in person, whilst Mr Bowker appeared for the Respondent. Both the Respondent and the Applicants had filed Statements of Case for the CMH (at p.29-32 and p.33-39). The Judge gave Directions for a three day hearing to be held between 30 September and 2 October 2024.

9. By 14 June 2024, the Respondent was directed to serve its Statement of Case which must set out a list of the "relevant defects" in the Building which require remediation in accordance with its duties pursuant to sections 83 to 85 of the BSA. The Respondent filed its Statement of Case, dated 14 June (at p.40-51) with an Addendum, dated 21 June (at p.52-53), both drafted by Counsel. The Respondent's pleaded case is:

> (i) At paragraph 4, the Respondent summarises the "relevant defects" which are based on the Façade Survey Assessment Reports provided by Andrew Gough (Ark Sustainability Limited) on 11 December 2020 and affirmed on 4 May 2021. These reports have been referred to as "**Ark 1**" and "**Ark 2**". Both include the EWS1 determination which have been critical to the Applicants' case. The Respondent accepted that there were the following "relevant defects": (a) the use of phenol formaldehyde in the external walls; (b) the use of polystyrene in the external walls; (c) the inconsistencies with fire cavity barriers behind the facing brickwork in wall type 3; and (d) the use of Massaranduba timber

decking installed over a treated pine subframe to the inset balconies and upper roof terraces.

(ii) The Respondent is a "relevant landlord", but not in respect of the work to the balconies.

(iii) The Building is a "relevant building".

(iv) A Remediation Order should not be made. If an Order is to be made, the dates should reflect the latest programme of works. This should include provision for a variation.

10. By 12 July, the Applicants were directed to file their Statement of Case in response. Their Statement of Case, dated 12 July (at p.54-70) was drafted by David Sawtell (Counsel). His instructing solicitor, Edwin Coe LLP, came on the record as the Applicants' representative when the Statement of Case was served. Their pleaded case is:

(i) The Applicants are dependent on the Respondent for carrying out inspections to the retained parts of the Building and consequently obtaining reports.

(ii) The Respondent is responsible for the "relevant defects" to the balconies.

(iii) There are additional "relevant defects" to the penthouse and plant room.

(iv) The Respondent has afforded itself an overly generous and lengthy period for the procurement and conduct of the remedial works. The works could and should be completed within 12 months of the Tribunal's determination. There has been no reason why the Respondent should have waited until all issues of funding from the BSF are resolved.

(v) The Applicants applied for an order under section 20C of the Landlord and Tenant Act 1985.

11. The Directions made provision for the parties to adduce expert evidence from a fire safety expert or jointly instructed expert. Any such report was to be disclosed to the other party by 31 August 2024. On 31 July (at p.1357), the Respondent wrote to the Applicants suggesting the appointment of a joint expert. On 8 August (at p.1359), the Respondent sent a further letter. The Applicant did not respond to this suggestion.

12. The Directions made provision for the service of witness statements pursuant to which the Respondent served a statement from Mr Adam

Azoulay, dated 12 July 2024 (at p.612-615) and the Applicants have served statements from Mr Kevin Hastings, dated 29 August (at p.616-621) and Mr Raymond Gubbay CBE, dated 29 August (at p.822-883). On 20 September (at p.87), Judge Martynski gave permission for the Respondent to file a second witness statement from Mr Azoulay, but this was to be restricted to the recent developments regarding the proposed works. His comments relating to the Applicants' case could rather be put to their witnesses in cross-examination. Mr Azoulay's second witness statement, amended in the light of the Directions, is dated 23 September (at p.884-886).

Late Developments

13. Judge Martynski had directed the parties to file Skeleton Arguments and any Authorities by 25 September 2023. On 23 September, the Respondent served on the Applicants a FRAEW Report which had been prepared by Mr Stephen McGrill BEng (Hons) (BEFS Ltd), dated 20 September 2024 (at p.1836-1884). This assessment had been prepared following the guidance and methodology set out in PAS 9980:2022. He concluded that the overall risk rating for the building in relation to fire risk associated with the external walls is deemed to be Medium (Low). At this level, there is a tendency to accept risk with little or no remediation required (at p.1944). This would upgrade the EWS1 assessment to B1 (p.1872).

14. On 2 April 2024, the Department of Levelling Up, Housing and Communities ("**DLUHC**") (formerly the Ministry of Housing, Communities and Local Government ("**MHCLG**")), had issued new guidance which applies to applications made to the BSF after 8 April 2024. It does not apply to existing applications. Any new application now requires a FRAEW Report. PAS 9980:2022 ("**PAS 9980**") recommends a risk-based approach to determining whether an existing multistorey, multi-occupied residential building is safe, in terms of external fire spread. External wall assessors should recognise and take account of all the following: (i) the combustibility and fire performance of external wall construction and cladding; (ii) the likelihood of secondary fires; (iii) whether a secondary fire is likely to result in direct harm to occupants or prevent them escaping; (iv) the role of fire and rescue service intervention, its effectiveness, and its limitations; (v) the time it might take for adverse consequences to occur and whether this can be mitigated by, for example, suitable fire safety design; and (vi) the extent and effectiveness of fire safety management for the building.

15. The background to this report is an email from Ms Funmi Folaranmi at the Greater London Authority ("**GLA**"). It arose from the Respondent seeking funding from the BSF in respect of the "relevant defects" to the penthouse which had been raised by the lessee, Mr Gubbay. Ms Folaranmi understood that the penthouse would be ineligible under the Consolidated Advice Note ("**CAN**"). She considered that a FRAEW

would provide a more holistic view of the cladding systems (see [102] below).

16. In his Skeleton Argument, Mr Bowker stated that the FRAEW was not adduced as an expert report, but rather as a critical development that affects fundamentally the case and must be brought to attention of both the Applicants and the Tribunal. He suggested that the Applicants might welcome McGrill's conclusions and choose not to pursue their application.

17. When Mr Sawtell had prepared his Skeleton Argument, he had had little opportunity to consider the first report with his clients. He noted that the report is based on an earlier FRAEW assessment of compartmentation and cavity barriers in a report by John Righiniotis MRICS (Sampas Surveyors), dated 18 October 2022 ("**the Sampas Report**"), which had not been provided to the Applicants and to which the Respondent had made no reference in their Statement of Case.

The Inspection

18. The Tribunal inspected the Building on the first morning of the hearing. The Applicants were represented by Mr Sawtell, Mr James Hibbert (Edwin Coe LLP), Mr Hastings and Mr Gubbay. The Respondent were represented by Mr Bowker and Mr Azoulay. There are retail units on the ground floor and 22 apartments on the upper floors. There are three apartments on floors 1 to 7 and the penthouse on the 8th floor. The layout of each floor is such that Apartment 101 has two bedrooms, 102 has one bedroom and 103 has three bedrooms. Externally, the Tribunal saw the core holes from where samples had been taken.

19. We inspected Apartment 303 which is owned by Mr and Mrs Chism. Mrs Chism was reluctant for the Tribunal to open the door onto the balcony as structural movement has made on door difficult to open.

20. We noted the fire precautions. A fire detector has recently been installed in each flat. This eliminated the need for waking watch. All the apartments have sprinklers which seemed to be original. There is a sounder with a main fire panel in the reception. Out of hours, this rings into a Call Centre. There are also five key holders.

21. We inspected the penthouse apartment on the 8th floor with its roof terrace. Our inspection was important as it highlights the Respondent's fundamental misunderstanding of the layout of the 8th and 9th floors. The penthouse is a three bedroom flat on the 8th floor. Access to the apartment is via a lift which open directly into the flat. To the side of the lift there is the main service riser for the Building. There is also a communal staircase on the opposite side of the lift. All these areas are outside the demise of the penthouse. This is clearly illustrated in the plan

attached to the penthouse lease at p.968.

22. There has been some suggestion that the penthouse is a duplex flat on the 8th and 9th floors (see plan at p.102). Again, this is incorrect. There is extensive glazing around the main living area, the ceiling height extending into the 9th floor. However, the plant room from the Building is on the 9th floor and is located directly above the rooms at the rear of the penthouse. The plant room shares a party wall with the raised ceiling area of the living space.

23. The penthouse has a roof terrace and a balcony. However, the balcony does not extend the whole way round the flat to the areas where the risers, lift shaft and communal staircase are situated. The roof terrace provides egress from water falling on the roof and down small ducts to the wooden surface of the terrace. The decking is so placed as to leave a small opening between each plank for water to drain down onto the membrane below and away via the waste pipes.

24. We inspected the plant room on the 9th floor which is situated directly above part of the penthouse. Kingspan "KoolTherm" insulation was clearly visible without protection on the plant room walls. The arch roof to the plant room was plywood lined which is combustible. The plywood was in a state of decay. It was unclear as to what insulation, if any, has been installed behind it. Any plantroom is an area of potential risk. The Tribunal finds it remarkable that this had not been assessed in the report commissioned by the Respondent. There has been no risk assessment of the carpark in the basement.

The Hearing

25. Mr David Sawtell (Counsel) appeared for the Applicants accompanied by Mr James Hibbert from Edwin Coe LLP. He adduced evidence from Mr Hastings and Mr Gubbay.

26. Mr Robert Bowker (Counsel) appeared for the Respondent. He was instructed by Scott Cohen who did not have a representative at the hearing. He adduced evidence from Mr Azoulay and Mr McGrill (remotely). No evidence was adduced from Watts Group Limited ("Watts") who were appointed on 14 April 2021 to project manage the remedial works.

27. We are grateful to the assistance provided by both Counsel. We are particularly grateful to Mr Bowker who found himself in a difficult position. We readily accept his explanation that when he had drafted the Respondent's Statement of Case (at p.41), he had not been provided with all the relevant reports which the Respondent had obtained. We note that in *Leigham Court Road* (see below), Mr Bowker and Mr Sawtell had both appeared, albeit that on that occasion, Mr Bowker had appeared for

the applicants and Mr Sawtell for the freeholder. Mr Bowker argued some points on which he had taken a contrary position, on instruction, in *Leigham Court Road*.

