



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case reference** : **LON/00AG/BSA/2024/0008**

**Property** : **The Central, 163-165 Iverson Road,  
London, NW6 2RB**

**Applicants** : **(1) MICHELLE TOBIAS  
(2) MAXI MALEKNIAZI-KAUSHAL  
(3) DANIEL MULDOON**

**Representative** : **DWF Adjusting Limited**

**Respondent** : **GROSVENOR FREEHOLDS LIMITED**

**Representative** : **Russell Cooke LLP**

**Type of application** : **For a remediation order under section  
123 of the Building Safety Act 2022**

**Tribunal** : **Judge Sheftel  
Judge N Carr  
Mr A Thomas RBI, FRICS, MIFireE**

**Date of Decision** : **10 January 2025**

---

**DECISION**

---

**Summary of Decision**

The tribunal makes a remediation order as set out in the annex to this Decision.

**Background**

1. This is an application dated 17 April 2024 for a remediation order under section 123 of the Building Safety Act 2022 (the “2022 Act”). The Second

and Third named Applicants are leaseholders of the Property. According to the application, the First named Applicant represents her daughter who is a leaseholder of the Property.

2. The Respondent is the freehold owner of the Property.
3. The application relates to the building known as The Central, 163-165 Iverson Road, London, NW6 2RB (the “Property”). The Property consists of two adjoining residential blocks: 163 Iverson Road and 165 Iverson Road. Construction of the Subject Property was completed in or around 2016.
4. A separate application for a remediation contribution order under s.124 of the 2022 Act was made in respect of the Property at the same time as the application for the remediation order. This was brought against the Respondent as well as: Gloucester Developments Ltd; Nava 1 Ltd; and Reichmann Properties Ltd. However, that (RCO) application was stayed by the tribunal at a case management hearing which took place on 17 June 2024. At that hearing, the tribunal gave directions through to the final hearing in respect of the remediation order application.

### **The law**

5. Section 123 of the 2022 Act (as amended) provides as follows:

#### **123 Remediation orders**

- (1) The Secretary of State may by regulations make provision for and in connection with remediation orders.
- (2) A "*remediation order*" is an order, made by the First-tier Tribunal on the application of an interested person, requiring a relevant landlord to do one or both of the following by a specified time—
  - (a) remedy specified relevant defects in a specified relevant building;
  - (b) take specified relevant steps in relation to a specified relevant defect in a specified relevant building.
- (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.

*"relevant building"* : see section 117;

*"relevant defect"* : see section 120;

*"relevant steps"* : see section 120;

*"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.
- (8) In proceedings for a remediation order, a direction given by the First-tier Tribunal requiring a relevant landlord to provide or produce an expert report is to be regarded as a decision for the purposes of subsection (7).
- (9) In subsection (8), *"expert report"* means an expert report or survey relating to—
  - (a) relevant defects, or potential relevant defects, in a relevant building;
  - (b) relevant steps taken or that might be taken in relation to a relevant defect in a relevant building."

6. For the purposes of sections 119 to 125 of the 2022 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.
7. Section 120 of the 2022 Act defines “relevant defect” and “relevant steps” for the purposes of sections 122 to 124 and Schedule 8 to the Act as follows:

**120 Meaning of “relevant defect” and “relevant steps”**

- (1) This section applies for the purposes of sections 122 to 124 and Schedule 8.
- (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.
- (4A) “*Relevant steps*”, in relation to a relevant defect, means steps which have as their purpose—
  - (a) preventing or reducing the likelihood of a fire or collapse of the building (or any part of it) occurring as a result of the relevant defect,

- (b) reducing the severity of any such incident, or
- (c) preventing or reducing harm to people in or about the building that could result from such an incident.

(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.”

### **The issues in the present case**

8. There is no dispute between the parties that:

- (1) The Second and Third Applicants are ‘interested persons’ for the purposes of s.123(5) of the 2022 Act and entitled to bring this application. As regards the First Applicant, pursuant to s.123(5)(d) of the 2022 Act, an interested person (i.e. one who may make an application for a remediation order) includes: “*a person with a legal or equitable interest in the relevant building or any part of it ...*”. The First Applicant does not fall within that definition insofar as it is said that she is the mother of a leaseholder. However, the point is of little practical significance given the status of the Second and Third Applicants.
- (2) The Respondent is a “relevant landlord” within the meaning of section 123(3).
- (3) The Central is a “relevant building” as defined by section 117.

9. The application listed a substantial number of alleged defects said to amount to relevant defects within s.120 of the 2022 Act because they create a fire safety risk. While there was substantial agreement regarding their existence between the parties, the full extent of relevant defects had not been fully resolved by the date of the hearing.
10. By the time of the hearing, there were essentially two broad areas of dispute between the parties:
  - (1) Whether to make a remediation order at all. In this regard, the key area of contention was the fact that it was said that the leaseholders were insured, and the role of Amtrust in these proceedings;
  - (2) If a remediation order were to be made, the terms of such order and the length of time to be permitted to carry out the works.

