FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/HYI/2023/0013** **LON/00BE/BSB/2024/0602**
Property	**:**	**Empire Square, 34 Long Lane, London SE1 4NH**
Applicants (RO) & Interested Persons (RCO)	**:**	**Robert Zampetti, Judith Long, Simon Palmer, Terry Weston, Jay Datta, Erich Hahn, Will Edwards, Andy Causby & Methodios Typou (residential leaseholders)**
Representative	**:**	**Robert Zampetti & Judith Long**
Respondent (RO) & Applicant (RCO)	**:**	**Fairhold Athena Limited (freeholder)**
Representative	**:**	**Mr Rupert Cohen (counsel)** Instructed by Womble Bond Dickinson
Respondent (RCO) & Interested person	**:**	**Berkeley Group Holdings plc (developer)**
Representative	**:**	**Mr Robert Bowker (counsel)** Instructed by Trowers and Hamlins
Interested person (RO)	**:**	**London Borough of Southwark**
Representative	**:**	**Not in attendance**
Type of application	**:**	**Applications for (1) a remediation order under section 123 and (2) a remediation contribution order under section 124 of the Building Safety Act 2022**
Tribunal	**:**	**Judge Nikki Carr** **Mrs Helen Bowers MRICS** **Mr Andrew Gee RIBA**
Date of hearing	**:**	**23-25 and 28 April 2025**

Date of Decision : 5 June 2025

DECISION AND REASONS

Introduction

(1) These applications concern the development known as Empire Square at 34 Long Lane, London SE1 4NH. The hearing of the applications took place over the course of 4 days. The named leaseholders, represented at the hearing by Mr Zampetti and Ms Long, made an application for a remediation order under section 123 of the Building Safety Act 2022 (hereafter 'RO' and 'the Act' respectively) against Fairhold Athena Limited by application dated June 2022. Fairhold Athena Limited, represented at the hearing by Mr Rupert Cohen of counsel, made an application for a remediation contribution order under section 124 of the Act (hereafter 'RCO') against The Berkeley Group Holdings Plc, represented at the hearing by Mr Robert Bowker of counsel, on 8 August 2024. We are grateful to them all for their submissions.

(2) For ease, as each group occupies two categories of party depending on whether we are referring to them within the RO or RCO proceedings, we will refer to them hereafter as "the Leaseholders", "Fairhold" and "Berkeley". Berkeley and the London Borough of Southwark were joined as an interested person in the RO proceedings. The latter did not attend and was not represented at the hearing, although Mr Vincent Arnold did provide a short witness statement. The Leaseholders were also joined as interested parties in the RCO proceedings.

(3) Various other acronyms or shorthand for relevant terminology were used at the hearing, which may be useful to set out at the beginning of this decision as follows:

AM	Airey Miller Surveys Limited
AOVs	Automatic Opening Vents
E&M	Estates & Management Limited, Fairhold's agent
Firstport	Firstport Property Services, Managing Agents retained by E&M on behalf of Fairhold
FRA	Type 4 Fire Risk Assessment (internal fire risk - intrusive)
FRAEW	Fire Risk Appraisal (External Walls)
FRC	Facade Remedial Consultants Limited
IN	Improvement Notice
Kiwa	Kiwa Fire Safety Compliance
LFB	London Fire Brigade
OVs	(manually) Opening Vents
PIR	Polyisocyanurate insulation

Southwark	London Borough of Southwark Private Sector Housing Enforcement & Licensing department
SRT	Self-Remediation Terms (also referred to in the papers as DRC on occasion)
SVC	Smoke Ventilation Consultancy
SVR	Smoke Ventilation Report
RWA	Remedial Works Agreement (also referred to in the papers as WRC or SWA)
William Martin	William Martin Compliance Limited

Approach to the two applications

(4) Inevitably, despite the two applications that have been made involving different parties and different tests to be applied, the material history is the same. While we intend to deal with the applications separately in decisions below in order to avoid any confusion or inappropriate cross-pollination (in so far as that is possible, it being Fairhold's position that whether we also make an RCO has a fundamental bearing on whether it is just and equitable to make an RO), we set out the relevant history below, in three parts: The Development, Investigative history, and History between the parties.

Background

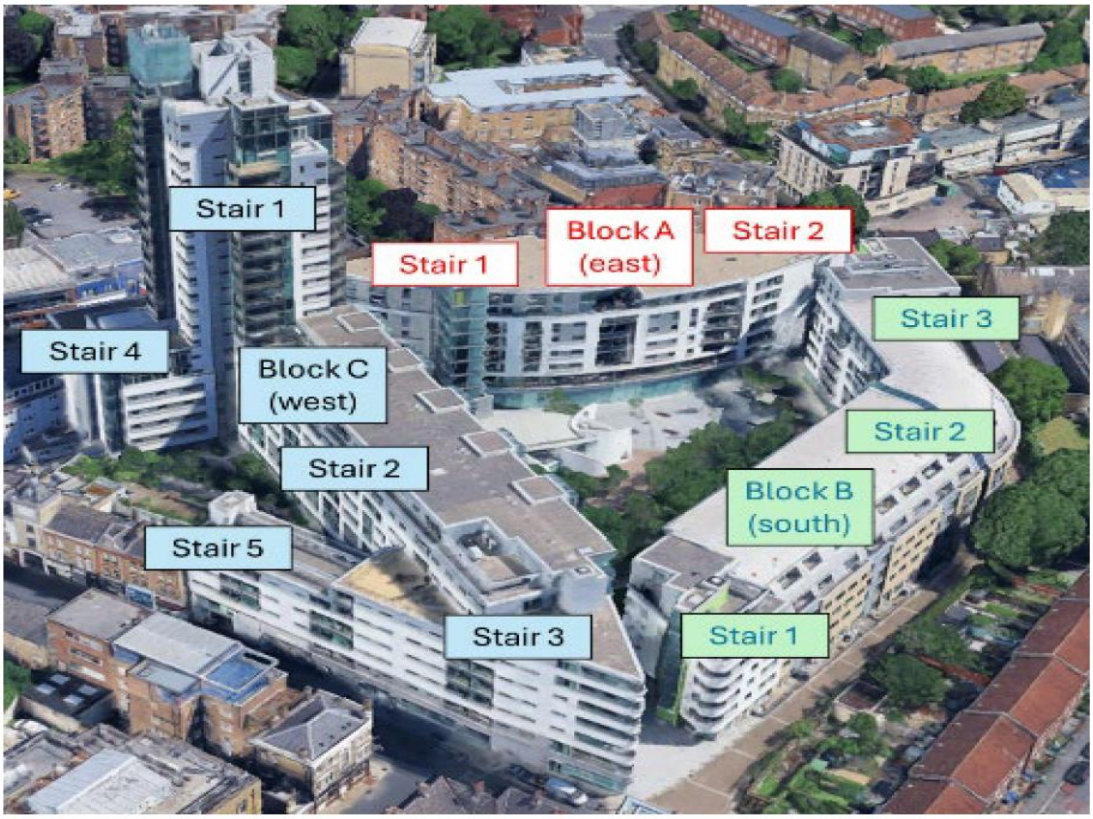
(i) The Development

(5) Empire Square ('the Building') is located in Borough, in close proximity to the eponymous underground station giving access to the Northern Line into the city, and to the Shard and Borough Market amenity areas. It was developed in around 2004 - 2006. Within the Building are 572 apartments, of which Southern Housing is the lessee of 212, and a business operation known as 'Marlin Apartments' the lessee of 157 (whether by a Mr John Corless or otherwise). Although the parties did not pursue any aspect of use of the Marlin Apartments, it appears that those 157 seemed to have some element of short-term occupation.

(6) The initial proposed fire strategy for the Building, prepared throughout 2002 – 2004, anticipated compliance with standards B1 – B5 of schedule 1 to the Building Regulations 2000, was prepared in anticipation of the Building meeting the requirements of the then-existing requirements of Approved Document B (2000 version with 2002 amendments) and (in relation to the part of the building more than 30 metres in height) the London Building Acts (Amendment) Act 1939. A 'stay put' fire strategy was prepared on that basis.

(7) The Building consists of three separate blocks: Empire Square East, Empire Square South, and Empire Square West. There is a single basement carpark underlying and serving all of the blocks, into which the majority of the stairs (including escape stairs) in each block lead. The blocks have also been variously referred to by the parties as Block A ('East Block'), Block B ('South Block') and Block C ('West Block'). The Tribunal visited all blocks and the basement car park during an inspection which took place in the morning of 23rd April before

commencement of the hearing. We reproduce from the report provided by Mr Jon Pagan MA(Cantab) CEng MIFireE, Head of Technical at KIWA Fire Safety Compliance and Berkeley's expert witness, two aerial google maps photographs, marked to demonstrate the situation of the blocks vis-à-vis each other:



(8) Each block is comprised of various stepped levels but is, excluding non-residential stories, at least seven stories/18 metres in height (excluding the ground floor commercial areas), and so not just a relevant building for section 118-119 of the Act as is admitted by Fairhold and Berkeley, but is also a 'higher risk building' for the purposes of Part 4 of the Act. Firstport is the appointed responsible person for the blocks and carries out its duties and functions; E&M (on behalf of Fairhold) is the Principal Accountable Person.

(9) In addition to the eight-storey block alike the East and South Blocks (often referred to as the 'spine' section), the West Block also comprises a tower of at least 22 stories ('the Tower'), and a seven storey 'key-worker block'. The corridors of the key-worker block connect to the stair of the Tower at all levels. The corridors of the eight-storey part of the block on the south side also connect to the stair of the Tower on all levels. On the evidence before us, and as was apparent at the inspection, the different levels of the West Block are, internally, one continuous building below the ninth storey.

(10) Where convenient below, the evidence we have drawn on is that relating to the West Block, being the block in respect of which the issues are the most extensive and the most contentious between Fairhold and Berkeley. We have nevertheless taken into account all of the evidence and submissions to us, and what we observed at the inspection, in coming to our decisions.

(ii) Investigative history

(11) As long ago as 2011, E&M commissioned a desk-study from M D Blithrey Chartered Surveyors into the external facades at the building, due to concerns from insurers regarding the building. The report concluded that the render system used was extruded polystyrene ('EPS') which is both combustible and prone to melt. Recommendations were made regarding the periodic inspection of the EPS, and for intrusive surveys to confirm the presence of cavity barriers/adequate fire stopping, in order to allay the fears of insurers who had raised issues with the insurability of the construction.

(12) In August 2020, FRC was instructed by Firstport to conduct an external facade report of each block, using the guidance in the Consolidated Advice Note then in place from MHCLG for buildings over 18 metres. Intrusive sampling was undertaken in various areas. Each report recommended that a holistic fire safety review be undertaken due to the presence of thermoplastic combustible insulation EPS render, and timber balcony constructions. Various observations were made regarding apparent breaches in or incorrect installation of cavities/fire stopping, supported with photographic evidence. Absent product markings or drawings, FRC concluded that the EPS in particular would not meet adequate performance requirements and would not comply with the (2000) building regulation B4(1). Firstport were advised to seek urgent professional advice

(13) In October 2020, Firstport engaged TriFire Limited (one Mr Adam Kiziak, by now well-known to have been undertaking such bad assessments that it led to his expulsion from the Institute of Fire Engineers in February 2025) to conduct an external facade review. which concluded that, despite the same issues as

identified in the FRC report, "*… the risk is such that there is no requirement for any interim measures, such as a waking watch, to be implemented. We have undertaken a holistic review of the property, in line with the NFCC guidance on implementing a simultaneous evacuation procedure. We are satisfied that the risk is sufficiently low that a change of evacuation procedure is not necessary. The means of escape from the building are seen to be adequate and sufficient, and the other fire safety systems provided are appropriate*." He therefore provided an EWS1 for each block, despite concluding that the EPS render system did not meet even a B1 standard.

(14) It appears that on the basis of that FRC, the decision was made to maintain the 'stay put' strategy.

(15) In June 2023, Southwark inspected each block. In October 2023, it served INs in respect of each block, identifying "*significant issues with fire safety*". These were served on Fairhold, who did not appeal any of the INs. The INs required completion of a number of measures within 24 months of 10 November 2023. Category 1 hazards identified included:

- the external wall systems (including for example the EPS render, defective fire barriers because of installation of EPS render over the top of them resulting in breaches of compartmentation, insufficient thickness of render basecoat, cavities in system as 'pockets' allowing unseen fire/smoke spread, stay-put policy likely to fail, PIR insulation to concrete tiled wall systems, timber decking to balconies), in which Southwark doubted Tri-Fire's conclusions for lack of evidence
- Insufficient smoke control (including for example locked OVs (only) at the end of long corridors, which will not open when head of stairs AOVs activate, basement lift lobbies to carpark not vented)
- Compartmentation and enclosure of services (including the smoke shaft serving the 22nd floor Tower lobby having unstopped penetrations, penetration issues to fire stopping, risers having insufficient fire resistance, fire stopping issues to basement car park)
- Fire doors (including excessive gaps at edges and hinges for common parts doors/chute hatches, lack of markings, lack of 60-minute resistant fire doors on the main staircase)
- Flat front doors (including excessive gaps, lack of marking to indicate resistance, and missing intumescent sealing of letterboxes)
- Lack of closers/unknown resistance of demised terrace doors
- Lack of Communal Automatic Fire Detection (external wall risk)
- Means of escape (issue including only single stair for 9 – 22 floor of Tower, sections of combustible render within 1.8meters of stairwell escapes)
- Lack of fire suppression e.g. sprinkler system or compensatory measure in >60 metre Tower.

(16) In November 2023, Mr Pagan began the FRAEWs for the blocks, to be completed using PAS 9980 guidance. On 28 November 2023, he wrote to Berkeley as follows (the email is not included, but rather transcribed to exhibits to Berkeley's statement of case in the RCO, and arose from a site inspection at

which it appears Mr Timothy Collison, Head of Technical for Berkeley, himself may have been present contextually):

… This email is just to follow up on the issues that were identified during the site inspection of Empire Square yesterday…

The inspection focussed primarily on the West Block which includes the Tower and the adjacent mid-rise block, so this email focusses on that building…

Once our site inspection is complete we will complete a site inspection report and an FRAEW report which will include a fire risk appraisal of the building taking into account all relevant factors. However, that will take some time and given the issues identified on site (as described later in this email) [Kiwa] do not consider it acceptable to wait that long in order to introduce mitigation measures. The purpose of this email is therefore to give a brief summary of the main issues that were identified on site and to describe a brief provisional risk appraisal which has been carried out, in advance of the full FRAEW report.

…

- *The rendered areas turn out to be a thin (approx 3mm thick) render over EPS. There was no mesh within the render. Mineral wool cavity barriers were present within every floor slab, but there was a 12mm thick layer of EPS over the face of the cavity barriers. That is a design that was used quite regularly by Sto in the early 2000s in order to prevent the darker colour of the cavity barriers being visible through the render. Unfortunately, it undermined the effect of the cavity barriers, to the point where they are unlikely to be effective. There were no cavity barriers in line with party walls or around the windows.*

EPS is a highly combustible material. Whilst there are systems incorporating EPS that have successfully passed the BS 8414 test, those tend to include a good standard of render, combined with cavity barriers that pass all the way through the EPS on every floor level. Those systems pass the BS 8414 test by containing the EPS to prevent it burning. In this case the render is thin, has no mesh, and the cavity barriers are compromised.

As a result, in [Kiwa's] view, the rendered facades present a significant risk of rapid fire spread up the facade.

The full FRAEW will need to include all relevant risk factors. In this initial email, the main ones we have considered are as follows:

- *Occupancy – the building was originally intended as general purpose apartments, but the current occupancy includes approximately 50% of the apartments on short term lets. Those occupants would not be familiar with the building. This would have a negative impact on the risk.*

- *Building height – the tower is tall (over 20 stories). The adjacent mid-rise block is 9 stories in height. This significantly increases the risk for the tower, and has a slight increase in the risk for the mid-rise block.*
- *The building is not covered by sprinklers. This increases the risk.*
- *For the tower, the rendered wall type is used in vertical strips which extend the full height of the building. For the adjacent mid-rise block, the EPS is used moderately extensively, but not in vertical strips as extensive as in the tower. This increases the risk for the tower and has a roughly neutral impact on the risk for the mid-rise block.*
- *The lower levels of the building include escape corridors that connect to multiple stairs. However, for the upper levels of the tower (i.e. above the top of the mid-rise block) there is only a single escape stair. This increases the risk for the tower and decreases the risk for the mid-rise block.*

Overall, based on this initial assessment, in [Kiwa's] view the risk for the tower is particularly high. The risk for the mid-rise block is still high, but not as severe as for the tower. [Kiwa] will be very likely to recommend remedial works for all areas with rendered EPS. However, in the interim, particularly for the tower, the risk is considered to be high enough to require an immediate change to simultaneous evacuation. That would typically require introduction of a waking watch and/or a fire alarm system to support that change. I've attached the NFCC guide, which gives guidance in this situation.

The change of evacuation strategy would only apply to the tower, but would include all levels of the tower down to ground level. The reason for that is that a fire in an apartment on the 1st floor could cause flames to emerge from a window, causing fire to spread up the height of the building, putting residents of the upper levels of the tower at risk. The system must therefore include, as a minimum, detection in all the apartments throughout the tower and alarm throughout all the upper levels of the tower.

We would also recommend that a survey be carried out of the internal fire compartmentation for the entirety of this building (not just the tower) particularly between apartments and the communal areas and checks that all fire safety precautions are fully operational. If those surveys identify significant shortfalls in those fire precautions, this risk appraisal will need to be revisited.