28. At the beginning of the hearing, we confirmed which lessees were now parties to the application. On 26 September 2024, an application had been made to join three additional lessees.

29. Mr Bowker made an application to adjourn the hearing in the light of the report provided by Mr McGrill. He urged the Tribunal to appoint a single joint expert to review all the existing expert and technical evidence, include the report of Mr McGrill. In particular, the expert should address any relevant defects, particularly in relation to the penthouse and the plant room. Such a report should be rule 19 compliant and be based on an agreed letter of instruction. In the absence of agreement between the parties, this should be settled by the Tribunal.

30. Mr Bowker asked the Tribunal to have regard to the Overriding Objective in rule 3 of Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. He emphasised the issue of proportionality. On 29 January 2024, Watts, the Project Manager, had assessed the cost of the works at £4.3m (see p.527 and p.611). The BSF now favoured the PAS 9980 methodology over the CAN. If any works were required, these would be funded by the BSF. However, Mr McGrill's report questions whether these works are required.

31. Mr Bowker recognised the difficulties that he faced in seeking an adjournment at this late stage. However, he argued that a single joint expert could address the inconsistencies in the current report. The Applicants had not obtained any expert evidence and had rejected the suggestion that a joint expert be appointed. None of the reports before the Tribunal were rule 19 compliant. He recognised that the Applicants had had insufficient time to address Mr McGrill's Report and that the Tribunal would be critical of the conduct of the Respondent. Mr McGrill was not available to give evidence and a remote hearing could not be arranged at short notice. Lessees might welcome a new report if it established that the disruption that would be caused by the current works were not necessary. He concluded by arguing the interests of justice required an adjournment.

32. Mr Sawtell opposed the application. In its pleaded case, the Respondent had conceded that there were relevant defects. The Applicants had been entitled to rely upon the expert evidence that had been obtained by the Respondent. The Respondent could and should have investigate possible relevant defects to the penthouse and plant room. There had been no application to amend its pleased case. Mr Sawtell concluded that Mr McGrill's report was seriously flawed and limited weight should be given to it.

33. Mr Sawtell was particularly concerned by the weight that Mr McGrill had given to the Sampas Report. This was first disclosed to the Applicants on 24 September 2024. The Respondent's Statement of Case (at p.41) purported to list all the reports in the Respondent's possession which refer to fire safety to the in the Building. The Respondent had not provided this report to their Counsel who had drafted this Statement of Case on 14 June. Mr Azoulay stated that the Respondent had not disclosed the Sampas Report as it had not considered it to be relevant.

34. The Tribunal made a preliminary ruling that we would proceed. We arranged a hybrid session so that Mr McGrill could give his evidence remotely. We indicated to the parties that we would decide what weight, if any, to give to Mr McGrill's report. If satisfied that it was in the interests of justice to do so, we would consider the appointment of a joint expert. We also stated that we would keep open the issue whether there were relevant defects to the penthouse and plant room which might be relevant to any Remediation Order. We accepted that it had been raised by the Applicants at a late stage, but this was an issue of which the Respondent had been aware.

35. The Tribunal proceeded to hear evidence from Mr Gubbay and Mr Hastings. Mr Bowker had limited questions for either witness and their evidence stands uncontradicted.

36. Mr Raymond Gubbay CBE is a retired concert promoter and impresario. In 2015, he purchased the Penthouse for £4.8m together with a parking space in the basement on a 999 years lease. He had sold his flat in Covent Garden as he could no longer cope with five flights of stairs. On 24 December 2020, without prior communication or warning, Y&Y served an additional invoice to cover 'waking watch' costs which was to commence immediately. For the first time, Y&Y informed the lessees of the safety concerns over cladding and remediation works. They also advised that the Building had failed to obtain a satisfactory EWS1.

37. Mr Gubbay states that the Respondent initially moved at commendable speed. On 26 April 2021 (at p.1094), Watts PM provided a programme under which the latest start in site was to be 30 September 2021 with practical completion on 18 February 2022.

38. Mr Gubbay suggested that the Respondent's approach changed from 14 February 2022 when the BSA amendments were announced, making the freeholder responsible for the necessary work. Since this point, there has been little to no progress on the works with limited communication from either the Respondent or Y&Y.

39. On 27 June 2022, the day before the relevant provisions of the BSA came into force, Y&Y issued a supplementary invoice for £19,419.70. On examination it appeared to refer solely to sums connected with the cladding and remediation issues which were covered by the BSA. He

instructed Farrer and Co ("**Farrers**") to challenge these charges (at p.1141-1155). He subsequently sent a number of emails himself, one of which is at p.1298. The issue remains unresolved. The Respondent states that it is awaiting a decision of the Upper Tribunal before deciding whether the sums should be refunded.

40. The Respondent has provided a Landlord's Certificate, dated 16 July 2024 (at p.859), which values his apartment at £5,755.148. He believes this to be a significant overvaluation, Savills having valued his flat at £4.5m (at p.1160)

41. Mr Gubbay is aged 78. He has found the uncertainty extremely stressful and has been prescribed medication. He has recently discovered that there are fire safety issues with the curved roof to his apartment. This was pointed out to him by a fire officer. His usual joie de vie has suffered badly from his four-year battle with Y&Y. He is unable to sell his apartment or to plan for his family and six grandchildren.

42. Mr Kevin Hastings has served as Chair of the 8 Artillery Row Residents Association since its inception to the present day. On 12 July 2022 (at p.629), the Tribunal granted a certificate of recognition. Mr Hastings has not been a lessee, but was a tenant at the Building between 16 April 2016 and 19 May 2024. He also suggests that the Respondent has demonstrated a consistent pattern of delays and non-transparency since February 2022. As a result of Mr Hastings' lobbying, on 23 February 2023 (at p.761), the City of Westminster ("**Westminster**") served a Hazard Awareness Notice on the Respondent.

43. Mr Hastings was concerned that, despite receiving substantial funds from the BSF, no substantial progress has been made towards rectifying the cladding issues or addressing the compartmentalisation fire risks in over the past four years. The Respondent's focus appeared to have been on consultancy fees and administrative expenses rather than on taking any concrete steps to ensure the safety of the residents. At the date of the hearing, the Respondent had received £304k (p.1227) from the BSF. However, Azoulay stated that none of this had been paid to either the Respondent or Y&Y. Although Y&Y had submitted their costs assessed at 2% of the project costs (p.1529), these would only be paid if then proposal proceeded.

44. Mr Hastings considered the Statement of Net Worth of £144.4m for the Respondent and its associated companies to be an underestimate. He also believes that the Landlord's Certificates (at p.1334-1351) have overstated the value of the flats. He suggests that this is to increase their contribution for the works. He concludes by describing how the lessees have endured four years of delays and lack of transparency. This has caused the lessees significant emotional and financial stress. Lessees have found themselves trapped in properties that they cannot sell or remortgage due to the EWS1 Rating of "B2". One leaseholder had sold

at a 25% discount on what he paid in 2015. Some lessees are in serious debt because of cladding costs that were added to the service charge. However, with the threat of forfeiture, the lessees have felt compelled to pay these charges.

45. On Day 2, Mr Adam Azoulay gave evidence. He is a Director of Y&Y, the managing agents. He has provided two witness statements. His first witness statement is dated 12 July 2024. He sets out the current situation:

(i) Funding: "The additional pre-tender support has been preliminarily approved and recommended by our liaisons at the Greater London Authority for FAB approval on the 11th July. As soon as the application has been approved, we should be in a position to draw down funds within a couple of weeks. The funds will allow us to proceed with the PCSA with the nominated contractor".

(ii) The works: "We are awaiting the PTS funds to be able to progress with the PCSA via Bell Building Projects Limited. With the delay in the PTS funding, we would now expect Bell Building Projects Limited's PCSA to run until December 2024. We are awaiting a revised programme to be issued by Watts Group Ltd which once received, we will be able to share."

46. At [4] of his witness statement, Mr Azoulay stated that he had been the assigned property manager "at all relevant times". He had to correct this. In 2020, Mr Meir Dove had been the relevant property manager who had instructed the initial reports. Mr Dove retained this responsibility until 27 January 2023 when he had left Y&Y.

47. At [9] of his statement, Mr Azoulay stated that he was the person who had carried out the disclosure exercise on behalf of the Respondent. He had no adequate explanation as to why he had failed to disclose the Sampas Report, dated 18 October 2022, until 24 September 2024. This also caused some professional embarrassment to Mr Bowker. On 21 June 2024, he had drafted the Respondent's Statement of Case (at p.40-53). Table 1 purported to set out in chronological order the reports in the Respondent's possession which refer to fire safety in the Building. There was no reference to the Sampas Report as this had not been disclosed to Counsel. Mr Azoulay's explanation was that it had not been disclosed as he had not considered it to be relevant. The Tribunal is unable to accept this explanation.

48. Mr Azoulay's second statement is dated 23 September 2024. He sets out the background to the decision to commission the further FRAEW Report from Mr McGrill.

49. Mr Sawtell subjected Mr Azoulay to detailed cross-examination. He

established the close relationship between the Respondent and Y&Y, Israel Moskovitz having a controlling interest in both companies. There is also a close relationship between Ballan Associations ("**Ballan**") and BEFS Ltd ("**BEFS**"), Terry Kinch being a director of both companies. He suggested that the reason for the delays was that the Respondent was not willing to commit any of its own resources to the works. He also suggested that there had been a lack of transparency. There had been a number of errors in the various reports which would have been corrected had the lessees been involved. The Tribunal did not find Mr Azoulay to be a satisfactory witness. We found him to be evasive.