### **The Property**

11. As set out in the Applicants' skeleton argument, 163 Iverson Road is a six-storey block comprising north and south wings, with 19 single storey flats and 4 maisonettes at basement and ground floor level. It is adjoined by 165 Iverson Road to the east. Access to the flats on floors 1-4 is provided via external balconies of timber frame construction, with steel handrails and glass panel balustrades. The external elevations are finished in white brick slips, vertical standing seam grey zinc cladding panels and vertical timber cladding panels.
12. 165 Iverson Road is a five-storey building with 10 single storey flats. The height of the building is approximately 14.25m. Access to the flats on floors 1-4 is provided via a single internal staircase and lift. The external elevations are finished in brick slips, zinc and timber cladding panels. Unlike 163 Iverson Road, there are no external walkways.
13. There are no material differences between the sample lease for 163 Iverson Road and the lease of 165 Iverson Road. So far as is relevant to the present case, pursuant to clause 8.7, the landlord (Respondent) covenants to provide the Services, which include maintaining, repairing and (where

beyond economic repair) replacing the Retained Parts and fire prevention equipment on the Retained Parts.

14. The Retained Parts are defined in clause 1 as:

*“all those parts of the Building that are not Lettable Units and includes (for the avoidance of doubt) the Common Parts, the foundations, structure, load bearing walls and columns, ceilings, floor slabs and roof of the Building...”*.

15. The Common Parts are defined as:

*“any areas provided by the Landlord for the common use of the occupiers of the Building such as walkways, entrance halls, lifts, landings, staircases, passages, forecourts, car park and landscaped areas...”*.

16. One of the issues had been whether the Respondent’s repairing obligations under the terms of the leases included the private balconies, as this would impact on whether the balconies should properly fall within any remediation order. However, this appeared to have been resolved by the date of the hearing and the Applicants did not seek to include the balconies within the draft remediation order.

### **The hearing**

17. The tribunal inspected the Property at 10am on 25 November 2024 in the presence of the parties’ representatives and both experts.
18. The hearing commenced at 1.00pm, following the tribunal’s inspection. The Applicants were represented by Harry Smith (counsel) and the Respondents by Aaron Walder (counsel).
19. The tribunal heard witness evidence from and Michelle Tobias on behalf of the Applicants. Maxi Makekniazi-Kaushal and Daniel Muldoon (the Second and Third named Applicants) had also provided witness statements, although insofar as they essentially adopted the evidence of Ms Tobias, they were not called to give oral evidence. On behalf of the Respondent, the tribunal heard from Elliot Dubey, the director of the Respondent. Oliver Steinberger of Barnard Cook (managing agents), and

Jonathan Whittaker of RTM North East Limited, the company engaged by the Respondent to progress the Respondent's Cladding Safety Scheme ("CSS") application, had also provided witness statements, although as neither was challenged by the Applicants, they were not called to give evidence.

20. The tribunal also heard evidence from the parties' experts: Michael Ogus BSc, Dip Arch, MSc, RIBA (an architect) on behalf of the Applicant and Paul Phillips BSc (Hons) MRICS, C.Build E MCABE (a Chartered Building Surveyor and Chartered Building Engineer) on behalf of the Respondent. It should be said that the experts were largely agreed in their approach and conclusions as further discussed below. Reference was also made to two FRAEW reports dated 7 June 2024 prepared by Bailey Partnership in respect of each of 163 Iverson Road and 165 Iverson Road, which had been obtained by the Respondent.

### **Preliminary matters**

21. An issue arose between the parties as to the bundle. The Applicants produced a bundle comprising 5734 pages. This was not agreed and the Respondent had contended that it was difficult to navigate. As a consequence, the Respondent produced a 'Core' bundle comprising 318 pages. This, however, contained three documents which the Applicants objected to on the basis that they contained without prejudice communications (correspondence between the parties' representatives dated 28 October 2024, 7 November 2024 and 11 November 2024). The versions contained in the core bundle were therefore initially redacted so as to exclude the offending parts. However, by the start of the hearing the issue had been resolved: the parties agreed that this material could be included in unredacted form, as well as a proposed Tomin Order over all of which both parties agreed to waive without prejudice privilege.
22. The tribunal also admitted additional documents during the hearing including various Companies House extracts and an indicative timeline of works produced by Bailey Partnership (contractors).



### **The factual position**

23. There was relatively little in dispute between the parties regarding the factual history, albeit their interpretations of that history differed considerably.
24. The works to construct the Property were carried out by South Coast Construction Limited under its contract with the Developer, Iverson Road Limited ('IVL'). Practical completion occurred in May 2016. It should be noted that IVL, which went into liquidation in 2017, had the same parent company as the Respondent, i.e. Gloucester Developments Limited. This is a company controlled by David Reichmann - who is listed at Companies House as a Person with Significant Control of the Respondent.
25. IVL appointed Premier Guarantee ('Premier') to provide a New Build Warranty to purchasers (and then-future purchasers) after practical completion. The underwriters of the New Build Warranties were Amtrust Europe Limited ('Amtrust'). IVL also appointed Premier Guarantee Surveyors Limited ('PGSL') as Approved Inspectors for the Property. As a consequence, purchasers of the New Build Warranty benefitted from additional cover under section 3.5 of the New Build Warranty terms and section 3.4 of the Social Housing Warranty terms.
26. The Respondent was registered as freehold owner of the Property on 30 January 2017.
27. Following the Grenfell Tower fire in June 2017, the façade of the Property was investigated. Cambridge Roof Exchange, on the instructions of Origin Housing, the social housing leaseholder, issued an inspection report dated 17 July 2019 in respect of 165 Iverson Road.
28. The London Fire Brigade ("LFB") issued a Notification of Fire Safety Deficiencies on 15 October 2019. In June 2020, Camden Council served an Improvement Notice on the Respondent as freeholder (which was varied in September 2020) for 163 Iverson Road, and in October 2020 for 165 Iverson Road.

