In the FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Tribunal case reference	**:**	**CAM/42UD/HYI/2023/0007**
Property	**:**	**Focus Apartments, Carr Street Ipswich, Suffolk IP4 1HA**
Applicant	**:**	**Secretary of State for Levelling Up, Housing and Communities**
Representative	**:**	**Kerry Bretherton KC and Ruth Keating, instructed by Walker Morris LLP**
Respondent	**:**	**Grey GR Limited Partnership**
Representative	**:**	**Jennie Gillies, instructed by DAC Beachcroft LLP**
Type of application	**:**	**Remediation order**
Tribunal	**:**	**Judge Wayte** **Judge David Wyatt**
Date of decision	**:**	**4 July 2024**

DECISION

Decision

The tribunal makes the accompanying remediation order.

Reasons

1. This building was a 1960s office block known as Eastgate House, which was converted for residential use in 2014/2015. It is about 22 metres above the level of Carr Street in Ipswich. It accommodates 25 residential flats on the third to seventh storeys. It sits above and is surrounded by retail premises on ground and first floor levels, known as the Eastgate shopping centre, with car parking areas on the shopping centre roof.

2. The Respondent is the head leasehold proprietor of the residential parts, known as Focus Apartments. The head lease was granted in 2015 for a term of 150 years. It includes small access and storage areas on the ground and first storeys, the residential storeys above and the roof of the block. Each of the flats was let on leases granted in 2016/2017 for terms of 125 years from 2016. The shopping centre is retained by the freeholder, Sheet Anchor Evolve (London) Limited.

3. The general background, law and parties are described in earlier remediation order decisions from tribunals in this jurisdiction about disputed matters concerning some of the other relevant buildings owned by the Respondent: Vista Tower in Stevenage (CAM/26UH/HYI/2022/0004), the Chocolate Box in Bournemouth (CHI/00HN/HYI/2023/0008), Bracken House in Manchester and The Timblebeck in Leeds (a combined decision, MAN/00BY/HYI/2023/0016 and MAN/00DA/HYI/2023/0012). Informed by those decisions and their preparations for the hearing about Focus Apartments, the parties were largely able to reach agreement in this case. Given what remains, there is no need for a detailed description of the background. However, in view of the general allegation of delay, we note below some particular points and events.

4. On 10 January 2018, the Respondent acquired the head lease for about £335,000. We were told that a fire risk assessment procured for them in February 2018 identified the risk of external fire spread due to the use of combustible materials, but described the risk as tolerable. Following further advice about the portfolio of buildings which the Respondent had acquired as ground rent investments and then discovered had fire safety risks, a tender process to investigate the buildings and potential remediation works started in October 2020. A survey was carried out by Wintech in November 2020. In view of the findings of their survey report, a waking watch was arranged until a fire alarm system was installed in 2021.

5. In July 2021, Suffolk Fire & Rescue Service ("**SFRS**") formally notified the Respondent's managing agents of fire safety deficiencies. In May 2022, saying that sufficient progress had not been made, they served two enforcement notices. One required internal works to deal with inadequate compartmentation/firestopping. The other related to missing cavity barriers and combustible components in external walls. Later in May 2022, there was a fire in Flat 405 which was "mostly" contained within the flat, with some smoke and water damage in the common area and external fire spread limited to the window area. It appears the fire station is very near the building and it had been possible to attend quickly. It was said that had helped contain the fire, which might otherwise have spread.

6. In July/August 2023, internal remedial works (compartmentation and fire stopping which did not qualify for Building Safety Fund ("**BSF**") funding) for the common parts were certified complete. Works to individual flats were completed in December 2023 (with, it appears, at

least some occupiers decanted to enable these works). A small number of snagging items had since been completed. The Applicant's case documents criticise the Respondent for a late application to SFRS for an extension of the deadline in the relevant enforcement notice, but it was not disputed that the notice had ultimately been complied with. All of the internal remedial works had been completed.

7. In relation to the external walls, the date for compliance with the remaining SFRS enforcement notice had been extended by reference to BSF requirements. An earlier extension anticipated that works would start in March 2024. That had later been extended to July 2024 and based on the current programme the Respondent will need to seek a further extension. As for the BSF process, in March 2023 the parties had agreed the form of grant funding agreement to be used for all the relevant buildings which the Respondent had registered with the BSF. On 30 June 2023, the BSF had confirmed the external works for Focus Apartments were technically eligible for funding. A funding application was made to the BSF on 28 July 2023 for ~£4.347m based on the estimates from the most competitive first-stage tender and programme, from Lawtech Group Limited, from an initial procurement process.