…

(17) On 29 November 2023, Mr Pagan followed up (again, transcribed into the exhibits to Berkeley's statement of case):

By the way, I would note that the TriFire Ltd report dated 12 October 2020 was based on site inspections of the external facade that they had carried out and had identified similar faults in the rendered EPS parts of the facade.

They recommended remedial works to be carried out (which is similar to our conclusions).

However, but [sic] in section 3 of their report (titled Interim Measures) they stated that they stated that [sic] they had carried out a holistic review of the property and had decided that it was not necessary to change the evacuation procedure to simultaneous evacuation. That obviously differs from our conclusions as described in my previous email.

Unfortunately they did not give any detail as to the process they undertook when carrying out their holistic review, so it is not possible for us to compare their review against ours in order to determine why their conclusions differ from ours.

However, one key difference is that our FRAEW is carried out to PAS 9980 which give a clear process to follow and a list of key risk factors that ought to be considered when carrying out that process. PAS 9980 was published in January 2021, which was a few months after the TriFire Ltd report was published, so the TriFire report could not have followed that process. I would also note that, as is the case for any risk appraisal, there is a considerable element of professional judgement included which can also introduce a certain element of variability into the analysis.

(18) On 18 December 2023, William Martin (Mr Robert Howard TIFireE MIFSM MIFPO) provided Type 1 FRAs for each block. For the East and South Blocks, William Martin was content that 'stay put' continued to be suitable. For the West Block, however, the following contents of the report made clear that 'stay put' was not, in his view, sustainable (responses in italics):

Due to ongoing issues and delays in carrying out remedial works on the cladding a decision has been made to hire 10 fire wardens 24/7 to patrol and should the need arise evacuate tenants, it is understood that additional wireless heat detectors are to be installed in to each flat in the near future.

Based on the available information, is the external cladding system at the property considered to be sufficiently low risk so as not requiring any further inspection: *NO*

Refer to action plan

…

William Martin Compliance Ltd has been appointed to provide competent advice to the Duty Holder in complying with fire safety law and approved guidance.

…

Documentation was observed on site confirming that the property was audited in 2020 by Southwark, Lewisham, Greenwich and Bexley Regulatory Fire Safety. The inspection found no major issues.

…

Fire Stopping:

All visible fire stopping appears to be provided in accordance with British Standard 476, and building service risers are suitably fire stopped appropriate to the design of the riser. Note: no responsibility is accepted by William Martin Compliance for issues relating to compartmentation which could not be viewed or identified at the time of the survey.

…

Evacuation Strategy:

There is generally an unacceptable risk to occupants primarily by virtue of the External Wall System and potential combustibility of materials involved. Additionally, there is inadequate compartmentation between the individual flats, electrical, plant and riser cupboards and throughout escape route(s) at this property to provide 30/60 minutes protection from fire and smoke for residents as identified in Part 2 of this report.

In view of the foregoing 'simultaneous evacuation' is recommended for this property until recorded deficiencies are completed or progressed to a level where a 'defend in place' or 'stay put' policy is deemed to be the appropriate evacuation strategy for this property.

(19) In April 2024, Kiwa (Mr Pagan) provided FRAEWs (revised between 23 - 25 April 2024), to assess the fire risk to occupants due to spread across the outer surfaces of external walls and attachments (such as the balconies) undertaken using PAS 9980 methodology, for each block. Fire risks arising from the interior or other external parts of the building were specifically excluded. Nor did it measure or confirm compliance with Building Regulations/guidance at the time of construction. The revision included reference to the William Martin FRAs, and carried out the risk assessment based on the 'stay put' strategy, rather than on the basis of the temporary transition to simultaneous evacuation.

(20) Mr Pagan's key findings were as follows:

(a) Given Mr Pagan's view of conflicts between William Martin's conclusion that there was inadequate compartmentation at the building, the FRAEW had been carried out on the basis that the internal compartmentation was to an adequate standard.

(b) Potential sources of ignition were:
   (i) Fires from within apartments (no sprinklers)
   (ii) Fires on balcony/external terraces (combustible materials stored on balconies)
   (iii) External fire at ground level (parking at close proximity to external walls)

(iv) Fire within a non-residential area (he identified that there was no potential *external* risk, as car park and bin stores are internal)
(v) Electrical attachments to external walls (external wall lights)
(vi) Fires from adjacent buildings/other areas (potential risks from adjacent buildings (the other blocks) in close proximity and a number of other buildings in close proximity)

(c) Wall types:
(i) Wall type 1 (ceramic tile wall build up at ground floor (commercial) level) - low risk
(ii) Wall type 2 (glazed wall system at isolated areas on all floor levels) - there is technically an internal compartmentation issue where there are no spandrel panels but only transoms forming separation between apartments, which transoms are unlikely to achieve 120 minutes fire resistance, and even less if made from aluminium - further investigations required. However, this internal issue would not cause rapid ongoing external fire spread as is the focus of the FRAEW – low risk
(iii) Wall type 3 (anodised aluminium cladding panel build up – extensive across all elevations) - no continuous cavity to the wall construction so no need for cavity barriers – low risk
(iv) Wall type 4 (rendered EPS – on the majority of all elevations) - render on top of EPS only 2mm thick, with EPS behind. Horizontal mineral wool cavity barriers overlaid with 10mm thick EPS over the face, therefore bypassing the cavity, significantly undermining the effectiveness of the cavity barrier. EPS has Euroclass of only E or F. Lack of specific detailed drawings showing the existence of cavity barriers horizontally, vertically, around the perimeters of doors and windows, or around service penetrations. Lack of detailed drawings for the inner wall blockwork to which rendered EPS is fixed – unacceptable (i.e. high) risk
(v) Wall type 5 (aluminium louvre panels – isolated areas at ground floor commercial units) - no drawings of cavity barriers provided. Conclusion was that these elements were for ventilation only – low risk.

(d) Balconies:
(i) Balcony type 1 (cantilever steel frame with glass and steel balustrade, timber decking) - more extensive assessment required – medium risk
(ii) Balcony type 2 (recessed balcony on concrete slab, render finish with glass and steel balustrade, timber decking) - despite the high-risk render (as that is due to wall construction), low risk
(iii) Balcony type 3 (recessed cantilevered balcony on steel frame with glass and steel balustrade, timber decking) - more extensive assessment required – medium risk

(e) Interim risk situation:

It is possible to tolerate higher risk levels that are present for a short period of time compared with those that would be acceptable over longer time periods.

The risk for the 9th floor and above is significantly higher than for the lower levels.

For the 9th floor and above, [Kiwa] would recommend a change in evacuation strategy to simultaneous evacuation…

For the Ground to 8th floor, [Kiwa] would not consider the risk to be high enough to justify the additional disruption caused by a change in the evacuation strategy. However, [Kiwa] would recommend that checks be made on all fire safety measures in order to ensure they are in good working order. That would include active fire safety systems as well as passive fire safety measures (i.e. fire doors). Should those checks identify failings in those safety measures, this risk review made need to be reassessed.

(f) Conclusions:

… the overall risk of fire spread over or within the external walls and attachments at Empire Square [West Block] has been assessed to be HIGH.

… further measures are required to reduce the risk further… [we] would recommend that the areas with rendered EPS be remediated to remove and replace the EPS. In addition, for the steel framed balconies in the Tower, the timber decking should also be replaced.

It is likely to require some time in order to carry out these remedial works. In the interim it will be necessary to ensure there is an acceptable standard of safety for the occupants of the building. [We] would recommend that the evacuation strategy for the 9th floor and above (i.e. the upper levels of the Tower) should be changed to simultaneous evacuation. That strategy should include detection in the areas directly below that. However, the areas from the 8th floor and below have access to multiple stairs and so the risks are not so high, so in [our] opinion it is not necessary to change to simultaneous evacuation for those areas.

(21) Amongst other recommendations for immediate actions made by Mr Pagan in the report, he advised Berkeley that checks should be made that all fire doors (including flat entrance doors, doors to staircases, doors into risers and any other doors that protect escape routes) were fire resisting and effectively self-closing. He also recommended further investigations into the compartmentation particularly at the slab edge between floors in the areas of glazed facade.

(22) On 30 April 2024, AM (Mr Keith Williams MISFM GiFireE BA(Hons) Dip Mgmt MBA MPA LLM, Intermediate Fire Engineer) provided Type 4 FRAs for the building on the instruction of Firstport, in the course of which sample areas were selected for intrusive survey. AM concluded:

(a) The current alarm system should be extended to cover all residents' apartments to support the temporary 'simultaneous evacuation' plan
(b) Fire stopping remedial works were required in several areas, including above the ceilings where cables and pipes passed through cross-corridor walls severely affecting the compartmentation of the building
(c) Remediation was required to a significant number of flat front doors, internal flat fire doors, communal doors and riser cupboards lacked sufficient fire stopping (observed when architraves removed)
(d) Most riser cupboards lacked sufficient fire-stopping and would not maintain 60-minute fire resistance
(e) Intumescent pads were required to be replaced/fitted to electrical sockets within the means of escape routes.

(23) The extension of the fire alarm system, rectification of fire stopping and riser cupboard issues, and works to doors were all considered 'high priority', meaning that they should be undertaken within 3 months. The remainder were classified as 'medium', requiring completion within 6 months.

(24) On 24 July 2024, the LFB confirmed by letter advice it gave to Firstport as follows:

The Type 4 intrusive Risk Assessment was carried out by Airey Miller on 29 April 2024, and recommends the current fire alarm system to be extended to all flats within the block. This would make the presently initiated waking watch redundant. My report states this recommendation is to be implemented as per the risk assessment. I am presently sending a draft Notice of Deficiencies to the Partnership Scheme between Hampshire and Isle of Wight Fire and Rescue service who are in partnership with FirstPort Group Ltd.

(25) Kiwa (Mr Pagan) reviewed the AM FRAs on 29 July 2024. He advised he was unable to determine whether the deficiencies identified were due to original construction or later additions. He suggested that the AM FRA only identified a small number of shortfalls in respect of fire doors, but did not identify any major or extensive shortfalls (he did not comment on the 'sampling' or whether it was extensive enough). He asserted that the FRA did not give any explanation why its author disagreed with his views regarding simultaneous evacuation, but he did say: "*it should be noted from a legal perspective, it is the person who carries out the fire risk assessment who has the duty to assess the overall risk levels. FRAEW reports in general would provide additional supplementary information and advice to the fire risk assessor to help them make that decision. So technically it is the fire risk assessor's decision as to whether to put the building into simultaneous evacuation or not.*" With that said, Mr Pagan concluded that there were no major issues in the FRA that would affect the conclusions of the FRAEW.

(26) Fairhold retained SVC to conduct a SVR in the building and carpark, and its reports were provided in October 2024. SVC made various findings, including that:

Building

(a) smoke ventilation is required in all corridors adjacent to each stair, but is present in stair 1 of the West Block only. If no additional ventilation could be provided to other stairs, a Fire Strategy review should be completed with a view to minimising risk to building users, perhaps by use of a different evacuation strategy and/or other
(b) There is no smoke ventilation at all to various corridor portions adjacent to stair 2 which is of concern and unlikely to be easily rectified. An engineered solution ought to be considered
(c) Floors 7 and 8 adjacent to stair 4 have no smoke ventilation, but no extended travel distance. Windows should be replaced with AOVs or an engineering purging solution should be installed
(d) Floors 2 – 4 have the same issue, that could be addressed by installation of OVs
(e) OVs should be replaced with AOVs on floors 9-21
(f) The lower section of stair 1 descends straight into the carpark with no intermediate lobby – one should be introduced
(g) The smoke shaft serving floors ground – 22 has AOVs at the top and the side. This could cause positive pressure in the shaft preventing smoke from entering or forcing it back out onto the fire floor. They must be checked for lockout
(h) Other services run into the shaft, compromising fire integrity. Further investigations were needed for fire stopping
(i) Issues were identified with wiring and junctions requiring making good
(j) AOVs on the 1 – 6th floors did not open adequately to prove 1 metre squared

Carpark

(a) The carpark ventilation is not adequate and falls short of many requirements of Approved Document B
(b) The main extract fans draw air from the car park (46%) and the ramp (54%) drawn in directly from outside. Therefore there are only 4-5 air changes per hour in the carpark when in emergency mode, instead of the required 10 (and the day to-day requirement of 6 changes per hour is also not met)
(c) Detection for activation should be by smoke detectors. There are none
(d) There are insufficient heat detectors
(e) Carbon monoxide detectors are mounted 3.4 metres from the floor. They should be 1.2 metres from the floor in order to be able to pick up carbon monoxide. There are also only half the required number
(f) Jet fans are installed so as to blow the wrong way, or many have their deflectors set so as to push air up instead of down (to limit Coanda effect). Some are placed against and other obstructions so will not be effectively

moving air. There are likely to be many stagnant areas that will not receive any changes per hour

(g) There are no sterile intermediate lobbies with required 0.4 metre squared permanently open vents, so concerns arise over smoke entering the building above

(h) SVC recommend adding intermediate lobbies with mechanical smoke protection and lowering/repositioning some of the jet fans.

(27) In January 2025, AM updated the FRAs taking into account the carpark (which its first version had omitted). In summary, its findings through sample surveys were that there are various non-compliant compartmentation and fire stopping issues (including lack of fire stopping to communal risers), and that it recommended a move to simultaneous evacuation for the whole of West Block (which by then was fitted with a temporary alarm system in floors 9 and above of the Tower, only).

(28) An additional report from SVC was provided at the hearing, dated 4 April 2025, demonstrating that Berkeley continued to disagree regarding SVC's findings (though it was said by Mr Brett that Mr Pagan and Mr Reeves were 90% agreed by his witness statement dated 24 January 2025).

(iii) History between the parties

(29) On the evidence available to us, in December 2020, Firstport informed Berkeley that it had applied to the Building Safety Fund to carry out remediation works. In March 2021, the difficulty regarding insuring the Building was ongoing - insurers were treating the building as a single building for the purposes of communication of fire risk between the blocks due both to their proximity and the 'underground layers', and the market was toughening its stance on both pricing and capacity where there was identified facade risk, additional facade fire load (from e.g. balconies), and an unknown schedule/timing for works to be undertaken (and at unknown cost).

(30) In unchallenged evidence, Fairhold stated that in February 2022 it received a request from Marlin (London Letting and Management) Limited ('Marlin'), on behalf of the leaseholder of the Marlin Apartments (in respect of which we know is that they are in the West Block, though not the arrangement), to undertake an intrusive investigation of the external facade of the West Block. When requests were subsequently made by Berkeley, they came through Marlin, and the arrangements proposed were unsuitable given that they would have meant the leaseholder was paying for or contributing to the costs of the surveys and possibly the work, and indeed themself carrying out the survey, despite Berkeley's responsibilities.

(31) On 5 April 2022, Berkeley signed the Developer Pledge, promising to take responsibility for remediation/mitigation works to address defects in buildings it had developed, of the nature anticipated by the Act.

(32) On 2 February 2023, Mr John Brett (Director of Health and Safety Compliance at E&M) emailed to a Mr James Fraser at Berkeley a draft template licence agreement for the investigations.

(33) By deed of bilateral contract dated 13 March 2023, Berkeley entered into the SRTs with the then Secretary of State for DLUHC , requiring it to remedy 'original development works' giving rise to 'defects' creating 'life-critical safety risks' in its developments/conversions.

(34) In around mid-April 2023, Mr Fraser returned a marked-up version of the draft to Mr Brett's colleague, Mr Russell Tillison (E&M). The parties then instructed external lawyers to progress it.

(35) There is clear evidence in the bundle that both Field Fisher (for Fairhold) and Trowers and Hamlins' (for Berkeley)'s non-contentious departments continued the efforts of the parties to enter into a licence for investigatory reports between May 2023 – September 2023.

(36) Due to the various issues in agreeing the licence across the portfolio at large in which Fairhold/E&M properties required agreements with Berkeley, a decision was taken to negotiate the investigatory licence on a bespoke basis for Empire Square.

(37) It appears Firstport updated leaseholders in March, April and May 2023 regarding Berkeley's obligations and attempts to enter into a licence for investigations.

(38) It was Fairhold's unchallenged evidence that during this period (from around February 2023), Berkeley did not actively engage with discussions about the remediation project, as it was focussed on agreeing the terms of the SRTs.

(39) By application to the Tribunal dated 26 June 2023, the Leaseholders applied for an RO, framed as an application seeking an order from the Tribunal that Fairhold be forced to grant access to Berkeley for investigative works. It is clear that the Leaseholders had formed the view that it was Fairhold holding up the process. That impression appears to have been formed on the basis of Berkeley's response to a formal letter from Neil Coyle MP, placing blame with Fairhold. It is very clear that Fairhold took a strongly different view of events to Berkeley (see for example the email dated 26 August 2022 from Mr Brett to James Fraser (Berkeley's Group Head of Operational Risk)).

(40) At a first CMH on 14 August 2023, the RO application was adjourned to 28 November 2023 to permit Fairhold to resolve the ongoing issues with the licence agreement. The adjournment was agreed with the parties and was conditional upon various matters including updates to the Leaseholders and other communications. The application was also amended so that a full RO in respect of relevant defects was sought from Fairhold.

(41) By an email dated 6 September 2023 Fairport notified leaseholders that a consent letter for an intrusive survey had been provided to Berkeley for its approval and that the results of that intrusive survey would inform the works to be specified in the SWA. It appears that the consent was agreed, and the requisite licence finalised by 27 October 2023, with intrusive investigations to

commence week beginning 13 November 2023. That was in fact the FRAEW carried out by Mr Pagan over the period November – December 2023. The final reports were said to be expected in January 2024, though as can be seen from the investigative history above, were in fact provided in April 2024 after William Martin's Type 1 FRAs had been reviewed.

