

THE BUILDING SAFETY ACT 2022

AUTHORITIES PACK

The judgments and decisions referred to in
A Section-by-Section Commentary and Case Digest

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4 Pump Court, Temple, London EC4Y 7AN

22 September 2026

The commentary, and the current edition of this pack:

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Neutral Citation Number: [2007] EWCA Crim 1937
IN THE COURT OF APPEAL
CRIMINAL DIVISION

No: 200703057/C5

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 11th July 2007

B e f o r e:

LORD JUSTICE LATHAM
(Vice President of the Court of Appeal Criminal Division)

MR JUSTICE PITCHFORD

MR JUSTICE ROYCE

R E G I N A

v

P

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(Official Shorthand Writers to the Court)

MR R EASTMAN appeared on behalf of the **Applicant**

MR O NSUGBE QC AND MR R MATTHEWS appeared on behalf of the **Crown**

J U D G M E N T

THE VICE PRESIDENT: This is an appeal by the prosecution under section 35(1) of the Criminal Procedure and Investigations Act 1996 with leave of the trial judge. The appeal relates to a preliminary ruling at a preparatory hearing given by the judge in relation to charges contained in an indictment which are under the Health and Safety at Work Act 1974. The first two counts in the indictment are counts which charged P Limited with offences under section 33(1)(a) of that Act, and the third and fourth counts in the indictment charged the respondent to these proceedings, Mr G, with two counts of contravening section 37(1) of that Act.

The proceedings arise out of a tragic accident at the docks when a six year old boy was thrown from a fork-lift truck, upon which he was being carried as a passenger, when it collided with a second truck which was "riding reel", which is the description given to a practice of carrying a third and unclamped newspaper reel on the top of two clamped reels. This practice alleged to be obviously dangerous. The prosecution in the trial allege that it was commonplace at the docks and that Mr G, as managing director of the company and chair of their Strategic Health and Safety Management Committee, who had ultimate responsibility for ensuring that the company employed safe systems of work, was accordingly guilty on the basis that the breaches by the company of its statutory duties had arisen by reason of his consent or connivance, or were attributable to his neglect.

The section in question, section 37, is a section which involves consideration of the secondary or ancillary liability of the person charged, the primary liability being that of the company under the sections of the Health and Safety at Work imposing primary liability on it.

As far as the issue with which we are concerned has been identified in the papers before us, it can, in one sense, be reduced to one simple point arising out of the ruling that the judge gave as to the meaning which he considered should be given to the concept of neglect in section 37 of the Act.

As we have indicated, the charge, following the wording of the section, charged him in the following terms, that "being the managing director of P Limited ... suffered that body corporate ... to commit an offence pursuant to section 2(1) of the Health and Safety at Work Act, contrary to section 33(1)(a) of that Act as amended, with his consent and/or connivance and/or by his neglect".

The problem relates to the ruling that the judge gave as to what the prosecution would have to prove in relation to neglect.

The relevant passage of the ruling that he gave is said as follows:

"Therefore I rule that where 'neglect' is relied on the following elements have to be proved:

1. That P Limited committed a breach of sections 2 and/or 3 of HSWA 1974.
2. The defendant Mr G had a duty to inform himself of the facts giving

rise to the breach or breaches, and did know of the material facts.

3. The defendant Mr G had a duty to act in relation to those facts.

4. The defendant Mr G was neglectful of his duty in the sense that he either knew or ought to have known but shut his eyes to the fact that there were reasonable practical steps he could have taken but which he did not.

5. That his neglect of duty caused or contributed to the company breaching its duty under section 2 or 3."

On behalf of the prosecution Mr Nsugbe QC submits that the judge erred in requiring the prosecution to establish that the defendant "did know of the material facts" in paragraph 2 of that ruling. He submits that the duty of the prosecution in relation to a charge under this section is properly set out in the only decision relating to this section which has so far been before an appellate court and that is Wotherspoon v HM Advocate [1978] JC 74. In that case, the Lord Justice-General, at page 78, said as follows:

"Upon the question of the interpretation of the word 'neglect' we do not detect in the competing arguments any material difference of approach. On both sides it is accepted, correctly, that the word 'neglect' in its natural meaning pre-supposes the existence of some obligation or duty on the part of the person charged with neglect. Where that word appears in section 37(1) it is associated with certain specified officers of a body corporate or with persons 'purporting to act in any such capacity'. It is any neglect on their part to which the commission of an offence within a specified category by a body corporate is attributable which attracts the penal sanction. As we read the subsection and also section 37(2) which deals with the case of a body corporate, the affairs of which are managed by its members, it seems clear that the section as a whole is concerned primarily to provide a penal sanction against those persons charged with functions of management who can be shown to have been responsible for the commission of a relevant offence by an artificial *persona*, a body corporate. Accordingly, in considering in a given case whether there has been neglect within the meaning of section 37(1) on the part of a particular director or other particular officer charged, the search must be to discover whether the accused has failed to take some steps to prevent the commission of an offence by the corporation to which he belongs if the taking of those steps either expressly falls or should be held to fall within the scope of the functions of the office which he holds. In all cases accordingly the functions of the office of a person charged with a contravention of section 37(1) will be a highly relevant consideration for any judge or jury and the question whether there was on his part, as the holder of his particular office, a failure to take a step which he could and should have taken will fall to be answered in the light of the whole circumstances of the case including his state of knowledge of the need for action, or the existence of a state of fact requiring action to be taken of

which he ought to have been aware."

We do not consider that we can give any better a description of the requirements of the section than that.

The problem in the present case appears to have arisen because the judge had been taken to certain passages in the ruling given by MacKay J in the prosecution of those who were said to have been responsible for the Hatfield rail crash, which would appear to impose on the prosecution a higher standard of proof. The passage in question comes at page 94 and refers, in the first instance, to the fact that the Act in question followed on a White Paper, which was a report of a committee chaired by Lord Robens on Safety and Health at Work, within which the recommendation was made that prosecutions should only be brought where there were offences of a flagrant, wilful or reckless nature. Having noted that Parliament had not chosen to adopt those words, MacKay J then went on to consider the circumstances in which the prosecution could properly ask for a conviction in relation to neglect.

Having cited the passage to which we have referred in Wotherspoon, he went on:

"In my judgment 'ought to have been aware' in this passage must have been construed in the sense of turning a blind eye in circumstances where the defendant had suspicion or belief as to the material facts but, because he feared the answer might be unpalatable, he did not want to know more. This is the sense in which it is described in Manifest Shipping v Uni-Polaris Insurance Co Limited [2003] 1 AC 46. It is a subjective test and not equivalent to inadvertence, laziness or even gross negligence. I believe this is the correct test to adopt in these counts at this stage and for the purpose of these applications."

With great respect to MacKay J, it seems to us that he places the burden too high. The section in the Act does not refer, for example, to wilful neglect. Nor did Wotherspoon in any way suggest that the question is whether the defendant in question ought to have been aware in the sense that he had "turned a blind eye". That equates the test in relation to neglect into the same test that is to be applied when the allegation is connivance. Parliament has chosen quite plainly that there should be a distinction between consent, connivance and neglect.

The question, at the end of the day, will always be, as the Lord Justice General said in Wotherspoon, whether or not it is proper, where there is no actual knowledge of the state of facts, nonetheless the officer in question of the company should have, by reason of the surrounding circumstances, been put on enquiry so as to require him to have taken steps to determine whether or not the appropriate safety procedures were in place. That will depend in every case on the evidence put forward by the prosecution in the first instance, and, if there is sufficient evidence to justify the matter going to the jury, the overall evidence, including that of the defendant, at the end of the trial.

In the present case it may well be that in order to establish that there is any case to go before the jury the prosecution will have to establish that Mr G did know of the practice

in question and its dangers. But the prosecution does not have to prove that if there were circumstances which ought to have put him on enquiry as to that practice, that may be sufficient to require an answer from Mr G. That is a question, therefore, which can only be answered at the end of the prosecution case. The ruling of the judge at the preliminary stage was accordingly too prescriptive.

The prosecution complain simply and solely of the passage in paragraph 2, as we have said, "and did know the material facts". With the abstraction of those words we consider that the judge's direction would be entirely appropriate to the facts as we know them of this case.

It follows that the appeal is allowed to the extent indicated. We do not think that it is necessary for us to go any further by way of elucidation of the necessary ingredients of the offence in question.

MR NSUGBE: My Lord, can I raise two matters? The first is that I have been asked by those responsible for reporting cases whether this is an appropriate case to lift reporting restrictions. We submit that it is, subject to, perhaps, the identification of the parties being restricted to initials perhaps. But other than that, my Lord, on their behalf I ask for reporting restrictions to be lifted.

THE VICE PRESIDENT: Mr Eastman.

MR EASTMAN: With the caveat my learned friend referred to, absolutely no objection whatever.

THE VICE PRESIDENT: Certainly I can see no objection to it being reported with initials.

MR NSUGBE: I am grateful. Thank you, my Lord.

The second matter relates to the costs of the appeal. We make the application for the costs of this appeal payable by the respondent. I know your Lordships may order, alternatively, costs in the case, but we do make the application.

THE VICE PRESIDENT: I think this matter ought to be dealt with by the trial judge --

MR NSUGBE: I am grateful.

THE VICE PRESIDENT: -- ultimately. Would you be content with that, Mr Eastman?

MR EASTMAN: Yes.

MR NSUGBE: Thank you, my Lords.

R v Charget Limited (t/a Contract Services) and others [2008] UKHL 73

House of Lords, 10 December 2008. Text as published at publications.parliament.uk.

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

R v Charget Limited (t/a Contract Services) and others (Appellants) (On appeal from the Court of Appeal Criminal Division)

[2008] UKHL 73

LORD HOFFMANN

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead. For the reasons he gives, with which I agree, I too would dismiss these appeals.

LORD HOPE OF CRAIGHEAD

My Lords,

2. On 10 January 2003 Shaun Riley was working in the course of his employment with the first appellant, Charget Ltd, at Heskin Hall Farm, near Chorley in Lancashire. Extensive works were being carried out on the farm, which was owned by the Ruttle Group of companies. The second appellant, Ruttle Contracting Ltd, a member of the group, was the principal contractor. The third appellant, George Henry Ruttle, was a director of the first appellant. He was also the second appellant's managing director. The works included the construction of a car park. This required the excavation from the site of a quantity of topsoil. A dumper truck was then used to move the spoil over a distance of about 500 yards to a depression in a field, beside which a ramp had been created to provide the dumper truck with a means of access.

3. During the previous day and for part of the morning on the day in question the dumper truck was driven by another employee. But he left the farm after receiving a telephone call telling him that his mother had been injured in a road accident. Shaun Riley was asked by the foreman to take over the driving of it. He made two trips carrying spoil from the car park to the depression without incident. While he was making a further trip that afternoon he met with an accident. The dumper truck tipped over on its side and he was buried by the load of spoil that he was transporting. It was some time before he could be pulled out, and attempts to revive him were unsuccessful. He died the following day in hospital.

4. The investigation which followed the accident revealed that there were various shortcomings in the health and safety organisation at the farm. But there were no witnesses to the accident, and the precise cause of it was never established. The dumper truck itself had no defects, and it was fitted with a seat belt. Unfortunately Mr Riley was not wearing the seat belt at the time of his accident.

5. Criminal proceedings were brought against the first appellant under section 33(1)(a) of the Health and Safety at Work etc Act 1974 alleging a breach of section 2(1) of the Act. The case against it was that it had failed to ensure, so far as was reasonably practicable, the health and safety at work of its employees. As the operations were under its control the second appellant was also prosecuted. In its case the allegation was that there had been a breach of section 3(1). This was because it had failed to conduct the undertaking in such a way as to ensure, so far as was reasonably practicable, that persons not in its employment who might be affected thereby were not exposed to risks to their health and safety. The third appellant was prosecuted under section 37 of the 1974 Act in respect that, through his connivance, consent or neglect, he had caused the second appellant to commit a breach of section 3(1) in failing to ensure, so far as was reasonably practicable, that persons not in its employment were not exposed to risks to their health and safety. In each case the particulars of the offence identified the date and place where these risks were said to have arisen, and they said that this was in relation to the driving or use of dumper trucks. In their defence the appellants maintained that they had done everything that was reasonably practicable to ensure the health and safety of persons working on the site, including Mr Riley.