8. On 29 August 2023, the Applicant sent a letter before action, proposing to apply for a remediation order against the Respondent under section 123 of the Building Safety Act 2022 (the "**Act**").

9. On 7 September 2023, following the same procurement approach used for the other buildings in their portfolio, the Respondent appointed Lawtech under a pre-contract services agreement ("**PCSA**") to carry out any further intrusive tests and produce their detailed design for the external remedial works, as the prospective design and build contractor.

10. On 18 September 2023, the Applicant made their application to the tribunal for a remediation order for Focus Apartments, describing as "*known defects*" the matters described in a fire risk appraisal of external walls report procured by the Respondent from CHPK Fire Engineering dated 21 March 2023 (following earlier versions) under the PAS9980 standard introduced in 2022. That report identifies the high risk external wall types requiring remediation as:

    a. render overlaying expanded polystyrene insulation (recommending removal of the EPS and replacement cladding with fire stops/barriers); and

    b. glass panels on cementitious board (recommending removal of timber frames and replacement materials with fire stops/barriers).

11. On 27 September 2023, the tribunal gave initial directions for the parties to prepare for a case management hearing. On 30 November 2023, Lawtech produced a works programme which had been revised from the versions previously discussed between the parties, taking into

account the need to obtain building regulations approval from the Building Safety Regulator under the new regime. At the case management hearing on 7 December 2023, the tribunal gave directions for the steps to be taken by the parties to prepare for a final hearing. The freeholder declined an invitation to apply to be joined to these proceedings; they did not wish to make representations.

12. In January 2024, it was agreed that the full works costings should be submitted to the BSF at the end of Lawtech's design period under the PCSA. On 2 February 2024, planning permission was granted for the external works. On 11 March 2024, the Respondent's advisers produced a provisional construction programme. This showed a proposed start on site date of 5 August 2024 and a 61-week construction period, with an estimated completion date of 28 November 2025. Following completion by Lawtech of its design and formal tender for the remedial works under the PCSA, this was revised to 19 August 2024, 66 weeks and 15 December 2025. On 20 May 2024, the Respondent's detailed draft application for BSF funding board approval was submitted for discussion. Apparently, it then took several weeks to explain these costs to those advising the BSF/the Applicant because the Respondent's quantity surveyors had produced detailed calculations rather than area-based prices.

13. The leaseholders had been invited to apply to be added as parties to these proceedings if they wished to make representations (or be directly involved, other than as witnesses for the Applicant). Instead, on 29 May 2024, 10 of the leaseholders produced a letter asking the tribunal to make a remediation order. They said there had been a second fire in a flat on 23 February 2024, when it appeared one fire service unit was stationed purely to direct water to the surrounding area from outside the building, causing water damage. It was not disputed that there had been a second fire, but we had no other information about it. The leaseholders said without an order they were concerned the matter could drag on for "*several more years*". They asked the tribunal to set an "*appropriate time schedule*".

14. On 31 May 2024, the parties confirmed that the Respondent had agreed to submit to a remediation order being made. They proposed reduction of the hearing to one day, or half a day, with no inspection. Accordingly, the inspection was cancelled and the hearing was reduced to 24 June 2024. On 19 June 2024, the parties produced their updated draft remediation orders. The only difference between them was whether what the Applicant called a six-month grace period should be included. That is, whether the specified time by which the Respondent would be required to remedy the relevant defects would be 15 December 2025, the estimated completion date in the current programme, or 15 June 2026.

15. On 21 June 2024, we sent to the parties their draft order with proposed revisions. These were informed by the approaches taken in the earlier cases mentioned above. As we explained, we were concerned that

without these amendments the order might delay the works in this case. Under the earlier version, an application would be needed to allow the Respondent to remedy the defects in a different way. There also seemed to be a risk of applications before the estimated completion date (or under a general liberty to apply, rather than permission to apply only about extension of the specified time) distracting these parties and causing delay.

16. We were grateful for the assistance from Counsel at the video hearing on 24 June 2024. We deal with the remaining matters in turn below. At the hearing, we were told that the BSF application had been finalised and submitted on 21 June 2024, seeking funding for a total estimated cost of £5.014m based on the final design/tender from Lawtech.

General

17. We are satisfied that we have jurisdiction under section 123 of the Act to make a remediation order. The parties have agreed that the defects they specified in the draft order are "relevant defects" for the purposes of s.120, in a "relevant building" for the purposes of s.117, the Respondent is the "relevant landlord" in relation to those defects and the Applicant is an "interested person" for the purposes of s.123.