50. The most recent letter on funding is a letter, dated 2 September 2023, from the DLUHC (Alistair Watters) (at p.522-534). The Respondent's application for PTS funding had been successful and it had been awarded £42,960, bringing the total PTS to £304,098 for the remediation of the unsafe non-ACM cladding at the Building. The next step was to approve the project for tender. The Respondent should inform the lessees and residents of the outcome of the application. The letter concluded by stating that the BSF had been put in place to ensure public safety. By enabling remediation to happen quickly, it would restore peace of mind and allow residents to get on with their lives. The DLUHC expected work on site to start as soon as possible and to be completed efficiently and safely.

51. On 29 January 2024, Watt provided an update on the remediation works (at p.522-534). The original scope of the works had been designed against the Ark report, dated 4 May 2021. A competitive tender had been run in May 2021. Post-tender investigations, design and pricing went on until mid-2022, when the selected tenderer, Brymor, went into administration. A new tender exercise had been started in November 2023. Bell Building Projects ("**Bell**") had provided the lowest tender in the sum of £4,303,967 (at p.527-528). Bell had specified 13 weeks for mobilisation and 46 weeks for construction.

52. On 22 July 2024 (at p.945), Watt provided their current timeline for the project. This projects that works would not start on site until 1 December 2025 and would then be completed within 11 months.

Issues to be Determined

(i) Issue 1: Whether we should adjourn the hearing in the light of the report provided by Mr McGrill and appoint a single joint expert to review all the existing expert and technical evidence.

(ii) Issue 2: The "relevant defects" conceded by the Respondent.

(iii) Issue 3: Any "relevant defects" in respect of the penthouse and plant room.

(iv) Issue 4: Is the Respondent the "relevant person" in respect of the balconies?

(v) Issue 5: Should the Tribunal make a Remediation Order?

(vi) Issue 6: The Terms of the Remediation Order.

(vi) Issue 7: Consequential Orders

The Statutory Provisions

53. Section 123 of the BSA provides:

(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.

54. 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.

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

> (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."

Background

56. In 2015, the Building was reconstructed to create retail units on the ground floor and 22 apartments on the upper floors. In 2017, the Respondent acquired the freehold from Victoria Holdings Limited.

57. In January 2020, in the aftermath of the Grenfell fire, the MCHLG issued "Advice for Building Owners of Multi-storey Multi-occupied Residential Buildings". In November 2020, the MCHLG issued Supplementary Advice. These constitute the CAN. On 11 March 2021, the Government established the BSF.

58. In 2020, Mr Dove commissioned three reports which have provided the foundations for the Respondent's Statement of Case. The three authors are associates of Ark Sustainability Ltd. The composite report has been referred to as the "**Ark 1**".

59. On 28 September 2020 (at p.126-145), Mr Sebastian Luszczyk MSc MCABE provided an "External Façade Investigation and Survey (Intrusive)". The objective of the survey was (i) to recover samples from the facade which would then be sent for testing at a UKAS laboratory to determine their composition as per RAMS; (ii) to conduct further intrusive investigation using a video borescope and gather photographic and contemporaneous notes; and (iii) to gather sufficient information to determine the composition of the facade which would then be used along with the laboratory test results to ascertain the correct category of EWS1 to issue. The Survey Notes confirm that "(i) Samples were taken to verify composition and fire performance of used materials. Composition of walls between 2nd and 7th floor is consistent with varied width of the cavity. It was noted that depth of the cavity varies between 60 and 130mm which indicates very poor workmanship. (ii) Samples 2-9 were taken at the slab height, mostly under the brick course with weeping holes. Cavity barriers were spotted only by the samples 5 and 9 in the boundary between two different compositions of external walls".

60. On 10 December 2020 (at p.147-171), Dr Brian Ash CEng provided a report on the "External Wall/Cladding System". The scope of the report was to determine whether the external wall/cladding systems used on the Building satisfied CAN which addressed the measures building owners should take to review ACM and other cladding systems to assess and assure their fire safety, and the potential risks to life safety for residents, people in the proximity of the building and fire fighters from external fire spread. This determination focused on external wall/cladding and did not address other fire safety issues of the MHCLG advice, such as fire doors, compartmentation and smoke ventilation. He concluded that from the results of the intrusive survey, the lack of cavity barriers/fire stopping to the voids containing combustible insulation presented the greatest risk of external fire spread. He noted that the thickness/composition of the internal structure was unknown.

61. In his assessment of fire risk, Dr Ash concluded that "The use of phenol

formaldehyde insulation (phenolic) or polystyrene insulation in Type 1 and 3 systems and the lack of adequate cavity barriers/firestopping negate the assumption of adequate compartmentation and increase the risk of fire spread beyond the flat of origin". He concluded (at p.157) that the risk to life from fire was moderate.

62. On 11 December 2020, Mr Andrew Gough BSc (Hons) provided a Façade Survey Assessment Report (at p.88-171). Mr Gough is a Façade Fire Safety Engineer and his conclusions are informed by the reports of Mr Luszeczk and Dr Ash. Mr Gough had prepared a draft report on 24 November which he revised in the light of Dr Ash's Report. The composite report was commissioned to provide an analysis and evaluation of the current cladding systems employed at the Building and determine compliance with the MHCLG guidance as well as provide an EWS1 form for the client to use in respect of any financing arrangements for the Building.

63. The EWS1 (at p.162-3), dated 15 December 2020, and certified by Dr Ash, gives an assessment of "B2". This assessment applies where there is combustible materials present in the external wall which do not achieve an adequate standard of safety. The physical survey of the Building highlighted a number of areas of concern due to the absence of, and inconsistencies with cavity barriers and the Phenol formaldehyde (Phenolic) and polystyrene insulants used within the facade. The EWS1 Assessment of B2 was assessed on the basis of the following (1.94):

> "The primary materials of the external walls are considered not to be of limited combustibility as defined within BS 9991:2015 as the:
>
> (i) Phenol formaldehyde (Phenolic) was found to be combustible and the Polystyrene was found to be both combustible and flammable.
>
> (ii) The intrusive investigation and survey established inconsistencies with fire cavity barriers behind the facing brickwork (wall type 3). It is therefore clear that the potential risk for unseen fire spread through an extensive void, breaching compartment lines is possible.
>
> (iii) The Massaranduba timber decking installed over a treated pine subframe to the inset balconies and upper roof terraces is considered to be both combustible and flammable.
>
> (iv) It has not been possible to establish the construction arrangement of the inner wall structure (wall type 3)."

64. The Tribunal highlights that these are the "relevant defects" which the Applicants admit in their Statement of Case (see [9] above). An important issue for this Tribunal is whether any of the developments over the subsequent four years have brought these findings into

question. Mr Sawtell contends that they have not. Indeed, they have formed the basis of the application to the BSF and the allocation of £304k of public funds.

65. The Applicants have two criticisms of these reports. First, the experts did not examine the exterior structure of the penthouse and the plantroom on the 8th and 9th floors. We find this surprising as the January 2020 CAN Advice Note (at [1.6]) "strongly advise(d) building owners to consider the risks urged building owners to consider the risks of **any** external wall system and fire doors in their risk assessments".

66. Secondly, the Applicants challenge the accuracy of the floor plan at 2.2.2. of the Report (at p.102) which is extracted from a "Build, Fire Strategy Report, May 2015". This wrongly suggests that the penthouse has a duplex design and that there is a spiral staircase. These errors were quite apparent to us on our inspection. These errors could have been corrected had the Respondent shared the report with Mr Gubbay. This misleading plan seems to explain why the proposed remedial works do not address any "relevant defects" in the penthouse and plantroom on the 8th and 9th floors. We address this under Issue 3.

67. At 17.00 on 24 December 2020 (at EC2.10), Y&Y alerted the Applicants to the fire safety issues. A waking watch service, 24 hours, 7 days a week, was to be put in place immediately. Unsurprisingly, this caused considerable concern to the residents. It seems that Mr Dove had had a meeting with the London Fire Brigade on 23 December 2020 who had insisted on either the installation of a full fire alarm system or a waking watch. The Respondent installed the fire alarm system in December 2021 at a cost of £32k. The Applicants note that there would have been substantial savings had the fire alarm system been installed more promptly. The cost of the waking watch for 12 months of some £200k has been charged to the lessees.

68. On 29 January 2021, Mr Dove held a Teams meeting with the lessees. On 2 February (at p.1366), the GLA informed Mr Dove that that the Building had passed the registration phase and the Respondent could now proceed to apply to the BSF. In February (at p.1378), Mr Dove made a PTS application to the BSF. On 18 March, the Respondent made a grant application for the fire alarm system for which an award of £30k was made

69. On 14 April 2021 (see p.525), the Respondent appointed Watts to provide project management and cost management services in relation to scoping, co-ordination of design, and procurement of the fire safety improvement works to the external façade only, via grant funding by the BSF. The scope of the works does not extend beyond the external wall as that does not come under the BSF's eligibility for funding. On 26 April (at p.1094), Watts produced a timeline. Works were to start on site on 2 September 2021 and be completed on 18 February 2022.

70. On 26 April 2021 (at p.211-227), Mr Max McCarthy (Ark Sustainability

Limited) provided a further report, having been granted access to Flats 301 and 501. The objective of his survey was to provide a clear understanding of the Type 3 (Red Brick Cladding) External Wall System which may be used by ASL to inform a determination for the purposes of an EWS1 Form or other analysis. Mr McCarthy concluded that the wall composition would appear to be consistent with the upper storeys being constructed from a steel structural frame with metal stud work infill panels. This composition was consistent with both sites under survey and would also provide some confirmation of the previous survey results.

71. On 4 May 2021 (at p.173-241), Mr Ash provided an updated report (the Ark 2 report). The EWS1 Assessment of B2 was again assessed on the basis of the following (p.179):

> "The primary materials of the external walls are considered not to be of limited combustibility as defined within BS 9991:2015 as the:
>
> (i) Phenol formaldehyde (Phenolic) (wall type 3) was found to be combustible.
>
> (ii) Polystyrene (wall type 1) was found to be both combustible, flammable and produced droplets of molten polymer.
>
> (iii) Intrusive investigation and survey established inconsistencies with fire cavity barriers behind the facing brickwork (wall type 3). It is therefore clear that the potential risk for unseen fire spread through an extensive void, breaching compartment lines could be possible.
>
> (iv) The Massaranduba timber decking installed over a treated pine subframe to the inset balconies and upper roof terraces is considered to be both combustible and flammable."