(42) At the second CMH on 28 November 2023 the case was further adjourned to 21 March 2024, in light of (1) Southwark's INs (works for which were in part being commenced by Fairhold) and (2) the progress being made towards an agreement between Fairhold and Berkeley.

(43) By email of 8 December 2023 at 9.48am (ten days after Mr Pagan's email to him), Mr Collinson sent an email to Fairhold (Mr Brett) in which he summarised Mr Pagan's email of 28 November 2023 (omitting from it Mr Pagan's rationale contained in the relevant bullet points addressing how the high risk was aggravated or mitigated). He then wrote as follows (his emphasis given to the exhibit is removed, and such a practice should be discouraged particularly where original documents are not provided):

Berkeley have no legal interest within the development, the decision to change the evacuation strategy falls to the responsible entities for the development. With the above in mind, we suggest that you seek advice from a competent person in consultation with LFB and review the fire risk assessment, to ascertain whether the building cannot sustain a stay put strategy. As part of this review, we suggest that the competent person also reviews the internal compartmentation between apartments and the communal areas and checks that all fire and safety precautions are fully operational across all blocks with the render cladding. If any significant shortfalls in those fire precautions were identified, we would like to be informed.

*If it was determined that a simultaneous evacuation strategy should be implemented within the Tower, notwithstanding that the FRAEW has yet to be completed and without prejudice to liability, Berkeley would be willing to pay and install a simultaneous evacuation alarm system within all apartments that require this system. This would be a wireless system in accordance with BS5839 Category L5, include heat detectors being installed within the apartments where necessary and a sounder to each flat entrance… From instruction from yourselves to undertake this work we could mobilise within 15 working days and the installation of the alarm system would take 3 – 4 weeks to install. This is predicated on having good access to all apartments that require the alarm system. If the change did take place, communication with residents would be an important factor in this. We have worked together in a collaboratively [*sic*] manner previously on residents communication, so we would want this to continue and have input in what is being issued to residents. With any communication being with yourselves through the usual channels. Please also see attached NFCC Guidance for temporary change to simultaneous evacuation for blocks of flats, which informs the responsible person of appropriate steps to take and guidance on resident engagement.*

We are willing to provide you with assistance to ascertain what next steps should be taken, and if you would like a meeting to discuss this matter further…

(44) By email responding at 9.20pm the same day, Mr Tillison sought clarification of what Mr Pagan was actually advising – instigating a waking watch before seeking advice, or seeking advice first.

(45) By email 11 December 2023, Mr Tillison wrote further to confirm that a waking watch had been stood up on Saturday (9 December 2023), and asking Berkeley to confirm it would meet the costs of the interim measures during the works. He requested an urgent response. We understand that the waking watch was 10-strong at that point in time.

(46) Mr Collinson responded to both those emails on 13 December 2023. He again quoted a response from Mr Pagan (and again we have removed Berkeley's highlighting):

Thank you for your e mail. We were informed by Firstport over the weekend that a waking watch has been stood up.

We note that Tri Fire previously provided an opinion in October 2020, following investigation into the external wall system, which recommended no interim measures. The Tri-Fire assessment was undertaken prior to the publication of the PAS 9980 standard. This recommendation is noted in the latest FRA for the building.

Kiwa are undertaking their assessment using PAS 9980 methodology as required by the Developer Remediation Contract. Berkeley have informed you of Kiwa's recommendation following the recent intrusive investigation and their initial assessment.

Kiwa's engineer has now confirmed the following:

"As noted previously, we have recommended that remedial works will be required for all areas of the building that have rendered EPS. In addition, we identified that for the tower the risk is high enough to require a change to the evacuation policy to simultaneous evacuation to protect residents in the interim period before remedial works are carried out.
The question is whether that change needs to be immediate (which, in practice can only be achieved by a Waking Watch) or whether it can wait until a fire alarm system is installed (which I understand can typically be achieved within about a month or less).
I don't know how long the remedial works will take before they start on site, but from experience it is unlikely to be rapid. The design for the works may have to go to Planning (Gateway 1) and I'd assume it will have to go through Building Regs approval, so the new Gateways 2 and 3 will presumably apply before work can start. I don't know for sure, but that sounds like a year or more before work can start. Maybe I'm wrong, and maybe it can be started in 6 months, but I'd be very surprised.

So the interim measures have to protect residents for several months, and maybe a year or so.
In addition, the remedial works will introduce additional risk factors such as scaffolding, weather sheeting etc. and the removal of combustible insulation, so that will introduce additional risks.
So, that period of time was part of my reasoning for recommending a change to simultaneous evacuation in the interim.
I don't believe the risk is high enough to require the change in the evacuation strategy to be absolutely immediate. As noted above, my understanding is that fire alarm systems can be installed to support a simultaneous evacuation strategy within about a month or less. If that timescale can be achieved, I would consider that to be sufficient and that introducing an immediate Waking Watch would not be required. But please do focus on getting the fire alarm in asap.
However, I would note that this is just my view based on the interim risk appraisal that we have carried out (which will be more fully documented in our report when that is completed). I would recommend notifying the London Fire Brigade, and I cannot guarantee whether or not they would agree with my view."

We do not propose to comment here on the engineer's view of the timing of any remedial works but you will note that this was a factor in the recommendation. You will also note his view that a waking watch is not necessary if an evacuation alarm is fitted promptly. Berkeley are not a responsible entity for this development. The responsibility for changing the evacuation strategy of the tower and the steps to be taken to implement this, fall to the responsible entities and their fire risk assessor. Having said that, Berkeley are willing to support you in making this decision and in your dealings with the LFB and local authority.

Berkeley's obligations under the Developers Remediation Contract (DRC) expressly exclude payment for the cost of interim safety measures, including waking watch costs and alarm upgrades; however, we have offered to pay for a simultaneous evacuation alarm system to be installed to the tower on a without prejudice to liability basis, in order to support leaseholders of this particular building and ensure they feel safe in their homes. It should not be assumed that our willingness to pay for the alarm to be installed on the tower will be repeated on any other buildings or projects and does not set any precedent whatsoever. It is also predicated on the basis that there would be full cooperation from yourselves and your clients to permit access to the building to undertake the works asap, as recommended by our fire engineer to obviate the need for a waking watch, and that all required access to apartments would be facilitated. We assume that the form of letter licence that enabled the survey investigations can be used to grant such access.

If the change in evacuation strategy is affirmed, then we require confirmation that you wish Berkeley to undertake the works to install the simultaneous alarm system in the tower, your licence to do so and confirmation of the arrangements by which our contractor will gain access to the apartments.

(47) By email of 18 December 2023, Mr Tillison confirmed that the waking watch would remain in place until a competent person recommended otherwise. He observed that "*the passing advice we've had is that Kiwa's stance is very strange and makes little sense*". He indicated that E&M had asked for access requirements to fit alarms had been instructed to Firstport. He further observed: "*I would urge you to reconsider the waking watch position as it's relatively clear such costs are recoverable under a Defective Premises Act claim – a point our external lawyers will shortly be in touch regarding.*"

(48) On 16 January 2024 the parties met to discuss the licence to install the fire alarm system, and on 12 February 2024 the licence was signed.

(49) On 16 February 2024, the parties met regarding the ongoing dispute over where the fire alarm system was required to be installed. It is said Mr Pagan confirmed his advice that only the Tower required the system, by subject to his then-current understanding that the compartmentation and fire and life safety systems were in good working order. E&M made Berkeley aware it had reports stating there were issues with the internal compartmentation above fire doors. Berkeley asked to see them.

(50) On an uncertain date, but in any event by at least mid-February 2024, Firstport made an application to the Waking Watch Replacement Fund ('WWRF') for the whole of the West Block. In the application it anticipated work starting in February 2024, and that the alarm be installed by Howlers (who we believe were installing alarms in the Tower above the 8th floor at the time as instructed by Berkeley).

(51) On 26 February 2024, Mr Mick Totty (Head of Fire Safety, Health and Safety Compliance at E&M) contacted Mr Pagan directly to ask him whether he had reviewed the FRAs:

Apologies if you have reviewed the FRA for Empire Square West but I wanted to draw your attention to page 9, Evacuation Strategy. It states:

"There is generally an unacceptable risk to occupants primarily by virtue of the External Wall System and potential combustibility of materials involved.

Additionally, there is inadequate compartmentation between individual flats, electrical, plant and riser cupboards and throughout escape route(s) at this property to provide a minimum of 30 / 60 minutes protection from fire and smoke for residents as identified in Part 2 of this report.

In view of the foregoing a "simultaneous evacuation" is recommended for this property until recorded deficiencies are completed or progressed to a level where a "defend in place or "stay put" policy is deemed to be the appropriate evacuation policy for this property".

This FRA was completed on 18th December 2023.

I'm sure that you can understand my concerns regarding the safety of all residents at Empire Square West. I just wanted to make you aware of the internal compartmentation on issues that have been raised in this report.

As I mentioned during our meeting I am still of the opinion that the evacuation strategy for the building should be Simultaneous Evacuation, and that the fire alarm system proposed for the tower should be installed in the whole building.

(52) By emails of the same date, Mr Pagan replied that various other parts of the William Martin FRA contradicted that conclusion, and so he found the FRA confusing. Mr Collinson wrote to tell Mr Totty he was not permitted to contact Mr Pagan direct, and asserting the last FRA Berkeley had received was that from TriFire.

(53) The Tribunal further adjourned the case at the third CMH on 24 March 2024 to 11 July 2024, and Fairhold was directed to provide contact details for Berkeley and Southwark so that they could make the decision whether they wished to be joined as Interested Persons.

(54) On around 28 March 2024 a fire alarm system was installed in the Tower. Consequently, Fairhold reduced the waking watch to five people.

(55) On 4 April 2024, Berkeley and Southwark were made Interested Persons in the RO application.

(56) By email dated 4 June 2024, Berkeley (Mr Ricky Allgood, Senior Technical Manager) wrote as follows:

We refer to previous correspondence in relation to the waking watch costs being incurred at Empire Square, most recently the email from Field Fisher to Trowers and Hamlins dated 24/05/2024. To reiterate the position previously advised, Berkeley do not accept any liability under the Developer Remediation Contract for the waking watch costs incurred by E&M at Empire Square. The Pledge and the DRC were created to implement a pragmatic government/industry solution to avoid the need for lengthy legal process, seeking a determination of liability against a developer, whilst preventing the cost of remedial work falling on leaseholders. The developer assumes responsibility for undertaking works to remedy 'Defects', determined to be required on a risk assessment basis. That is why the DRC does not require developers to pay any costs beyond those associated with the investigations, risk assessment and any recommended remedial works and expressly excludes certain costs for this purpose: for example, the cost of interim safety measures, such as a waking watch.

Whilst Field Fisher mention the recent FTT decision in the Triathlon Homes case as the basis on which Berkeley should be responsible for these costs under the Building Safety Act, the necessity for installing a waking watch was not in dispute in those proceedings (and we further understand the decision is subject to appeal). At Empire Square, the fire engineer specifically confirmed his view that, provided the alarms were installed promptly, the need for a change in evacuation strategy was not absolutely immediate and, therefore, a

waking watch was not required. We did not have sight of the advice, if any, that E&M obtained at that time from a competent person in order to support the decision to immediately implement a change in strategy and a waking watch.

We were made aware in late February, that an updated FRA dated 18/12/2023 had been commissioned. This was shared by your Mick Totty direct to the fire engineer and it included a statement to say "there is inadequate compartmentation between individual flats, electrical, plant and riser cupboards and throughout escape route(s) at this property to provide a minimum of 30 / 60 minutes protection from fire and smoke for residents as identified in Part 2 of this report. In view of the foregoing a 'simultaneous evacuation' is recommended for this property until recorded deficiencies are completed or progressed to a level where a 'defend in place' or 'stay put' policy is deemed to be the appropriate evacuation policy for this property". Given the discussions that were taking place in, and the costs that were being incurred, we fail to understand why it took two months for this document to be shared.

As noted by the fire engineer, there is one single statement of inadequate compartmentation in the December 2023 FRA and a number of other references that directly contradict that statement.

We had understood that E&M were to appoint a competent person to review the fire engineer's view and determine whether interim measures were required. The position advised by the fire engineer was not adopted, the waking watch was set up immediately and not just for the tower but for the entirety of the West block. Prior to this, E&M had appeared to follow the advice given by a previous fire engineer (Tri Fire) in their external façade review, dated 12/10/2020. This report noted that remedial works were required to the EPS render system but Tri Fire had undertaken a holistic review of the building and were satisfied that no interim measures were required. This appears to align with the adequate compartmentation position set out in the January 2023 FRA and also largely reiterated in the December 2023 FRA save for the one contradictory statement noted previously.

As matters stand, therefore, we accept no liability for the waking watch costs.

You will be aware that the draft licence/works contract documents, being negotiated by our respective solicitors in relation to the DRC, contain provision that any party's rights outside the document are preserved. There is, therefore, no reason for the issue of these costs to hold up any agreement on the terms of those documents and/or the scope of any works to be undertaken under the DRC.

Further, Berkeley's payment of your solicitor's costs in relation to the negotiation of those documents does not cover the costs of correspondence in relation to matters outside that drafting.

(57) By email dated 27 June 2024, Mr Allgood wrote to confirm Berkeley was continuing to review the FRAs (it is unclear which ones). He also asked for confirmation of any response from WWRF.

(58) Mr Brett responded to forward an email from DLUHC (omitted from the bundle) which we are told said that Berkeley should be funding the fire alarm system in the West Block. Mr Brett asked for it to be expedited. Mr Allgood responded to say: "*Given Berkeley are not fire engineers, we cannot confirm whether we are in agreement that extension of the alarm system to the West of the Block is "clearly required". We have issued the reports to Kiwa, to review on our behalf, given their previous involvement in producing the FRAEW assessments… Berkeley's current position, therefore, is we will not be funding the installation of the alarm across the remainder of the West Block. The cost is expressly excluded under the DRC and you will recall our installation of the alarm to the tower was carried out without prejudice to liability. Berkeley is not a Responsible Person for this development and the determination of the appropriate evacuation strategy of the West Block remains a matter for the Responsible Person and its professional advisors.*"

(59) By its position statement dated 8 July 2024, Berkeley asserted to the Tribunal that delay in agreeing the SWA was due to Fairhold's insistence on peer-reviewing Mr Pagan's FRAEW. It asserted that conduct was a strategic attempt to force Berkeley to do the works in the INs for which it was not responsible under its SRTs. Fairhold made it clear, by a witness statement in response, that the peer review was entirely commonplace, and to ensure that the works within the FRAEWs satisfactorily mitigated the identified risks presented by the external wall makeup of the building. It was also needed to establish any inconsistencies between the INs and the FRAEWs. It was merely trying to ensure the property was properly remediated.

(60) At the fourth CMH on 8 July 2024, Berkeley actively encouraged the Tribunal to list the RO for hearing on the grounds above, even in the knowledge that would result in the RCO application, as recorded in Judge Powell's directions of 16 July 2024. Those directions also permitted Berkeley and Southwark to actively participate in the RO application, by statements of case and submissions.

(61) By application dated 8 August 2024, Fairhold made its RCO application against Berkeley.

(62) By email of 26 September 2024, Firstport received advice from SVC (Mr Reeves) that while Mr Reeves had not formally completed a survey of the carpark, it was evident from carrying out the other surveys that in several blocks all stairs directly serve the carpark, in contravention of Approved Document B (now and at time of build), with no protective intermediate lobbies or permanently open vents, and in one stair the door opens directly to the carpark. The smoke system was wholly unfit for purpose, because there is no main extract serving the carpark at all. His view was that the carpark was not adequately protected to continue its use for motor vehicle parking, and

immediate cessation should be imposed until a full survey and rectification was provided. On 26 September 2024 Fairhold consequently increased the waking watch to six people.

(63) It was Fairhold's uncontested evidence that delays in the WWRF application being progressed by DLUHC included attempts by that department to persuade Berkeley that it should install the requisite alarms. Berkeley's answer was, we were told, to continue to refuse. The WWRF application was approved on 9 October 2024 in the sum of £190,896.00 (inclusive VAT), but the Grant Funding Agreement was unfortunately issued in the wrong name (Firstport instead of E&M) causing further delay. The funding remained yet to be received at the date of the hearing.

(64) By directions dated 16 October 2024, the Tribunal joined the RCO application for hearing with the RO application. Those directions made provision for each party in the RCO to rely on expert evidence, to identify: (i) which defects are or are not relevant defects; (ii) the scheme necessary to remedy the relevant defects; and (iii) the cost of remedying the relevant defects.

(65) An email of 22 October 2024 demonstrates that Berkeley also took issue with the AM FRAs.

(66) On 2 December 2024, Berkeley agreed the Government's joint plan to accelerate developer-led remediation.

(67) On 4 April 2025, a fire alarm system was installed by Fairhold to the remainder of the West Block except the car park, and the waking watch reduced to two (for the carpark).

(68) By the date of the hearing, the scope of works and RWA still had not been agreed. We invited the parties to use some of the hearing time to endeavour to agree those matters and what might be 'relevant defects' arising from them. We also invited Fairhold and Berkeley's non-contentious lawyers to come to the Tribunal and endeavour to 'hash out' the substance of the licence agreement, the same issues in which had been passing back and forth between them for some months. We are grateful to the parties for their cooperation; some of those negotiations sped up matters that appeared to us to have lain no better than stagnant for far too long. It was acknowledged by all that it was the fact of the hearing taking place that resulted in this progress.