18. We have decided that we will make a remediation order if we are satisfied that it is in terms which should not get in the way of (or delay, or distract the parties from co-operating about) the requisite remedial works. We do so for the same general reasons as explained in relation to Vista Tower and Bracken House/The Timblebeck. The order should serve as a backstop, reassuring the Applicant and leaseholders that the remaining works will now be carried out within a reasonable time. That is all the more important following the fires at flats in Focus Apartments, which were no fault of the Respondent but must give residents even more cause for concern. Further, the Respondent has in effect consented to the making of such an order.

19. At the hearing, Ms Bretherton generally did not press the criticisms which the Applicant had sought to make of the Respondent. It seems to us that she was right not to do so. The remedial works and BSF process are not as far advanced as those for Vista Tower, for example (where a grant funding agreement and works contract had been entered into and works had started). But that was an (even) higher risk property and the final design and funding application stages have now been reached. Given the matters noted above, the Applicant's criticisms that the Respondent has had knowledge of fire safety risks since 2018, and enforcement notices have not been complied with, are in isolation misleading. Ms Bretherton pointed to the finding in the Chocolate Box decision that, in that case, the Respondent had prioritised seeking BSF funding above carrying out remedial works as soon as possible. As Miss Gillies observed, we were not taken to anything which would justify such criticism in relation to Focus Apartments. The approach taken by SFRS seems consistent with the view that it was reasonable for

these difficult and substantial remedial works to be carefully planned around the requirements of the BSF. As noted above, SFRS have granted extensions of their remaining enforcement notice to enable the requisite planning/funding process.

Specified time

20. In the Vista Tower case, the Applicant had proposed a "grace period" paragraph in their draft remediation order, providing that no application would be needed to extend the specified time by up to two months in total (if the Respondent notified the leaseholders, the tribunal and the Applicant, with a brief description of their reasons). In that case, we decided that a margin of six months would be appropriate. Although the terms of their remediation orders were different, the tribunal deciding the Chocolate Box case, and the tribunal deciding the Bracken House/The Timblebeck cases (where it had been said for the Applicant that an additional margin of any length was unnecessary but alternatively two months would not be unreasonable) decided that a similar margin of six months would be appropriate.

21. In these proceedings, the Applicant said it was now concerned about grace periods being included in remediation orders, when there is no specific provision for this in the legislation. Ms Bretherton said that tribunals had now made remediation orders in a wide range of cases and these tended to be generous with the specified date, rather than allowing a grace period. She pointed to a 10% contingency which had been included in a Focus Apartments programme from early March 2024 and suggested that had in effect been spread across the periods in the current programme. She said there was no evidential basis for assessing any grace period. She pointed out that the priority must be to minimise the risk to the life of residents, which remained until remedial works were completed. If we decided a margin should be included, it ought to be as short as possible and nothing like six months.

22. Miss Gillies referred to the scale of the portfolio of relevant buildings which had been acquired by the Respondent. She noted the process developed, starting with Vista Tower in October 2022, to for each building investigate defects and procure/plan remedial works to be designed by suitable contactors, follow the BSF application process, enter into a JCT design and build contract with the chosen contractor and enter into a grant funding agreement with the BSF. She acknowledged the 10% contingency in the earlier draft programme, but pointed out that in fact none is shown in the current programme. She reminded us of the complex nature of the works, noting specific matters which we mention below. She noted that, save in relation to the Chocolate Box, no adverse findings had been made about the Respondent. She had floated the possibility of a margin of nine rather than six months, but this had been suggested in case the tribunal were concerned that six months would not be enough.

23. Miss Gillies described different potential categories of case. She observed that other remediation order cases (not involving the Respondent) have predominantly been brought by leaseholders against landlords who were a long way from being in a position to commence works. In such cases, the tribunal had made an open form of order with general liberty to apply, to enable pressure and practical progress. The order in Waite v Kedai Limited (Leigham Court Road, LON/00AY/HYI/2022/005 & 6) was an example. She contrasted that with the submissions and observations in Vista Tower about the mechanisms under JCT contracts and a grant funding agreement for variations or extensions of time and the importance of avoiding interference with these. She pointed out that the tribunal deciding the most recent Bracken House/The Timblebeck cases shared the concern that in cases like this the remediation order should not get in the way. There, as here, commencement had been near but contracts had not yet been entered into. It was important not to impose terms which necessary third parties had not (yet) signed up to.