72. Mr Bowker suggested that there was a significant change from Mr Ash's previous report in that he had changed the language in (iii) above from "is possible" to "could be possible". He suggested that this change had been made because of the findings by Mr McCarthy. We do not consider that this change was significant and there is no suggestion in the report that this change of language was considered to be significant. The significant change was that while in December 2020, it had not been possible to establish the construction arrangement of the inner wall structure (wall type 3), Mr Ash was now able to make a positive finding that there was Phenol formaldehyde (Phenolic). The assessment was therefore made with a greater degree of certainty of the relevant defects.

73. On 7 May 2021 (at p.243-244), Dr Ash issued a second EWS1 certifying his previous assessment of "B2".

74. At about this time, the Respondent appointed AFL Architects to draw up detailed plans for the remedial works. These are at p.499-521. The

Tribunal notes that the architects did not inspect the Building or commission any scale plans. They rather relied upon information provided by the client and planning application drawings. These did not accurately record the lay out of the penthouse and plant room on the 8th and 9th floors.

75. The AFL plans have been drawn up based on the "Ark Facade Assessment Report" (see p.499). The proposed works contemplated the replacement of the decking/supports on the balconies with compliant material (see the 9 Notes on the "loggia" at p.499). A decision was taken to exclude the penthouse at levels 8 and 9 from the scope of the works (see 510). The apartments were to be occupied during the remedial works (p.517). The plans record (i) 18 May 2021: issue for tender; (ii) 30 November 2021: issue for Stage 4 (by which stage there would have been detailed designs); (iii) 14 December 2022: re-issued (the Tribunal was not told the reason for this); and (iv) 4 October 2023: "Building regs amendments add". This was the latest iteration of the plans. The Respondent adduced no evidence from AFL Architects to explain the remedial works that are planned.

76. On 24 May 2021 (at p.248-437), Watts produced the Employer's Requirement for Cladding Remediation Project. In June (p.656), tenders were submitted. On 15 June (p.1419), a PTS agreement was submitted to the BSF.

77. On 25 June 2021 (p.438-448), Hydrock provided a Technical Design Note. Section 3 of the Report addresses the penthouse (emphasis added):

> "It has been confirmed that the Penthouse is a single dwelling and as such it is not considered to contribute to apartment to apartment fire spread (subject to further survey to confirm provision of connections to the stair core). Notwithstanding, it is believed that the external wall build up of the penthouse contains combustible materials. If these are not removed the best outcome that could be achieved is a B1. Note: this is subject to further review as this is not stated within the Ark report."

The Hydrock Report alerted the Respondent to the need to review the position of the penthouse. However, it would seem that no steps were taken to do this. Any such inspection would have alerted the experts the correct lay out of the penthouse and plant room on the 8th and 9th floors.

78. On 6 July 2021, Mr Dove issued a Section 20 notice in respect of the proposed works. The Respondent subsequently decided not to proceed with this. In December 2021, the fire alarm system was installed. On 24 December, the waking watch ceased. On 4 January 2022 (at p.687693), Mr Gubbay complained of the unnecessary costs of the waking watch that had been incurred (some £100k) by the delay in installing the fire alarm system.

79. On 10 January 2022 (P.1482), the GLA wrote to Mr Dove seeking an

update. It advised that "the best would be for the applicant to proceed at pace to sign the GFA". On 10 February (p.1488), Watts was pressing the GLA to approve funding of £150k for investigative works. Mr Dove had been told that the PTS was capped at £110k. It is apparent that the Respondent was not willing to fund the shortfall. In March (p.449-457), Brymor provided a Schedule of Works.

80. On 15 June 2022 (at p.1132), the Respondent issued service charge demands totalling £50k for the waking watch, and on 22 June 2022 (at p.1135) an interim charge for fire safety professional fees of £107.5k. On 28 June 2022, the relevant provisions of the BSA came into force. Mr Gubbay instructed Farrers to challenge these charges. On 8 July 2022, Brymor went into administration. In July, following an application to this tribunal, the Respondent agreed to recognise the Residents Association. On 12 October (at p.1141), Farrers wrote to the Respondent asking them to confirm when the works would commence and their duration. In the absence of the Respondent committing themselves to an acceptable timetable, Mr Gubbay would consider an application for a remediation order. On 24 November (at p.1152), Farrers sent a further letter noting that they had not received a substantive reply.

81. On 18 October 2022 (at p.1885-1937), the Respondent obtained the Sampas Report prepared by Mr Righiniotis. Mr Azoulay was unable to explain why this report had been requested. He stated that it was not disclosed to the Applicants as he had not considered it to be relevant. Despite this, Mr Sawtell noted that the Respondent had sought to charge the lessees £3,500 for this report (see p.864).

82. Mr Righiniotis concluded (at [6.1]):

> "On the basis of the evidence provided and the site visit undertaken on 18th October 2022, when assessed for risk to life in accordance with PAS 9980, the external wall systems present a low risk to occupants. This was due to the following: (i) The EW01 wall system was judged as a system and due to the satisfactory level of encapsulation of the insulation was considered to provide adequate protection against fire propagation. (ii) There is adequate cavity barrier protection around windows and vertically between apartments. (iii) There is limited potential for vertical fire spread between balconies due to the low measure of combustible mass, distance, and the fire retarding properties of the Massaranduba decking used. In summary, the wall system on the Building was considered satisfactory".

83. Mr Righiniotis recommended (at [7]) that Y&Y took the following action in relation to this report: (i) inform the leaseholders on a continuing basis to remove combustible materials and large amounts of storage from their balconies and verandas to avoid unnecessary build-up of combustible materials such as wooden furniture; and (ii) furniture should be replaced by non-combustible items and all ignition sources (such as smoking, BBQ, heaters) should be removed from balconies; (iii)

new tenants or leaseholders have to be informed on this practice as a rule.

84. Mr Righiniotis concluded that the external fire spread was within normal expectations therefore the overall building rating risk was considered to be low. He assessed a EWS1 Determination of "A2". Both Counsel accepted that this assessment was irrational given the undisputed evidence that there were combustible materials present in the external walls.

85. The Respondent immediately recognised the problems to this report. On 2 December 2022 (at EC1.4), Mr Dove sent the report to Terry Kinch (Ballan Associates) for his opinion. On 7 December (at EC2.2), Mr Kinch responded. His reply was copied to Mr Azoulay and Richard Veti (BEFS). He stated:

> "Further to my email earlier this morning I have discussed the report provided in more detail with Richard and can report as follows: We have now completed a brief review of the report provided for 8 Artillery Road as requested. On informal review we are concerned with the assumptions made and survey/inspection process undertaken without additional supporting information that is not included in the report. While the building does generally appear to be of low risk type we would not accept the report as written. Our advise (sic) would be to seek further information to demonstrate that the assumptions made are in fact correct. In particular detail of the insulation type within the wall sections and the exact materials used in the insulated facade panels. This information may be demonstrated without intrusive investigation if suitable information is made available from the writer or in 'As Built' records."

86. On 17 January 2023 (at EC.2), Mr Dove sent further documentation to Mr Kinch and asked for his further opinion. The email was copied to Mr Azoulay, Mr Veti and the Respondent (Mr Moskovitz). We do not know what further documentation was provided. On 27 January, Mr Dove left Y&Y and Mr Azoulay assumed responsibility for the Building. Thereafter, this report was not taken further until September 2024. Mr Sawtell argued that the Tribunal should give no weight to this report. Mr Bowker accepted that the report was unreliable both as a PAS 9980 report and in respect of its EWS1 assessment. However, he sought to rely on its factual findings in respect of the external wall construction.

87. On 23 January 2023 (at p.1524), Watts (Ed Resek) provided an update to Mr Azoulay. He noted that Watts were still owed two unpaid invoices from early Summer 2022. The Respondent (Mr Gurvitz) had made it clear that he did not dispute the validity of the invoices, but did not want to pay the invoices, preferring to wait for the BSF to release further PTS funding. Watts remained committed to the project but were uncomfortable about committing more time and resources to the project until these debts were cleared.

88. On 28 February 2023 (at p.761), Westminster issued a hazard awareness notice against the Respondent pursuant to section 29 of the Housing Act 2004. The Council was satisfied that a Category 2 hazard existed in respect of the fire safety. The Council advised the Respondent of the existence of the hazards. Whilst not requiring the Respondent to carry out any works, the Council considered that the works specified in the Notice to be practical and appropriate remedial action to be taken in relation to the hazard. The recommended remedial action included the following:

> "1. Undertake all necessary works to adequately mitigate or remove hazard arising from the presence of non-fire resisting external wall system cladding and insulation material. Replace in accordance with current Building Regulations with material complying with Euro Class A1 or Euro Class A2-s1, d0. Ensure associated cavity barriers and fire stopping has been provided as required by Building Regulations. Provide documentary evidence that replacements to the external wall systems (cladding and insulation) fully comply with building regulation requirements at all stages of the construction and upon completion of the works.
>
> 2. To the balconies replace any combustible material used in balcony construction, so that they do not assist fire spread on the external wall and to meet the intention of building regulations requirements. Replace any combustible material with one that is non-combustible (Euro Class A1 or A2-s1, d0). Provide documentary evidence that replacements to/within the balconies fully comply with building regulation requirements at all stages of the construction and upon completion of the works."

89. On 20 March 2023 (at p.458-498), Y&Y obtained a Fire Risk Assessment from Safety-Reports Ltd. The report (at p.477) noted the problems in compartmentalisation and fire stopping, including in the plant room.

90. On 27 September 2023 (at p.1227-1228), the DLUHC approved the Respondent's application for additional PTS funding in the sum of £42,960. This brought the total PTS to £304,098.