29. The Respondent engaged DCCH to carry out investigations and to provide a report into fire safety defects, which was produced in February 2020. The report confirmed that a percentage of the timber cladding was not of the appropriate class, cavity barriers were missing, service penetrations required fire-stopping and that gaps in balcony balustrades required filling. The Respondent also instructed CS Todds for a Type 2 FRA report in November 2019, with the report issued on 21 January 2020.
30. A waking watch was instituted at the Property by 13 November 2019. A new fire alarm system was installed at the Property in July 2020, which removed the need for a waking watch.
31. On 9 September 2020, solicitors acting for the leaseholders made claims under the Premier New Build Warranty for the cost of remediation works. Although the claim was initially rejected in full, it was subsequently at least partially accepted – specifically in relation to the installation of cavity barriers and fire stopping.
32. In January 2021 the Respondent instructed PRP, a project management firm proposed by Origin Housing, to design and tender the proposed scope of remediation works.
33. It appears that Amtrust paid for the waking watch and the fire alarm system, and also paid for the work carried out by PRP between 2021 and January 2022.
34. In early 2023, Amtrust began to intimate bringing a claim against the Respondent and a letter of claim was served on 2 March 2023. Amtrust initially refused to pay PRP's outstanding fees. Although these were subsequently paid, by September 2023 Amtrust had declined to pay for future costs incurred by PRP.
35. On 17 April 2024, the same date as the date of this application for a remediation order, the leaseholders entered into a 'Participation Agreement' with Amtrust. The recitals to the Participation Agreement provided that:

*“Further to an insurance claim made to policy number 2006020-000054 on 26 November 2019, AmTrust has accepted that policy number 2006020-000054 provides coverage in principle for the fire safety*

*defects identified at the Property (referred to at Recital 3.2 above), subject at all times to the terms and conditions of the policy documents ...*

Further, the terms of the Participation Agreement provide that:

- (1) By clause 7.1, *“The Tenants’ Representatives and the Participating Tenants accept and agree that AmTrust has the right to pursue the claim and/or the Proceedings against Grosvenor Freehold Limited and/or its associated companies in the name of the Tenants’ Representatives acting on behalf of themselves and the Participating Tenants.”*
  - (2) By clause 7.2, *“The Tenants’ Representatives and the Participating Tenants accept and agree that, at all times acting with good faith, AmTrust has the exclusive right to progress the claim and/or the Proceedings as it sees fit and, to the extent relevant, the exclusive right to determine settlement parameters... .”*
  - (3) Clause 9.1 also provides that *“In the event that the claim and/or the Proceedings result in a financial sum being ordered to be paid by Grosvenor Freehold Limited and/or any of its associated companies that sum will be paid by the Tenants’ Representatives to AmTrust, or AmTrust’s solicitors to be held on account to fund the remedial works required to address the various fire safety defects identified at the Property”* – although as pointed out by Mr Smith, the present proceedings could not result in an order for payment of money to the leaseholders.
36. In summary, therefore, it appears that Amtrust initially accepted liability, for the cost of at least some of the works – although the leaseholders felt the need to instruct solicitors to pursue their claims. However, since 2023 Amtrust has instead sought to assist the leaseholders in pursuing remediation of the Property against the Respondent, at the Respondent’s cost.
37. Much of the energy in these proceedings has been spent arguing whether it is Amtrust or the Respondent who is to blame for the lack of progress. It is not in dispute that the Respondent has not complied with the October 2019 enforcement notice issued by the LFB and improvement notices issued by the London Borough of Camden. However, Mr Dubey’s evidence was that the Respondent (unlike Amtrust) was the only party trying to assist the leaseholders in ensuring that the Property is remediated and

asserted that a lot of work had been going on in the background. Some support for this proposition can be found in the unchallenged evidence of Mr Steinberger, who sets out the various steps taken by and on behalf of the Respondent to address fire safety issues such as the installation of a waking watch and the installation of a fire alarm system – although not initially to remedy defects. In addition, Mr Walder pointed out that the Respondent began work to obtain CSS funding for pre-tender matters in March 2024 – before these proceedings were commenced in April 2024. Further, he submitted that the CSS only began in mid-2023 and so the application for funding was made a mere matter of months later. It is also the case that the Property would not have qualified for funding under the Building Safety Fund as it was not of sufficient height.