6. On 10 November 2006 the appellants were found guilty of the charges that had been brought against them. The first appellant was fined £75,000 and ordered to pay £37,500 costs. The second appellant was fined £100,000 and ordered to pay £75,000 costs. The third appellant was fined £75,000 and ordered to pay £103,500 costs. They were granted leave to appeal against both conviction and sentence. On 13 December 2007 the Court of Appeal, Criminal Division (Latham LJ, Gibbs and Jones JJ) dismissed the appeals [2007] EWCA Crim 3032; [2008] ICR 517.

7. The principal issues in the appeal were directed to the way in which the case for the prosecution had been presented to the jury. In simple terms, the prosecution based its case against the first and second appellants on the proposition that it was sufficient for it to identify and prove a risk of injury arising from a state of affairs at work. The contention for the appellants was that it was for the prosecution to identify and prove particular acts or omissions consisting of a failure or failures to comply with the duties laid down in sections 2 and 3 of the Act respectively. The Court of Appeal held that the policy of the 1974 Act was to impose a positive burden on employers, rather than simply disciplining them for the breach of specific obligations. That being so, the prosecution was entitled simply to point to a state of affairs as amounting to a breach of the statutory duty: paras 22 and 23. In this case the relevant risk was the risk of injury caused by driving the dumper truck. That this was a real risk, as opposed to a purely hypothetical one, was established by the fact that there was an accident. That was sufficient to justify the requirement that the first and second appellants should have the burden of proving that they had done all that was reasonably practicable to protect against that risk: para 26.

8. The case against the third appellant was that he was directly involved in the works, as he gave specific instructions as to how they were to be performed. He had signed a statement in December 2004 in which he said that his involvement in the project at Heskin Hall Farm was considerable, that he ran the job and that he made most of the decisions. It was submitted on his behalf that the judge gave no guidance to the jury as to how the words “neglect, connivance or consent” in the charge against him could be relevant to the facts of the case. But there was no submission that he had no case to answer, and the court said that the only sensible inference was that, if it was established that the company had committed an offence, he willingly allowed it to do so or knowingly turned a blind eye to it. The jury could not have been in any doubt about what those words meant in the context of this case: para 15

9. The Court of Appeal certified that the following points of law of general public importance were involved in the decision:

“i. In proceedings against an employer under section 2 of the Health & Safety at Work etc Act 1974 is it sufficient that the prosecution proves merely a risk of injury arising from a state of affairs at work, or, need it go on to identify and prove specific breach or breaches of duty;

ii. In proceedings against an undertaking under section 3 of the Health & Safety at Work etc Act 1974 is it sufficient that the prosecution proves merely a risk of injury arising from a state of affairs at work, or, need it go on to identify and prove specific breach or breaches of duty;

iii. In proceedings against a person under section 37 of the Health & Safety at Work etc Act 1974 is it sufficient as regards the predicate offence under section 3 of the Act that the prosecution proves merely a risk of injury arising from a state of affairs at work, or, need it go on to identify and prove specific breach or breaches of duty.”

The statutory provisions

10. The 1974 Act was designed to give effect to the recommendations of the Report of the Robens Committee on Safety and Health at Work 1970-72 (July 1972) (Cmnd 5034). Among its main recommendations was the revision and re-organisation of the statutory provisions dealing with safety and health at work within the framework of a single comprehensive enactment. It recommended that there should be a new statute which should be primarily enabling in character. It should be limited to matters that would not require frequent amendment but would provide a foundation for a practical and efficient code of occupational health and safety: para 127. The law as it then stood lacked any central statement of general principle governing the wide variety of detailed provisions on specific matters, which were spread over a number of main statutes and a host of subordinate statutory instruments: para 128. So it recommended that the general principles of safety responsibility and safe working should be embodied in a statutory declaration which would set all of the detailed statutory and other provisions in a clear perspective, and that the Act should begin by enunciating the basic and over-riding responsibilities of employers and employees: para 129.

11. Part I of the 1974 Act, in which all the provisions that are relevant to this case appear, is designed broadly to follow these recommendations. It begins with a preliminary section which sets out the general purposes of that Part. Section 1, so far as relevant to this case, provides:

“(1) The provisions of this Part shall have effect with a view to -

- (a) securing the health, safety and welfare of persons at work;
- (b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work.

...

(3) For the purposes of this Part risks arising out of or in connection with the activities of persons at work shall be treated as including risks attributable to the manner of conducting an undertaking, the plant or substances used for the purposes of an undertaking and the condition of premises so used or any part of them.”

12. Sections 2 to 7 set out a series of general duties for the achievement of those purposes. The provisions that are relevant to this case are in sections 2 and 3. So far as relevant they provide as follows:

“2(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

(2) Without prejudice to the generality of an employer’s duty under the preceding subsection, the matters to which that duty extends include in particular -

- (a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;
- (b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
- (c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;
- (d) so far as is reasonably practicable as regards any place of work under the employer’s control the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;
- (e) the provision and maintenance of a working environment for his employees that is, so far as it reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

...

3(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety.

...”

13. The primary means of enforcing these provisions is through a system of inspection. As the Robens Committee recommended in para 261 of its report “Safety and Health at Work” (1972) (Cmnd 5034), the Act provides a means for ensuring that practical improvements are made and preventative measures adopted to promote occupational health and safety. Various powers are given to the inspectors appointed under the Act. These include powers of entry and investigation: section 20. Improvement notices may be served if an inspector is of the opinion that a person is contravening the statutory provisions or has done so and is likely to do so again: section 21. Section 47(1) provides that nothing in Part I of the Act is to be construed as conferring a right of action in any civil proceedings for any failure to comply with any duty imposed by sections 2 to 7. A note to this section in Current Law Statutes explains that the policy of the Act was not to create any new liability for personal injury pending the report of the Pearson Commission on civil liability and compensation for civil liability, leaving the position as regards breaches of any existing statutory provisions unaffected. But the Act provides for the imposition of criminal sanctions.

14. Section 33 sets out the offences that may be committed under Part I of the Act. It provides inter alia:

“(1) It is an offence for a person -

(a) to fail to discharge a duty to which he is subject by virtue of sections 2 to 7.”

Section 37(1), which applies to offences by bodies corporate, provides:

“(1) Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”

The “relevant statutory provisions” to which section 37(1) refers include the provisions of Part 1: section 53(1). Section 40 deals with the onus of proving the limits of what is reasonably practicable. It places the onus of proof of compliance with any duty or requirement which is qualified by those words on the defence. This is the position where compensation is sought for a breach of provisions such as section 29(1) of the Factories Act 1961, which provided that every place at which a person has to work shall, so far as is reasonably practicable, be made and kept safe for any person working there (now repealed and replaced by regulations 5, 12, 13 and 17 of the Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004): see *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107. Section 40 avoids leaving this important issue to implication by providing expressly where the onus lies.

The issues

15. Mr Lissack QC for the appellants identified the central issue at the outset of his argument. He said that it was for the prosecution to prove the acts and omissions by which it was alleged there had been a breach of duty. It was not enough for it simply to assert that a state of affairs existed which gave rise to risk to health or safety. He said that this proposition applied equally to the third appellant, as the offence alleged against him depended on proof that the body corporate of which he was the managing director had committed an offence under one of the provisions in Part I. But in his case the prosecution had also to identify and prove a state of facts of which he should have been aware and which should have put him on his inquiry. He submitted that these provisions should be read in a way that was compatible with the presumption of innocence that was guaranteed by article 6(2) of the European Convention on Human Rights. Account must be taken of the reverse burden which section 40 imposed on the accused and of the penalties that may be imposed on an individual. They had recently been increased to up to two years’ imprisonment and an unlimited fine when convicted on indictment: Health and Safety (Offences) Act 2008, section 1(1) and (2) and Schedule 1. To be proportionate the prosecution must bear the overall burden of proof.

16. As the argument developed it seemed to me that Mr Lissack’s primary submission raised issues about prosecution practice as well as issues of statutory interpretation. The starting point must be to determine what the prosecution must prove in order to show that, subject to issues about reasonable practicability, an offence has been committed. This is an issue of statutory interpretation. The scope of the duties that sections 2(1) and 3(1) prescribe must be identified. Then there is section 37(1). The question is what more must be proved to establish that the officer has committed an offence. An answer to these questions will still leave open issues as to what further particulars, if any, the prosecution must give in the interests of fairness when a prosecution is brought. Mr Lissack said that guidance was needed on this point. The answers to these various questions must then be applied to the facts of this case to determine the outcome of the appeals.

The scope of the duties

17. The first issue is to determine the scope of the duties imposed on the employer by sections 2(1) and 3(1). In both subsections the word “ensure” is used. What is he to ensure? The answer is that he is to ensure the health and safety at work of all his employees, and that persons not in his employment are not exposed to risks to their health and safety. These duties are expressed in general terms, as the heading to this group of sections indicates. They are designed to achieve the purposes described in section 1(1)(a) and (b). The description in section 2(2) of the matters to which the duty in section 2(1) extends does not detract from the generality of that duty. They describe a result which the employer must achieve or prevent. These duties are not, of course, absolute. They are qualified by the words “so far as is reasonably practicable”. If that result is not achieved the employer will be in breach of his

statutory duty, unless he can show that it was not reasonably practicable for him to do more than was done to satisfy it.

18. This method of prescribing a statutory duty was not new. As Lord Reid explained in the opening paragraphs of his speech in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107, the steps which an employer must take to promote the safety of persons working in factories, mines and other premises are prescribed by a considerable number of statutes and regulations. Sometimes the duty imposed is absolute. In such a case the step that the statutory provision prescribes must be taken, and it is no defence to say that it was impossible to achieve it because there was a latent defect or that its achievement was not reasonably practicable. In others it is qualified so that no offence is committed if it was not reasonably practicable to comply with the duty. Sometimes the form that this qualified duty takes is that the employer shall do certain things: see, for example - and there are many that could be cited - section 48(1) of the Mines and Quarries Act 1954 which provided that the manager of every mine must take such steps by way of controlling the movement of strata within the mine and supporting the roof and sides of the working place as might be necessary for keeping it secure, and regulation 11 of the Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306) which lays down a series of measures that must be taken with regard to dangerous parts of machinery. Sometimes it is that he shall achieve or prevent a certain result. Section 29(1) of the Factories Act 1961, which was considered in *Nimmo*, took that form. So too do sections 2(1) and 3(1) of the 1974 Act. It is the result that these duties prescribe, not any particular means of achieving it.

19. Examples can be found in the cases to demonstrate that this is how these provisions have been applied in practice. In *Lockhart v Kevin Oliphant Ltd* 1993 SLT 179 the respondent was charged with a contravention of sections 2(1) and (2) and 33(1)(a) of the 1974 Act. One of its employees was electrocuted and died when a street lamp that he was erecting touched an overhead power line. The sheriff acquitted the respondent, holding that the Crown had not established a sufficient case against it because the respondent was entitled to rely on plans and the site engineer's marking of the location of the lamp post. His decision was held by the High Court of Justiciary to be erroneous. Lord Justice Clerk Ross said at p 183E that the fallacy in the sheriff's approach was that he treated the words "so far as is reasonably practicable" as if they were part of the offence. He then added this explanation at p 183F:

"Section 2(1) of the Act of 1974 is clearly intended to secure that a stated result is achieved, namely, the health, safety and welfare at work of all the respondent's employees. Once it is established that that stated result was not achieved, a prima facie case of breach of statute arises, and in terms of section 40 the onus is on the respondent to prove that it was not reasonably practicable to do more than the respondent did to satisfy the statutory duty."