(69) We asked the parties to update the Tribunal regarding progress with agreeing the scope of works and RWA within one month of the hearing, before the decision was delivered. By an agreed note dated 28 May 2025, Berkeley and Fairhold stated that the scope and RWA were agreed save for the standard of the work for the internal defects at the property. Berkeley continued to seek that remediation be carried out in accordance with the SRTs, bringing the risk to 'tolerable'. They conceded that there is at this moment no definition of that term and no British Standard or Publicly Available Specification for that term, PAS 79-2 having been withdrawn. Neither Fairhold or the Leaseholders found the term, without an associated measurable standard, acceptable. We indicated that we would resolve the question by our decisions.

The Law

(70) So far as relevant to the disputes before us, the Act (as amended by the Leasehold and Freehold Reform Act 2024) provides 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.

122 Remediation costs under qualifying leases etc

Schedule 8—

(a) provides that certain service charge amounts relating to relevant defects in a relevant building are not payable, and

(b) makes provision for the recovery of those amounts from persons who are landlords under leases of the building (or any part of it).

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.

124 Remediation contribution orders

(1) The First-tier Tribunal may, on the application of an interested person, make a remediation contribution order in relation to a relevant building if it considers it just and equitable to do so.

(2) "Remediation contribution order", in relation to a relevant building, means an order requiring a specified body corporate or partnership to make payments to a specified person, for the purpose of meeting costs incurred or to be incurred in remedying, or otherwise in connection with, relevant defects (or specified relevant defects) relating to the relevant building.

(2A) The following descriptions of costs, among others, fall within subsection (2)—

(a) costs incurred or to be incurred in taking relevant steps in relation to a relevant defect in the relevant building;

(b) costs incurred or to be incurred in obtaining an expert report relating to the relevant building;

(c) temporary accommodation costs incurred or to be incurred in connection with a decant from the relevant building (or from part of it) that took place or is to take place—

(i) to avoid an imminent threat to life or of personal injury arising from a relevant defect in the building,

(ii) (in the case of a decant from a dwelling) because works relating to the building created or are expected to create circumstances in which those occupying the dwelling cannot reasonably be expected to live, or

(iii) for any other reason connected with relevant defects in the building, or works relating to the building, that is prescribed by regulations made by the Secretary of State.

(2B) The Secretary of State may make regulations for the purposes of this section specifying descriptions of costs which are, or are not, to be regarded as falling within subsection (2).

(3) A body corporate or partnership may be specified as a person required to make payments only if it is—

(a) a landlord under a lease of the relevant building or any part of it,

(b) a person who was such a landlord at the qualifying time,

(c) a developer in relation to the relevant building, or

(d) a person associated with a person within any of paragraphs (a) to (c).

(4) An order may—

(a) require the making of payments of a specified amount, ...;

(aa) if it does not require the making of payments of a specified amount, determine that a specified body corporate or partnership is liable for the reasonable costs of specified things done or to be done;

(b) require a payment to be made at a specified time, or to be made on demand following the occurrence of a specified event.

(5) In this section—

- "associated": see section 121;
- "developer", in relation to a relevant building, means a person who undertook or commissioned the construction or conversion of the building (or part of the building) with a view to granting or disposing of interests in the building or parts of it;
- "expert report" has the meaning given by section 123(9);
- "interested person", in relation to a relevant building, means—
  (a) the Secretary of State,
  (b) the regulator (as defined by section 2),
  (c) a local authority (as defined by section 30) for the area in which the relevant building is situated,
  (d) a fire and rescue authority (as defined by section 30) for the area in which the relevant building is situated,
  (e) a person with a legal or equitable interest in the relevant building or any part of it, or
  (f) any other person prescribed by regulations made by the Secretary of State;
- "partnership" has the meaning given by section 121;
- "relevant building": see section 117;
- "relevant defect": see section 120;
- "relevant steps": see section 120;

- "specified" means specified in the order.

- "temporary accommodation costs", in relation to a decant from a relevant building, means—
  (a) the costs of the temporary accommodation, and
  (b) other costs resulting from the decant, including removal costs, storage costs and reasonable travel costs;

- "works" means works—
  (a) to remedy a relevant defect in a relevant building, or
  (b) in connection with the taking of relevant steps in relation to such a defect.

Schedule 8

No service charge payable for defect for which landlord or associate responsible

2(1) This paragraph applies in relation to a lease of any premises in a relevant building.

(2) No service charge is payable under the lease in respect of a relevant measure relating to a relevant defect if a relevant landlord—

(a) is responsible for the relevant defect, or

(b) is associated with a person responsible for a relevant defect.

(3) For the purposes of this paragraph a person is "responsible for" a relevant defect if—

(a) in the case of an initial defect, the person was, or was in a joint venture with, the developer or undertook or commissioned works relating to the defect;

(b) in any other case, the person undertook or commissioned works relating to the defect.

(4) In this paragraph—

- "developer" means a person who undertook or commissioned the construction or conversion of the building (or part of the building) with a view to granting or disposing of interests in the building or parts of it;
- "initial defect" means a defect which is a relevant defect by virtue of section 120(3)(a);
- "relevant landlord" means the landlord under the lease at the qualifying time or any superior landlord at that time.

No service charge payable if landlord meets contribution condition

3(1) No service charge is payable under a qualifying lease in respect of a relevant measure relating to any relevant defect if the landlord under the lease at the qualifying time ("the relevant landlord") met the contribution condition.

(2) The contribution condition is that the landlord group's net worth at the qualifying time was more than N x £2,000,000,

where N is the number of relevant buildings within sub-paragraph (3).

(3) A relevant building is within this sub-paragraph if a member of the landlord group was, at the qualifying time, a landlord under a lease of the relevant building or any part of it.

(4) For the purposes of this paragraph—

(a) "the landlord group" means the relevant landlord and any person associated with the relevant landlord;

(b) the net worth of the landlord group at the qualifying time is to be determined in accordance with regulations made by the Secretary of State.

(5) The Secretary of State may by regulations amend the amount for the time being specified in sub-paragraph (2).

(6) This paragraph does not apply if, at the qualifying time, the relevant landlord was—

(a) a private registered provider of social housing (as to which see section 80 of the Housing and Regeneration Act 2008),

(b) a local authority (as defined by section 30), or

(c) a prescribed person.

No service charge payable for cladding remediation

8 (1) No service charge is payable under a qualifying lease in respect of cladding remediation.

(2) In this paragraph "cladding remediation" means the removal or replacement of any part of a cladding system that—

(a) forms the outer wall of an external wall system, and

(b) is unsafe.

No service charge payable for legal or professional services relating to liability for relevant defects

9 (1) No service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect.

(1A) Sub-paragraph (1) does not apply to the extent that the service charge is payable to a management company in respect of legal or other professional services provided to the company in connection with an application or possible application by the company for or relating to a remediation contribution order under section 124.

(2) In this paragraph the reference to services includes services provided in connection with—

(a) obtaining legal advice,

(b) any proceedings before a court or tribunal,

(c) arbitration, or

(d) mediation.

…

Paragraphs 2 to 4, 8 and 9: supplementary

10(1) This paragraph supplements paragraphs 2 to 4, 8 and 9 (the "relevant paragraphs").

(2) Where a relevant paragraph provides that no service charge is payable under a lease in respect of a thing—

(a) no costs incurred or to be incurred in respect of that thing (or in respect of that thing and anything else)—

(i) are to be regarded for the purposes of the relevant provisions as relevant costs to be taken into account in determining the amount of a service charge payable under the lease, or

(ii) are to be met from a relevant reserve fund;

(b) any amount payable under the lease, or met from a relevant reserve fund, is limited accordingly (and any necessary adjustment must be made by repayment, reduction of subsequent charges or otherwise).

(3) In this paragraph—

- "the relevant provisions" means sections 18 to 30 of the Landlord and Tenant Act 1985 (service charges) and section 42 of the Landlord and Tenant Act 1987 (service charge contributions to be held on trust);

- "relevant reserve fund" means—
(a) a trust fund within the meaning of section 42 of the Landlord and Tenant Act 1987,
(b) an express trust of a kind mentioned in subsection (9) of that section, comprising payments made by the tenant under the lease and others, or
(c) any other fund comprising payments made by the tenant under the lease and others, and held for the purposes of meeting costs incurred or to be incurred in respect of the relevant building in question or any part of it (or in respect of that building or part and anything else).

(4) The Secretary of State may by regulations modify the application of this paragraph as it applies in relation to a lease of premises that do not include a dwelling.

(71) We were referred to the following cases in the course of argument:

Assethold Limited v Adam & Ors (Corben Mews) [2022] UKUT 282 (LC) ('*Corben Mews*')
Radcliffe Investment Properties v Meeson [2023] UKUT 209 (LC) ('*Meeson*')
Triathlon Homes v Stratford Village [2025] 1 P&CR 2 ('*Triathlon*')

2-4 Leigham Court Road, London SW16 2PG LON/00AY/HYI/2022/0005 & 6 ('*Leigham Court Road*')
Secretary of State for Levelling Up, Housing and Communities v Grey GR Limited Partnership CAM/26UH/HYI/2022/0004 ('*Vista Tower RO*')
419 High Road, Space Apartments, London N22 8JS LON/00AP/HYI/2022/0017 ('*Space Apartments*')
Vista Tower, Stevenage SG1 1AR CAM/26UH/HYI/2023/0003 ('*Vista Tower RCO*')
The Chocolate Box, 8-10 Christchurch Road, Bournemouth BH1 3NA CHI/00HN/HYI/2023/0008(1) ('*Chocolate Box*')
Flats 1-14, 171 Tower Bridge Road, London SE1 2AW LON/00BE/LSC/2023/0335 ('*Tower Bridge Road*')
8 Artillery Row, London SW1P 1RZ LON/00BK/BSA/2024/0004 ('*Artillery Row*')

(72) We now give our separate decisions in the two applications, before coming back to consideration of the two applications together in the context of our conclusions and the terms of the orders.

Decision: Remediation Order

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(73) The leaseholders did not provide any expert evidence of their own regarding the defects at the building, or regarding timescales for completion of works). They relied on the contents of the INs. They agreed the provisional contents of a draft RO with Mr Cohen (subject to our findings and wording), and were involved with the discussions of the experts so that they informed us various matters (including the issue with the open atrium) were resolved to their satisfaction.

(74) We thank Mr Zampetti and Ms Long for their clear submissions. Their case is simple: they are stuck in the wings while Fairhold and Berkeley continue to argue about what should be done. The IN works should have been completed by November 2025, and are nowhere near done (with the issues of most concern not even commenced while Fairhold and Berkeley fight over their respective obligations). They do not believe that Fairhold or Berkeley has in mind their very real problems of living in an unsafe building causing them stress and anxiety, with skyrocketing insurance costs, and barely any opportunity to mortgage (or remortgage) or sell while the known issues exist, whether in order to get away from the risk or for some to simply move on with their expanding families and the like. The practical needs of the leaseholders to live in a safe Building must be given priority over the disputes about standard between Fairhold and Berkeley.

(75) The Leaseholders wish for the Building to be remediated as quickly and effectively as possible; they want the clock to start (and to continue) ticking. They want both Fairhold and Berkeley's feet held to the fire and for somehow their incentives to be made to align with each other. They observed that their

experience was that progress had only been made by bringing the matter before the Tribunal. They wished for enforceable timelines to be imposed, with financial consequences or safeguards for non-compliance. They asked whether we could impose some kind of mandatory dispute resolution process, or independent third-party adjudication of disputes between Berkeley and Fairhold, and had researched strategies and suggestions to promote better cooperation and communication, including for any gateway 2 submission. They supported Fairhold's application for an RCO, and sought an order that required remediation of the relevant defects to be commenced by 30 September 2025 and completed by 30 June 2027.

(76) They also asked us to embed accountability in the order, for example by requiring updates to the leaseholders on the progress that was being made.

(77) Mr Cohen submitted that it would not be fair and just to make an RO. Firstly, Berkeley is responsible for the defects and should be required to remediate them. That is the spirit of the legislation and its contract with the government by the SRTs.

(78) Secondly, if Fairhold has to remediate in Berkeley's place, it will be a much longer process as Fairhold is neither a Tier 1 contractor nor house builder. It does not have the knowledge or experience required to remediate the difficult building at Empire Square, nor have established relationships with teams of contractors. It would have to carry out due diligence, go to tender, carry out the consultation process and appoint a team of various experts before it could even begin to carry out any works, which would take around 18 additional months on top of a pre-construction work phase of around 18 months and a construction work phase of around 27 months. It would also result in 'non-qualifying' leaseholders paying for works that Berkeley was unwilling to carry out because not within its SRTs. It was, in effect, blind-sided by Berkeley's position at the CMH in July 2024 pushing for the RO hearing, as it had thought that the organisations had been cooperating to remediate at Empire Square. Having to concentrate on this application had diverted time and resources away from agreeing the RWA, with no fault on its part.

(79) Thirdly, the Leaseholders should take comfort from the fact that the INs had been given and had not been appealed, and that progress had been made in respect of those items that were not relevant defects within these proceedings. Fairhold remained committed to ensuring the Building is remediated.

(80) As an alternative position, Mr Cohen argued that an RO should be made only if an RCO is also made, in order to ensure that the purpose of the Act - that innocent parties should not pay for remedial work required because of developer defects - was given full effect. It was not in the current position for want of activity, but rather because of the resistance demonstrated by Berkeley.

(81) In its position as Interested Person, and in contrast to its position at the July CMH, Berkeley took a neutral view of whether an RO should be made. It remained of the view that the RO could not and did not bind it. Its obligations to MHCLG under the SRTs were its only obligation.

(82) The irony was not lost on us when Mr Bowker went on to submit that, regarding the Leaseholders' request for some kind of dispute resolution mechanism, paragraph 16 of the SRTs was binding on the parties who were not signatories to that agreement.

Decision

(83) As raised with Mr Cohen at the hearing, we are not satisfied that 'fair and just' is the applicable test for making an RO, reluctant though we are to disagree with our colleagues in *The Chocolate Box*.

(84) If one looks at the various cases in which the question of whether to make an RO is addressed, it is clear that the question is one that has increasingly become the focus of attempts to define what is in section 123 into a 'test' which lawyers understand. Lawyers are not used to working with an unfettered discretion – we have minds that prefer a framework that can lead to an 'answer' that can be applied repeatedly. However, nowhere in section 123 do the words 'just and equitable', or 'balance of prejudice', or any other formulation that appears in the caselaw that has developed, appear.

(85) We consider that is a deliberate choice by Parliament – after all, the very next section (s 124) *does* use the 'just and equitable' formulation so it must have been firmly in its mind. As was said in the very first remediation order decision (Judge Powell and Mrs Bowers MRICS) in *Leigham Court Road*, "*the BSA creates a freestanding regime designed to address a specific problem. Although other regimes may amount to a 'heft of good sense', they are not conclusive as to the Tribunal's jurisdiction or the extent of its powers… this Part of the BSA is in deliberately broad terms to enable the Tribunal to find the best and most practical, outcomes-focussed solutions to myriad circumstances that will inevitably present themselves in applications such as this"*. The Act is *solution* focussed rather than blame focussed, it is concerned with the *building* not with the parties to the application. We must take a purposive approach - ask ourselves what the best answer is in this application, to achieve remediation of the relevant defects in the building for the safety of the leaseholders. The outcome of that assessment must be within a range of reasonable decisions, but would not be open to challenge unless no reasonable decision maker, on the facts know to it, could have come to the same decision. That is qualitatively different from an argument that a decision is not just and equitable because of some key feature or behaviour of a party.

(86) We consider that is reflected by what Judge Waite and Judge Wyatt said at paragraph 120 of *Secretary of State for Levelling Up, Housing and Communities v Grey GR Limited Partnership* (29 April 2024) CAM/26UH/HYI/2022/0004 ('*Vista Tower RO*'). Importantly, that was a case in which the Secretary of State was making the argument that section 123 mandated the making of an RO if the conditions in the other sections were fulfilled, and in which there was consequently full argument about the meaning of the statute:

That said, we accept that a Remediation Order is a novel remedy and agree that although it might appear to be similar to an order for specific performance (of the provisions of the lease and/or enactment requiring the relevant landlord to repair or maintain anything relating to the relevant defect), different considerations apply. We agree with Mr Rosenthal that the focus is not on providing redress for non-compliance with a legal obligation (as with damages or specific performance), but on remediation of life-threatening building safety defects in tall residential buildings. In particular, 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.

(87) Even if we are wrong in that, we also consider that the above approach is in keeping with what Mr Justice Johnson and Judge Rodger KC, sitting as the First Tier Tribunal, said in *Triathlon* of the interpretation to be given of the just and equitable test under section 124 of the Act:

237. Section 124 gives no guidance on how the FTT is to decide whether it is "just and equitable" in any particular case to make an order. Beyond stating the obvious, that the power is discretionary and should therefore be exercised having regard to the purpose of the 2022 Act and all relevant factors, it is not possible to identify a particular approach which should be taken. But the FTT is well used to exercising its discretion by reference to what is just and equitable in other contexts, notably with regard to costs protection under section 20C, Landlord and Tenant Act 1985 and paragraph 5A(2) of Schedule 11, Commonhold and Leasehold Reform Act.