38. This view of matters was not accepted by Ms Tobias. She gave evidence as to a meeting between her and the Applicants and David Reichmann on 20 December 2023 to try to find a way forward. According to Ms Tobias, Mr Reichmann initially tried to persuade the leaseholders to take over the freehold of the Property. When this offer was declined, it was asserted that David Reichmann stated categorically that he would not agree to fund the costs of the remedial works required as he did not know how much that cost would be, and he would therefore not sign a building contract for the works even with funding in place for some of the works through the insurance claim. That is notable because Grosvenor Freeholds Limited is the only legal identity who can sign such a contract, being the only party that is entitled to carry out the works.
39. Ms Tobias gave evidence that Mr Reichmann stated at the same meeting that if the leaseholders progressed with this application to the tribunal, he would put Grosvenor Freeholds Limited into liquidation. We note that Mr Reichmann was not called to give evidence. Mr Dubey stated that he was not aware of this meeting until reading about it in Ms Tobias's witness statement. In the circumstances, we have no reason to doubt Ms Tobias's evidence in this regard.
40. Further, Ms Tobias maintained that it was always understood that the insurers would not pay for all of the works. Although it was suggested on

behalf of the Respondent that she may have been confused or misremembered, in our view, Ms Tobias has been heavily immersed and involved in this matter throughout and was an credible and reliable witness. Further, Mr Smith submitted, and we are satisfied, that her understanding was correct: insofar as the policy covered matters that were in breach of Building Regulations as at the time of construction, it would not have covered the timber cladding to the external façade in any event, as Mr Ogus and Mr Phillips were in agreement that insofar as it was not in areas of escape, this had not been a breach of the applicable Building Regulations.

41. Although there was no clear evidence in relation to the change of approach by Amtrust, Mr Smith's explanation was that the change in Amtrust's approach broadly coincided with the introduction of the 2022 Act, which gained Royal Assent on 28 April 2022 and of which Part V and Schedule 8 came into force on 28 June 2023. Section 7D of the policy provides that:

*"The maximum the Underwriter will pay for any claim relating to Common Parts will be the amount that the Policyholder has a legal liability to contribute towards the cost of repairs, rectification or rebuilding works".*

42. That does not seem an implausible explanation. Insofar as the leaseholders would no longer be liable for the cost of remedial works, as a result of the coming into force of Schedule 8 to the 2022 Act, the obligation to pay out under the policy would no longer arise. Since that time, and in particular, since the signing of the Participation Agreement, recourse has instead been sought against the Respondent.

### **Should the tribunal make a remediation order?**

43. While it is common ground that relevant defects (for the purposes of the 2022 Act) exist at the Property, as noted above, the Respondent maintains that no remediation order should be made.
44. The principles governing the making of a remediation order were not seriously in dispute. Broadly, both parties accepted that the tribunal

retains a discretion whether to make a remediation order notwithstanding that the underlying jurisdictional threshold has been met – as it has in the present case, i.e. that an application has been made by an interested person against a relevant landlord in relation to relevant defects in a specified relevant building. The existence of a discretion is said to exist notwithstanding the fact that while section 124 of the 2022 Act in relation to remediation contribution orders provides that an RCO may be made where it is considered to be ‘just and equitable’ to do so, there is no equivalent in the provisions of section 123 for remediation orders.

45. Although there is no appellate authority on this point, the parties referred to previous decisions of the FTT where the question was discussed. For example:

(1) In *Di Bari v Avon Ground Rents* LON/00AP/HYI/2022/0017 (“*the Space Apartments Decision*”), in considering its discretion to make a remediation order, the FTT considered the respective prejudice to the applicants and the respondents in making an order;

(2) In *Secretary of State for Levelling up, Housing and Communities v Grey GR Limited* CAM/26UH/HYI/2022/0004 the tribunal stated at para.121 that

*“if the pre-qualification criteria set out in section 123 apply and there are relevant defects we consider that it is likely that the tribunal will make an order, subject to the facts of each case”.*

And at para.122 it was stated that:

*“...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.”*

(3) In *Secretary of State for Levelling up, Housing and Communities v Grey GR Limited*

CHI/ooHN/HYI/2023/0008 (“the Chocolate Box Decision”), the tribunal stated at para.221 that:

*“... if Parliament had intended the test under section 213 to be the same as the test under section 124 in respect of Remediation Contribution Orders and under section 130 in respect of Building Liability Orders, it would have said so.”*

However, at para.225, it was noted that:

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

At para.227, the tribunal concluded that:

*“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.”*

46. Mr Walder submitted that insofar as there was a suggestion from the decision in *Vista Tower* that there should be a ‘presumption’ in favour of making a remediation order where the underlying criteria are otherwise met, this would be wrong. We do not understand that this is what was being suggested in *Vista Tower* but in any event, we agree with the general proposition from all of these decisions (none of which are binding) that the discretion is a wide one, which has not been defined or circumscribed in the statute. Accordingly, the tribunal can take into account all relevant

circumstances in determining whether a remediation order should be made in any given case. Ultimately, the principal focus is ensuring that a building with relevant defects is remediated in a timely fashion so that occupants are not living in an unsafe building.