91. On 15 August and 4 October 2023, AFL Architects made various revisions to their drawings which are at p.499-521. As noted (at [73] above), a decision had been made to exclude the penthouse at levels 8 and 9 from the scope of the works

92. On 16 November 2023, Y&Y held a meeting with residents. The meeting was recorded and there is a transcript at p.1229-1279. The residents expressed their frustrations at the delays that had occurred. They suggested that this was because the Respondent was not willing to provide funding for the works. Mr Hastings (at p.1241) suggested that if there was no movement, the lessees would have no option but to apply to this tribunal for a remediation order. On 31 December 2023, Mr Gubbay complained to Mr Azoulay about the sum of £16,399.55 which

had been brought forward in his service charge account in respect of fire safety works. On 19 January 2024 (at p.1302), Mr Azoulay responded stating that the Respondent was awaiting a decision of the Upper Tribunal as to whether these sums were recoverable. He concluded by stating:

> "With regards to the remedial works, we are continuing with the application on this project and tendering process with both the project managers and the government department to ensure we are fully compliant in the quickest way possible."

93. On 29 January 2024 (at p.522-534), Watts provided an update for the Respondent. Watts explained (at p.525) that the scope of the works was developed against the intrusive survey report completed by Ark Sustainability Limited in May 2021. After Brymor had gone into administration in July 2022, a new tendering exercise was started in November 2023. Bell Building Projects ("**Bell**") had provided the lowest tender in the sum of £4,303,967 (p.527). Bell's programme (at p.529) was 13 weeks for "mobilisation" and 46 weeks for "construction".

94. Watts summarise the "wall types/risk areas" at p.525. This is based on the Ark 2 Report (see [71] above). It was noted that cavity barriers were required "at compartment line surrounding penthouse". However, as the penthouse was a "single dwelling" it was not considered to contribute to apartment-apartment fire spread. As the Building was largely of brick construction, a PAS 9980 was not required.

95. On 28 February 2024 (p.6-24), the Applicants issued their application for a remediation order. On 1 March 2024 (p.71-74), the Tribunal issued Preliminary Directions.

96. On 6 March 2024 (at p.610), Watts (Ed Resek) produced a revised timeline. Considerable delays were built in whilst funding was secured, the designs were finalised and approved and the works contract was agreed. Works were to start on 22 September 2025 and be completed by 21 August 2026. On 6 March (p.1795), Watts (Ed Resek) informed the GLA (Funmi Folaranmi) and Mr Azoulay that he had made the signing of the works contract conditional not only on passing FAB but also on securing BSR Full Plans Approval. On 18 March (at p.1799), the GLA sought clarification as to whether the revised programme had been shared with the Residents Association and whether residents would need to be decanted. The Respondent does not seem to have addressed the issue as to whether decanting will be required. On 20 March (at p.1801), Mr Azoulay shared the revised programme with the Residents Association.

97. On 14 June 2024 (p.40-51), the Respondent filed their Statement of Case. On 21 June (p.52-53), the Respondent filed an Addendum. On 12 July (p.54-70), the Applicants filed their Statement of Case and Edwin Coe LLP came on the record as their representative.

98. On 12 July 2024 (at p.54-70), the Applicants filed their Statement of

Case. They challenged the Respondent's position in respect of the penthouse that combustible materials could be retained as there was no communication with other dwellings. They argued that there was the potential for the spread of fire to and from the penthouse (including its external surface). In particular: (i) the penthouse is the top habitable floor of the Building; (ii) the penthouse is fully connected to the rest of the Building; (iii) the penthouse shares a lift opening directly into the apartment; (iv) the penthouse also shares a riser and staircase; (v) the concrete floor to the penthouse has openings in it to allow for pipework and cabling to come from the rest of the Building; (vi) the roof terrace to the penthouse has water ducts allowing for drainage to the rest of the Building; (vii) the decking to the roof terrace has gaps between the individual pieces of decking; and (viii) the penthouse is not the last floor in the Building. Above part of the single floor penthouse is the plantroom together with other essential equipment. There is therefore, a potential risk of the spread of fire between the penthouse and this part of the Building and vice versa. The Applicants identified the following "relevant defects" in respect of the penthouse flat. The external wall build-up of the penthouse contains combustible materials which are relevant defects. The inside of the roof has been lined with combustible plywood. The filling is unknown but is believed to be combustible phenolic foam.

99. On 17 July 2024 (p.888), Westminster (Mark Hickinbotham) sought an update from Mr Azoulay. On 22 July 2024 (at p.945), Watts (Ed Resek) produced the most current timeline. Works are now scheduled to start on 1 December 2025 and be completed by 30 October 2026.

100. On 24 July 2024, the GLA (Funmi Folaranmi) raised the issue of Mr Gubbay's penthouse flat with both Watts (Ed Resek) and Mr Azoulay. Mr Resek's response (at p.947) was that his understanding was that the penthouse spanned the "entire level/floorplate". He stated: "Given that the penthouse flat/entire floor is a single dwelling. It does not meet the definition of/requirement for fire compartment lines" and was therefore ineligible for funding under the DLUHC/BSF criteria.

101. The problem of Mr Resek's response was it was based on a fundamental misunderstanding of the layout of the 8th and 9th floors of the Building. We discuss this at [21] to [22] above). The Applicants had provided an accurate description of the penthouse flat at [39] of their Statement of Case, dated 12 July 2024 (at p.63).

102. As a result of this error, on 7 August (at p.951), Ms Folaranmi, advised the Respondent to obtain a FRAEW regarding the roof of the penthouse. This was based on advice from the MHCLG. The error was aggravated by the reliance that the MCCLG placed on the inaccurate plan which had been included in the Ark 1 report (see [65] above). The FRAEW assessment was intended to provide "a more holistic view of the cladding systems". This email led to the Respondent obtaining the report from Mr McGrill.

103. Mr Azoulay exhibited this correspondence to his second witness

statement. On 18 September (at p.1364), Edwin Coe LLP wrote to Scott Cohen pointing out Mr Resek's error. The Respondent adduced no evidence to explain how this error arose, as a result of which the Respondent has failed to identify a "relevant defect" affecting the Building.

Issue 1: The evidence of Stephen McGrill

104. The first issue that we must consider is whether we should adjourn the hearing in the light of the report provided by Mr McGrill and appoint a single joint expert to review all the existing expert and technical evidence. We discuss the respective arguments of Counsel at [29] – [34] above. We made a preliminary ruling that we would proceed, but would consider whether in the light of all the evidence we should seek further evidence from a joint expert. The issue is whether Mr McGrill's report raises a real concern in our minds that there may be no defects that require any improvements or alterations to the Building's fire safety design.

105. We are satisfied that we should determine this case on the Statements of Case filed by the parties. We were not persuaded by Mr McGrill's evidence that we should revisit the four "relevant defects" identified in the two Ark Reports. Mr Sawtell subjected Mr McGrill to detailed cross-examination. He identified a number of weaknesses in Mr Mc Grill's Report. Indeed, Mr McGrill conceded that he would need to revisit his Risk Items in his Table 13 (at p.1862) in the light of a number of points that he conceded.

106. Mr McGrill's Report is at p.1836-1844. The Tribunal found the report to be unsatisfactory for a number of reasons. The Respondent failed to give to give Mr McGrill adequate instructions on the purpose of the report. On 30 September 2024 (at EC2.1), BEFS (Richard Veti) had requested details of "the tribunal context so that we can address this in the report". This was not provided.

107. Mr McGrill lists the documents that he reviewed at p.1881. His starting point was the Sampas Report which had been obtained in 2022, even though the Respondent had accepted that this report was seriously flawed and had not sought to rely on it in these proceedings.

108. Mr McGrill was not provided with a copy of the of the External Façade Investigation by Mr Luszczyk (see [59] above). Mr McGrill conceded that this report, which had identified "very negligent workmanship" (at p.139) was highly relevant. Mr McGrill accepted that he did not have Mr Gough's May 2021 Report. He had seen Mr Gough's earlier report. However, the later report had been updated to take account of the inspection of Flats 301 and 501 which have been carried out on 26 April 2021.

109. The context of Mr McGrill's report was that the Respondent had accepted that there were four "relevant defects" in their Statement of Case. The

outstanding issue was whether there were additional "relevant defects" in respect of the penthouse. His report, at p.1846, includes the same inaccurate plan of 8th and 9th floors (see [66] above).

110. Mr McGrill stated (at p.1837), that the background to his instructions was that all the reports obtained by the Respondent provided "slightly contradictory evidence". This is not correct. For the last four years, both the Respondent and the BSF have been working on the basis of the Ark 1 (11 December 2020) and Ark 2 (4 May 2021) reports. The only contradictory report is the discredited Sampas Report upon which no one has sought to rely. The Ark Reports assessed an EWS1 rating of "B2". Mr McGrill rather suggested a B1 Rating (at p.1839). The additional assessment of the penthouse had the potential to increase the safety risk.

111. One of the problems is that Mr McGrill adopted a different methodology, namely FRAEW rather than CAN. The application to the BSF, for which public funding of £304k has been expended for PTS, was made on a CAN Assessment. This was the correct methodology for an application made prior to April 2024. The only reason that the GLA suggested a FRAEW Assessment was the belief that the penthouse fell outside the scope of CAN as it was a single dwelling which would not contribute to apartment-to-apartment fire spread. We are satisfied that this was based on a misunderstanding both of the design of the Building and the scope of any CAN Assessment (see [65] above).

112. Against the background of his understanding that the relevant reports had been contradictory, Mr McGrill sought to carry out a FRAEW assessment following the PAS 9980 methodology. The Tribunal has a number of concerns about the approach that he adopted. Mr McGrill did not visit the Building himself. He rather relied on information fed back to him from BEFS colleagues. He had regard to an inaccurate plan of the 8th and 9th floors (at p.1846).