In *R v Associated Octel Co Ltd* [1994] 4 All ER 1051, 1063a, where the allegation was that there had been a contravention of section 3(1), Stuart-Smith LJ said:

"If there is a risk of injury to the health and safety of the persons not employed by the employer, whether to the contractor's men or members of the public, and, a fortiori, if there is actual injury as a result of the conduct of that operation there is prima facie liability, subject to the defence of reasonable practicability."

20. In *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171 it was recognised that this result-based approach is consistent with the general purpose of the Act. The appellants were convicted of failing to conduct their undertaking in such a way as to ensure, so far as was reasonably practicable, persons not in their employment were not exposed to risks to their health and safety. One of their buildings contained two cooling towers which, when inspected, were found to contain the bacteria which causes legionnaire's disease. No-one had actually succumbed to that disease, but there was a risk to health and safety and the prosecution's case was that prima facie there was a breach of section 3(1) because the appellants had failed to ensure that persons not in their employment were not exposed to that risk. The appellants contended that no actual risk to the public had been established. But Steyn LJ said at p 1177G-H that the ordinary meaning of the word "risks" supported the prosecution's interpretation that the section was concerned with the possibility of danger:

"The adoption of the restrictive interpretation argued for by the defence would make enforcement of section 3(1), and to some extent also of sections 20, 21 and 22, more difficult and would in our judgment result in a substantial emasculation of a central part of the Act of 1974. The interpretation which renders those statutory provisions effective in their role of protecting public health and safety is to be preferred."

21. For these reasons I would reject Mr Lissack's primary submission that sections 2(1) and 3(1) require the prosecution to identify and prove the acts and omissions by which it is alleged that there was a breach of the duty

to achieve or prevent the result that they describe. What the prosecution must prove is that the result that those provisions describe was not achieved or prevented. Once that is done a prima facie case of breach is established. The onus then passes to the defendant to make good the defence which section 40 provides on grounds of reasonable practicability. A contrast may be drawn with sections 4 to 6, which set out a series of more particular measures that must be taken. Where breaches of those sections are alleged, the respects in which there was a breach must be identified.

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22. Mr Lissack then said that it was not enough for the prosecution simply to assert that a state of affairs existed. This proposition raises the issue of prosecution practice. As I have said, the statute prescribes the result that must be achieved. That is one thing. How the prosecution proposes to prove that this was so is another. The situation will vary from case to case. In cases such as the present, where a person sustains injury at work, the facts will speak for themselves. Prima facie, his employer, or the person by whose undertaking he was liable to be affected, has failed to ensure his health and safety. Otherwise there would have been no accident. But a case where the alleged risk has not had this result cannot be dealt with so easily. It will be necessary to identify and prove the respects in which there was a breach of duty. This is likely to require more by way of evidence than simply an assertion that that state of affairs existed. The particular risk to which the employees, or the persons referred to in section 3(1) as the case may be, were exposed must be identified. This will require an analysis of the facts in each case. Even where an injury has occurred it may not be enough for the prosecutor simply to assert that the injury demonstrates that there was a risk. Where a prosecution is brought under section 3(1), it may be necessary to identify and prove the respects in which the injured person was liable to be affected by the way the defendant conducted his undertaking.

23. Your Lordships were referred to a number of cases which show how practice varies as to the amount of detail that the prosecutor may give when the charges or counts are being formulated. The overriding test is one of fair notice. In Scotland the prosecutor is required to set out the facts and circumstances of the crime charged. These facts and circumstances must be such as to constitute a crime known to the law. Where a contravention of a statute is alleged it is necessary to specify all the facts and circumstances that constitute the offence. The narrative must be sufficiently detailed to identify the risk that the facts and circumstances gave rise to. In *Lockhart v Kevin Oliphant Ltd*, for example, the charge specified breaches of section 2(2)(a) and (c) as well as of the general duty in section 2(1), and it referred to the fact that the street lamp was being erected in such close proximity to an overhead power line that the deceased was electrocuted. In *Adamson v Procurator Fiscal, Lanark*, 31 October 2000, not reported, the appellants were charged with a contravention of section 3(1) in respect that they failed to ensure that an Ayrshire bull which they kept in a field and attacked a man who was working on the grass verge of an adjacent public highway was securely fenced. Delivering the opinion of the High Court of Justiciary, Lord Carloway said:

“What requires to be proved by the Crown is that a particular operation exposed persons to the risk of harm, in this case physical injury. It is sufficient for the proof of the existence of risk that a possibility of danger is created. Actual harm need not be proved: *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171. If such possibility is made out on the evidence then a conviction is bound to follow unless the defence is established. Of course the Crown is obliged, as a matter of fair notice, to specify in the charge the particular operation said to give rise to the risk. In this case, that operation was the keeping of a bull in a field, which was not secured.”

24. Narrative charges of the kind used in Scotland are not required in England and Wales. But it is the practice for the statement of the offence to be accompanied by particulars of the offence in which the facts and circumstances are set out. Here again the test of how much detail need be given is that of fair notice. The particulars in *R v British Steel Plc* [1995] 1 WLR 1356 did no more than state the name and address of the undertaking and the names of the persons not in the employment of the defendant who were exposed to risks. But in that case there was no dispute about the cause of the accident: see p 1358B. It was common ground that the operation in which the men were engaged was inherently dangerous: p 1359B. In cases where the defendant is in real difficulty in framing its defence because insufficient notice has been given, it is open to the defence to ask for further particulars.

25. In *R v Board of Trustees of the Science Museum* the particulars of the offence set out in the indictment specified three failures with respect to the air conditioning system at the museum whereby members of the public were exposed to risks to their health from exposure to the bacteria: a failure to institute and maintain a regime of regular cleansing and disinfection, a failure to maintain in operation an efficient chemical water treatment regime

and a failure to monitor its efficiency. It would have been sufficient for the prosecution to prove the presence of bacteria in sufficient quantities in the air conditioning system to expose the public to risks to their health and safety. But where defects in the employer's plant or systems of work giving rise to those risks have been identified the case for the prosecution may well be strengthened by the leading of that evidence. Even in cases where injury or death has resulted, investigations following the accident may not have disclosed the exact cause of it. Proof of its cause will focus attention on the particular aspect of the employer's undertaking that gave rise to the risk. If the prosecution chooses to take this course, fair notice of its case must be given. Details must then be given in the particulars.

26. For the reasons given by my noble and learned friend Lord Brown of Eaton-under-Heywood, I would reject Mr Lissack's argument that allegations such as those in the prosecution's case summary had to be specifically proved and that the jury should be directed that they could only convict if they were unanimous as to which of them had been made out: *R v Brown (Kevin)* (1984) 79 Cr App R 115. Fairness may, as I have said, require giving notice of such allegations. But they are not ingredients of the offence. What sections 2(1) and 3(1) prescribe is the result that is to be achieved or prevented, not any particular way or ways of achieving this. In Brown's case the offence was fraudulently inducing the investment of money. The means by which that investment was induced was an essential ingredient. A number of matters were specified in the charge as together constituting that ingredient. As Eveleigh LJ said at p 119, it was enough that any one of them was proved, but that had to be to the satisfaction of the whole jury. In the case of sections 2(1) and 3(1) the result is what the jury must be agreed about. So long as they are agreed on that, they do not need to be agreed on all the details of the evidence.

Proportionality

27. The question then is whether this approach to the legislation is proportionate. The first point to be made is that when the legislation refers to risks it is not contemplating risks that are trivial or fanciful. It is not its purpose to impose burdens on employers that are wholly unreasonable. Its aim is to spell out the basic duty of the employer to create a safe working environment. This is intended to bring about practical benefits, bearing in mind that this is an all-embracing responsibility extending to all workpeople and all working circumstances: Robens report, para 130. The framework which the statute creates is intended to be a constructive one, not excessively burdensome. In *R v Porter (James)* [2008] EWCA Crim 1271 the Court of Appeal set aside the conviction of the headmaster of a school where one of his pupils lost his footing on a step which gave access from one playground to another while he was unsupervised, with tragic consequences. It held that there was no evidence that the conduct of the school had exposed the child to a real risk: para 22. The situation was not such as to give rise to a risk of the type that section 3 identifies: para 25. That was an exceptional case, but it makes an important point. The law does not aim to create an environment that is entirely risk free. It concerns itself with risks that are material. That, in effect, is what the word "risk" which the statute uses means. It is directed at situations where there is a material risk to health and safety, which any reasonable person would appreciate and take steps to guard against.

28. Section 40 imposes a reverse burden of proof on the employer. In *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264, para 21 Lord Bingham of Cornhill said that the justifiability of any infringement of the presumption of any innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case. In para 30 he drew attention to the difference between the subject matter in *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545 on the one hand, where it was held that the imposition of a legal burden on the defendant undermined the presumption of innocence, and *R v Johnstone* [2003] UKHL 28; [2003] 1 WLR 1736 on the other, where it was held that there were compelling reasons why there should be a legal burden. In the former case, where section 28 of the Misuse of Drugs Act 1971 was in issue, a defendant might be entirely ignorant of what he was carrying. In the latter, offences under section 92 of the Trade Marks Act 1994 are committed by dealers, traders and market operators who could reasonably be expected to exercise some care about the provenance of goods in which they deal. It seems to me that the situation in which the reverse burden imposed by section 40 arises is analogous to that in *R v Johnstone*. Sections 2 and 3 impose duties on employers who may reasonably be expected to accept the general principles on which those sections are based and to have the means of fulfilling that responsibility.

29. In *R v Davies (David Janway)* [2003] ICR 586 the judge ruled against a submission that section 40 was not compatible with the presumption of innocence in article 6(1) unless the section was read down so as to impose only an evidential burden on the employer. His decision was upheld by the Court of Appeal. Delivering the judgment of the court, Tuckey LJ said that it had concluded that the imposition of a legal burden of proof was

justified, necessary and proportionate. Regard had to be had to the fact that the Act's purpose was both social and economic, to the fact that duty holders were persons who had chosen to engage in work or commercial activity and were in charge of it and that in choosing to operate in a regulated sphere they must be taken to have accepted the regulatory controls that went with it. In para 26 however he added these comments:

"Before any question of reverse onus arises the prosecution must prove that the defendant owes the duty (in the case of section 3 to the person affected by the conduct of his undertaking) and that the safety standard (in the case of section 3 exposure to risk to health or safety) has been breached. Proof of these matters is not a formality. There may be real issues about whether the defendant owes the relevant duty or whether in fact the safety standard has been breached, for example where the cause of an accident is unknown or debatable. But once the prosecution have proved these matters the defence has to be raised and established by the defendant. The defence itself is flexible because it does not restrict the way in which the defendant can show that he has done what is reasonably practicable."

30. In my opinion the Court of Appeal reached the right decision in that case, and it did so essentially for the right reasons. But I have difficulty with some of its reasoning in para 26, and with the third sentence in particular. Mr Lissack sought support here for his argument that the prosecutor must bear the overall onus of proof. But, as Mr Horlock QC for the respondent submitted, the proposition that it sets out goes too far. The prosecution must show that there was a connection between the work that the employee was doing (in section 2 cases) or the conduct of the undertaking (in section 3 cases) and the accident. But the fact that the cause of the accident was unknown or was debatable is irrelevant so far as the prosecution's case is concerned. This is because the duty that these provisions lay down looks to the result, not the means of achieving it. Prima facie a breach of section 2(1) arises where an employee is injured while he is at work in the workplace. That fact in itself demonstrates that the employer failed to ensure his health and safety at work. The same is true where a person not in his employment but who may be affected by the undertaking suffers injury. The effect of the reverse burden must be understood against that background. Nevertheless for the other reasons that the Court of Appeal gave in *R v Davies* I would hold that the placing of a legal burden of proof on the employer in the case of this legislation is not disproportionate. The penalties that may be imposed on an individual have now been increased: see para 15. But I do not think that, when account is taken of the purposes that this legislation is intended to serve, this alteration in the law renders what was previously proportionate disproportionate.