47. Turning to the present case, the Respondent's principal argument is that it would be wrong to make an order in light of the particular circumstances and the role of the insurers, Amtrust – specifically, it is said that the making of a remediation order would be an abuse of process and contrary to public policy.
48. On the Respondent's case, for two years the leaseholders, Amtrust and the Respondent engaged under the terms of the leaseholder's New Homes Warranty to bring into effect the remedial works necessary to correct the defects in the Property listed in Mr. Phillips' report. Amtrust then ceased to support those works and purported to use its right under clause 6.8 of its New Home Warranties with the Leaseholders to (i) enter into the Participation Agreement and (ii) pursue the Respondent for a remediation order. Under the terms of the Participation Agreement, the insurer has the right to pursue the claim in the name of the leaseholders and the exclusive right to progress the claim as it sees fit. It is also the case that any sums paid as a result of these proceedings are to be paid to the insurers – although that should not arise in the context of the present application.
49. It was submitted that were a remediation order to be made, this would mean that the insurer would be able to avoid having to pay out under the policy. This, the Respondent contended, would be wrong. The insurer has been paid a considerable premium to provide a service and moreover, the insurer had, at least in part, accepted liability when the claim was first made. In the Respondent's submission, it cannot have been Parliament's intention that the effect of the introduction of the 2022 Act, which seeks to avoid leaseholders from having to pay for remedial works, was that such policies should effectively become worthless or that the 2022 Act would provide grounds for insurers to avoid liability.
50. As an alternative, it was suggested that even though Amtrust sought to deny liability in June 2023, citing the contribution condition within the



policy at clause 3 (which provides an exclusion where the policy holder has an entitlement to statutory damages or compensation), they subsequently affirmed liability on 21 September 2023 (i.e. after the relevant parts of the 2022 Act had been in force) - and therefore under established principles of insurance law, Amtrust cannot seek to escape liability now.

51. In summary, the Respondent argues that the tribunal should exercise its discretion not to make a remediation order. In particular, the Respondent asserts that the genesis of this application, and the reasons for it, are the insurer's desire not to pay for the works after it has affirmed that it would, which has delayed the repair of the leaseholder's building. Further, if a remediation order were to be made, the leaseholders would effectively be exchanging Amtrust's substantial resources for the Respondent's application for public funding to carry out repairs in the form of the CSS. In addition, it is said that it is prejudicial to the Respondent to have to forward-fund works where an alternative source of funding, namely insurance monies, would have been available but for the Applicants and the insurers changing their position and pursuing this litigation.
52. On the Applicants' case, it is said that the Respondent's argument is wrong/misconceived. In particular:
  - (1) Prior to the coming into force of the 2022 Act, the general position was that leaseholders were liable to pay for remediation works through the service charge. However, that was changed by the 2022 Act. On the Respondent's submission, the leaseholders should be forced to have recourse to their insurance – effectively creating a means test, which would be contrary to the intention of the 2022 Act. In any event, section 123 of the 2022 Act is not concerned with how much money the respective parties have or even who pays, but rather about making sure that relevant defects are put right.
  - (2) Mr Smith maintained that insurance monies are not in fact available. In his submission, this is not a case about policy avoidance or whether the contract of insurance has been affirmed. Rather, as a result of Schedule 8 to the 2022 Act

coming into force, the insurers' liability under the policy no longer arises. Mr Smith also rejected the Respondent's submission that Schedule 8 operates as a procedural bar rather than extinguishing liability – akin to limitation. As Mr Smith submitted, the language of Schedule 8 (see paragraphs 2-4 and 8-9) is that “No service charge is payable...”. In otherwords, liability does not arise and therefore it is not correct that leaseholders are sitting on funds properly due to them.

- (3) It is denied that Amtrust is attempting to avoid its liability under the policy. Mr Smith relies on recital 3.4 of the Participation Agreement, which provides that:

*“Further to insurance claim made to policy number 2006020-000054 on 26 November 2019 Amtrust has accepted that policy number policy number 2006020-000054 provides coverage in principle for the fire safety defects identified at the Property ... subject at all times to the terms and conditions of the policy documents...”.*

In Mr Smith's submission, the words “*subject at all times to the terms and conditions of the policy documents...*” are clear and unambiguous – and confirm that Amtrust is not undertaking to pay out beyond what it is legally required to. Indeed, it is said that that this is not a surprising position for Amtrust to take.

53. On the issue of the insurers' liability, we consider that this is not something that needs to be resolved in determining whether to make a remediation order. There would appear to be much force in Mr Smith's submission that the liability under the policy no longer arises by virtue of schedule 8 to the 2022 Act. However, this raises an awkward question for Amtrust in the present case given that the defects were known about and a claim was made under the policy, which was accepted (at least in part), two years prior to the 2022 Act coming into force. Ultimately, however, we agree with Mr Smith's first point that the primary focus in making a remediation order is not on who pays or the parties' respective means, but rather ensuring that relevant defects are remedied. Having said that, given the wide (and unfettered by statute) discretion of the tribunal, we accept

that issues such as the existence of the insurance policy might be something that can be taken into account as part of the tribunal exercising its discretion, but we put it no higher than that.

*Abuse of process/champerty*

54. The Respondent's alternative case for why a remediation order should not be made is that the proceedings are an abuse of process. In this regard, Mr Walder sought to rely on the specific nature and terms of the Participation Agreement itself, which, it was argued was champertous and/or contrary to the Damages Based Agreements Regulations 2013. Both counsel provided detailed written submissions on this issue.
55. By way of summary, it is said that reason is it an abuse is because this process is funded and driven by Amtrust, and Amtrust seeks to use an order of the tribunal against a third party to escape the consequences of its own bargain under the policies. The core purpose of the 2022 Act is to ensure that certain categories of housing are repaired responsibly and swiftly. That purpose is not served if the 2022 Act's provisions are used to assist insurers to escape their liability to pay for remedial works to the same categories of housing. The Respondent maintains that the insurers have inserted themselves into this process, with the clear intent of extinguishing their liability, rather than any interest in the remediation of the building. In the Respondent's submission, exercising discretion in favour of such an abuse would be tantamount to accepting it and encouraging it and will provide a model for warranty providers to deal with claims in this way. Accordingly it is contended that this is a case where the motivation for seeking a remediation order is relevant to the tribunal's exercise of its discretion, since it is a motivation that taints the whole case.
56. More specifically, it is said that the Participation Agreement is a damages-based agreement. Reliance is placed upon the fact that the leaseholders are to make a payment to AmTrust as the person providing claims management services if the leaseholders obtain a specified financial benefit in connection with the matter in relation to which the services are provided, and the amount of that payment is determined by reference to