113. Mr McGrill (at p.1863) summarises the relevant risk factors, which are either Negative, Neutral, or Positive. The number of each are counted to a total which arrives at an overall risk of Medium (Low) for wall types WS-1, WS-2 and WS-3. The Tribunal identified possible mistakes or errors in these Risk Factor categories. One possible error is the "Cavities" section of WS-2 states the risk is Positive for the "absence of cavity barriers". The Tribunal queried this point (and others as follows) with Mr McGrill, and suggested that this should be Negative or Neutral at best. Mr McGrill conceded this might be the case. This raises further concerns that there may be numerous other incorrectly classified risk factors.

114. The risk factor for Balconies is noted as Neutral for WS-1; as containing Timber (or other combustible) material on steel plate or concrete. The Tribunal queries this risk factor and suggests that could be Negative. The risk factor for Balconies in WS-3 is noted as Positive. WS-03 is the Penthouse wall/roof. The tribunal query this risk factor and suggest it could be Negative.

115. The risk factor for the single lift present in Artillery row is noted as Neutral as there is "a suitable firefighting lift present". The Tribunal queried this assessment and asked how the lift was confirmed as a firefighting lift. Mr McGrill had no other evidence to support his judgment than "he was told it was such a lift". The essential features for firefighting lifts are numerous, but include special controls for use by firefighters and dual independent power supplies. The Tribunal did not observe either of these provisions, and suggest that the lift is not a firefighting lift. The risk factor should therefore could be Negative.

116. The Tribunal is satisfied that if the risk factors are revised on a detailed review, the overall assessment is likely to change from Medium (low), to either Medium (high) or even High.

117. The Tribunal has carefully assessed Mr McGrill's report and is satisfied that that there are a number of technical and quantitative flaws. The report does not cause the Tribunal to have any concerns about the veracity of the Ark 1 and Ark 2 reports which have informed the Respondent's Statement of Case. There appears to be no dispute over the presence of insulation of limited combustibility in the construction of main walls. The presence of these materials results in "relevant defects" which have been approved for remedial action by the BSF. We are satisfied that the Ark EWS1 assessment of "B2" is robust. The Respondent should be working towards achieving an assessment of "A1".

Issue 2: The "Relevant Defects" conceded by the Respondent

118. In their Statement of Case, the Respondent (at p.42) conceded that there are the following "relevant defects" based upon the Ark Reports:

(a) the use of phenol formaldehyde in the external walls;

(b) the use of polystyrene in the external walls;

(c) the inconsistencies with fire cavity barriers behind the facing brickwork in wall type 3; and

(d) the use of Massaranduba timber decking installed over a treated pine subframe to the inset balconies and upper roof terraces.

119. In their Statement of Case (at p.62), the Applicants admit and aver that each of these items are relevant defects. The Tribunal notes that these defects are taken from the Ark 1 report (4 May 2021) at p.179. This is informed by Mr McCarthy's inspection of Flats 301 and 501 which he carried out on 26 April 2021. Since these relevant defects are conceded, there is no need for the Tribunal to discuss these further.

Issue 3: Any "relevant defects" in respect of the penthouse and plant room

120. The Applicants seek to rely on a further "relevant defect" to the penthouse and plant room, namely the combustible insulation and plywood used in the external walls and internal partitions of the penthouse and plantroom. This was first raised in their Statement of Case which was filed on 12 July 2024 (at p.63).

121. The Applicants have not adduced any expert evidence. They rather rely on the series of reports obtained by the Respondent over the last four years. The Directions made provision for the parties to adduce evidence from a joint expert. On 31 July 2024 (p.1357), the Respondent proposed the appointment of a joint expert. The Applicants did not respond to this proposal. However, had the Respondent made a more specific proposal for a joint expert to assess any relevant defects to the penthouse and plant room, the Applicant's response may have been different. The Tribunal notes that the Respondent commissioned the report from BEFS without any discussion with the Applicants. Neither did the Respondent seek any Direction from this Tribunal in respect of this report.

122. At the hearing, the Tribunal canvassed with the parties whether, having regard to the Overriding Objective, the Applicants should be entitled to raise this issue. The options including adjourning the case for further expert evidence on this issue or requiring Mr Gubbay to issue a further application if he wished to take the point.

123. Having considered all the evidence before us, the Tribunal is satisfied that the Applicants should be permitted to take this point. The Respondent's approach to the penthouse and plant room has been seriously flawed. They have relied on an inaccurate plan of the Building (see [65] and [66] above). We are satisfied that the Ark Reports should have addressed the external walls and internal partitions of the penthouse and plant room.

124. Our site inspection extended to the penthouse and the plant room. The Tribunal could not miss the "Kingspan KoolTherm" insulation visible on the plant room walls. Its exposed state presents a significant fire risk. The insulation and associated timber elements of construction present a real fire "load" and obvious risk to rapid spread of fire. It is probable that the same "Kingspan" insulation is found in the external wall of the penthouse. We are satisfied that this "relevant defect" is inexorably linked to the remaining parts of the Building.

Issue 4: The Balconies

125. Mr Bowker argues that the Respondent is not a relevant landlord of any of the Applicants in respect of the balcony and terrace timber decking because the Respondent is not required under a lease of the Building or "by virtue of an enactment" to "repair or maintain anything" relating to the decking.

126. Mr Sawtell responds that balconies are not demised to the tenants. The landlord has the repair responsibility in respect of the 'Retained Parts'.

This is defined to include the structure of the balconies. The tenant is given a right to use the balcony associated with their apartment. This right is granted on the basis that the tenant repairs and maintains the surface of the balcony. This does not absolve the landlord of its own repair obligations in respect of the relevant defect. In any case, given the purposive approach adopted to leaseholder safety in section 123 of the BSA, coupled with other relevant provisions in the 2022 Act and the Regulatory Reform (Fire Safety) Order 2005, it is not appropriate to adopt a narrow and rigid interpretation to the term 'relevant landlord'. The Respondent therefore has a repair obligation in the part of the Building that is related to the relevant defect.

127. The "relevant defect" is the Massaranduba timber decking installed over a treated pine subframe to the inset balconies and upper roof terraces which is considered to be both combustible and flammable. The required work is for the timber decking to be removed from the inset balconies and upper roof terraces of the Building and replaced with suitable non-combustible decking that complies with the relevant Building Regulations and Approved Document B as at the time of the Works.

128. Section 123(3) of the BSA provides (emphasis added): "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.

The Lease

129. The lease for the penthouse is at p.966-1005, and that for Apartment 103 at p.1007-1049. There are no material differences. Counsel highlighted the following:

> (i) 'Property' is defined (at p.973) as "the flat on the eighth floor of the Building known as the Penthouse, 8 Artillery Row London SW1P 1RJ, the floor plan of which is shown edged red on Plan 1 and more particularly described in Schedule 1." The lease plan Is at p.968 and this excludes the balconies.
>
> (ii) "Retained Parts" is defined (at p.973) as all parts of the Building other than the Property the Flats and the Retail Unit including: (a) the main structure of the Building including… the structure of the balconies (including any balcony railings or walls); …. (c) all decorative surfaces (excluding those forming part of the Property or any Flat or the Retail Unit) of: (i) the Building ……".
>
> (iii) Schedule 1 (at p.982) defines "the Property". By paragraph (h) this includes "the floor surface only of any balcony or roof terrace".
>
> (iv) Schedule 2 (at p.983) defines the tenant's "Rights". Paragraph 3 relates to "Balconies/Roof Terraces" and provides for "The

exclusive right to use any balconies or terraces exclusively serving the Property shown shaded green on Plan 1 in connection with the Permitted Use subject to the Tenant repairing and maintaining the surface and complying with any reasonable regulations relating to the use of such balconies or terraces issued by the Landlord or its managing agents from time to time".

(v) The "Landlord's Covenants" are set out in Schedule 6 (at p.998). By paragraph 4.1, the Landlord is required to provide the Services. Schedule 7 (at p.1002) specifies "The Services". By paragraph 1(a), the Services include "maintaining, repairing and replacing the Retained Parts".

130. Mr Bowker argues that on the proper construction of the lease, the Landlord is not required to repair or maintain anything relating to the decking.

131. Mr Sawtell argues that the balconies are not demised to the Tenant. The Tenant is merely granted a right to use the balcony outside their apartment. The Tenant's assumption of responsibility to repair and maintain the surface of the balcony again speaks to the fact that it is the Landlord who is ultimately in control of the balcony. The Tenant only assumes responsibility for the surface. The rest of the balcony (including the decking and subframe) must therefore fall to the Landlord. It is the decking and the subframe, as opposed to its surface) that engages the relevant defect that is the subject of this application.

132. The Tribunal prefers Mr Sawtell's submissions. The required work is for the timber decking to be removed from the inset balconies and upper roof terraces of the Building and replaced with suitable non-combustible decking. We are satisfied that this is the responsibility of the Respondent. The Tenant's responsibility is restricted to maintain the surface of the decking.

"By Virtue of any enactment"

133. In the light of our finding that the Respondent is the "relevant person" under the terms of the lease, it is not strictly necessary for the Tribunal to consider the alternative formulation of the liability arising under "any enactment". However, we address this as we received detailed written and oral submissions from both Counsel. Mr Sawtell's starting point is that the balconies are retained by the Landlord who granted the exclusive right to use a balcony to the corresponding Tenant. This is not an interest in possession; all that the Tenant is granted is a right to use the balcony. By section 72(1)(a) of the BSA, an 'accountable person' is a "a person who holds a legal estate in possession in any part of the common parts". By section 72(6)(a), common parts include "the structure and exterior of the building, except so far as included in a demise of a single dwelling or of premises to be occupied for the purposes of a business". The balconies are part of the exterior in the possession of the Landlord. Therefore, the Landlord is the accountable person in respect of the balconies.

134. Mr Sawtell argues that the balconies fall within the definition in section 72(6)(b) of a common part, as a part of the building provided for the use

135. + of the residents, "alone". Consequently, the broad obligation imposed on the accountable person created by section 84 to prevent building safety risks materialising or to reduce their severity (including by carrying out works) is engaged.