31. It was suggested that some significance might be attached to the fact that the qualification of the duty in section 2(1) by the insertion of the phrase "so far as is reasonably practicable" survived without criticism when the legislation was examined by the European Court of Justice in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* Case C-127/05, 14 June 2007. The Commission sought a declaration that, by restricting the duty of employers in this way, the United Kingdom had failed to fulfil its obligations under article 5(1) and (4) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers. The court held that article 5(1) simply embodied the general duty of safety to which the employer is subject, without specifying any form of liability and that it was not to be read as requiring the imposition of no-fault liability. The focus of the argument was, however, on the question whether qualification of the employer's duty was in conflict with the requirements of the article. The question whether the imposition of a legal burden on the employer was compatible with article 6(2) of the Convention was not, of course, in issue. All one can say is that the ECJ appears not to have regarded the legislation as a whole as disproportionate, bearing in mind that it was accepted that the duty in article 5(1) did not imply that the employer was required to ensure a zero-risk free working environment: para 53.

Liability of officers

32. The prosecution of a director, manager, secretary or other similar officer under section 37 requires it first to be established that a body corporate of which he is an officer has committed an offence under one of the other provisions in that Part of the Act. Where the offence that is alleged against it is a breach of section 2(1) or section 3(1) the considerations mentioned above will, of course, all apply. So he can say in his defence that there was no breach of that provision by the body corporate or, if there was, that it was not reasonably practicable for the body corporate to avoid it. It is only when it is proved that an offence under one of those provisions has been committed that the question can arise as to whether the breach was something for which the officer too can be held criminally responsible. Then there are some additional facts and circumstances that must be established. The offence which section 37 creates is not an absolute offence. The officer commits an offence under this section only if the body

corporate committed it with his consent or connivance or its commission was attributable to any neglect on his part. These are things relating to his state of mind that must be proved against him.

33. Here too the circumstances will vary from case to case. So no fixed rule can be laid down as to what the prosecution must identify and prove in order to establish that the officer's state of mind was such as to amount to consent, connivance or neglect. In some cases, as where the officer's place of activity was remote from the work place or what was done there was not under his immediate direction and control, this may require the leading of quite detailed evidence of which fair notice may have to be given. In others, where the officer was in day to day contact with what was done there, very little more may be needed. In *Wotherspoon v HM Advocate* 1978 JC 74, 78 Lord Justice General Emslie said the section is concerned primarily to provide a penal sanction against those persons charged with functions of management who can be shown to have been responsible for the commission of the offence by a body corporate, and that the functions of the office which he holds will be a highly relevant consideration. In *R v P Ltd* [2008] ICR 96 Latham LJ endorsed the Lord Justice General's observation that the question, in the end of the day, will always be whether the officer in question should have been put on inquiry so as to have taken steps to determine whether or not the appropriate safety procedures were in place. I would too. The fact that the penalties that may be imposed for a breach of this section have been increased does not require any alteration in this test. On the contrary, it emphasises the importance that is attached, in the public interest, to the performance of the duty that section 37 imposes on the officer.

34. In *Attorney-General's Reference (No 1 of 1995)* [1996] 1 WLR 970 the questions were directed to the effect of section 96(1) of the Banking Act 1987 which is in identical terms to section 37 of the 1974 Act. Lord Taylor of Gosforth CJ said at p 980 that where "consent" is alleged against him, a defendant has to be proved to know the material facts which constitute the offence by the body corporate and to have agreed to its conduct of the business on the basis of those facts. I agree, although I would add that consent can be established by inference as well as by proof of an express agreement. The state of mind that the words "connivance" and "neglect" contemplate is one that may also be established by inference. The offences that are created by sections 2(1) and 3(1) are directed to the result that must be achieved by the body corporate. Where it is shown that the body corporate failed to achieve or prevent the result that those sections contemplate, it will be a relatively short step for the inference to be drawn that there was connivance or neglect on his part if the circumstances under which the risk arose were under the direction or control of the officer. The more remote his area of responsibility is from those circumstances, the harder it will be to draw that inference.

Conclusion

35. How are these various considerations to be applied to the facts of this case? Mr Lissack said that insufficient details were given in the particulars to enable the defendants to fashion their defence and the jury to identify the respects in which the first and second appellants were in breach of duty. He referred to Lord Pearson's observation in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107, 131C-D, that the prosecutor who alleges a breach of section 29(1) of the Factories Act 1961 must aver with sufficient specification and prove in what respects the place of work was unsafe and that its unsafety caused the accident. In my opinion however sufficient details were given in this case, as it was stated that the risks to the employees' health and safety at work were in relation to the driving or use of dumper trucks. It was not necessary for the prosecution to go further and specify the respects in which risks were associated with that activity or to identify the cause of the accident. The fact that there was an accident showed that the risks in this case were real, not hypothetical.

36. No mention is made of the accident in the particulars. But no complaint was made at the trial that fair notice had not been given. It was common ground that, as the prosecutor said in his opening, the case arose out of Mr Riley's fatal accident when he was driving the dumper truck. The state of affairs that it demonstrated was that the first appellant failed to ensure Mr Riley's health and safety and that the second appellant failed to ensure that he was not exposed to risks to his health and safety. It was then for these defendants to prove to the lower standard that they had done all that was reasonably practicable to protect him against that risk.

37. There was no submission at the end of the prosecution case that there was no case for the third appellant to answer. That being so, I do not think that it can be maintained that he did not have fair notice of the case that he had to meet. He denied that he had assumed any responsibility for what was taking place on the site, but he did not give evidence. The jury's verdict shows that they accepted the case for the prosecution, which was that he was directly involved in the works and that the way they were carried on was subject to his specific instructions and control.

38. For these reasons I consider that the Court of Appeal was right to hold that there were no grounds for setting aside the jury's verdict in the case of any of the appellants. I would dismiss these appeals.

LORD SCOTT OF FOSCOTE

My Lords,

39. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead and, for the reasons he gives, with which I am in full agreement, I too would dismiss this appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

40. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead. I agree with all of it and there is little that I wish to add.

41. At the appellant's trial the jury were directed that if they were sure that the first appellant was the employer and that there was a risk to the health, safety and welfare of employees arising from the driving or use of dumper trucks at the site, they should ask themselves:

"has the defence proved that it is more likely than not that it was not reasonably practicable for [the first appellants] to do more than it did in order to ensure that employees were not exposed to a risk to the health, safety and welfare of employees arising from the driving or use of dumper trucks at this site?"

If the answer to that question was "no" they should find the first appellants guilty. (Similar directions were given in respect of the second and third appellants, naturally taking account of the section 37 dimension to the third appellant's case.) Counsel then acting for the appellants expressly accepted that these were indeed the appropriate directions to be given. Now, however, it is said by Mr Lissack QC on their behalf that, on the contrary, these directions were fundamentally flawed and that it was necessary for the prosecution to have identified and proved one or more particular acts or omissions constituting the section 2(1) (or section 3(1)) breach of duty.

42. In a case summary provided to the appellants before trial the prosecution had in fact outlined what they contended were a whole series of failures on the appellants' part: amongst them, failures to train employees in the safe use of dumper trucks, to identify hazards in the use of such trucks, to plan safe routes, to instruct employees in the use of safety belts, and to carry out risk assessments. What Mr Lissack now argues is that some such allegations as these had to be specifically pleaded and proved and, moreover, that a Brown direction (in conformity with *R v Brown* (1984) 79 Cr App R 115) was also required: in short the jury should have been directed that they could only convict if they were unanimous as to which (if any) of the various specific allegations were made out to the criminal standard of proof.

43. Just such a direction was held to have been required in *R v Beckingham* [2006] EWCA Crim 773 where the Court of Appeal, Criminal Division, for want of a satisfactory Brown direction, allowed Ms Beckingham's appeal against her conviction under section 7 of the 1974 Act in relation to an outbreak of legionnaires disease traced to the cooling towers of an air-conditioning system for which she, the building owners' employed architect, had been responsible. The prosecution had served on Ms Beckingham ten particulars of alleged breaches of duty by way of specified acts or omissions. Rose LJ, giving the Court's judgment, said at para 20 that

"having regard to the way in which this case was presented by the prosecution, it was incumbent on the judge specifically to direct the jury that they must unanimously be sure that one or more of the particulars relied on as supporting the offence was made out and that this gave rise to a breach of duty under section 7."

Critical to that decision, however, are the terms of section 7 of the Act, strikingly different from those of sections 2 and 3. Section 7 provides:

"It shall be the duty of every employee while at work (a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work . . ."

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Neutral Citation Number: [2023] EWHC 1880 (TCC)

Claim No: HT-2021-000281

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Date: 26 July 2023

Before:

MR JUSTICE WAKSMAN

(1) USAF NOMINEE NO. 18 LIMITED
(2) USAF NOMINEE NO. 18A LIMITED
AS NOMINEES HOLDING ON BARE TRUST FOR
(3) APEX GROUP TRUSTEE SERVICES LIMITED (FORMERLY KNOWN AS SANNE
TRUSTEE
SERVICES LIMITED) ACTING AS MANAGING TRUSTEE OF
USAF PORTFOLIO 18 UNIT TRUST

Claimants

- and -

WATKIN JONES & SON LIMITED

Defendant

Fenner Moeran KC, Jonathan Selby KC and Alexandra Bodnar (instructed by Walker Morris LLP,
Solicitors) for the Claimant

Fiona Parkin KC, Nicole Langlois and Omar Eljadi
(Instructed by DLA Piper UK LLP, Solicitors) for the Defendant

JUDGMENT

Hearing dates: 27-29 March 2023

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INTRODUCTION

1. In this case, there are three Claimants, USAF Nominee No. 18 Limited, USAF Nominee No. 18A Limited and Apex Group Trustee Services Limited, to which I shall refer individually as C1, C2 and C3 or collectively, “the Claimants.” No distinction is made between the Claimants in terms of the claims they make. They are all, or purport to be, trustees of one kind or another. The Defendant, Watkin Jones & Son Ltd (“WJ”) is a building contractor.
2. The claims concern what is said to have been the defective design and construction of the external façade of a building known as Jennens Court in Birmingham (“the Property”). The contract under which WJ was engaged was a JCT 1998 Edition with Contractor’s Design, with bespoke amendments, dated 4 July 2007, for the design and construction of 586 ensuite student bedrooms in cluster flats, some retail units and a dance studio (“the Development”). The cost of the Development was £17.98m. Practical Completion occurred on 27 July 2009 with a Final Certificate issued on the same day.
3. On 22 February 2008, WJ provided a collateral warranty (“the CW”).
4. In mid-2020, following an inspection of the Property, concerns were raised about the suitability of the cladding which was later replaced. The total cost of the replacement works was £3.797m.
5. C1 and C2 are the present registered title holders to a long lease of the Property (“the Lease”). Its duration is 150 years from 24 August 2007.
6. The claims made by the Claimants against WJ are for damages for breach of the CW (“the CW claim”) and/or negligence (“the Negligence claim”) and/or under the Defective Premises Act 1972 (“the DPA claim”). The latter was recently added by amendment in the light of the extension to the limitation period provided for by section 135 of the Building Safety Act 2022.
7. The trial of these claims is set down for 10 days commencing on 15 January 2024.
8. However, apart from the substantive dispute on the claims, which has been fully articulated in detailed statements of case, WJ has also taken a number of points as to whether any of the Claimants has title to sue at all (“the Title to Sue Dispute”). If WJ were to succeed on its core points here, none of the Claimants will have title to sue in the way in which they do at present. Depending on the extent of WJ’s success, amendments would at least be required and other parties might have to be joined, without which the action would fall to be dismissed. The Claimants deny that there is any impediment to their ability to bring these proceedings.
9. On 16 February 2023, I ordered that there be a 3-day trial of Preliminary Issues, all relating to the Title to Sue Dispute. This is my judgment on those Preliminary Issues following that trial.
10. Although there are 17 Preliminary Issues in total, there are two core disputes between the parties:
 - (1) The first is whether, by reason of a merger in 2009 under Jersey law, of the companies referred to below as B1 and B2, there was a defect in the appointment of trustees

thereafter which adversely affected the ability of each of C1, C2 and C3 to bring these proceedings. I refer to this as the Trust Element of the Title to Sue Dispute;

- (2) The second is whether, in any event, the Claimants, or any of them, disposed of their interests in the Long Lease and the CW to Wells Fargo Bank NA London Branch (“WF”) by way of absolute assignment pursuant to a security agreement with WF. I refer to this as the Security Element of the Title to Sue Dispute. No application to join WF has thus far been made.