238. A similar discretion, though expressed by reference to what is reasonable rather than what is just and equitable, is conferred on the FTT by section 20ZA(1), Commonhold and Leasehold Reform Act 2002, when dispensing with the requirement of consultation on expensive service charge items. In Daejan Investments Ltd v Benson & Ors *[2013] UKSC 47 14 Lord Neuberger acknowledged the value of identifying the proper approach to the exercise of the dispensing jurisdiction, to promote consistency in decision making and enable parties to receive clear and reliable advice, but at the same time recognised the absence of specific guidance in the section itself:*

> *"However, the very fact that section 20ZA(1) is expressed as it is means that it would be inappropriate to interpret it as imposing any fetter on the LVT's exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself, and any other relevant admissible material. Further, the circumstances in which a section 20ZA(1) application is made could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules."*

239. As for "other relevant admissible material", we were referred by Mr Nissen KC to the explanatory notes to the 2022 Act which refer, at paragraph 1019 to the FTT's discretion under section 124, as follows:

> *'Subsection (1) provides that the Tribunal can only make a remediation contribution order if it considers it just and equitable to do so. This is*

intended to ensure fairness in proceedings while giving the Tribunal a wide decision making remit which it is expected will allow it to take all appropriate factors into account when determining whether an order should be made, including the wider public interest in securing the safety of buildings, as well as the rights and interests of the individual against whom an order might be made.'

(88) We are satisfied, on the overwhelming evidence we have seen, that there are relevant defects in the building, in particular in relation to:

(a) Rendered EPS facades
(b) Timber balconies
(c) Compartmentation/Fire stopping
(d) Smoke ventilation and means of escape

(89) To our minds the fact that Berkeley is the developer and responsible for the defects, and has signed the SRTs, is at best neutral on the RO. We find that the fact a developer has entered into the SRTs and has expressed willingness to remediate is no fetter to our discretion. The context surrounding that willingness – and progress towards the remediation – are legitimate considerations that may take the position from one of neutrality to either positive or negative.

(90) The relevant defects have been known about in this case for a very long time (and with each new investigation the picture of the Building, as a whole, gets worse). The rendered EPS was known about in 2011. 14 years later, it remains on the Building and no planning has been commenced for the remediation works as Berkeley and Fairhold still have not agreed the RWA (and a month after the hearing the scope of works remains draft because of the issue over standard of the works). Moreover, it is Berkeley's express and emphatic position that it will continue to do the work *the SRTs* require them to do regardless of whether there is an RO – indeed, it is part of Fairhold's case on the RCO that is precisely why Berkeley pressed for the RO hearing. In the RCO, Fairhold's position is that the fact that Berkeley expresses the commitment that way should leave us in real doubt that they will address the relevant defects, and is one of the reasons why an RCO should be made. The existence of that doubt favours the making of an RO.

(91) We do not accept that, in the circumstances of the present case, the INs offer any reassurance. The works in them are due to be completed by November 2025. Regardless of (or perhaps particularly in the knowledge of) Berkeley's approach to the SRTs, which was known long before Berkeley took the position it did to promote the hearing of the RO, Fairhold was at all times under an obligation to comply with those INs. It places the blame for its non-compliance on its ongoing discussions with Berkeley, but in taking that course it has made a conscious decision not to comply with its obligations. It has had (now) two years to comply with the INs, and only the parts that are not related to its ongoing negotiations with Berkeley have been progressed. Those parts might be considered the minor issues. The major issues remain unresolved. In waiting for Berkeley to agree it has promoted its hopes and convenience over the safety

of people in and about the building. We are satisfied that Fairhold has made the choice not to comply with the timescales in the INs because Berkeley has signed the SRTs, and that has resulted in delay to remediation of the Building.

(92) Fairhold is not wholly to blame, and we do note that where the developer has signed the SRTs Fairhold is not able to access funding from the BSF. But nor does Fairhold lack culpability. Can the leaseholders or Tribunal be satisfied that, because those INs (and Southwark's powers to enforce them) exist, the leaseholders have sufficient guarantee that the building will be made safe as soon as reasonably possible? In the current circumstances, the answer must be no.

(93) We accept the Leaseholders' submission that it is only when their application was brought, and the Tribunal began to actively manage this case, that any progress was seen by them to be made (whether because of the potential for a real outcome by way of an order, or simply because Fairhold was more active in its updates to leaseholders). We note that Fairhold and Berkeley are still, a month after the hearing and having heard the Tribunal's views on whether its decision is circumscribed by the SRTs, unable to resolve between them the standard to which remediation will be required to be made. That is a factor that balances in favour of an order being made.

(94) We do accept that if Fairhold has to do the work, it will take longer, cost more, and there may be a consequential impact for non-qualifying leaseholders if they are not able to obtain their own orders against Berkeley. Those are factors that would mitigate against an RO. However, given the already substantial period of time during which Fairhold and Berkeley have failed to agree even the scope of the works, if we do not make an RO we have no faith that the pace of progress will itself increase. In the time it has been in negotiations with Berkeley, the initial additional 18-month period Fairhold would need for preliminaries has already passed once.

(95) Nor do we take lightly the fact that non-qualifying leaseholders may end up paying some of the costs if they are unable to obtain their own RCOs against Berkeley or pursue their own successful section 27A L&TA applications against Fairhold. When balanced, however, against the continuing danger the building poses to its occupants, we consider that any sums those who are not in occupation might (and it *is* only might at this juncture) have to pay are outweighed by the safety risk to the occupants (including non-qualifying leaseholders' own subtenants where applicable).

(96) Taking a pragmatic approach to the question of whether we should make an RO, we are satisfied that in all of the circumstances of this case making an order is more likely to result in an increase in activity resulting in making the building safe, than not making an order. We therefore make a remediation order, in the terms at annexe 1. We consider those terms further below in the section 'Terms of the Orders'.

Decision: Remediation Contribution Order

(97) After taking some time for negotiations before commencing the hearing, Fairhold and Berkeley arrived at a broadly agreed (subject to refinement and standard) scope of works or investigations which included:

- Removal of the rendered EPS
- Removal of combustible balcony decking in accordance with the requirements of (i) Mr Pagan's FRAEW and (ii) the Building Safety Regulator in the gateway 2 process
- Installation of cavity barriers
- Internal fire-stopping works
- Smoke ventilation works both internally and in the carpark, and
- Enabling/making good works associated with the above.

By update dated 28 May 2025, the parties indicated they had agreed the scope of works (and RWA) in substance, save for the issue of the standard for the internal works. We asked for a copy of the scope of works, omitting reference to a standard. It is appended to the Orders at the end of this decision.

(98) It was therefore in that context that we heard from Mr Pagan for Berkeley, and Mr Mark Humphreys BSc(Hons), Director at AM for Fairhold as experts, the evidence being limited to the issue of the risk in the West Block and the standing up of the waking watch. We also heard from Mr Milton McIntosh, in-house Solicitor, Mr Brett and Mr Scott for Fairhold, and Mr Collinson and Mr Allgood for Berkeley.

(99) Since the matters regarding the Marlin Apartments were (sensibly, in our view) not pursued in closing, we make no further reference to them here.

Whether it is fair and just to make a remediation order for incurred costs?

(100) Fairhold seeks an order for:

(a) Incurred waking watch costs in the sum of £1,225,801.20 (including VAT) as at 22 April 2025
(b) Continuing waking watch costs (carpark) in the sum of £3,205.44 (including VAT) per week
(c) Expert reports £95,851.45
(d) Management costs of Firstport and E&M, to be confirmed
(e) Legal costs (billed and unbilled to 17 April 2025) in the sum of £308,574.23

Waking Watch

Waking watch costs – decision to stand up the Waking Watch

(101) Mr Pagan stood by his written advice in his emails of November and December 2023 when carrying out the FRAEWs.

(102) He had made a distinction between the risk of the rapid spread of fire over the external walls of the Tower and the rest of the block because of what he said were the vertical strips in which the render had been applied. There was less rendered EPS on the lower parts of the block. He accepted that both parts of the building were, however, at high risk, it's just that the Tower was particularly so. He accepted that there was no structural division between the parts and that the West Block was one building.

(103) He also quite properly accepted that two different experts looking risk could take two different views, even applying PAS 9980. He said that he would expect to see some process to support a different view. He would want to understand the difference of opinion. He'd be happy to explore any such difference of opinion. He would be surprised if someone came to a different view from his, but it was not impossible. He accepted that there exists a range of reasonable viewpoints and that someone coming to a view different from his would not necessarily be wrong.

(104) He said that he recommended that the fire alarm system be put in the whole Tower because it was important that there was early detection of a fire below level 9, so that those at 9 and above had early warning. He did not accept that a fire in a flat at level 8 in the adjacent part of the building would also present a risk to the Tower, as he said there was a "sizeable" horizontal gap to between those apartments and the Tower, so that fire was unlikely to spread so far. He appreciated other fire engineers may have different views, but stated he expected someone with his experience and expertise to take the same view as him. He confirmed that his view was not the only correct one available.

(105) He stated that his advice regarding the waking watch was that if a fire alarm system would take longer than a month to instal, there was a need for one. He confirmed he agreed that there was a need for the waking watch between December 2023 – March 2024. He confirmed that thereafter, there needed to be an assessment of the number of personnel, on the basis that the responsible person by then ought to have known its residents. He accepted that there might be at least a need for additional staff. He suggested that even the reduction from 12 to 4 personnel might have been to many. With the fire alarm system in the Tower, all that was required was staffing support. He accepted that would result in additional staff costs. He agreed that the carpark required a waking watch or a fire alarm system, though the fire alarm system would be more cost effective.

(106) Mr Pagan sought to explain away the letter from the LFB. He stated that as the measures were in place, the LFB was unlikely to take issue with a more extensive waking watch than was required. It would only take action if what was in place was insufficient. He also sought to explain away the LFB's comment regarding the need for a fire alarm system to the whole block, by suggesting that they were simply agreeing with measures Fairhold had stated they were already taking. The LFB would never object to additional measures being taken. It was a non-objection to the proposals rather than an endorsement of the strategy.

(107) Mr Pagan took issue with the William Martin Type 1 FRA for the West Block on the basis he said that it was in effect the same as the previous (TriFire) FRA, save that it mentioned the compartmentation. He was unclear of the basis for the comment, as the rest of the report seemed to suggest there was no problem. He remarked that the report was published the same day as William Martin's visit. When it was put to him that the document suggested that there was an "unacceptable risk" because of "inadequate compartmentation", and that a reasonable landlord in possession of the Type 2 FRA would be right to deploy simultaneous evacuation, Mr Pagan responded that he agreed that was the advice from the FRA and that Fairhold should take it into account, but that a reasonable client would check what was meant by compartmentation failures. Nevertheless, he conceded that if the FRA said go to simultaneous evacuation that it should be done.

(108) Mr Humphreys gave evidence that he had received a telephone call from Mr Tillison on 8 or 9 December 2023 in the evening, and that Mr Tillison had made him aware of the FRAEW that concluded there was a high risk to the extent that the engineer recommended a waking watch. Mr Tillson had told Mr Humphreys that advice was qualified, and had phoned him for advice in accordance with the requirement for Fairhold to obtain its own advice. Based on the information given, Mr Humphreys had advised that regardless of how Fairhold had obtained the knowledge, a qualified fire engineer had said that there was a high risk. It could take weeks or months for Fairhold to obtain its own advice, and Mr Tillison had to think about Fairhold's obligations to keep the residents safe. It was all very well for the fire engineer to come up with practical solutions but the responsible entity had to make the decision. Mr Humphreys advised that if the building posed a high level of risk and Fairhold had been advised that a waking watch should be installed, it had no other option than to do so until there was an ability to peer review the FRAEW, which could take months. He asked rhetorically "*would I be able to sleep at night if a building was left without a waking watch for the sake of a peer review*" and suggested the answer would be "*of course not*".

(109) Mr Humphreys had had no more involvement until the AM FRAs. He confirmed that he was an Associate Member of the Institute of Fire Engineers and had undertaken professional exams. Mr Tillson had been a client since around 2022. He had not been asked to consider anything further as there was a whole team at E&M.

(110) Mr Brett gave evidence that he had returned from holiday on the 12 December 2023. Internally, there had been a consensus decision in his absence to stand up the waking watch. Mr Brett was Mr Totty's manager, who had taken advice from Mr Humphreys in Mr Brett's absence, as he was not a technical expert. The initial decision had been a collaborative one between Mr Totty, Mr Tillison, Kevin Omar, Michael Gaston and possibly others in his team. Mr Brett had taken back over from Mr Tillison on his return. He had agreed with the decision that had been made.

(111) Mr Brett's evidence was that it was "*uncommon*" for a fire engineer conducting a FRAEW to raise the alarm regarding building safety by email mid-

way through the PAS 9980 investigations. It meant that the risk must have been significant, even with further investigations unresolved. To highlight the issue so strongly spoke volumes coming from a fire safety expert. Mr Brett's area of expertise was risk assessment (he later told us his qualifications which are a degree in design engineering, a masters in Health, Safety and Environment management, an MBA and other qualifications. He is a chartered member of the Institute of Occupational Safety and Health, and a specialist member of the International Institute of Risk and Safety Management. He had undertaken Institute of Fire Engineer-approved courses in connection with fire safety, and had been Director of Resident Safety for the London Borough of Camden post-Grenfell, including for the Chalcotts estate. He had been in private employment with Balfour Beatty, Amazon Pan Global, and had been head of the NHS Property Service's Health, Safety and Fire teams. His experience spanned over 30 years).

(112) A dynamic risk assessment had had to be undertaken, in which there had been no need to involve Mr Pagan as he had carried out his function for Berkeley and the information was there in front of Fairhold. Fairhold had no need to challenge Mr Pagan's expertise when it came to the FRAEW, which wasn't in any event sent to Fairhold until April 2024. It had the information in front of it from his email.

(113) Mr Brett took a different view of that risk when it came to the remainder of the block. Exactly the same render was on the lower floors. The keyworker and spine blocks abutted the Tower where the EPS render ran up it. He had concluded that the risk of fire spread from the 1st floor in the Tower was the same risk as was present where the render systems of the Tower and the rest of the block abutted each other. The team making the decisions had 60 years' experience of risk assessment between them enabling the holistic approach. He took the view that Mr Pagan had in effect back-pedalled from his November email in the email provided to Berkeley the contents of which had been sent to Fairhold on 13 December 2023. The TriFire report referred to was irrelevant – the FRAEW was far more intrusive. Fairhold had stopped using TriFire at that point, and everyone in the industry knew why.

(114) Mr Pagan had himself recommended further investigations in his FRAEW into the compartmentation. The bigger picture was that the Tower and rest of the West Block were not just linked externally, but intrinsically by the internal layout, which Mr Pagan may have been unaware of at the time. E&M had to submit a fire safety case to the regulator as the Principal Accountable Person of the whole block, and had to consider the whole Building holistically, which was not Mr Pagan's remit for the FRAEW. Fairhold had had no choice but to act in the residents' safety.

(115) Mr Brett disagreed that it was possible to take no steps "*absolutely immediately*" and did not understand what was meant by that. The National Fire Chiefs Council "Guidance to support a temporary change to a simultaneous evacuation strategy in purpose-built blocks of flats" ('the NFCC Guidance')

made clear that a maximum of 30 days before putting a measure in place was recommended. There was insufficient time. It had taken until March for the temporary alarm system to be installed. Given the immediacy of the risk Fairhold had had to act. It had notified the LFB, as it was duty bound to do so. LFB had wanted the waking watch. The building was under constant dynamic risk assessment by the team, and would be until it was fixed. All agreed they found the Kiwa stance very strange.

(116) Mr Pagan's email had rightly been taken very, very seriously. It was advice from an experienced fire engineer. Mr Brett reiterated that the Fairhold team had 60 years of experience and knowledge between them in public and private posts up and down the country and was used to dealing with significant issues. A fire like Grenfell was not the sort of thing anyone ever wanted to happen again, and a waking watch was what would ensure that in this Building. The fact that Mr Pagan had almost argued against it made no sense. Mr Pagan could not have been aware of the idiosyncrasies of Empire Square when he made his initial comments.

(117) Mr Brett did not accept that the difference between the view of Mr Pagan and of himself could be characterised as a "*difference in professional opinion*". E&M was part of the Primary Authority Scheme ('PAS'), partnered with Tyne and Wear. They had gone to them too, and PAS had also visited. They agreed with the AM advice. Mr Brett, Mr Totty, AM, PAS, the LFB – all disagreed with Mr Pagan. He was the outlier. He did not doubt Mr Pagan's experience, but Mr Brett's job was to look at safety and how people react to assess risk.

(118) In his view, in light of that there had to be measures for the whole West Block. At first, Berkeley was only proposing putting the alarm above floor 8 in the Tower, contrary even to Mr Pagan's advice, and he had had a helpful chat with Mr Collinson to persuade it to at least install them to the whole Tower. He considered Berkeley's approach to be ludicrous. It was unfeasible to run two fire escape strategies for one building simultaneously. Mr Brett's concern was with life-risk consequences, and the appropriate action had been taken.

Waking Watch costs – liability to pay

(119) Mr Brett's evidence in connection with the email of 18 December 2023 was that Fairhold had bought a defective building from Berkeley, and that he did not want leaseholders paying for costs associated as a consequence, including the waking watch. The waking watch numbers had been kept under constant review, and had not been more extensive than necessary. The waking watch had been obtained at favourable rates.