136. The Regulatory Reform (Fire Safety) Order 2005 ("**the Order**"), as amended by the Fire Safety Act 2021 ("**the FSA**"), extends to the external walls of a building (article 6(1A)(a)), which is deemed to include anything attached to the exterior of those walls, and in particular, balconies (article 6(1B)(b)). By article 3(b)(i), the person having "control" of the premises in connection with their trade or business is the responsible person. By article 5(2), the responsible person must ensure that any duty imposed is complied with in respect of those premises, "so far as the requirements relate to matters within his control." By article 5(4), "Where a person has, by virtue of any contract or tenancy, an obligation of any extent in relation to— (a) the maintenance or repair of any premises, including anything in or on premises; or b) the safety of any premises, that person is to be treated, for the purposes of paragraph (3), as being a person who has control of the premises to the extent that his obligation so extends." The duties include, at article 8, the duty to take general fire safety precautions, which are defined at article 4(1)(a) as including "measures to reduce the risk of fire on the premises and the risk of the spread of fire on the premises". While the Order is not the primary enactment that governs the Respondent's obligations, it still imposes duties on it in respect of the balconies.

137. Mr Sawtell argues that Section 123(3) is written in deliberately broad terms. The legislation has a clear, purposive, intent. Prior to the enactment of section 123, there were numerous disputes as to whether a particular fire safety defect fell within the landlord's repair obligation and any relevant right of entry, and hence whether it was obliged to remediate it. Section 123 is intended to cut through such disputes. The Tribunal is required to look beyond the strict extent of the landlord's repair obligation and to consider how best to remediate serious building safety defects.

138. Mr Sawtell also relies on *Secretary of State for Levelling Up, Housing and Communities v Grey GR Limited Partnership; Vista Tower, Stevenage SG1 1AR (CAM/26UH/HYI/2022/0004*); Judge Wayte and Judge David Wyatt; 29 April 2024; ("***Vista Tower***"), in which the FTT confirmed (at [119]) that the relevant legislation is drafted in "deliberately broad" terms, which therefore enables the Tribunal to respond appropriately to the "myriad circumstances that will inevitably present themselves. The jurisdiction of the FTT should not be defeated by an infelicity or perceived lack of clarity in the drafting of the leases; instead, a practical approach consistent with leaseholder safety should be adopted.

139. Mr Bowker contends that the key issue is whether Order requires the Respondent to replace the decking. He contends that article 5 applies. Articles 5(2), (3) and (4) use the words "matters within his control", "by virtue of any contract or tenancy" and "to the extent that his obligation so extends". These words are critical. The duties in the Order are imposed so that they operate efficiently and effectively. They are intended to dovetail with the responsible person's obligations. The responsible person is not asked to do anything outside the scope of its powers. This makes very good sense. Article 6 concerns the application of the Order to premises. The FSA introduced new arts. 6(1A) and (1B), a purpose of which was to remove any confusion about the extent of the responsible person's duties in respect of external walls and attachments to those walls including balconies. He contends that there can no longer be any doubt that the duties under the Order apply to attachments and balconies. Those duties do not, however, extend beyond the matters for which the responsible person has control. Otherwise, the duties would not have practical utility. Here, the decking is not controlled by the Respondent in any meaningful way and is not within the extent of its obligations under the lease. For these reasons, the Respondent contends that it is not a relevant landlord in respect of any defects relating to the decking and, therefore, the Tribunal does have jurisdiction to make a remediation order for that work.

140. The Tribunal prefers Mr Sawtell's argument. If the Respondent is not the "relevant landlord" under the terms of the leases, we are satisfied that it is the person required by virtue of an enactment to repair or maintain anything relating to the relevant defect. We are attracted by the approach adopted by the FTT in *Vista Tower*. We are satisfied that the BSA should be construed purposively. We are further satisfied that the balconies are retained in the possession of the Respondent.

Issue 5: Should the Tribunal make a Remediation Order?

141. Section 123(2) of the BSA gives this Tribunal a discretion to make a remediation order 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. The BSA does not specify the factors which a tribunal should take into account in deciding whether or not to make a remediation order. Mr Sawtell notes that the BSA does not specify the availability of public funding as a relevant factor. He argues that if the Applicants can establish the criteria in section 123, the starting point is that a remediation order should be made. Mr Bowker argues that where the works, contract and the BSF are inextricably linked, it is not appropriate to disrupt that process by making an order.

142. The Tribunal has had regard to four recent decisions of First-tier Tribunals ("**FTTs**"). The first decision in time is *White and others v Kedai Limited; 2-4 Leigham Court Road, London, SW16 2PG* (LON/00AY/HYI/2022/0005 & 0016). Judge Timothy Powell and Mrs Helen Bowers; 9 August 2023 "***Leigham Court Road***". The FTT made a remediation order. The FTT noted (at [66]) that the focus of the BSA is

on building safety and the improvement of standards. There is no guidance in the BSA about how a FTT should assess the risk to the safety of people in or about the building, or the scope of the works that may be required "to remedy" the relevant defects, or the standard to which any remedial works must be carried out. The wording of this Part of the BSA is in deliberately broad terms, to enable the FTT to find the best and most practical, outcomes-focussed solutions to myriad circumstances that will inevitably present themselves in these applications (at [77]). This is an evidence-based exercised, led predominantly by inspection reports and expert evidence, but also informed by the FTT's own experience and expertise in building matters and what it saw for itself at the inspection. Once the FTT 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 (at [81]).

143. The second case is *Di Bari and Others v Avon Ground Rents Limited; Various flats at 419 High Road, Space Apartments, N22 8JS (LON/00AP/HYI/2022/0017;* Judge Martynski, Mr Mason, and Mr Gee; 28 February 2024; ("***Space Apartments***"). In concluding that a remediation should be made, the FTT had regard to the issue of prejudice (at [59] – [64]). The prejudice to the Respondent in making an order was that it is having an enforceable order imposed on it to carry out extensive works that it is willing to undertake in any event. However, that prejudice was mitigated by a provision in the remediation order allowing the Respondent to make an application to the FTT to vary the order if circumstances warranted such an application. The prejudice to the Applicants in not making an order was that they would remain at the mercy of the Respondent. Realistically, it was only the Respondent that has the means to carry out the works. There was the further prejudice of uncertainty. Until the works were completed, the Applicants would continue to live in a Building that was unsafe and in flats that may well be unsellable and unmortgageable. A binding order would alleviate these problems. The FTT concluded that greater prejudice will be caused to the Applicants in not making an order.

144. The FTT noted that whilst was clear that the Respondent is engaging in the process and was willing to carry out works, it had concerns regarding the delays that had already occurred. At a late stage, the Respondent had commissioned a FRAEW report, but the results of that report were still awaited. The FTT concluded (at 64]): "whilst we do not doubt the Respondent's intentions to carry out works, we consider we consider that it is appropriate to now bind the Respondent to a firm timetable".

145. The third case is *Vista Tower*. The FTT made a remediation order despite the fact that works had started. The FTT noted (at [121] that focus of the BSA is on the remediation of life-threatening building safety defects in tall residential buildings. If the pre-qualification criteria set out in section 123 apply and there are relevant defects, the FTT considered that it is likely that the FTT would make an order, subject to the facts of each case.

146. At [122], the FTT stated:

> "As to relevant considerations, we think the facts of the case and in particular the works required and the situation of the relevant parties are much more relevant to the exercise of the discretion than any suggestion of unreasonable delay or even political motivation. We consider that our jurisdiction should be more practically focussed on ensuring the defects are remedied in a responsible fashion".

147. The fourth case is *SofS for Levelling Up, Housing and Communities v Grey GR Limited Partnership; the Chocolate Box, 8-10 Christchurch Road, Bournemouth, BH1 3NA (CHI/00HN/HYI/2023/0008)*. Judge J Dobson, Mrs J Coupe and Mr J Stead; 14 May 2024; "***Chocolate Box***"). The FTT made a remediation order, despite the fact that works had started and the occupiers had been decanted. The FTT found that works had started in response to an Improvement Notice served by the local housing authority. The total cost of the works was in the region of £17.6m. At [223], the FTT decided not to adopt the approach of "the balance of prejudice". We highlight the following passages from the determination:

> "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
>
> 162. ..... 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 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.
>
> 168. ..... 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.
>
> 225. ... "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.
>
> 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.
>
> 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.
>
> 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."

148. Section 123 of the BCA gives a FTT both the power, and a discretion, to make a remediation order. In determining whether to make a remediation order, we should take all relevant factors into account in determining what is just and equitable. The statutory criteria have all been satisfied. It is accepted that the Applicants are "interested persons", the Respondent is a "relevant landlord" and the Building is a "relevant building". We have identified the "relevant defects".

149. The legislative purpose of the BCA is to "secure the safety of people in or

about buildings and to improve the standard of buildings". Parts 4 and 5 make provision for the management of building safety risks in higher risk buildings. If satisfied that the statutory criteria in section 123 are met, we are satisfied that our starting point is that a remediation order should be made. Our primary concern is the safety of the occupiers of the Building. We should seek to ensure that the relevant defects are remedied in a responsible manner. Having regard to these statutory objectives, we are satisfied that we should make a remediation order.

150. We also have regard to the following, albeit that these are all secondary considerations:

(i) Whilst funding is a relevant consideration, BSF funding is no justification for any delay in putting the necessary works in hand. The primary concern is the safety of the occupants; the funding of the works is a secondary concern. The BSA sets out the statutory framework for the funding of any relevant works.

(ii) The Respondent is the only person who has the ability to carry out the works. It may be that the remediation order imposes a substantial financial burden on the Respondent which it is unable to recover from either the BSA or the lessees. However, this cannot be a factor of significance, being an inevitable consequence of the BSA.

(iii) There have been unacceptable delays, and works should now be put in hand at the earliest opportunity. It is not strictly necessary for us to consider the causes of the delays, but we have considered above the background to this application. The Applicants bear no responsibility for these delays.