CHRONOLOGY OF RELEVANT EVENTS

11. In order to make sense of the Title to Sue Dispute, and which parties are involved, I need to set out the somewhat complex chronology of documents and events and in doing so, I will introduce the relevant parties. There are two parts to this chronology. The first part deals with the Trust Element while the second part is concerned with the Security Element.
12. On 31 March 2006, a Trust Instrument, governed by Jersey law, was executed between RBSI Trust Company Limited and RBSI Custody Bank Ltd (both Jersey companies) as trustees, and Cordea Savills Fund Managers (Jersey) Limited (“Cordea Limited”), another Jersey company, as Manager (“the TI”). The TI related to the establishment of a unit trust scheme pursuant to Article 7 (3) of the Trusts (Jersey) Law 1984 (“the TJL”) to be known as the Cordea Savills Student Fund (“the Fund”) to make investments in what was described as the Seed Portfolio and other property. It is common ground that the Fund was to and did invest in the Development.
13. The trustees referred to above changed their names on 2 July 2007 to BNP Paribas Services Trust Company (“B1”) and BNP Paribas Securities Services Custody Bank Ltd (“B2”).
14. On 16 January 2007, the freeholder of the Property, Advantage West Midlands (“Advantage”) agreed to grant the Lease (which is presently vested in C1 and C2), to WJ. Pursuant to that agreement, Advantage executed the Lease in favour of WJ on 24 August 2007. However, by a Supplemental Agreement made on the same day between Advantage, WJ, and B1 and B2 as trustees, WJ agreed to assign the lease to B1 and B2.
15. In fact, the actual assignment to B1 and B2 occurred some time later, on or around 22 February 2008. This followed an initial assignment to an English company called Pureluck Limited (“Pureluck”) which was the original developer and which had made the original JCT contract (referred to above) with WJ. That earlier assignment was made on or about 30 January 2008 and the price paid for it was stated in the Property Register to be £5.76m. The price paid shortly thereafter by B1 and B2 for the onward assignment to them was £5.96m. The interposition of Pureluck in this respect is not material for present purposes.
16. There was also, on 22 February 2008, the execution by WJ of the CW. In fact, the CW was initially in favour of Pureluck. But at or about the same time, the benefit thereof was transferred to B1 and B2.
17. Accordingly, going forwards, B1 and B2 now held the legal title to the Lease as well as the benefit of the CW. It is not in dispute that they held both of them as trustees of the Fund.

18. On 27 March 2009, Advantage transferred its freehold interest in the Property to Birmingham City Council (“Birmingham”).
19. However, there then occurred an event which lies at the heart of the Trust Element of the Title to Sue Dispute. This was the merger, under Jersey law, of B2 and a different BNP company called BNP Paribas Services Trust Co. (Jersey) Ltd (“B3”), another Jersey company (“the Merger”). I will need to explore the detail of the Merger below but at this stage, it is sufficient to note the following:
- (1) The key statutory provision is Article 127G of the Companies (Jersey) Law 1991 (“the CJL”) as inserted by the Companies (Amendment No. 6) (Jersey) Law 2002 (“the 2002 Amendment”). It reads as follows:

“127G Completion of merger

(1) Upon the delivery to the registrar in accordance with Article 127F of the documents to which that Article refers the registrar shall, if those documents comply with that Article, register the merged company and issue to it a certificate of incorporation under Article 9.

(2) Upon the issue of the certificate of incorporation -

(a) the merging companies are merged and continue as one company as provided in the merger agreement or, in the case of a merger under Article 127C, the resolutions approving the merger;

(b) all property and rights to which each merging company was entitled immediately before the certificate of incorporation is issued become the property and rights of the merged company;

(c) the merged company becomes subject to all criminal and civil liabilities, and all contracts, debts and other obligations, to which each of the merging companies was subject immediately before the certificate of incorporation is issued; and

(d) all actions and other legal proceedings which, immediately before the certificate of incorporation is issued, were pending by or against any of the merging companies may be continued by or against the merged company,

and the merging companies cease to be companies incorporated under this Law.

(3) The registrar shall record that a company has, by virtue of paragraph (2), ceased to be a company incorporated under this Law.”

I refer to the above as “A127G”.

- (2) At the time, (and indeed subsequently) English law did not have a like provision for the merger of English companies;
- (3) For the purposes of the merger, B2 and B3 each passed a special resolution. B2’s resolution approved its merger with B3, stating that B2’s issued share capital would be added to that of B3, with its own shares being cancelled. B3’s resolution was a mirror image. It approved the merger and the addition to its own share capital of B2’s issued share capital, with B3’s own shares not being cancelled;
- (4) Those special resolutions were registered with the Jersey Financial Services Commission (“the JFSC”);
- (5) The merger itself occurred on 30 June 2009 as shown by a “Certificate of Incorporation on the Merger of Two Limited Companies” from the Jersey Companies

Registrar dated 30 June. This recorded the merger of B2 and B3 and stated that they “continue as one company, being” B3 with its existing registration number 6043;

- (6) Finally, by a letter addressed to B2 dated 7 July 2009 from the Deputy Registrar, the receipt of the relevant documents for the merger was acknowledged and it went on to state that B2 ceased to be a company incorporated under the law on 30 June. It then said:

“Having ceased to be a company under the Law, the company BNP PARIBAS SECURITIES SERVICES CUSTODY BANK LTD cannot be reinstated”.

20. On 5 December 2011, B1 and B3 as trustees of the Fund, and Cordea Limited entered into an Amended and Restated Trust Instrument and a Supplemental Trust Instrument by which the TI was modified in respects which are not material for present purposes. However, I note that Recital A to the Amended and Restated Trust Instrument, when referring back to the original TI, referred to RBSI Trust Company Limited and RBSI Custody Bank Ltd (the former names of B1 and B2) as “the Original Trustees” and in Recital B, B1 and B3 (defined in the title as the “Trustees”) are referred to as the “current trustees” of the Trust. Recital A to the Supplemental Trust Instrument, does not make reference to “the Original Trustees”, but Recital B is in the same terms as Recital B for the Amended and Restated Trust Instrument.
21. By a Deed of Variation made on 28 November 2013 between Birmingham and B1 and B3, as Trustees of the Fund, the Lease was varied. By section 6 of this document, headed “Trustees Liability”, the liability of B1 and B3 was limited to the assets held on trust for the time being of the Fund which were in their possession or control as trustees. Further they and their successors in title as trustees of the Fund had no obligation to meet any claim or liability under the Deed except to the extent that it could properly be met out of trust assets.
22. On 8 July 2014 a number of significant events occurred:
- (1) A Supplemental TI was made between B1, B3 and Cordea Limited. One of the changes made was to permit the Trust to operate by a single Managing Trustee in place of the existing two Trustees and a Manager;
 - (2) B1 and B3 formally retired as trustees and Cordea Limited retired as Manager, and were replaced by Pavilion Trustees Ltd (“Pavilion”), another Jersey company, pursuant to an instrument of Appointment, Retirement and Removal;
 - (3) B1 and B3 transferred the Long Lease to Pavilion;
 - (4) By a Deed of Assignment, B1 and B3 assigned the benefit of the contract documents relating to the Development, including the CW, to Pavilion (“the First Assignment”).
23. There is a question (see below) as to whether, at the time, any notice was given of the First Assignment. The Claimants say that there was, because of a copy of such a notice dated 21 July 2014 which was recently found in the files of Nabarro LLP, which acted for Pavilion back in July 2014 (“the 2014 Notice”). However, there is a dispute between the parties as to whether this notice was ever sent, or at least received. That factual dispute will be determined at the main trial hereafter, not now. The Claimants further allege that in any event, notice of the First Assignment was given later by letters dated 22 September 2020 and 22 July 2021, each being sent by email on those days.

24. On 9 December 2015, Pavilion retired as Managing Trustee and C3, then known as Sanne Trustee Services Limited, but now known as Apex Group Trustee Services Ltd (another Jersey company), was appointed in its place.
25. On 4 August 2016 Pavilion assigned the CW to C1 and C2 ("the Second Assignment"). In the Deed of Assignment, the latter were expressed to be acting as nominees, holding on bare trust for C3 as Managing Trustee. On the same day, the Lease was transferred to C1 and C2 by Pavilion, the TR1 stating expressly that they were holding it on trust for C3 as itself the trustee for the Trust. That transfer was registered at the Land Registry on 1 September 2016. These transactions explain why, in the title of these proceedings, C1 and C2 are described as nominees holding on bare trust for C3, and C3 is itself described as managing trustee of the Trust.
26. The name of the Fund has itself changed on at least two occasions. Prior to 4 August 2016 it had become known as USAF Portfolio 14 Unit Trust and then on that date it changed its name to USAF Portfolio 18 Trust ("UP18T"). Nothing turns on those changes of name. However, I should add that the remedial works undertaken to the cladding and other aspects of the façade to the Property at issue in these proceedings were paid for out of the assets of the UP18T fund.
27. That completes the chronology of the Trust Element. I now turn to the Security Element.
28. The events of 4 August 2016 described in paragraph 25 above were a precursor to (at least) three separate but related agreements concerned with the provision of a £100m loan facility to USAF No. 18 Ltd Partnership, acting through its general partner USAF GP No 18 Ltd ("USAF 18 Ltd"). The provider of the facility was WF as lead arranger, agent and security arranger for a consortium of banks. The 3 agreements are a Facility Agreement, Security Agreement and a Security Agreement over Intra-Group Loan Agreements, each dated 11 August 2016.
29. The principal agreement with which I am concerned is the Security Agreement to which the parties were WF on the one hand, acting as security agent, and a number of companies on the other, which included C1, C2 and C3.
30. Clause 2.1 (c) of the Security Agreement ("Clause 2.1 (c)") provides as follows:
- "Each Chargor, with full title guarantee and as security for the payment of all Secured Liabilities, assigns to the Security Agent by way of security:
- [...] (ii) all its Receivables;
- [...] (vii) all its Assigned Agreements;... "

THE ISSUES BROADLY STATED

31. Here, I expand on the Trust Element and the Security Element of the Title to Sue Dispute, so as to provide a more detailed picture of the competing positions of the parties. This summary does not, however, deal with some of the more nuanced arguments made by each side, which will be considered in context below.