(120) In evidence, Mr Collinson accepted that: (i) Berkeley had stated that the decision on what steps to take was not for Berkeley but for the responsible person to make, and that Berkeley would not be responsible for any decision based on Mr Pagan's views; (ii) that Fairhold had taken the steps that Berkeley had told it to take per the email of 8 December 2023, *vis* consult with the LFB

and review the FRA to ascertain whether the West Block could sustain the stay put strategy; (iii) that Fairhold had also investigated the compartmentation issue as instructed by Berkeley; (iv) that Fairhold had been rapid in its reaction to the email of 8 December 2023; (v) that Berkeley must have been aware that it was possible that Fairhold would come to a different conclusion to Mr Pagan; and (vi) that Berkeley was aware from at least 18 December that Fairhold would look to it for the costs of the interim measures to the West Block. He also accepted that if it turned out that Mr Pagan's recommendation was wrong, Berkeley knew that the waking watch costs were indelibly linked to the simultaneous evacuation strategy, and that it would be responsible for those additional costs for the areas outside of the Tower.

(121) In evidence, Mr Allgood's evidence was that (i) the SRTs do not require Berkeley to pay for waking watch costs; (ii) Berkeley told Fairhold it would not pay for the waking watch costs because it disagreed with the Type 2 FRA; (iii) that Fairhold had been told in December 2023 that the decision was solely its; (iv) that he expected that there ought to have been scrutiny of the Type 2 FRA by Fairhold and by Mr Pagan; (v) that no such condition had been mentioned in Berkeley's email of 8 December 2023; (vi) that the Type 2 FRA advised simultaneous evacuation because of the outcome of the EWS1, and that its conclusions regards the external walls were consistent with Mr Pagan's; (vii) that that advice was given in respect of "all occupiers in [the West Block]"; and (viii) Berkeley did not take issue with that conclusion.

(122) Mr Allgood conceded that the conclusion regarding the external wall system was consistent with Mr Pagan's evidence, so that the refusal to accept liability on the basis of the disagreement with the findings on the internal compartmentation could not stand up to scrutiny. He accepted that it was possible that Fairhold could reasonably expect Berkeley to pay for the waking watch. To refuse to accept liability on the basis of the disputed compartmentation issue was therefore wrong. He agreed it was not fair of Berkeley to refuse to install the fire alarm system across the whole of the West Block as a consequence.

(123) Mr Allgood agreed that Berkeley should be paying the waking watch costs for the period between December 2023 – March 2024 when the Tower alarm system was installed. He agreed that some presence of a waking watch was still required thereafter, even if the sum was lower. He agreed that Berkeley should pay some of the costs. He agreed that the waking watch costs in respect of the carpark were reasonable as that was Mr Pagan's advice. He accepted that the WWRF had expected Berkeley to pay for the fire alarm system to the rest of West Block. He agreed that part of the reason Berkeley had refused to pay was that it was not obliged to do so under the SRTs, though a review of the FRAs was also a factor. He accepted that the WWRF had approved funding for the fire alarm system, and that indicated that DLUHC also disagreed with Berkeley's assessment of the risk, and that therefore it was possible Mr Pagan was wrong. He agreed that at minimum, Berkeley should pay the costs of installation of the fire alarm system on 28 March 2024.

Waking watch costs – mitigation of period

(124) Mr Brett stated that Fairhold had not installed a temporary fire alarm system itself to the rest of the block, as it would have fallen to non-qualifying leaseholders to pay for it. They had applied to the WWRF. "Interim measures" were not specified in the NFCC Guidance, and a waking watch was as good as a fire alarm system. Costs to residents of a fire alarm system was not justified. Berkeley had resisted reasonable attempts not just by Fairhold but also the WWRF to persuade it to put in the alarm system to the rest of the block. Berkeley just hid behind the SRTs. Fairhold believed the WWRF should pay for the fire alarm system absent Berkeley doing so. Berkeley had been given every opportunity to take action and had refused to do so.

(125) In his evidence, Mr Allgood accepted that throughout 2024, Fairhold continually sought to agree with Berkeley for it to install a fire alarm system in the rest of the West Block, and that Berkeley had been given every opportunity to do so. He agreed that Berkeley should have installed it. However, he disagreed that Berkeley should have to pay the waking watch costs for the whole of the period, on the basis that Fairhold could have installed a fire alarm system itself to mitigate the accruing costs. He agreed it was reasonable for Fairhold to turn to the WWRF for funding, but that as Fairhold had self-funded at least some of the waking watch it should have done the same with the fire alarm system. He agreed that it would not be reasonable for non-qualifying leaseholders to have to pay those costs. He agreed it was potentially unfair to Fairhold if an RCO did not require Berkeley to pay the waking watch sums.

Decision

(126) We are satisfied that it was a reasonable decision on the part of Fairhold to stand up the waking watch in the West Block, and to retain it even after the Tower fire alarm system was installed.

(127) In carrying out the FRAEWs Mr Pagan was not engaged to consider anything but the risk of rapid fire spread over the external walls at the Building, which he himself repeatedly reminded Berkeley in his emails to them. In evidence he readily accepted that in carrying out the FRAEW, he was looking at one element of the building and that there are various other factors in any Building that will affect the total level of risk. He also accepted that someone who made a different decision would be within the bounds of a reasonable range of different but valid opinions.

(128) We were surprised, given the picture that has subsequently built up around the West Block as a whole including the admitted compartmentation issues and its internal configuration, that Mr Pagan stated to us that had he to make the 8 December 2023 decision again, he would still have determined as he did that only the Tower was at high enough risk to require a change in escape strategy and interim measures. We consider that Mr Cohen is right that this demonstrates that Mr Pagan is an outlier when one looks at all of the reports that have been obtained. Perhaps that explains what appears to be his initial conflicting view towards the car park, which he also considered was not at high risk due to his assessment it is "*little used*". Nevertheless, he agreed a waking

watch is appropriate due to the wholly inadequate smoke control system and the direct descent of fire-stairs into it.

(129) We are further troubled by the reliance by Berkeley on the Tri-Fire FRA, given the known problems of the work of Mr Kiziak, in favour of the now multiple reports demonstrating the risk to occupants from various construction defects in and about the Building, including issues with compartmentation and smoke control. Mr Pagan himself says, in his expert report dated 18 March 2025 section 6.1, that in general he agreed that he found the compartmentation defects identified by AM at a joint inspection on 22 November 2024, including in cross-corridors, and which he agreed has an impact on the spread of smoke.

(130) In the joint expert report of Mr Humphreys and Mr Pagan, Mr Pagan agrees that the waking watch was necessary until the fire alarm system was installed in the Tower, and that a reduced waking watch was appropriate thereafter for the rest of the Block and for the carpark. His oral explanation for concluding otherwise was not satisfactory, as he endeavoured to suggest that was on the basis of the Tower alone as per his answer in G2. That is very clearly not what is reflected as identified in the Topic/Potential relevant defect in boxes G4 and G5, and we are satisfied that Mr Pagan had no such misunderstanding of what he was saying in those sections for all that Berkeley sought to suggest so in closing.

(131) There are now multiple reports with which it seems that Berkeley disagrees or does not fully accept, in reliance on Mr Pagan's advice. It has not, however, produced its own counter-reports, and Mr Pagan's expert evidence is based largely on the FRAEW and what he says are "*inconsistencies*" in the other reports "*for which* [he] *would prefer an explanation*". It would not appear that any consideration has been given by him to investigations underpinning the Southwark INs. In the joint report of him and Mr Humphreys, he agrees the compartmentation/stopping issues are largely as identified by AM.

(132) We are satisfied that Mr Pagan has simply approached the question of risk on a different basis to the approach to risk taken by Fairhold.

(133) We suggested to him at the hearing that his conclusions were based on a siloed (external wall), rather than a holistic, approach to the increasing evidence of risk at the building, and we are satisfied that we should (and therefore do) make that finding. We are persuaded that his task has been, as reflected in his own emails, part-by-part rather than 'overview' in nature, and that he gave Berkeley a clear warning of the same when he said: "*it should be noted from a legal perspective, it is the person who carries out the fire risk assessment who has the duty to assess the overall risk levels. FRAEW reports in general would provide additional supplementary information and advice to the fire risk assessor to help them make that decision. So technically it is the fire risk assessor's decision as to whether to put the building into simultaneous evacuation or not*". That, of course, is also not quite correct; it is the responsible person's decision, albeit that they will form their view on the basis of all the information available to them including the FRA.

(134) We are satisfied that is the reason that he is an 'outlier' amongst all of the experts and reports on which the risk assessment must be based. When he carried out the FRAEW he was not, as he informed Berkeley, in a position to conduct a holistic assessment. He himself recommended internal investigations. Berkeley has elevated Kiwa's FRAEW, and Mr Pagan, above all others even despite Mr Pagan making it very clear the report was not conclusive on the question of safety risk as whole.

(135) We consider that is what led Berkeley to take the erroneous view that there is a 'comparative' element to the high risk for the whole of West Block versus the Tower, which has resulted in an approach that minimises the significance of that high risk in the rest of the block inappropriately, even despite Mr Pagan's own bullet point analysis of the risks in November 2023. We also find it difficult to understand his conclusion that the risk is not high enough to justify interim measures, given that various of the assessments he makes in his expert report appear to conflict with that view.

(136) We prefer Mr Brett's evidence on the question of safety risk that informed Fairhold's decision.

(137) Mr Bowker made a submission in closing that Mr Brett's evidence was expert evidence inappropriately dressed as factual evidence. We are satisfied that is not the case. Mr Brett's evidence was perfectly properly offered as the person with the factual knowledge of what happened on the decision-making team for Fairhold. The depth of Mr Brett's expertise in risk assessment may be inconvenient to Berkeley's case, but his evidence was properly given to demonstrate the rationale behind the choices made by E&M as Fairhold's agent and the responsible entity, not to offer an expert view. As Jackson LJ set out, in the excerpt from *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2220 (TCC) in Building Contract Disputes (2025: Sweet and Maxwell) Chapter 10 (10.513), provided by Mr Bowker:

"*I conclude that in construction litigation an engineer who is giving factual evidence may proffer (a) statements of opinion which are reasonably related to the facts within his knowledge and (b) relevant comments based upon his own experience. For example, an engineer describing the foundation system which he designed may (and in practice frequently does) go on to explain why he believes this was appropriate to the known ground conditions. Or an engineer brought in by a claimant to design remedial works (which are subsequently challenged as excessive) may refer to his experience of rectifying comparable building failures in the past…*"

(138) We are satisfied that Fairhold's decision to a stand up a waking watch, and to continue it even after the Tower had finally (four months after Mr Pagan's initial email to Berkeley) had a fire alarm installed, was a reasonable one. As Judge Cooke said in *Corben Mews*, "*only a supremely confident landlord would have done anything else*" in light of the information available to it, which information included Mr Pagan's assessment that the whole Building risk was 'high' from the external wall construction alone, and included a decision made by a team which included Mr Brett with his significant experience of management of building safety risk.

(139) We note that contractual principles of loss and mitigation are not the same as the test in the Act; we are concerned with what is just and equitable.

(140) We must have in mind, as the Tribunal said in *Triathlon*, at paragraph 261: "*The ability to make a claim for a remediation contribution order under section 124 is a new and independent remedy, which is essentially non-fault based. The remedy has been created by Parliament as an alternative to other fault-based claims which a party may be able to make in relation to relevant defects. It seems clear to us that Parliament did not intend that the availability of other claims or potential claims should either disqualify an applicant from making a claim for a remediation contribution order or delay the making of that claim.*" This is not a contractual route, and while contractual principles might be considered as that "heft of good sense" *Leigham Court* identified, that is not the only consideration.

(141) In the *Vista Tower RCO*, the Tribunal (Judge Wyatt, Judge Sheftel and Mr Williams MA MSc PgDipSurv MRICS) refused an argument that "*anything that has not been shown to be 'unavoidable' should be outside the scope of an RCO…*" and determined that "*When considering whether it is just and equitable to make or include certain costs in a RCO, it is helpful to consider whether the relevant remedial works/costs were within a range of reasonable responses/costs… that range is relatively wide*" (paras 80 – 83).

(142) We reject Mr Bowker's submission that what we ought to do is look at such costs as if Berkeley were in the position of a leaseholder, and thus import section 27A L&TA principles into the assessment. We must consider relevant factors, to determine what is just and equitable. That is a wider test.

(143) We consider that a relevant consideration is that we have found that the waking watch was a necessary measure. We have found that Berkeley has looked narrowly at the question arising from its SRTs, but has failed to look more widely at what is just and equitable when it comes to placing, and/or paying for, interim measures arising from the construction, knowing that would leave leaseholders with non-qualifying leases paying (at least in part) for those measures. We consider it was a perfectly proper concession made by Mr Allgood that Berkeley knew that Fairhold would be looking to it for the waking watch sums, had a reasonable expectation that if it jumped through Berkeley's initial hoops (our words) in its 8 December 2023 email Berkeley would fund the necessary measures, and that it would not be fair for Fairhold or the leaseholders to have to pay.

(144) As stated in *Triathlon*, this route to recovery should ignore the availability of such other claims as might exist or potentially exist, and focus on those with the "deepest pockets". Berkeley here undoubtedly has the deepest pockets. That is not a factor in isolation though; the facts making that a more pertinent observation are that it is also responsible for the construction of the Building. It then exercised a choice not to install fire alarms when invited to do so even by MHCLG, and to take a narrow view of the safety of the people in and about the Building. It made choices throughout to continue to entrench its position on, or at least partly on, the basis that the SRTs did not oblige it to pay

for interim measures. That approach was taken despite its potential liability under the Act (which was clearly intimated to it). It ignored or failed to understand what Mr Pagan was quite plainly telling it – that he was not technically the one best placed to conduct a holistic risk assessment and it was not his decision (just as it itself informed Fairhold it was not Berkeley's decision), and that if a fire alarm system was not in place within a month a waking watch would indeed be necessary to at least part of the Building.

(145) Berkeley's mitigation argument is tantamount to one that leaseholders of non-qualifying leases should be left to bear sums not ordered. That is deeply unattractive in context. In *Vista Tower RCO,* the Tribunal observed that "*leaseholders* [of non-qualifying leases] *are lower in the hierarchy of liability. The purpose of the BSF and the Act is to protect all leaseholders and other residents. Moreover, the non-qualifying leaseholders (along with anyone else with a legal or equitable interest in the building) also have the right to make their own application for a RCO against the developer*".

(146) We are satisfied that Fairhold was conscious of the exposure of its leaseholders of non-qualifying leases to the ongoing costs of the waking watch. It made the application to the WWRF in at least February 2024, and repeatedly obtained reports required by Berkeley to try to encourage Berkeley to revise its position.

(147) While it is a relevant consideration that Fairhold confirmed in evidence that is spent its own money on installing the alarm in April 2025, and that it therefore appears that it was in a position to fit the alarm before the WWRF has in fact paid out any sums, it is also a relevant consideration that the WWRF did not make a decision for many months and it was only after it had that decision that Fairhold took the step.

(148) We find that in the circumstances, maintaining the waking watch instead of putting in the alarm earlier was within a range of reasonable responses available to Fairhold.

(149) Overall, we find that the it is fair and just to order Berkeley to pay the full sums incurred in respect of the waking watch despite Berkeley's argument regarding mitigation.

(150) If we are wrong in that, we would nevertheless find it just and equitable to order an RCO for a reduced period for the waking watch in the West Block (though in the relevant period recognising the need for the waking watch in the carpark) so as not to require Berkeley to pay for the waking watch between 5 September 2024 – 4 April 2025 (when the alarm was installed to the rest of the block), on the basis that by at least early July 2024 Fairhold ought to have known that Berkeley were not going to install the alarm systems, and ought to have mitigated the sums being expended both for the non-qualifying leaseholders and itself (as we understand it had self-funded some of the waking watch) by installing a fire alarm system. We take the view that, given the previous experience in installing the fire alarm system during the period

December 2023 – March 2024, that could have been done within two months. The reduced sum from 9 December 2023 to 4 September 2024 (two months from when there was a reasonable understanding that Berkeley would not expand the fire alarm) would have been £669,445.20.

Continuing waking watch costs - carpark

(151) For the same reasons, and additionally because Mr Pagan agreed in evidence that the waking watch to the carpark is a reasonable response, we order that Berkeley must pay to Fairhold those ongoing costs until such a time as Berkeley puts in a sufficient temporary alarm system or Berkeley or Fairhold remediates the issues in/adjoining the carpark, whichever is the sooner.

Total Waking Watch - Conclusion

(152) We are satisfied that it is fair and just to make a remediation contribution order in respect of the waking watch for the various periods and for the various complement deployed in the total sum of £1,225,801.20 (including VAT) to 22 April 2025, and fair and just to make a remediation contribution order for the ongoing costs of the waking watch to the carpark at a weekly rate of £3,205.44, payable month to month until the relevant defects in and surrounding safety in the carpark are remediated and/or an appropriate fire alarm system is fitted.

Expert reports

(153) Berkeley's issue with the expert reports that Fairhold seeks the costs of is that Fairhold should demonstrate the reports are in connection with a relevant defect.

(154) It is important to set out which reports Fairhold has sought the costs of. They are:

(a) £45,119.55 (inc VAT) for the AM FRAs (invoices June and July 2024)
(b) £3,600 (inc VAT) to peer review Mr Pagan's FRAEW (invoice 31 July 2024)
(c) £9,349.90 (inc VAT) for the 1st SVC survey and reports (invoice 22 November 2024)
(d) £31,782 (inc VAT) for FRC intrusive survey (invoice 20 October 2020)
(e) £4,740 (inc VAT) for a TriFire EWS1 survey (invoice 4 December 2020)
(f) £1,260 (inc VAT) for SVC Expert report (invoice 30 April 2025)

(155) Mr Bowker's submissions were focussed on reports that have not in fact been claimed for, for example the William Morris Type 1 FRAs, and (unknown to us) Galway Haines reports. He also suggested that the reports should be to a quality that 'withstood scrutiny'.