the amount of the financial benefit obtained. Under clause 9.1 of the Participation Agreement, all recoveries are to be paid by the leaseholders' representatives to AmTrust, or AmTrust's solicitors 'to be held on account to fund the remedial work required'. Hence, Amtrust will obtain the full benefit of any proceeds of these or other proceedings issued under the Participation Agreement. In the Respondent's submission, this does not meet the requirements of Damages Based Agreements Regulations 2013 in that it does not specify the reason for setting the amount of the payment at the level agreed, and the amount of payment recovered by Amtrust under the Participation Agreement exceeds 50% of the sums which would be recovered by the Applicants. In the circumstances, which it was submitted also render the agreement champertous, it was submitted that the Participation Agreement is unenforceable.

57. In conclusion, it was submitted that if Amtrust's contention that the policies do not respond to the leaseholders' losses is correct, Amtrust has no interest whatsoever in these proceedings and is wantonly and officiously intermeddling with the disputes of others without interest, justification or excuse. Alternatively, if Amtrust *does* owe the leaseholders obligations under the policies, the Respondent maintains that the Participation Agreement has been formed purely to assist the insurer of the Property to avoid meeting its liabilities.
58. In our view, the difficulty with the Respondent's argument is that notwithstanding the provisions of clause 9.1 of the Participation Agreement, under the present application for a remediation order, there is no prospect of any sums being paid to the leaseholders. Moreover, even if the Participation Agreement is unenforceable, it is not clear why that should affect the underlying proceedings. It is accepted that the Second and Third Applicants are proper applicants, the Respondent is a proper respondent and the Property is a relevant building – in other words the proceedings are properly brought. Further, the Second and Third Applicants have a clear interest in the outcome of these proceedings, quite apart from any interest that Amtrust might have. Accordingly, we do not

accept that this issue provides a ground for refusing to make a remediation order.

*Our conclusion based on the circumstances of the present case*

59. It is clear that there is a significant dispute between Amtrust and the Respondent about who should fund the works. Unfortunately, the result is that the leaseholders have been left in the middle, continuing to live in an unsafe and un-remediated building. While the arguments of both Amtrust and the Respondent were put forward with considerable vigour, it is important not to lose sight of the tribunal's jurisdiction under s.123 of the 2022 Act. The question before us is whether to make a remediation order and if so on what terms. We do not have power under s.123 of the 2022 Act to determine who pays for such works. Even if the Respondent were correct in its contention that Amtrust is using this process as a way to avoid its liability, this does not change the fact that the Respondent is the only party that has the right to carry out the necessary repairs. In the circumstances, even if we were to accept the Respondent's arguments with regard to Amtrust, we do not consider this sufficient reason not to make a remediation order: irrespective of how the works are funded, it is the Respondent's obligation to carry out those works.
60. Further, it is unarguable that there has been considerable delay. Despite the fact that problems with the Property have been known about for 5 years, remediation works have not yet commenced. Some element of the delay can fairly be attributed to the insurers. Even if the Amtrust is now entitled to rely on the provisions of Schedule 8 to the 2022 Act to say that liability under the policy does not arise, that was not the case for a period of approximately 3 years (between 2019 and 2022) during which time the defects were known and the insurer had, at least in part, accepted liability. It also appears that the leaseholders considered it necessary to instruct solicitors to correspond with Amtrust in order to move things forward. However, by no means does this absolve the Respondent. In particular it is not disputed that the Respondent has failed to comply with the LFB Notice or the two local authority Improvement Notices.

61. It was submitted on behalf of the Respondent that now that the first stage of CSS pre-tender funding has been obtained, the tribunal can have confidence that the works will be carried out. However, given that no works have taken place for 5 years, the tribunal cannot be not satisfied that the Property will not be remediated in any event without an order being made.
62. Having regard to all the circumstances of the case, in our view, the decisive factors are:
- (1) The Property remains un-remediated with significant relevant defects (although it is understood that some firestopping work has been done at 165);
  - (2) The only party permitted to carry out repairs under the terms of the leases is the Respondent;
  - (3) Given the delay to date, we are not satisfied that the necessary remediation works will take place without an order of the tribunal.
63. Accordingly, we determine that it would be appropriate to make a remediation order in the present case. Were we to accept the Respondent's argument that no remediation order should be made on account of the actions of Amtrust, the persons who would suffer would principally be the leaseholders as they would be left in an unsafe building. In our determination that would be the wrong outcome and we do not accept that it would be a proper exercise of our discretion.