The Trust Element

The Claimant's position

32. The Claimants contend that the effect of the Merger was that B2 now continued in existence as part of B3. Further, and without more, the legal title to the Lease, along with the benefit of the CW, were now vested in B1 and B3 by operation of law, namely A127G. Further, and again by operation of law, B3 now became the “other” trustee to B1, which had previously been B2.
33. Thereafter, B1 and B3 were in all respects the trustees of the Fund and were entitled to act as such. Accordingly, they were entitled to execute the documents which they did on 8 July 2014 so that they and Cordea retired and Pavilion replaced them, and the Lease and the benefit of the CW were assigned to Pavilion. Thereafter, Pavilion had full capacity to act as the single Managing Trustee of the Fund and make further dispositions and agreements.
34. Accordingly, and moving forwards, C3 was properly appointed in place of Pavilion on 9 December 2015. Further, Pavilion had title to assign the benefit of the CW and the Lease to C1 and C2 as its successors in title, to hold on trust for C3.
35. On that footing, C1 and C2 had and continue to have title to bring the claims presently made against WJ under the CW. Further, and as holders of the Lease, they had and have *locus* as the property owners to bring the DPA Claim. This is because, under s1(1) (b) of the Defective Premises Act (“the DPA”), they were owed the relevant duties by WJ, since each of them was a “person who acquires an interest (whether legal or equitable)...” in the Property. The Claimants accept that C1 and C2 would not have standing to bring the Negligence Claim. However, C3 does, because it is the ultimate successor in title to B1 and B2 who held the Lease at the material time, ie when the works at the Property were being undertaken.
36. Yet further, the fact that all of the Claimants expressly hold their interest upon trust (in the case of C1 and C2, for C3, and in the case of C3, for the beneficiaries of the Trust) does not affect their ability to bring these claims, nor does it impede their ability to recover damages for the losses caused by WJ.
37. Insofar as is necessary, and so far as the Lease is concerned, the Claimants rely on section 58 of the Land Registration Act 2002 (“section 58”) which provides that, as they are the lessees shown on the Title Register, they are conclusively presumed to hold the legal title in the Lease.

WJ's position

38. The first argument made by WJ is that the result of the Merger was not that B3 assumed the mantle of B2, as it were. B3 did not, as a result of A127G acquire any of the property or rights or liabilities of B2. Nor is it deemed so to have done. The only way that B3 could have them vested in it is first, and crucially, if it had been appointed as a trustee in place of B2 - but it never was. This means that B3 never became a trustee and had no power to act as such, even though this is what it purported to do. Instead, B2 *qua* B2 remained a trustee albeit now as part of B3. But while it remained so, it lacked the capacity to act as such since it had ceased to exist as a separate company. The effect of all of this is that the subsequent attempt by B3 (along with B1) to appoint Pavilion as the single Management Trustee was invalid. Equally invalid were the transfers of the Lease and the benefit of the CW from Pavilion to C1 and C2.

Because it never became a trustee itself, Pavilion had no power either to appoint C3 which was therefore never validly appointed itself as a trustee.

39. Since C3 is not the trustee of the Fund and has no standing to bring these claims, neither do C1 and C2, either because the transfers to them by Pavilion were invalid or in any event because their claimed standing is only as trustees for C3 as itself trustee of the Fund. But C3 is not in fact a trustee.
40. All of the above is concerned with the question of the “trusteeship” of B3 (or not) and its consequences. However, WJ also says that the transfer of the CW to C1 and C2 by Pavilion was substantively defective anyway. This is because, at least under English law, there needed to have been a transfer of the CW by novation or assignment from B1 and B2 jointly, to B1 and B3 jointly. Yet there was never any form of transfer. Further, the effect of the Merger under Jersey law here is irrelevant, since this question of transfer must be decided under English law. On that basis, B1 and B3 never jointly acquired the benefit of the CW and so were incapable of transferring it to Pavilion. From that point on, any transfer by Pavilion would be of no effect. Accordingly, the benefit of the CW never passed to C1 or C2. Furthermore, and even if there was somehow an assignment of the CW from B1 and B2 to B1 and B3, there was no notice of that assignment. This means that there could only have been an equitable assignment and the legal interest in the CW remained with B1 and B2. B1 and B3 only ever had, at best, an equitable interest in the CW and they could not have passed anything greater than that to Pavilion and the same goes for Pavilion and then C1 and C2.
41. As for the transfer of the Lease to C1 and C2, while it cannot be gainsaid that they are the legal owners (by virtue of section 58) this takes them no further. That is because they are explicitly bringing the proceedings as nominees (i.e. trustees) for C3 as Managing Trustee. But C3 is not the validly appointed trustee. Accordingly, there is no present basis on which C1 and C2 can bring the claims against WJ under the DPA.
42. As for the claim in negligence, WJ says that at best, any such claim must be based on the notion that WJ owed a duty of care to the trustees for the time being of the Trust. That could only be C3 or its predecessors, Pavilion or before it, B1 and B2. There could be no relevant duty owed to C1 and C2 because they only acquired an interest in the Property (via the Lease) in 2016. Thus far, the Claimants would agree (see paragraph 35 above). However, as for C3, this was not a properly appointed (or “true”) trustee nor was Pavilion, nor B3 before it (see paragraph 63 of WJ’s Skeleton Argument). Accordingly, there can be no claim in negligence either. I should add that WJ denies that any substantive duty of care would have been owed to B1 and B2 anyway, but that is an argument for the main trial, not for now.

The Security Element

43. WJ’s core point here is that whatever interests and claims were possessed by C1 and C2 in 2016, by reason of the Security Agreement and in particular Clause 2.1 (c), there was an absolute assignment thereof by C1 and C2 to WF. The effect of this is that the only party who could now bring the claims would be WF. Or at least it would be necessary to be joined as a party or consent to the claims being brought on its behalf, before the claims could be heard. As none of this happened, the claims must fail at this stage. Another outcome would be that amendments would have to be made to the Claim Form in respect of the capacity in which the Claimants sue.

44. The Claimants' answer to this core point is that there was no absolute assignment but only the creation of a security interest in favour of WF which does not prevent C1 and C2 from bringing these claims as a matter of substance.

THE EVIDENCE

45. There are a number of key documents which need to be construed and a number of points which are said to arise, either as a matter of Jersey or English law. As to the former, I have reports and I have heard evidence from two Jersey law experts. They were Advocate Simon Franckel, instructed by WJ, and Advocate Raulin Amy, instructed by the Claimants.
46. Advocate Franckel produced two reports dated 22 December 2022 and 14 March 2023. Advocate Amy also produced two reports, dated 19 January and 14 March 2023.
47. Otherwise, there was no live evidence; there were witness statements filed in support of WJ's strikeout application and WJ's application for a trial of preliminary issues. They do not now take the matter any further.
48. Both experts were instructed to opine on the scope and effect of A127G with particular regard to the situation where, as here, the merging companies were both corporate trustees. This is because of the Claimants' contention that B2's role as a trustee or its "trusteeship" became vested in B3 instead, and without more, as a result of the Merger. This was because of the operation of A127G. WJ rejects that proposition.

THE PRELIMINARY ISSUES

49. I can now set out the Preliminary Issues to be decided. They are as follows:

"A: The effect of the 2009 Merger:

1. In determining whether the merger between BNP Bank Co and BNP Jersey Trust Co ("2009 Merger") operated so as to have the effect that BNP Bank Co's rights under the Collateral Warranty were thereafter held by BNP Jersey Trust Co, is the Court required to apply Jersey law or English law?
2. If the answer to Issue 1 above is English law:
 - (a) As a matter of English law does the 2009 Merger have the effect that BNP Bank Co's rights under the Collateral Warranty were held thereafter by BNP Jersey Trust Co?
 - (b) If the answer to Issue 2(a) is "No" what happened to BNP Bank Co's rights upon the 2009 Merger and does this affect the Claimants' ability to bring the Collateral Warranty Claims in this action?
3. If the answer to Issue 1 above is Jersey law, do the provisions of Article 127G(2) of the Companies (Jersey) Law 1991 (as amended by the Companies Law (Amendment No 6) etc.) ("CJL 1991") operate so as to have the effect that BNP Bank Co's rights under the Collateral Warranty were thereafter held by BNP Jersey Trust Co?
4. If the answer to Issue 3 above is "No", what happened to BNP Bank Co's rights upon the 2009 Merger and does this affect the Claimants' ability to bring the Collateral Warranty claims in this action?
 - (a) As a matter of English law does the 2009 Merger have the effect that BNP Bank Co's rights under the Collateral Warranty were held thereafter by BNP Jersey Trust Co?
 - (b) If the answer to Issue 2(a) is "No" what happened to BNP Bank Co's rights upon the 2009 Merger and does this affect the Claimants' ability to bring the Collateral Warranty Claims in this action?
5. In determining whether the 2009 Merger operated so as to have the effect that BNP Bank Co's title to the long lease in the Property was thereafter held by BNP Jersey Trust Co, is the Court required to apply Jersey law or English law?
6. If the answer to Issue 5 above is English law, as a matter of English law:
 - (a) Did the 2009 Merger have the effect that BNP Bank Co's title in the long lease was thereafter held by BNP Jersey Trust Co?
 - (b) On the basis that s. 58 of the Land Registration Act 2002 confers upon the First and Second Claimants "deemed" title to a property which forms part of assets held as part of the PT18UT, are the

First and Second Claimants persons who "acquire an interest (whether legal or equitable) in the dwelling" and, as such, persons to whom a duty is owed under (and can bring proceedings for breach of) s.1(1)(b) of the Defective Premises Act 1972?

7. If the answer to Issue 5 above is Jersey law, as a matter of Jersey law, do the provisions of Article 127G(2) of the CJL 1991 operate so as to have the effect that BNP Bank Co's title to the long lease was thereafter held by BNP Jersey Trust Co?

8. If the Answer to Issue 7 is "No" what happened to BNP Bank Co's rights to the title to the Property upon the 2009 Merger and does this affect the Claimants' ability to bring the DPA and tortious claims in this action?

9. Do the provisions of Art 127G(2) CJL 1991 operate so as to have the effect that BNP Jersey Trust Co was thereafter the co-trustee of the P18UT with BNP Trust Co, such that Pavilion and the Third Claimant thereafter were validly appointed trustees of the P18UT?

10. If the answer to Issue 9 is "No", could BNP Trust Co nonetheless continue to act as a "sole trustee" following the 2009 Merger such that Pavilion and the Third Claimant thereafter were validly appointed trustees of the P18UT?

11. If the answer to Issue 10 is "No", does the Third Claimant nevertheless have standing to bring these proceedings on behalf of the beneficiaries of the P 1 8UT?

12. What was the nature of the interest in (i) The Collateral Warranty and (ii) the long lease held by each of the Claimants immediately prior to their execution of the Security Agreement with Wells Fargo in August 2016?

(a) On the assumption that notice of the First Assignment to Pavilion was given to the Defendant on or around 21 July 2014?

(b) On the assumption that such notice was not given?

13. Does clause 2.1(c) of the Security Agreement assign to Wells Fargo Bank N.A all (or any) of such rights, title and interests that each of the Claimants then had in:

(a) The Collateral Warranty; and/or

(b) Any claims and causes of action the Claimants may otherwise have had against the Defendant for breach of the Collateral Warranty, negligence, and/or breach of s. 1(1) of the Defective Premises Act 1972 — including, for the avoidance of doubt, in relation to claims and causes of action for breach of s.1(1) of the Defective Premises Act 1972, was it possible to effectively so assign such claims and causes of action or was such assignment prohibited by reason of s.6(3) of that Act; and/or

(c) The long lease?

14. If and to the extent that the answer to Issue 13 is "Yes" was such an assignment a legal or equitable assignment? In respect of the Collateral Warranty only, this question is to be answered:

(a) On the assumption that notice of the First Assignment to Pavilion was given to the Defendant on or around 21 July 2014.

(b) On the assumption that such notice was not given.

15. If and to the extent that the answer to Issue 14 is that the assignment to Wells Fargo operated as a "legal assignment" do any of the Claimants have standing to bring these proceedings?

16. If and to the extent that the answer to Issue 14 is that the said assignment was equitable in nature do any of the Claimants have standing to bring these proceedings:

(a) On their own account?

(b) As trustees for Wells Fargo?

17. If (which is to be determined at trial) notice of the First Assignment to Pavilion was not given to the Defendant on or around 21 July 2014 then was notice of the First Assignment either on or around 22 September 2020 or 22 July 2021 capable of being effective, notwithstanding the occurrence of events between 21 July 2014 and 22 September 2020 and/or 22 July 2021?"

THE TRUST ELEMENT

50. I shall deal with each Preliminary Issue below, but I begin by considering the overarching and fundamental question on the Trust Element, which is one of Jersey law. This is whether A127G applies to the case of merging corporate trustees. If it does not, then a number of consequences follow in terms of acts or dispositions purportedly carried out or executed by B3 which I have summarised above.