(156) Mr Bowker did not put to any of the witnesses any questions about the reports above. It is plainly set out in Mr Crawford Scott, Head of Estate Management for E&M's, witness statements that these reports were obtained "*in preventing risks from materialising or in reducing the severity of building safety incidents at Empire Square that have been identified so far*", in echo of the Act.

(157) In the context of the background set out at the start of this decision, the findings we have made above regarding the competing evidence of the situation at the building, and the witness evidence we heard as regards the waking watch, Mr Bowker was right not to push the point.

(158) In respect of Mr Kiziak's report, though with hindsight we agree it cannot withstand scrutiny, at the time it was obtained that was unknown to either party. More pertinently, Berkeley has sought to rely on it in these proceedings.

(159) For the reasons set out above, we consider that it is just and equitable to order Berkeley to pay these sums.

Management costs

(160) These costs relate to the management fees incurred by E&M and Firstport in the "*assistance* [Firstport] *have provided in preventing risks materialising or in reducing the severity of the building safety incidents at Empire Square*", and including "r*esource made available by E&M to liaise with relevant professionals involved with the remediation of Empire Square, and to attend relevant meeting at Empire Square in relation to the remediation of the Building*". Mr Scott's position is that these will not be quantifiable until remediation has in fact taken place.

(161) Mr Bowker's only cross-examination of Mr Scott as regards these sums was in respect of how the Tribunal was to calculate them, absent any invoices or proper information.

(162) In closing he submitted that was a breach of the Tribunal's directions, which provided the Tribunal with no evidence on which to exercise its section 124 jurisdiction. He therefore invited us to dismiss the application for those costs, or to postpone the decision.

(163) No issue was taken with whether these sums are recoverable at all. We are satisfied that these are sums that are recoverable within the definition of 'relevant steps' added to section 120 by the LFRA.

(164) The evidence in respect of these charges is such that we are indeed not in a position to make an assessment of the sums so far incurred, or to be incurred ongoing. However, the result is not that we have no jurisdiction to make an order.

(165) The first point is that no step taken in proceedings is invalidated simply by a failure to comply with directions – rule 8 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013. The Tribunal has a series of choices it can make in respect of non-compliance.

(166) While the directions of 16 October 2024 did make provision for Fairhold's statement of case to include: "[1(b)] *The costs which Fairhold alleges it has incurred or will incur in remedying the relevant defects… including details of how those sums have been calculated"*, at first blush and on a confined reading, that is not a direction specifying calculations of *associated* costs of management expenditure incurred by Fairhold in the pursuit of

remediation (whether as relevant measures, or of a class of recoverability from leaseholders of non-qualifying leases because they fall within paragraph 9 or paragraph 10 of schedule 8 to the Act).

(167) Even if there is a breach of the *spirit* of the directions, the next question is what should be the consequence in light of the overriding objective (rule 3)?

(168) At that stage, it is important to look at what the Act requires a party to prove in RCO proceedings. As amended by the LFRA, the Tribunal undoubtedly has jurisdiction to make an order for 'reasonable costs' if it is not presented with a specified amount:

> (4) An order may—
>
> (a) require the making of payments of a specified amount, …;
>
> (aa) <u>if it does not require the making of payments of a specified amount, determine that a specified body corporate or partnership is liable for the reasonable costs of specified things done or to be done</u>;
>
> (b) require a payment to be made at a specified time, or to be made on demand following the occurrence of a specified event.

(169) Those amendments came into force on 31 October 2024, and formed part of Fairhold's statement of case. Berkeley has known throughout that Fairhold will rely on the provision.

(170) We are satisfied that therefore, even if there is a breach of the directions in spirit (and there is certainly no breach in letter), the fair and just outcome applying the overriding objective is that we take no action on the point. Certainly, it would not be fair and just to strike out an element of Fairhold's case when it has brought it as the statute permits (i.e. for an uncrystallised sum), and Berkeley has had every opportunity to engage with the issue from the very beginning.

(171) For all of the reasons set out previously, we are also satisfied that it is fair and just to make an order that Berkeley pays the reasonable costs of management incurred by reason of the requirement to remedy relevant defects or take relevant steps to achieve relevant measures for such remediation. Those sums will need to be assessed at the end of the remediation process if they cannot be agreed.

<u>Legal Costs</u>

(172) The parties' arguments on this matter were limited. Mr Bowker simply asserts that the Tribunal has no jurisdiction to make such an order; its jurisdiction is limited per rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013. He asked us to read the explanatory notes to the LFRA for the amendments to section 124.

(173) Mr Cohen submitted that rule 13 is irrelevant; the Act makes provision for costs. The types of costs in section 124(2A) is not a limited list, and the Secretary of State can add to it. "*In connection with*" in section 124(2A)(a) was wider than "*for or because of*" as we (Mrs Sarah Phillips MRICS and I) found

in *Tower Bridge Road*. He argued that Mr Bowker's only reasoning behind his assertion was that the argument had not been run before, but *Vista Tower RCO* had been the only case for which the amendment had been in force, and it came into force only days before that hearing.

(174) As this is a matter of jurisdiction, we must satisfy ourselves that we have the power to make an RCO for litigation costs. We must therefore look at the specific provision, and at the scheme of the Act, and may take into account any explanatory notes that might offer interpretative assistance.

(175) We start with section 124(2), in which the overarching principle is identified. The costs for which we may make an RCO as those "*incurred or to be incurred in remedying, or otherwise in connection with, relevant defects (or specified relevant defects) relating to the relevant building*."

(176) "Costs" in that provision is unlimited by other definition. It seems to us a natural reading of the word that it can include legal costs.

(177) "*In connection with*" seems to us to be a very wide term, consistently with all of the powers Parliament has seen fit to give to the Tribunal in this legislation generally.

(178) We then go to section 124(2A). We observe that the Act itself uses these words before coming to the specific identified list of matters that might be relevant costs for an RCO (our underlining): "*The following descriptions of costs, <u>among others</u>, fall within subsection 2…*". We find that the list is therefore not definitive and does not proscribe us making a finding that a class of costs is within our power to make an RCO in connection with that has not been identified in that list.

(179) Section 124(2A)(a) makes provision for recovery of "*costs incurred or to be incurred in taking relevant steps in relation to a relevant defect in the relevant building*". We must therefore look back to the definition in section 120 for what "relevant step" means. There it is set out that "relevant steps" are:

> 120(4A)… 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.

(180) It does not seem to us offensive to the provisions to interpret enforcement of Fairhold and Berkeley's obligations in the Act through the Tribunal, with the consequent expenditure of litigation costs, as relevant steps. We are satisfied that the purpose of these proceedings is to ensure that the Building is remediated, so as to prevent or reduce the likelihood of a fire, the severity of its consequences, and the harm to people in and about the building from it. If the Building had been remediated, we would not be considering the

applications. The RO application would not have been brought. The RCO would not in consequence have been sought.

(181) The explanatory notes to the LFRA, which Mr Bowker invited us to review and Mr Cohen endorsed, state this about section 120(4A): "*682. These are essentially preventative or mitigating steps that can be taken to reduce the risk and/or severity of any incident resulting from a relevant defect*". About section 124(4A): "*690. … These are examples of costs which can be recovered under a remediation contribution order. 691. New subsection (2B) provides the Secretary of State with the power to make regulations specifying the descriptions of costs which are, or are not, to be regarded as falling within subsection (2)…*".

(182) We consider that both the section and the notes make it clear that the Secretary of State does not *have* to specify a prescribed list of matters that are within our jurisdiction to award as costs within section 124(4A); simply she may. Nor has she provided any regulations making a prohibition on the award of litigation costs (which would seem to us was capable of consideration as part of the amendments, but has not been identified either in the list in subsection (4A)(a) or any such regulations). It therefore seems to us that the notes do not assist us to come to the conclusion argued for by Mr Bowker.

(183) It is therefore important to look at the rest of Part 5 and schedule 8 for indicators that legal costs might fall within or outwith the definition of relevant measures, or for any other indication that they might be recoverable as part of an RCO.

(184) In paragraph 9 of schedule 8 the Act expressly provides:

> 9 (1) No service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect.
>
> …
>
> (3) In this paragraph the reference to services includes services provided in connection with—
>
> (a) obtaining legal advice,
>
> (b) any proceedings before a court or tribunal,
>
> (c) arbitration, or
>
> (d) mediation.

(185) Two things arise from that: the Act does make provision for legal costs recovery; in a landlord seeking to recover that sum through service charges, it can only do so from leaseholders with non-qualifying leases. That fits with the scheme of the Act that qualifying leaseholders should be protected from costs

of remediation, and clearly makes the association between remediation and legal costs. The provision is phrased in the same way as section 124(2); services provided "*in connection with*".

(186) It is therefore the case that per schedule 8, legal costs are specifically recoverable from some parties (leaseholders with non-qualifying leases). The leaseholders of non-qualifying leases might then have a section 27A L&TA challenge to payability. The landlord would need to demonstrate that it is within a reasonable range of decisions, open to it in accordance with the terms of the lease, to charge to the leaseholders of non-qualifying leases the cost of the remediation works, without first having pursued (or simultaneously pursued) the developer liable for the defects.

(187) If the leaseholder were to be successful in the argument, to read section 124 of the Act as producing the result that that cost is not recoverable from the developer would lead to absurdity. Where then is the landlord's answer, when it has become entangled in disputes with the developer who is liable for the defects, and has promised the Government it will remediate, but has expressed unwillingness to do anything but what its SRTs require? The landlord has become subject to costly litigation because of the poor construction. It does not seem to us to be within the policy of the Act that just because the landlord *is* a landlord, it has to swallow those costs.

(188) What would the policy argument be for finding a person subject to an RCO application liable to legal costs or otherwise? None has been put forward by either party. However, it is plain that the developer is at the top of the waterfall of liability.

(189) As we said above, alternative remedies available to a landlord are neither here nor there when it comes to the RCO jurisdiction, but if a landlord is not able to obtain its costs through the RCO, which is a non-fault based exercise of discretion, unless it proves fault *in the conduct of litigation* under section 13 (which will be a very high bar in that context), then where is its remedy?

(190) We also think it would result in absurdity to read section 124(4A) in such a way that would lead to the provision almost invariably requiring leaseholders to pay litigation costs (subject to their own RCO applications, which would inevitably require them to be unsuccessful on a section 27A challenge first, thus engendering a pernicious merry-go-round of proceedings and costs), where the intention of the Act is that leaseholders should not pay for costs incurred because of developers' poor construction practices.

(191) We turn to Mr Cohen's argument that the interpretation we are inclined towards can be supported by looking at the situation of a right to manage company ('RTM'). In a case in which an RTM had to obtain an RCO, Mr Bowker's argument would leave the RTM in a position whereby the potential cost of doing so would effectively act as a bar to the remedy, particularly in a case in which the RCO was pursued for funding a FRAEW (for example). The

consequence would be that the cost of the litigation would fall on the constituent lessees of the RTM, the very people who the scheme of the Act seeks to protect. It would make no sense for the parties to swallow the litigation costs to engage the very jurisdiction designed to prevent them swallowing the costs. We agree with Mr Cohen that would be absurd.

(192) We are satisfied that it is within our jurisdiction under section 124(2) to therefore include legal costs within the very broad ambit of costs described per that section. There is nothing in the Act that we find prohibits us from doing so. All the indicators in the surrounding provisions and the explanatory notes point to a specific power granted by statute for costs of all types to be included, provided they are in connection with "relevant measures" in respect of "relevant defects". Interpreting section 124(4A) "relevant measures" as including the legal costs associated with steps to achieve the three listed outcomes is consistent with paragraph 9 of schedule 8. On a holistic overview, that interpretation permits all of the provisions of Part 5 to work properly together with each other. To interpret section 124 otherwise would result in absurdity.

(193) The Act has at its centre the aim to ensure leaseholders do not pay for developer defects. In this case, it appears Fairhold are liable under paragraph 3 of schedule 8. Therefore, it is only leaseholders with qualifying leases that obtain the costs protection of paragraph 9. Fairhold is not permitted to pass that portion on to leaseholders with non-qualifying leases (paragraph 11 of schedule 8), and so will itself have to absorb that part of the costs.

(194) Leaseholders with non-qualifying leases will, unless we make an order for Berkeley to pay those costs, be liable to pay the costs of these proceedings through no fault of their own, unless they are successful on the merry-go-round. Fairhold may then end up paying a greater proportion of the costs, again through little fault of its own.

(195) As observed by all at the hearing, it is only this litigation that has driven any progress. Berkeley developed the Building. The legal proceedings have been brought about because of the poor construction; we would not be here but for those defects. We find it would be absurd to interpret section 124 in any other way than to include a power to make an RCO for legal costs that would otherwise fall to innocent parties, since those costs are in connection with remediation of the Building as envisaged in section 124(2). We find that term is deliberately wide in echo of the matching schedule 8 provisions.

(196) For those reasons, and for the reasons set out above in the section about the waking watch, we consider it fair and just to make an RCO for the legal costs.

(197) In the alternative, if we are wrong that the costs of the RO proceedings are 'in connection with' remediation of the Building (wide though that term is), on grounds Fairhold was the Respondent in that case (and so that part of the litigation was not an active step taken by it in connection with remediation of the Building), we would nevertheless have found that the costs associated with

the RCO are costs that are incurred in connection with remediation of the Building as per section 120(2). Fairhold was pushed into making the RCO application by (we find) Berkeley's unreasonable position at the CMH on 8 July 2024 that Fairhold was doing something wrong in asking to peer review its FRAEW for ulterior motives, and insistence that the Tribunal list the RO despite knowing that would result in an immediate RCO. The RCO has been only been sought at all as a direct consequence of Berkeley's position, and we find that position was taken as a direct consequence of (as we further explain below in paragraph 220 and for the reasons also set out in the surrounding paragraphs) Berkeley seeking to gain an upper hand to enable it to deliver remediation of a smaller scope of works, to a lower standard than the Act requires. In other words, Fairhold had to make the application to achieve appropriate remediation of the Building because if an RO was made, it would have to carry out works that at that time Berkeley refused to accept were required, and to the standard to which Berkeley continues to insist it will not commit. The RCO is clearly a measure taken for the purpose of remediation, and the litigation costs would not have been incurred but for it.

(198) We are not, however, in a position to assess those costs on either position. The sums claimed overall are £308,574.23 (both solicitors' and counsel's costs). It seems to us that the appropriate order in the circumstances is detailed assessment by the county court, an exercise for which the Tribunal is not equipped by the papers provided.

Whether it is fair and just to make a remediation contribution order for future works/costs?

(199) Berkeley submits that it would not be fair or just to make an RCO against it on grounds that it is unnecessary - it is it willing and bound to carry out the works. Berkeley submits this is in reliance on its SRTs.

(200) It is particularly troubling that it is Berkeley's stated and emphatic position (both in its pleadings and orally before us, and, it seems, even a month after the hearing) that, regardless of what finding we make for the RO application in particular as regards relevant defects, it will not consider itself bound by those findings and will continue to perform its obligations under the SRTs. While as a matter of law it may be true Berkeley is not bound by the terms of the RO, Berkeley will be bound by any RCO we make, which itself in this case will relate to the standard of works required in the RO. Albeit we accept that Berkeley's permitted participation in the RO was limited to submissions, in the RCO it was in no such position. If, as appears to be the case, it wished to put forward the case that there are some relevant defects that are not developer defects, or that a particular scheme of works was all that was required (which would include standard of the works) it was in a position to do so in the RCO case – it was specifically given permission to present expert evidence regarding those issues by the directions of 16 October 2024.

(201) In closing Mr Bowker took a pleadings point that Fairhold had not set out its case on the defects. We disagree. It is clear that Fairhold's case was pleaded by reference to Berkeley's own FRAEW, the INs, the FRAs and SVC's report. The details of those matters were plainly known to Berkeley, and have throughout Berkeley and Fairhold's relationship in the remediation of this building been the subject of dispute. The obvious answer was for Berkeley to call its own expert or factual evidence to demonstrate either that the issues were not relevant defects that within the meaning of the Act, or that they were not developer defects. Mr Pagan's expert witness report was put forward to cover the issues, and in inviting the Tribunal to make findings in respect of his evidence Berkeley has had its opportunity to put forward such dispute as it has. In the event, the parties came to an agreement on all but the safety risk and waking watch, and standard of works points. Respectfully, Mr Bowker's submission is, in that context, a submission that goes nowhere.

(202) As observed in *Triathlon*:

> 85. *In this instance Parliament has decided that, irrespective of fault, it is fair for those with the broadest shoulders to bear unprecedented financial burdens… the Act and the* [Building Safety (Leaseholder Protection) (Information) Regulations 2022] *disclose a heirarchy of liability, with the original developer and its associates at the top…*
>
> 261. *…The ability to make a claim for a remediation contribution order under section 124 is a new and independent remedy, which is essentially non-fault based. The remedy has been created by Parliament as an alternative to other fault-based claims which a party may be entitled to make in relation to relevant defects… It also seems clear to us that Parliament intended that an application for a remediation contribution order should provide a route for securing funding for remediation works without the applicant having to become involved in, or to wait upon the outcome of other claims arising out of the relevant defects, which might involve complex, multi-handed, expensive and lengthy litigation… we can see nothing unfair in making remediation contribution orders on the applications, without requiring Triathlon to hazard the pursuit of other claims which it may have.*
>
> 265. *…The policy of the 2022 Act is that primary responsibility for the cost of remediation should fall on the original developer, and that others who have liability to contribute may pass on the costs they incur to the developer…*"

(203) We found Berkeley's failure to put forward a positive case, and reliance on the RO not being binding on it (and elevation of the SRTs above the Act), particularly unattractive given the clear disconnect between what the Act endeavours to achieve and terms of the SRTs, which in turn has a direct impact on the weight to be given to Berkeley's reliance on the fact it is both willing and required to carry out the works.