#### **Content of the remediation order**

64. Although both parties produced separate draft remediation orders (the Respondent's being subject to its primary contention that no order should be made), by the morning of the second day of the hearing the differences between them had become quite small. As noted above, there was considerable agreement between the parties as to the categories of relevant defects. It was accepted the defects reported on and agreed by the experts should be included within a remediation order. Indeed, save for

two points of dispute and the length of time to be allowed to comply with the remediation order, the terms of the draft order were agreed.

*Outstanding issues regarding relevant defects*

65. The two remaining disputed issues related to the replacement of what was described as Wall Type 1 (the brick slip cladding) and Wall Type 2 (the timber cladding to the façade).
66. The definition of “relevant defect” under section 120 (2) and (5) of the 2022 Act makes clear that a ‘relevant defect’: (a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works; and (b) causes a building safety risk. The “relevant works” include “works relating to the construction or conversion of the building” if completed within the relevant period of 30 years after 28 June 1992. A “building safety risk” is defined in section 120(5) as meaning “a risk to the safety of people in or about the building arising from – (a) the spread of fire, or (b) the collapse of the building or any part of it.” It is notable that Part V of the 2022 Act does not define either ‘relevant defect’ or ‘building safety risk’ by reference to any specific criteria such as compliance with building regulations, or applicable guidance or codes of practice for assessing the fire risk.
67. It should be said at the outset that the disputes regarding Wall Type 1 and Wall Type 2 were not specifically addressed in the parties’ expert’s reports. Whilst we have no doubt that both experts were honest, professional and keen to assist the tribunal, their evidence barely touched on these matters. This was principally because both reports focussed on the Property’s compliance with Building Regulations as at the time of construction. However, as noted above, the tribunal’s jurisdiction to identify relevant defects for the purposes of Part V of the 2022 Act is not limited to a determination of whether the construction was in compliance with Building Regulations at the time of the works. Indeed, one of the reasons for the necessity for the 2022 Act is that previous standards with regard to fire safety are no longer always considered to be sufficient.

68. The evidence relating to Wall Type 1 and Wall Type 2 derived largely from two FRAEW reports (for 163 and 165 Iverson Road) dated 7 June 2024 by the Bailey Partnership, which had been obtained by the Respondent and which were not the subject of challenge.
69. With regard to Wall Type 1, the FRAEWs identify combustible materials in the brick slip cladding and give a FRAEW risk rating of ‘High’. Similarly, with regard to Wall Type 2, the FRAEWs identify combustible material in the timber cladding and give a FRAEW risk rating of ‘High’.
70. Mr Phillips’s evidence was that, although he is a building surveyor, he has fire safety experience and had completed a EWS1 course. As such, at the hearing he gave his views on the two disputed aspects. Mr Ogus did not feel able to comment, as these matters were not within his expertise.
71. Mr Phillips contended that in relation to Wall Type 1, it would be disproportionate to remove the cladding. Instead, and taking a risk-based approach, said to be consistent with PAS 9980 (the government sponsored code of practice for assessing the fire risk associated with external wall construction), he considered that the relevant defect could be remediated by the installation of cavity barriers and fire breaks. It was suggested that these actions would reduce the risk level to low-medium, which, in Mr Phillips’s view, would be ‘tolerable’. It was accepted by Mr Phillips that in order to install the fire breaks, it would be necessary to remove the external cladding. However, he maintained that the relevant defect is the lack of fire breaks and therefore the replacement of the cladding would only be as a consequence of putting in fire breaks, not because removal of the cladding itself was necessary.
72. The FRAEW report recommends that remedial works should either be the removal and replacement of the combustible insulation materials and/or the installation of an appropriate system of cavity barriers and fire breaks. It also makes clear at para.1.4.1 that:
- “... the most suitable approach to address this is deemed to be the complete **removal and replacement** of the combustible materials ...”* (emphasis in original).



The report gives an alternative of undertaking remedial repairs, albeit this option was described as “... *depending on the client’s appetite for risk.*” Further, and contrary to Mr Phillips’ view, according to the FRAEWs this option would “*reduce the overall risk to a “medium” level*”. The report adds that:

*“... we have become aware that insurers of buildings containing combustible materials will not offer leaseholders insurance where combustible materials are left in situ when a remedial repair is undertaken as opposed to its removal and replacement.”*

73. In our view, we do not accept the suggestion that it would be disproportionate to replace the brick slip cladding. We asked Mr Phillips about the holistic approach to be taken, particularly in light of the fact that this is a timber-framed building. While we note Mr Phillips’s contentions as to proportionality, we would also be reluctant to endorse his evidence that the FRAEW would have been prepared with the CSS fund application in prospect and therefore would likely take an overly cautious approach with a concomitant position on funding in mind. The FRAEW reports make clear that removal and replacement is the preferred option, and are prepared by experienced professionals in fire safety. The FRAEW reports suggest that undertaking remedial repairs would only reduce the risk level to ‘medium’, which in our view would not be satisfactory holistically.