A127G, TRUSTEESHIP, PROPERTY AND RIGHTS

51. As refined prior to and during the trial, the position of both sides now is that it does not follow from the Merger that B2 was dissolved as a company. However it has ceased to be a corporate entity in its own right and is no longer shown as incorporated as it had been before. The latter is what the Deputy Registrar said in terms in the letter dated 7 July 2009 referred to at paragraph 19.(6) above.
52. The Claimants' position is that B2 continues to exist but only as part of B3, as the new Certificate of Incorporation on the Merger dated 30 June 2009 states. It then follows from A127G (a) to (c) in particular that legal title to the Lease and the benefit of the CW which had vested in B2 jointly with B1, and as trustees, were now vested in B1 and B3 without more. The same applied to B2's rights and obligations as trustee.
53. WJ's position, as already noted, is that such vesting does not occur where the underlying substantive rights or property are held by the merging company (i.e. B2) as trustee and in any event the trusteeship does not move from B2, as it were.
54. This was the principal area of dispute between Advocates Franckel and Amy and so I turn first to consider their evidence. For these purposes, I shall refer to B3 as being the company which merged with B2 and the merged company which now purportedly has all the relevant rights and property vested in it, as "Newco" albeit that it has the same name and company number as B3.
55. Advocate Franckel qualified as an English solicitor in 1989 and then, following a move to Jersey, qualified as an Advocate there in 2004. He established his own firm in 2008 and is a sole practitioner. He specialises in dispute resolution concerned with contentious and non-contentious trusts. He also deals with insolvency, contentious probate and professional negligence matters along with partnership/shareholder disputes. He has appeared in a number of Jersey trust law cases as well as some non-trust cases. He has also published a number of articles.
56. Advocate Amy qualified as an English solicitor in 2000 but never practised there. He became an Advocate in Jersey in 2003 and has been employed by Ogier (Jersey) LLP (or its predecessor) since October 2000. He has been a partner in its corporate department since 2007. He is also the practice partner for the firm's Jersey office. He has worked predominantly as an adviser on corporate and finance-related transactions and this has included specifically dealing with mergers of companies and the establishment, acquisition and financing of Jersey Property Unit Trusts ("JPUTs"). The Trust here is a type of JPUT.
57. I will deal with the detail of their respective evidence below, but I make a few general observations about the experts at the outset. First, being primarily a trusts litigation lawyer, Advocate Franckel accepted that he is not a corporate specialist like Advocate Amy, and does not work in the areas of mergers and acquisitions. On the other hand, Advocate Amy is not a trusts lawyer though he deals with JPUTs; but on the essential question of the effect of a merger under A127G, he has had much more cause to deal with that provision than Advocate Franckel. Second, overall, I found Advocate Amy to be a more persuasive witness. His evidence was very clear and he made concessions where appropriate. On occasion, Advocate Franckel seemed to be too much an Advocate in his own cause, he was reluctant to make

concessions where they were appropriate, and sometimes his approach seemed unrealistic. There is also no doubt that on the specific point as to whether A127G encompasses the merger of trustee companies (a common phenomenon in Jersey) he is in a minority of Jersey lawyers in the view that he takes. He has not written any papers on the subject and has never actually been involved in such a merger because he does not do merger work.

58. I should also at this stage refer to some materials which are pertinent to the key trusteeship issue. First, there is the decision of the Royal Court of Jersey in *Re Capita* [2011] JRC 138. Here, Capita, a corporate trustee, made an application against the Jersey Financial Crimes Unit for disclosure of a substantial number of documents which the Unit had seized from a Mr Arthur as part of a fraud investigation. Mr Arthur had been a director of a former trustee of the trust and had dealt with its affairs. Capita now needed to see these documents, as they were records of the trust's affairs which would assist Capita in resolving issues over the trust's assets and liabilities. The Unit was willing in principle to provide disclosure but only with Mr Arthur's consent. Although the latter had said he would provide an appropriate written consent, he did not do so. In those circumstances, the Unit was not prepared to release the documents without an order of the court.
59. On the underlying merits of the application, the Court agreed that it was well-founded and of course, no one was positively opposing disclosure. However, the Bailiff (the most senior judge in Jersey) clearly wished to be satisfied that Capita was the valid trustee and entitled to make the application (although again, no one was positively contending that it was not). To that end, the Bailiff said as follows:
- “1. This is an application by Capita Trustees Limited in its capacity as trustee of the Dunlop Settlement. That trust was established in 1999 and is governed by Jersey law. In February 2001 Stirling Trustees Limited was appointed as trustee in place of the former trustee. On 10 September, 2007, a formal merger took place between Stirling and Capita under the Companies (Jersey) Law 1990 and Capita is the continuing company after the merger. Accordingly, Capita has been the trustee of the trust since that date...
- 6.... In our judgement there can be no doubt that Capita is entitled to these documents. Capita is, in law, now the same company as Stirling which was the trustee of the trust throughout the relevant period. Mr Arthur was at all times either Stirling's director or its employee or its agent and he was carrying out all he did on behalf of Stirling in its capacity as trustee. Capita is therefore entitled to demand these documents or copies from Mr Arthur who is under an obligation to produce them.”
60. On any view, the Bailiff considered that Capita had effectively replaced Stirling as the current trustee because it was the “continuing company after the merger” by reason thereof. Capita was now the “same company as Stirling”. Although he does not say so in terms, this can only be because of the effect of A127G and Advocate Franckel does not suggest otherwise. Although the point was not argued out because there was no one to take it, the decision in *Capita* is obviously of some significance here. It was the clearly expressed view of the Bailiff that A127G did indeed include the position of merged corporate trustees, along with other merged companies.
61. Second, on 11 April 2016 a consultation paper was published by the Jersey government on various proposed amendments to the Trusts (Jersey) Law 1984 (“the TJL”). Part of that paper stated as follows:

“6. Confirmation of the appointment of a corporate trustee post-merger

6.1 From time to time a corporate trustee merges with another corporate body. The TJL84 is silent as to whether, following that merger, the newly formed corporate body continues as the validly appointed trustee of a particular trust without further action. Reference is made to the relevant sections of the Companies (Jersey) Law 1991 ("CJL91"), namely Part 18B.

6.2 It is the view of the Working Group that whilst it is strongly arguable on the statutes that a valid appointment of a corporate trustee would continue to be valid notwithstanding any subsequent merger, it was nevertheless desirable to introduce confirmatory wording into both the TJL84 and the CJL91 to put the point beyond doubt.

6.3 It is proposed that the following (or words to this effect) be inserted into the TJL84:

"A trustee which merges with another company pursuant to the provisions in the Companies (Jersey) Law 1991 shall continue to be a duly appointed trustee of a trust notwithstanding its merger with another company."

6.4 And the following (or words to this effect) be inserted into the CJL91 at Article 127FN(2)(b):

(1) When a merger is completed in which the merged body is a company or a body falling within Article 127B(3) -

(a) all property and rights to which each merging body was entitled immediately before the merger was completed become the property and rights of the merged body;

(b) the merged body becomes subject to all criminal and civil liabilities, and all contracts, debts and other obligations which include (for the avoidance of doubt) rights and obligations entered into as a trustee or within another fiduciary capacity, to which each of the merging bodies was subject immediately before the merger was completed;...

62. Third, I refer to the minutes of the Jersey Trust's Law Working Group meeting of 21 September 2016. Advocate Franckel was not a member of that working group. The minutes referred to a report from a Ms Richardson (LR), a government representative as follows:

"Section 6 - Confirmation of appointment of a corporate trustee post-merger"

LR advised that section 6 of the Consultation Paper considered whether confirmatory wording was required to put beyond doubt that a newly merged corporate body continues as the validly appointed trustee of a particular trust without further action.

LR reported that the general perception was that it was not necessary but that if an amendment to this effect would produce clarity then it was desirable to make the amendment. Such amendment would be intended to be made in the Companies Law.

GC commented that it would be helpful for trust companies merging, but agreed that this should be contained within the Companies Law."

63. Finally, I refer to the response to the paper ("the Response") which was published on 11 January 2017 along with the government's comments. There were 21 individual responses including from a number of law firms, the Jersey Association of Trust Companies and some corporate and individual trustees and the Chancery Bar Association. Advocate Franckel did not provide a response. On the question raised by paragraphs 6.2-6.4 of the consultation paper, the Response stated as follows:

"Section 6: Confirmation of appointment of a corporate trustee post-merger"

Question 14 Do you consider that the TJL84 and CJL91 should be amended to introduce confirmatory wording to put beyond doubt the point that the newly merged corporate body continues as the validly appointed trustee of a particular trust without further action?

The general perception of respondents was that amendment was not strictly necessary but as certainty and clarity were welcome all those respondents who made comment on this section, supported putting the matter beyond doubt by way of the amendments.

One respondent (a trade association) considered it desirable if the amendment could cover both Jersey and foreign law trusts.

The same respondent suggested it might be preferable for any clarifications to, in fact, be placed within the CJL91 rather than the TJL84, relying on Dicey & Morris (15th Ed. Vol 2 para 30-011) which indicates that the question of whether a corporation has been amalgamated with another corporation is determined by the law of its place of incorporation. In this circumstance, the provision could also usefully confirm that other fiduciary offices held by trust companies, such as executorships, would also

transfer in accordance with the merger provisions. A second respondent (trust company) considered that (wherever the provision was) it should be wide enough to include other fiduciary arrangements such as escrow arrangements and nominee ships.

Question 15 Do you consider that the CJL91 should be amended to resolve any potential doubt as to (i) the need to give notice to creditors who have dealt with the merging entity solely in that entity's capacity as trustee? and (ii) the need for the corporate trustee planning to undertake a merger to give notice to itself?

All respondents agreed that it should not be necessary for notice to be given to creditors who dealt with the merging entity solely in that entity's capacity as trustee nor for a corporate trustee to give notice to itself. It was also suggested that it should be made clear that it is not necessary to give notice to beneficiaries or to any other person who is owed duties under trusts of which the corporate trustee is trustee..

Question 16 Are there any other points that need clarification related to the merger of a corporate trustee with another corporate body?

No other points were raised.

Given the support for the amendments and the comments set out above, the Government is minded to make the amendments as proposed (subject to drafting amendments of the Law Draftsman) at paragraphs 6.3 and 6.4 of the Consultation Paper but to make these amendments to the CJL91. Furthermore, this will give the opportunity to add in to the CJL91, wording to the effect that any licence held by either of the merging companies shall not pass to any merged company unless the permission of the relevant licensing or regulatory authority is granted.”

64. Despite the above, in the event, no amendment dealing with this point was ever made, to either the TJL or the CJL. Neither expert knew why not, but one can only assume that it was because in the end, it was not regarded as a priority given the general perception that the trustee point was covered by A127G anyway. Advocate Franckel also confirmed in evidence that he had not written to any professional body on this question.
65. On the core point about trusteeship, I consider first the evidence of Advocate Franckel. In his first report, he made reference to various provisions of the TJL. These included Article 17 which provides for how a new trustee may be appointed if the trust instrument does not do so. Article 19 does the same thing for retiring trustees. Both provisions make express reference to the need for all things to be done which are required to vest trust property in the new trustee or divest it from the retiring trustee.
66. As for A127G, he said that there were no words there which could have the effect of substituting Newco for B2 as trustee. While A127G (2) (b) refers to the “property and rights” of the merging companies now becoming the property and rights of the merged company, this does not assist. That is because, under Jersey trust law, assets held by the merging company (here B2) in its capacity as trustee are not property and rights to which it is entitled. This proposition is drawn from some provisions in the TJL. First, Article 21 (6) imposes a duty on a trustee to keep trust property separate from his own personal property. Further, Article 54 of the TJL in its amended form (Article 50 in the original) provides as follows:
- “54. Nature of trustee's estate, following trust property and insolvency of trustee
- (1) Subject to paragraph (2) -
- (a) the interest of a trustee in the trust property is limited to that which is necessary for the proper performance of the trust; and
- (b) such property shall not be deemed to form part of the trustee's assets...”
67. Article 54, like Article 51 (referred to below) fall within a section of the TJL containing “provisions of general application” applicable to Jersey trusts and where the context permits, foreign trusts.