(204) As has been observed by this Tribunal and the Upper Tribunal now on many occasions, the Act has it its heart a non-fault based purposive approach to remediating buildings that pose a risk to the safety of people in and about the building arising from something used (or not used) as soon as reasonably possible, for the protection of leaseholders.

(205) The Act has two principal goals: that buildings that require remediation are remediated as quickly as possible, and that those not responsible for the defects that require remediation do not pay for it.

(206) In order to establish a defect is a relevant defect, all that needs to be established is that in a relevant building there exists a defect arising from relevant works in the relevant period as a result of anything done (or not done) or used (or not used) in the carrying out of those works, which causes a 'building safety risk'.

(207) A building safety risk is widely defined - 'a risk to the safety of people in or about the building arising from the spread of fire or the collapse of the building or part of it'.

(208) The standard of remediation to be imposed by any RO is not specified in the Act. In the caselaw that has so far arisen, it has been interpreted to mean that works of remediation of the relevant defects should meet an outcome that satisfy the building regulations/standards in force at the time of their remediation. That achieves the elimination of the identified risk (or mitigation of it, where it cannot be fully eliminated).

(209) Paragraph 2 of Schedule 8 to the Act makes it clear that the waterfall of liability for costs of remediation begins with the landlord/developer. If paragraph 2 applies, no leaseholder is liable to pay for any costs of remediation (the provision is not just limited to qualifying leaseholders). We note that the land registry title document appears to show that Berkeley and Fairhold (at least then) operated from the same business address. It seems to us possible that, as in other developments of which we are aware, Berkeley and Fairhold were in partnership in respect of the development at Empire Square, but we need not decide the point. If liability is not under paragraph 2, it appears that it is under paragraph 3 of schedule 8, meaning that leaseholders with non-qualifying leases will be required to pay sums calculated in accordance with paragraphs 5 – 10, which of course substantially limit both the amounts and the period over which sums may be demanded. There will inevitably be a section 27A L&TA challenge, and possibly years of future litigation, if Fairhold does not pursue reasonable other avenues open to it to fund the costs of the works.

(210) The key point arising is that if Fairhold is made subject to an RO, it will need to remediate the defects identified and found by us to be relevant defects to the standard required by the Tribunal, and will be limited in its ability to recover sums from even from leaseholders of non-qualifying leases, by the provisions of paragraphs 5 – 7 of schedule 8 to the Act, supposing those sums

survive a section 27A challenge on payability. It is neither fair nor just to those leaseholder or to Fairhold to have to pay for developer defects and the associated costs on the basis of Berkeley's contract with the Government, to which neither the leaseholders nor Fairhold are party.

(211) It is also the case that the SRTs do not appear to bear much of a relationship to the Act, which is surprising given the context in which they arise. Striking examples are that the requirement to remediate in the SRTs is to the standard of a 'tolerable risk' 'defects' giving rise to a 'life-critical safety risk'. Nor are the costs of interim measures like a waking watch payable. The SRTs purport to be binding in various respects on third parties, including freeholders and leaseholders who are not signatories.

(212) A matter that has loomed large in these proceedings is Berkeley's stated position that it would not consider itself bound by any decision of the Tribunal in the RO application, that defects are 'relevant defects' as between the leaseholders and Fairhold, and will continue works in reliance on the SRTs. What that may leave is a situation in which Fairhold has to do works to remediate relevant defects to a higher standard which Berkeley refuses to undertake because of the lower standard of remedy and higher specified risk required from a defect, found in the SRTs. We do not accept Mr Bowker's characterisation of this in his closing as a "*distinction without a difference*" given Berkeley's repeated reliance on those SRTs to justify why it would not be bound by our findings on the RO. If there was no difference, why would Berkeley so vociferously take that stance (as it would simply not matter)? Nor is it reflected in Berkeley's own evidence of its conduct regarding the waking watch.

(213) We are satisfied that Berkeley's stance has demonstrated conduct towards remediation the character of which Mr Brett prophetically expressed himself concerned as far back as 26 August 2022:

"*the reason we require initial meetings with the developers is that some of the smaller developers have taken a rather limited approach to how they intend to assess and remediate the buildings they developed, which are over 11m and have life-critical fire safety issues. They have concentrated solely on PAS 9980 and not the "other industry standards relevant to ensuring that the building meets a life-critical safety standard" as set out clearly in the Agreed Principles which form an integral part of the signed Pledge*."

(214) If Fairhold was in a development arrangement with Berkeley when Empire Square was developed, it would not be able to pass those costs on to leaseholders. As it was in no such arrangement, without an RCO it has to rely on limited recovery against non-qualifying leaseholders. Those leaseholders would themselves be able to bring an RCO application against Berkeley on the basis it would not be just and equitable for them to have to pay where Berkeley was the developer of an unsafe Building, but hiding behind the SRTs to deliver a lower quality, or a narrower scope, of remediation that the RO required.

Would it be just and equitable to leave them in the position of having to do so? In our view the answer is no.

(215) Disappointingly, given the large number of reports already obtained over the years since this building was built (not all of which were before us, but which amount to at least 35 in number according to Berkeley's statement of case), and which largely agree with each other, and Mr Pagan's recommendation for further reports now more than a year ago, the scope of works agreed continues to include further investigations that have not yet been undertaken by Berkeley – for example, the recommended investigations at the floor slab behind the glazed curtain walling, or sampling of fire doors and letterboxes (given that wear and tear works have already been undertaken by Fairhold). It continues to suggest that Berkeley does not accept the evidence that already exists, but (two years on from signing the SRTs) has nevertheless not done its own investigations to disprove the evidence provided to it, relying on Mr Pagan's evidence (unfairly on him, given his expressed limitation on his reports) to the exclusion/criticism/minimisation of anything else provided. That does not appear to us the conduct of a willing developer, and is having a real effect on the delay to remediation for the most important people in the scenario, i.e. the leaseholders.

(216) Berkeley also submits it would not be fair and just to make an RCO on grounds of Fairhold's conduct. It asserts that Fairhold delayed in granting e.g. the licence for investigations. It appears that it was reporting the same to MHCLG and Mr Coyle, leading the leaseholders to a particularly narrow view of where the fault for want of remediation lay.

(217) On the evidence, it is true that initially E&M and Berkeley were endeavouring to agree a licence for the whole portfolio of properties for which they are in the same situation as for Empire Square. Both Berkeley and Fairhold have been at various times less than timely in responses within their non-contentious departments. The very fact that the parties still, by the time of the hearing, failed to agree matters that have been on foot between their non-contentious lawyers regarding the RWA since at least July 2023, during the course of which there have been multiple joint meetings and email correspondence, demonstrates that Berkeley's narrative that it was Fairhold failing to grant access for investigations – which narrative resulted in the leaseholders initiating the RO application - is (at least) skewed. It was in fact Fairhold's unchallenged evidence that it was Berkeley's concentration on its dealings with MHCLG in that period that caused the delay to the execution of the licence for investigations. The correspondence between Field Fisher and Trowers and Hamlins included in the bundle certainly makes clear that at the time, it was Field Fisher doing the bulk of the chasing between May 2023 – October 2023 (when Berkeley finally returned the countersigned licence dated September).

(218) Why, then, was Berkeley throughout informing MHCLG that it was not progressing because of Fairhold's delay? Why did it give the leaseholders the impression that it was doing its utmost and that Fairhold was delaying things,

leading the Leaseholders to make an application to the Tribunal in the terms they did? We are satisfied that it was keen to play a blame game, in which it was convenient to deflect from its own failure to prioritise or make reasonable progress in agreeing a licence to investigate to defects. It is remarkable that even now, 18 months after commissioning Mr Pagan's FRAEW, it still apparently has not made any of its own investigations into what Fairhold's FRAs have now repeatedly found regarding the compartmentation, fire-stopping, smoke ventilation and so forth at Empire Square, choosing to take a 'sit back and prove it' attitude (which it itself tried to deflect onto Fairhold when it reasonably asked to peer review Mr Pagan's FRAEWs).

(219) Mr Cohen submitted, and we find, that the above evidences that Berkeley is principally motivated by its pockets rather than the spirit of the pledge, and more importantly the legislation that puts safety of the users of evidently dangerous buildings front and centre of the regime. It is untenable to argue (and to be fair to him, we do not think Mr Bowker took the argument so far to suggest) that if Berkeley remediates in accordance with the Act, MHCLG will consider it in breach of its SRTs. That is the upshot of its argument. We find that the SRTs are a 'minimum' approach and the Act (as interpreted since commencement by both this Tribunal and the Upper Tribunal) much wider. That is by no means a 'distinction without a difference'. Protection of the leaseholders is simply being forgotten in Berkeley's rigid insistence it will do no more than the SRTs require.

(220) Nor do we accept that the leaseholders or Fairhold can take any comfort from Berkeley's behaviour in respect of other developments, given the history at Empire Square. The chart provided is meaningless unless conduct proves it to be reliable in any particular case. It was Berkeley who pressed for the RO hearing to go ahead. It knew that it would, as a consequence, be made subject to the RCO application. Perhaps this is a salutary tale in being careful what you wish for, but it seems to us likely that it might reasonably have concluded, in light of the above, that an RO would be made. The law is sufficiently established that it could also have reasonably concluded that the Tribunal would be satisfied it was fair and just to make an RCO if an RO was made, given the evidence provided. We consider Mr Cohen is right when he says the only plausible explanation for Berkeley encouraging the Tribunal to, in effect, 'get on with' the RO application, even knowing that meant Fairhold would instantly make an RCO application against it, was it would put it in a better bargaining position with Fairhold in respect of the works it was willing to do under the SRTs, and Fairhold in a weaker position in which a 'deal' with Berkeley would be a better outcome for it than an RO, even if that deal led to works insufficient to remediate the building defects in accordance with the Act.

(221) It is an important factor that the Building remains unsafe and that works must commence as soon as possible and be to the relevant standard. If Berkeley is unwilling to do so because of its reliance on its contractual requirements in the SRTs, Fairhold will only be enabled to carry out those works to the higher standard if it has funds to do them. Berkeley is the developer and is at the top of the waterfall of liability. If Fairhold must pass costs on to leaseholders with

non-qualifying leases, it is significantly impeded in the amount and rate of recovery (paragraphs 5 – 10 of schedule 8), and open to ongoing litigation if it does not take reasonable steps to obtain monies from third parties such as Berkeley. It withdrew its application to the Building Safety Fund on the basis of Berkeley signing the SRTs. It will, without the RCO, be in a vacuum where it must turn to other resources. This will cause further delay, and injustice because, at heart, these are developer defects.

Conclusion

(222) For all of those reasons, we consider it is fair and just to make an RCO, both for the incurred costs and for the estimated sums that Fairhold will incur in remediating the Building.

TERMS OF THE ORDERS

Remediation Order

(223) Disappointing though we understand it will be to the Leaseholders, we cannot impose a timeline that we are not satisfied that the evidence sustains is achievable. Both experts for Fairhold and Berkeley anticipate that the works can be done within 27 months of the preliminaries, which will themselves take 18 months, including an extended period for the Building Safety Regulator to review the Gateway 2 submission. We appreciate the research the Leaseholders put into strategies for ensuring the success of that submission, and are sure that Berkeley and Fairhold will have them in mind at the relevant time.

(224) Fairhold will need additional time on top of that 45 months, to secure a team of experts it does not yet have in place, who in turn can prepare tenders and so forth. This is a complex building and there are very substantial issues that do not appear immediately amenable to resolution, particularly for example the over-long residential corridors to fire stairs that have no means of smoke ventilation at all. Mr Humphreys states that if Fairhold undertakes the works, there will be an additional 18 months during which it will need to identify and tender the works, enter into consultation and so forth.

(225) While there will inevitably be a greater period of time than it will take for Berkeley to do the works, we consider that the period is a matter of resource. It is appropriate to resource works required for people's safety in such a way as to ensure that the remediation is done as quickly as possible. We consider 12 months for that first initial phase should be sufficient.

(226) We understand it will come as a disappointment to the Leaseholders that we find that we cannot impose a shorter timeline than that within the order annexed to this decision.

(227) Nor are we satisfied that it is appropriate to mandate a form of dispute resolution between Fairhold and Berkeley, be it neutral evaluation by a third party expert or otherwise (and though Mr Gee expresses his gratitude for the faith the Leaseholders place in his expertise, it would not be possible or appropriate for the Tribunal to undertake that role or appoint such a person. The answer would lie in an application to the Tribunal in accordance with the terms of the order itself). We believe the answer lies in keeping the timetable tight so that disputes cannot be allowed to simply rumble on in the way they have hitherto.

(228) We find that the works to remove the specified relevant defects should be carried out in compliance with the Building Regulations applicable at the time the works are carried out, so that the relevant defects no longer exist and such that the works achieve approval by the Building Safety Regulator. The purpose of Part 4 is to provide for relevant defects to be cured, not simply reduced to 'tolerable' (whatever that term might mean in context) where their removal is possible.

Remediation Contribution Order

(229) The costs of the waking watch have been incurred, and it is fair and just to order their payment in short order, and we do so.

(230) For those costs that require to be assessed, we consider that neither the parties nor (consequently) we will be in a position to make an assessment of the reasonable costs of Firstport/E&M until (1) we know whether the parties comply with the order and (2) in any event, the works are complete. We therefore make an order in the terms of the order attached.

(231) In terms of the costs of these proceedings, we consider the most appropriate form of order to make is that there should be a detailed costs assessment by the county court, if the parties are unable to agree. We therefore make that order.

(232) Mr Bowker took issue with the estimated sums Mr Humphreys ascribed to the remediation required by the RO. Berkeley, however, offered no contrary evidence, and we are satisfied with Mr Humphreys' calculations based on available data from contractors' specifications on other projects. That is the approach a Quantity Surveyor would take. It is hardly surprising that the sum at this stage has to be rough, given that Fairhold has started no project. The answer lies in embedding balancing provisions in the RCO.

Suspended Orders

(233) Save for the crystallised sums in respect of the waking watch and reports, and the uncrystallised sums to be assessed, in this case, we consider that the appropriate answer to achieve remediation of the identified items in the RO in the shortest possible period by the appropriate body (i.e. Berkeley), to the standard required by the Act, is to take a novel approach and to impose suspended orders on both Fairhold and Berkeley.

(234) All parties agreed that the Act does not make mention of suspended orders, but that the width of the Tribunal's discretion under sections 123 and 124 permitted of such orders.

(235) Some might ask what is the point of making the orders and then suspending them – doesn't that put the Leaseholders in the same position they are now? In our view the answer to that question is 'no', for the following reasons.

(236) We consider that the benefit of a suspension is to give Berkeley a final opportunity to review its position in respect of the works that must now be funded and undertaken, and the standard of those works. It is our hope and expectation that the above findings lead Berkeley to conclude that insofar as the works it plans do not meet the standard of the works required by the RO, it will have to pay via the RCO for Fairhold to do them to that standard. If Berkeley has to pay for them, it is likely that it can obtain the labour and materials to undertake the works to the standard required by the RO at much more favourable rates than Fairhold having to do the work. The likelihood is that if works have to be carried out by Fairhold a second time (because the SRT works do not achieve the outcome required), Berkeley will end up paying twice.

(237) The Tribunal endorses a return to a pragmatic approach, which in this case has been overshadowed by disagreement over the meaning of SRTs to which two of the parties in this litigation are not in fact signatories. Those contractual obligations do not oust the jurisdiction of the Tribunal, and carrying out remediation to a higher standard than stipulated because the Act requires it will not put Berkeley in breach of those SRTs.

(238) It is clear that when their toes are held to the fire Fairhold and Berkeley can cooperate, but it is also clear that it takes the pressure of a hearing or the threat of a consequence for that to happen. A suspended order is, in effect, a constant threat of consequence that should sharpen the focus back to what is most important, remediation.

(239) This is a final opportunity for both Berkeley and Fairhold to demonstrate their commitment to remediating the building. If they do not do so, both the Remediation Order and Remediation Contribution Order will immediately 'bite'. By setting Berkeley and Fairhold's ongoing relationship in this context,

the result to the leaseholders will also be a remediated building to the required standard in the shortest possible period of time.

(240) We build in a mechanism for variation, as it is appropriate to recognise that in complex construction works, and particularly where the Building Safety Regulator faces delays in its ability to process gateway 2 applications, things can cause delay that are simply outside of the parties' control.

(241) It is important that applications are made before the deadline is missed, but again the parties are asked to adopt pragmatism. If a milestone is missed only by a matter of days or a week, we would expect that the parties could all agree retrospective variation without the Tribunal's assistance to resolve the substance of the application.

(242) Nevertheless, we warn that such things as are within the parties' control and are nevertheless allowed to slip without good reasons are unlikely to be viewed favourably in any such application.

(243) We are therefore satisfied that the orders should be made on the terms as set out in the Orders annexed.

Conclusion

(244) It is our view, and our hope, that these orders allow for the best practical solution to the tangled relationships between the parties, and return the leaseholders' safety and interests to the head seat of the table, where they belong.

Name: Judge Nikki Carr **Date:** 5 June 2025

Attachments: Empire Square Remediation Order FINAL
Empire Square Remediation Contribution Order FINAL