Conclusion

24. Generally, we accept the submissions made by Miss Gilles. We will not attempt to define categories of case, but this order is not being made on the basis of fault. The works planning and funding application process is at an advanced stage, with no apparent uncertainty about the scope of the work or the steps to be taken before works commence, so there should be no need for the tribunal to be involved further.

25. We agree that the anticipated start date is tied to whatever time may be needed for approval from the Building Safety Regulator and entry into a grant funding agreement. The application had been submitted to the Building Safety Regulator, but if they required the anticipated 12 weeks to grant approval that would be in September 2024. Once such approval had been given, the Respondent could then seek to enter into the planned JCT design and build contract with Lawtech, which includes the additional protections required by the agreed form grant funding agreement. We hope the final funding application can be approved, and the grant funding agreement can be entered into, quickly. However, those matters are likely to take a little time. Because of the time needed for completion of the PCSA design and then consultation between the relevant professionals, the final funding application has only recently been submitted to the BSF. The Applicant will have a great deal of influence on the timing through their control of the funding process. The parties are again encouraged to co-operate with each other to seek to avoid or minimise delays going forward.

26. Further, as was pointed out in submissions and noted in the earlier decisions, there are inherent risks (or probabilities) of delay in construction projects, and remediation works are likely to be riskier than new-build construction works. Here, the building is seven storeys high and has the complexities of the shopping centre around and underneath it. The Respondent had been liaising with the freeholder

for the necessary licences for scaffolding, storage and alterations, but the third party ownership is a complicating factor.

27. In the circumstances, the Applicant's preference for a deadline which is the same or only shortly after the estimated completion date is unrealistic. It would be likely to lead to the type of wasteful, distracting litigation which might tip the balance in favour of not making an order. Of course the remaining remedial works must be carried out as soon as possible to address life safety risks, but we cannot ignore the practicalities of what will need to be done from now on to deliver these remedial works. There is a real danger (or likelihood) that the start date and the completion date will unavoidably be delayed. Here, the 66-week period is shorter than the 84-week period for Vista Tower, but by the time of the hearing in that case there were fewer contingencies (or likely causes of delay), with building regulations approval having been obtained through local authority co-operation under the previous regime, the works contract and the grant funding agreement having already been signed up and works already underway.

28. In our assessment, taking into account the obvious potential causes of delay, the appropriate deadline to be specified in paragraph 1 of the remediation order is 15 June 2026, six months after the estimated completion date in the last version of the programme. Dealing with the suitable contingency in that way, as proposed in the draft consent order and in line with the approach taken in the other cases mentioned above, avoids the need for any debate about whether there can or should be a separate provision for a "grace period" or the like. To be clear, this is not an extension of the target date which the parties should be aiming for. Since the deadline gives a fair allowance for potential causes of delay, it may be more difficult to justify any application to extend that deadline.

29. This decision turns on the facts of this case. As with Vista Tower, we are not satisfied that this is a case where an order providing for short deadlines or active intervention is needed to put pressure on a landlord who is failing to engage. Our approach is intended to avoid doing more harm (by risking interference with the contractual mechanisms which should soon be in place, or otherwise causing distraction and delay) than good. It seems consistent with the position taken by leaseholders, who said that without an order they were concerned the matter could drag on for several more years, and asked us to set an "appropriate time schedule".

30. However, we do consider that, taking much the same approach as in Vista Tower, the Respondent should notify the Applicant and use all reasonable endeavours to notify the leaseholders if the Respondent will be unable to remedy the relevant defects by 15 December 2025 or any later notified date, explaining each time their new proposed completion date and their reasons, as set out in paragraph 3 of the draft order. The parties were not concerned about this. It provides an appropriate marker and transparency.

31. The parties were also content with our proposed paragraph 2, to avoid being prescriptive about how the defects are to be remedied, in case a different way is found when the works are underway. The paragraph simply requires the Respondent to notify the Applicant as soon as practicable if that happens. They would probably have to do that anyway, under the BSF requirements or the terms of a grant funding agreement, if any different remedial works were proposed.

32. As to paragraph 4 of the draft order, Ms Bretherton invited us to consider giving general liberty to apply, but could not foresee any potential issue for us to decide other than whether the time for compliance with the order should be extended. Ms Bretherton confirmed this had been raised for completeness and was not pressed. In view of the specific nature of the relevant defects agreed by the parties, the high-level agreed specification of remedial works and the agreed approach that this order should not be prescriptive about how the defects are to be remedied, we consider that in this case the permission should be limited to applications after 15 December 2025 about the time for compliance, as set out in paragraph 4.

Judge David Wyatt **4 July 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).