(iv) The delay in the works has caused unnecessary anxiety and stress to the occupiers and lessees. This is not only the risk to their safety. It also includes their uncertainty about their future, the fact that they are unable to sell their flats and that their flats are unmortgageable. There has also been a lack of transparency.

(v) The remediation order is enforceable in the Couty Court. However, the Respondent is protected by the provision in the order allowing it to make an application to the FTT to vary the order if circumstances warrant such an application.

Issue 6: The Terms of the Remediation Order

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

152. The Applicants provided a draft Remediation Order at the hearing. After the hearing, both Mr Bowker and Mr Satwell made further submissions on the terms of the remediation order. Mr Bowker has made his

submissions without prejudice to his primary submission that no remediation order should be made.

153. The first issue is the Schedule of Works. Mr Bowker argues that these should merely refer to the "relevant defects" agreed between the parties (see [118] above). Mr Sawtell responds that the Respondent's draft merely specifies the defects and not the works required to remedy them. We are satisfied that sufficient detail is required so that the Respondent understands what is required of it. This is the approach taken by other FTTs. Mr Sawtell also relies on *Blue Manchester Ltd v North West Ground Rents Ltd* [2020] EWHC 2777 (TCC) at [9]. We are further satisfied that the order should extend to the balconies, penthouse and plant room.

154. The Second issue is the date by which the works should be completed. Mr Sawtell contends for a start date of three months from the date of the order with a completion date of 30 October 2025. Mr Bowker contends that no start date should be specified, but the completion date should be 30 October 2026. Mr Bowker takes his date from the latest Watts timeline, dated 22 July 2024, at p.945. However, Watts suggest that works will not start on site until 1 December 2025. Considerable delays are built in whilst funding is secured, the designs are finalised and approved and the works contract is agreed. Mr Sawtell contends that the critical issue is the duration of the works. Watts contend for 46 weeks plus an additional 2 weeks over the Christmas shut down.

155. The Tribunal is satisfied that it is appropriate to specify a start date and is satisfied that works should start by no later than 1 March 2025. There have been unacceptable delays to date. The works should be completed by 31 December 2025.

156. Both parties are agreed that the order should make provision for the Respondent to apply to this Tribunal to vary the works and to extend the time for compliance with the order. It seems that the Respondent has yet to determine whether the works can be executed whilst the residents remain in occupation of their apartments.

157. Mr Bowker takes issue with the detail specified in paragraphs 2 to 6 of the Applicant's draft order. He contends that the two essential elements of a remediation order are the works and the completion date. Section 123 of the BSA does not extend beyond these two elements. Neither do they form part of thew Tribunal's case management powers. There is no jurisdiction to specify date. Furthermore, an A1 rating goes beyond the remedying of relevant defects. If there is jurisdiction to include a minimum ESW1 rating, it is B1.

158. Mr Sawtell accepts that the Upper Tribunal has yet to provide any guidance on the drafting of remediation orders. However, he relies on a number of recent FTT decisions. He accepts Section 123 provides a very limited steer as to what a remediation order should contain, save for the identification of relevant defects, the building, and the time by which

those defects are to be remedied. However, FTTs have accepted that it is implicit in that regime that a workable order must contain other elements. In particular, successive orders have required the respondent to carry out the works to a certain standard, and to file and serve evidence that the works have been completed to that standard. He relies upon the following decisions:

(i) In *Vista Tower*, the Order (at [2]) required the respondent to carry out and complete the specification of remedial works agreed between the applicant and the respondent in the Schedule. Section 2.0 of the Schedule included obligations so as to comply with the Building Regulations and to prepare an updated EWS1 form.

(ii) In *Chocolate Box*, the form of the order to be made was considered in detail at [265] to [274]. The FTT considered it appropriate to direct that an updated FRAEW report be provided ([27]). The order provided for compliance with the Building Regulations.

159. Mr Sawtell argues that it is implicit in the remediation order regime that FTTs should have a power to make orders which are ancillary to its jurisdiction for the purpose of giving effect to a remediation order.

(i) Section 1(1) of the BSA provides that the overall policy of the Act is to "secure the safety of people in or about buildings and to improve the standard of buildings".

(ii) When carrying out the works in a remediation order, the respondent must execute them to an appropriate standard so that they are not, themselves, defective.

(iii) Further, when carrying out such works, the respondent already comes under an obligation to comply with the Building Act 1984 and any relevant Building Regulations.

(iv) As part of this power, or alternatively its powers as to case management, the Tribunal can direct that the respondent files evidence of compliance with these standards and statutory obligations.

160. The Tribunal prefers the submission of Mr Sawtell. Any remediation order must be effective to achieve its desired outcomes and be enforceable. The whole objective of the BSA is to ensure that buildings are brought up to an acceptable standard to secure the safety of residents. A Tribunal should use its case management powers to ensure that a respondent knows what is required of it and for an applicant to be able to take enforcement action at an early stage if it becomes apparent that the relevant defects will not be remedied within the time frame contemplated by the order.

Issue 7: Section 20C Order and Tribunal Fees:

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

162. The Tribunal makes the following Order:

(i) Pursuant to s.20C Landlord and Tenant Act 1985 the costs incurred by the Respondent in respect of this action are not to be regarded as relevant costs for the purposes of service charges payable by any of the Applicants.

(ii) Within 28 days of this order, the Applicants' solicitors shall provide a copy of both this decision and order to the other leaseholders who are not parties to this application and that letter shall remind them of their right to apply for an order under s.20C, Landlord and Tenant Act 1985 if so advised.

163. The Applicants apply for a refund of the tribunal fees of £300 which they have paid. In the light of our decision to make a remediation order, we are satisfied that it is appropriate for the Respondent to refund to the Applicants the tribunal fees which they have paid. The said sum is to be paid within 28 days.

Judge Robert Latham
18 November 2024

Rights of appeal

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

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.
The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

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

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

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

erence: LON/00BK/BSA/2024/0004

IN THE FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

IN THE MATTER OF 8 ARTILLERY ROW, LONDON SW1P 1RZ

B E T W E E N :

(1) Li Jing (Apartment 103)
(2) Yang Xiao (Apartment 203)
(3) Nigel Harris (Apartment 301)
(4) Divine Heritage Limited
(Apartment 302)
(5) Nick Chism and Debbie Chism (Apartment 303)
(6) Hingwan Cheung (Apartment 403)
(7) Albert Abutaliev and Regina Arsentyeva (Apartment 601)
(8) Lucia Granozio (Apartment 602)
(9) Judy Chun (Apartment 603)
(10) Jimmy Hidayat under a Power of Attorney for Julian Alexander (Apartment 701)
(11) Yu-Yu Lin (Apartment 702)
(12) Khalid Al Jassim (Apartment 703)
(13) Raymond Gubbay CBE (Penthouse)

Applicants

- and -

Avon Ground Rents Limited

Respondent

REMEDIATION ORDER
Section 123 of the Building Safety Act 2022

UPON considering the application, evidence and submissions in this matter and for the reasons set out in the decision of 18 November 2024

IT IS ORDERED THAT:

1. The Respondent shall remedy the relevant defects specified in the attached Schedule (the '**Relevant Defects**') in 8 Artillery Row, London SW1P 1RZ (the '**Building**') by 31 December 2025 (the '**Specified Time**').

2. Within seven days of the certified date of practical completion of the works required by paragraph 1 above, the Respondent shall notify the Tribunal, the Applicants, the leaseholders, Westminster City Council and the London Fire Brigade that it has complied with this Order and provide a copy of the certificate of practical completion.

3. The Respondent shall file the completion certificate issued under Regulation 44 of the Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 (or such other Building Control approval as is appropriate at the time of completion of the Works) with the Tribunal and serve the same on the Applicants, the leaseholders, Westminster City Council and the London Fire Brigade within 1 month of receipt.

4. The remediation works shall commence no later than 1 March 2025.

5. The Respondent shall ensure that the level of fire-safety risk arising from those parts of the Building specified in the Schedule is such that the works achieve approval by the Building Safety Regulator (or such other Building Control body is competent to provide such approval at the time of completion of the Works).

6. The Respondent shall obtain a post-Works Fire Risk Appraisal of External Walls (FRAEW) pursuant to PAS 9980:2022 together with Form EWS1: External Wall Fire Review that satisfies Option A1 within one month of practical completion of the works.

7. The parties have permission to apply in relation to the attached Schedule. In particular, the Respondent has permission to apply to vary the works and to extend the time for compliance with this Order.

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

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

Judge Robert Latham
18 November 2024

SCHEDULE

The Respondent is required to remedy the following relevant defects in the Building as specified below (the '**Works**'). All detail for works and the specifications for remedial works materials should be approved by the BSR prior to commencement of work.

Combustible insulation in the external walls

A. The combustible insulation (including phenol formaldehyde insulation and polystyrene insulation) is to be removed from the external wall systems of the Building and replaced with suitable non-combustible insulation.

Cavity barriers in the external walls

B. The fire stopping and cavity barriers are to be remediated in the external masonry walls so that the Blocks are compliant with the Building Regulations current at the time that the Works are carried out.

Timber decking to the balconies and upper roof terraces

C. The timber decking is to be removed from the inset balconies and upper roof terraces of the Building and replaced with suitable non-combustible decking that complies with the relevant Building Regulations and Approved Document B as at the time of the Works.

Penthouse and plantroom walls

D. Any combustible insulation and plywood used in the external walls and internal partitions of the penthouse and plantroom of the Building is to be removed and replaced with suitable non-combustible material that complies with the relevant Building Regulations and Approved Document B as at the time of the Works.

Standard of the works

E. The Works shall be carried out to the standard that a post-Works Fire Risk Appraisal of External Walls (FRAEW) pursuant to PAS 9980:2022 should not prevent a Form EWS1: External Wall Fire Review to Option A1 from being issued in respect of the Building.

Making good

F. The Respondent shall make good any damage caused to the Building on account of the Works.