74. As regards Wall Type 2, again, the FRAEW reports stipulate that the most appropriate solution would be the removal and replacement of the timber cladding system, the PIR insulation and timber battens:

*“Accordingly, remedial action was considered likely to address the risk, and **removal and replacement** of the timber cladding system including the polyisocyanurate (PIR insulation and timber battens with an alternative system that achieves A2-s1, do or better rating was the most appropriate means to achieve this.”* (emphasis in original)

75. The reports give an alternative; to apply a fire-retardant treatment system to the timber cladding and install an appropriate system of cavity barriers and fire breaks. However, this is again qualified by stating that it “*depend[s] upon the client’s appetite for risk*”. Further, it is stated that fire-retardant treatment products require re-application periodically and

maintenance in order to function as intended. Moreover, it is stated that “... *such products would not completely eliminate the risk as the timber decking is inherently combustible.*” The report adds the same concern about insurance as above where combustible materials are left in situ.

76. In light of all of these qualifications we do not consider that application of a fire-retardant treatment would be adequate to remedy the relevant defect in relation to Wall Type 2.
77. Mr Phillips stated that he generally agreed with the assessment of the FRAEW, save that it was not applicable for all of the timber cladding at the Property. While the analysis in the FRAEWs was clearly applicable to the escape routes, in his view, there was no need to replace the timber cladding to the façade of the building where it was not above the entrances or did not span two storeys or more. He contended that in these residual areas, it would not be proportionate to remove the timber cladding – and arguably did not amount to a relevant defect. However, the difficulty with this analysis is that the FRAEWs draw no such distinction. Moreover, having regard to the concerns over leaving combustible material in situ, we find no valid basis for not replacing all of the timber cladding.

*Time for remedying the specified defects*

78. As regards the length of time to be allowed for the remediation works to take place, while we are conscious that any time period should not be unrealistic, we are also concerned that it should not be longer than necessary – particularly given that no works have been carried out for 5 years despite fire safety issues having been apparent throughout that time.
79. The Respondent proposed a time period of 36 months, as compared to 18 months suggested by the Applicants.
80. The Respondent’s period of 36 derived from two sources: a chart produced by Bailey Partnership which was adduced during the hearing and in Mr Phillips’s report. Mr Phillips provided a breakdown of the overall time as follows:

- (i) CSS Funding (Pre-Tender Support) – 2.5 – 3.5 months  
(10-14 weeks)

- (ii) Design – 6 months
- (iii) Procurement (Incl CSS Funding for the works) – 5 months (24 - 26 weeks)
- (iv) BAPA engagement throughout CCS Funding, Design and Procurement stages
- (v) Pre-Construction Activities – 3 months
- (vi) Construction Phase – 18 months

Total – 35.5 months

81. However, Mr Phillips accepted that he was not a project manager and that the information had been pulled together by members of his costs consulting team.

82. In contrast, the witness statement of Mr Whittaker (who had provided his statement on behalf of the Respondent), suggested a much shorter timeframe. Mr Whittaker is currently engaged by the Respondent to assist with the CSS application and his witness statement set out the progress that has been made to date and included time estimates for the future of the project. Paragraph 14 of his statement provides as follows:

*“Based on previous experience of dealing with Homes England on funding under the Building Safety Fund (which applied to High Rise buildings over the height of 18 metres and buildings situated in Greater London) and my experience of dealing on other projects under the CSS, my estimate of the next stages is as follows:*

- (a) The design phase will take approximately 6 months to complete;*
- (b) The construction phase will take approximately 12 months to complete.”*

In other words, the design phase and construction phase should take a total of 18 months.

83. The statement also makes clear that after the design phase, an application for ‘full funding’ would be produced to Homes England. According to paragraph 17 of Mr Whittaker’s statement:

*“My role at the stage of full funding for each block will be to work with the Respondent’s Cost Consultant to produce a full works cost schedule and submit to Homes England for full funding approval. I understand Homes England have an internal KPI to approve this within ten working*

*days however I have no influence on this timeframe. Once full works funding is approved, the Respondent can commence entering into contract for the Construction phase.”*

84. While there might be an argument as to the relevance of funding arrangements in determining the specified period for the completion of specified works, we are alive to the realities of the circumstances in the present case. In any event, however, in light of Mr Whittaker’s evidence, we consider that a period of 19 months is appropriate. This starts from the basis of the total of 18 months indicated for design and the works themselves and gives another month for the application to Homes England (noting the reference to the target of 10 working days for approval). We are fortified in our conclusion that 19 months would be sufficient on the basis that the Respondent would not be starting from scratch as shown by Mr Whittaker’s statement and Mr Dubey’s evidence that efforts have been going on in the background already.
85. In the circumstances, we determine that the works must be completed within 19 months of the date of this order.
86. It should be noted that the remaining terms of the order were agreed between the parties. In particular, it was agreed that there should be further investigation of what the parties have described as Wall Type 3 (the zinc standing seam cladding), which can take place at the same time as the remedial works which have already been identified.

### **The remediation order**

87. The tribunal’s remediation order is at the annex to this Decision and is drafted having regard to the matters set out above. For the avoidance of doubt, the tribunal retains jurisdiction for so long as the relevant defects remain at the Property, and there is a possibility of a variation of the remediation order, either as to scope or as to timing.

**Name:** Judge Sheftel

**Date:** 10 January 2025

### **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 should be made on Form RP PTA available at <https://www.gov.uk/government/publications/form-rp-pta-application-for-permission-to-appeal-a-decision-to-the-upper-tribunal-lands-chamber>

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).

## **Annex – Remediation Order**

[Separate document]