68. Thus, according to Advocate Franckel, A127G (2) (b) cannot apply to trust property held by a trustee, here being the trust property held by B2 along with B1, prior to the Merger.
69. Advocate Franckel's view was that the way to ensure that here, B3, did become the new trustee in place of B2 and was constituted as a joint owner of the relevant rights and properties was as follows: First, there should be a Deed of Retirement and Appointment ("DORA") executed by B1, B2, Newco and the Manager and in favour of Newco as the new trustee. The DORA itself would have to be approved by each of B1 B2 and B3 prior to the merger and would identify the relevant trust assets to be transferred. There would need to be a Special Resolution to this effect from each of them. As this was not in fact done, B3 never became a trustee and never became owner of any of the relevant rights.
70. In his second report, Advocate Franckel amplified these points. He now referred to Clause 29 of the Trust Instrument which set out the procedure for the removal or retirement of trustees in these terms:
- "29. REMOVAL OR RETIREMENT OF TRUSTEES
- (a) One or both of the Trustees may:
- (i) be removed by Extraordinary Resolution; or
- (ii) retire by written notice served on the Manager.
- (b) In either case, the Manager shall use its best endeavours to find new trustees and upon doing so, the Trustees and the Manager shall, by instrument supplemental hereto, appoint such new trustees to be the Trustees in place of the retiring Trustees.
- (c) The retirement or removal of a Trustee shall not take effect until the later of the date specified in the Extraordinary Resolution or Notice and the date of appointment of a replacement Trustee approved by the JFSC."
71. Since, in this case, there was no process of retirement of B2 and appointment of Newco, Newco never validly became a trustee. The effect of that, however, was that B2 remained a co-trustee with B1 because it was not dissolved as a result of the Merger even though it no longer had any separate corporate identity and had ceased to be a company in its own right. However, since it no longer had any separate identity it could not in any way act as a trustee, or indeed act at all. This would be analogous to an as-yet unremoved trustee who could no longer act as a result of mental or physical incapacity. This analysis would mean that the relevant property interest previously held by B2 was now in something of a limbo. It did not revert back to B1 as a surviving trustee because on this analysis, B2 remained as a trustee, albeit non-functioning. Nor could the property be said still to be held by B2 since it no longer had any separate corporate personality. This is why the Claimants suggested that the result would be that the property would be *bona vacantia*.
72. Advocate Franckel makes the further point that, while A127D-E provide for members and creditors of the intended merging companies to object to the proposed merger and for the Jersey Court to rule on the issue if necessary, there is no similar provision to allow objections from the beneficiaries of the trust where the merging companies are the trustees. Hence, he infers, it cannot have been contemplated by the legislature that A127G was dealing with the merger of corporate trustees at all.
73. A yet further point is that the Trust here constituted an "Expert Fund" which fell within Article 3 of the Collective Investment Funds (Jersey) Law ("CIFJL"). This meant that any "functionary" of the Trust, which would include the trustees, needed a permit or licence from the JFSC.

74. Advocate Franckel goes on to say that all of the somewhat unusual consequences of the Merger for trustees could here have easily been avoided. First, B1 B2, Newco and the Manager could have entered into a DORA prior to the Merger taking place, as referred to above. Equally, the property and other interests could have been the subject of a transfer from B1 and B2 to B2 and B3 again, just prior to the merger. B2 and B3 could also have obtained an “in principle” approval from the JFSC to grant a licence to Newco.
75. Alternatively, he says that a different corporate structure could have been set up to begin with. This would involve B2 not being the original corporate trustee alongside B1 but rather creating an SPV (“special purpose vehicle”) subsidiary to act as the trustee for the specific trust. If B2 later merged with B3 (and the SPV would then be regarded as a subsidiary of Newco) the status of the SPV itself as trustee would be entirely unaffected. Mr Franckel said that the use of an SPV is commonly done with Jersey trust companies.
76. In cross-examination, he was pressed to explain further his conception of the position of B2 after the Merger. He accepted that, in order to be a trustee, there had to be a person, natural or corporate, which is obviously true. Yet he also accepted that B2 itself no longer had a separate corporate personality as opposed to now being a part of Newco. On that basis, it is very difficult to see how B2 can be said to still remain as trustee albeit an ineffective one. What Advocate Franckel did not suggest was that B2’s trusteeship had simply been eliminated leaving one trustee only, namely B1. But what he was at pains to resist was the suggestion that because B2 only now exists as a part of and through Newco, which is a separate entity, the relevant trustee and property holder must now be Newco. Yet there is no meaningful sense in which it can be said that B2, as distinct from Newco, still exists.
77. A further point of difficulty for Advocate Franckel concerned the operation of A127G (2) (d) which provides for actions by or against the merging companies now being continued without more, as it were, save to change the name to Newco. But if A127G had no application to the case of merging trustees, there is a lacuna. If B2 was the relevant defendant prior to the Merger, it cannot now be sued, since it is no longer a legal person - but neither can Newco. When dealing with this issue in cross-examination, Advocate Franckel’s evidence was somewhat unclear. He seemed at one stage to be saying that an action against a trustee (which then merged with another corporate trustee) could continue against Newco provided that no trust property was involved but if it was, then A127G (2) (d) would not apply. In which case, the action would effectively be stymied. If there were two trustees that might not matter, but there need not always be two trustees as indeed became the case here, assuming that the changes to the TI were validly made. Advocate Franckel said it was all a question of capacity. I can quite see that, in theory, there could be a company, X, which merged with company Y and part (but not all) of X’s functions happen to be as a trustee of a particular trust. What Advocate Franckel seems to be saying is that A127G (2) (d) would apply in all respects save any which concerned X’s capacity as a trustee. Thus, for example, if a tenant of the trust property held by X and let out for the benefit of the trust as legal owner, had a claim against X as landlord, that claim could not be continued against Y because it concerned X in its capacity as a trustee.
78. This could produce some very odd situations. Moreover, there is nothing in A127G (2) (d) which distinguishes between proceedings relating to trust property and those relating to personal (i.e. non-trust) property. Advocate Franckel accepted this but said that this was taking the provision in isolation which one should not do, for the purpose of interpreting

A127G as a whole. What he meant by this is that one had to read sub-section (d) in the light of the previous sub-sections. We returned to the question of sub-section (d) later in his evidence when I asked some further questions about his analysis. I wanted to know, in the case of a claim against a single trustee, how the claimant could resolve the position following a merger. Advocate Franckel said that the claimant could apply to the court for directions, including the appointment of a new trustee, under Article 51 of the TJL. In the meantime, the title of the action would remain as it always had been but until the court intervened, nothing further could be done. This seems a somewhat impractical and unnecessary consequence if it was to apply in every case of merging trustee companies. I refer further to Article 51 below.

79. The mainstay of Advocate Franckel's argument, as it seems to me, was that, for the purposes of sub-section (b), the property and rights which became the property and rights of Newco were limited to those to which, in our case, B2 was "entitled" to use the language of the provision. But B2 was not "entitled" to any property and rights held by it on trust. Hence they never became Newco's. He prayed in aid of this, Article 54, as set out in paragraph 66 above. However, that then raises the question as to whether the definition of trustees' assets for the purposes of that Article is coterminous with the property and rights to which B2 was "entitled" for the purpose of the merger provisions of the CJL and in particular A127G. As a matter of both language and logic, I do not see why they should necessarily be the same. That is not least because the CJL here is concerned with corporate identity and attributes upon a merger when on any view the only remaining corporate entity after the merger is Newco. There is nothing to suggest that there could be a partial merger, with part of the company's assets that were trust property left behind somehow. The only alternative is that what Advocate Franckel is really saying is that, at least in the case of professional corporate trustees like B1 and B2, of which there are many in Jersey, and which play an important role in the financial services offered there, the merger provisions including A127G have no application at all to trustee companies. In other words, they are simply unable to merge in this way. If that is the case, it would seem that there have already been many invalid mergers because Advocate Amy said that Jersey trust companies have often, in his experience, merged. The Merger here is a case in point where, for reasons of corporate administration, one subsidiary in a group of companies engaged in banking and other financial services is to be merged with another. Advocate Franckel could not opine on that situation since he does not do merger work. Moreover, he has not actually come across any of the arrangements which he said could get round the problems inherent in the non-application of A127G to corporate trustees.
80. He also made clear that for the purposes of interpreting the language of A127G, I had to consider sub-paragraph (c) which provides that the "other obligations" to which each of the merging companies had been subject, prior to the merger, became the obligations of Newco. Here he said that "obligations" excluded obligations of trustees. It is difficult to see why this follows, especially in the case of a trustee company all of whose obligations would be *qua* trustee, owed either to the beneficiaries or to third parties in respect of trust property or other dealings relating to the trust. But there is nothing in sub-section (c) which makes this distinction.
81. I should add here that neither Advocate Franckel nor Advocate Amy contended that the process of construing a statute under Jersey law was in any material sense different from that process when dealing with a law of England and Wales.

82. However, Advocate Franckel had a broader point about A127G which was that if it covered the merger of corporate trustees, it would mean that there was an absence of the normal controls that would govern a change of trustees. In effect, he thought that there was a clash between the corporate law provisions of A127G and principles of trust law, if his interpretation was not followed. That is why he said, for example, that beneficiaries have no say in the proposed merger unlike the company's creditors or shareholders. It is also why he pointed to the fact that the trustees of the Trust here needed to have a licence - and yet this was somehow being sidestepped if they could simply merge through A127G. He deployed this argument to support a purposive construction of the provision which would militate against the interpretation contended for by the Claimants.
83. I have to say that I thought these concerns were overstated. First, and as he ultimately accepted, a trustee company wishing to merge should consider whether the merger is appropriate for the purposes of the Trust. He questioned whether that would actually happen, but that does not answer the point that it would be part of the trustee's duties to consider this. And as a counter-point on a practical level, it would be hard to see what could be objected to about a merger which is no more than a reorganisation of professional corporate trustees, as here, even if there could be companies which had a trustee role but were not in fact professional trustees.
84. Second, on the basis of Advocate Amy's evidence (see below) and as one might imagine in a jurisdiction like Jersey, there have historically been mergers between trustee companies and they do not appear to have given rise to any difficulties so far as the relevant trusts are concerned. Certainly, Advocate Amy was unable to point to any.
85. Third, as to the question of the need for a new licence for Newco, Advocate Amy explained how, in practice, the JFSC would be involved in any merger anyway, and the question of any necessary licence would be dealt with at that stage.
86. Accordingly, I do not consider that the supposed adverse consequences for trusts envisaged by Advocate Franckel are realistic. They cannot form the basis of an argument which rests on a purposive interpretation of A127G. Indeed, if there really were the sort of difficulties suggested by Advocate Franckel, it would be remarkable if they were not raised by trust lawyers in particular either at the meeting to discuss the consultation paper, or in the Response, both of which are referred to above.
87. As for how Newco should then take over the trusteeship of B2 and the relevant trust property, as suggested by Advocate Franckel, he was cross-examined on this. It was pointed out that there may be temporal problems since, for example, Newco would not exist *qua* Newco at the time when B1 and B2 resolved to appoint it and issues of that kind. I daresay that there could be ways found to avoid those problems, but the real question is whether resort to them was needed at all. It is only necessary if Advocate Franckel is correct in his underlying interpretation of A127G. The same goes for the powers of the Jersey Court under Article 51 of the TJL. This provides as follows:

“51 Applications to and certain powers of the court

- (1) A trustee may apply to the court for direction concerning the manner in which the trustee may or should act in connection with any matter concerning the trust and the court may make such order, if any, as it thinks fit.

- (2) The court may, if it thinks fit -
 - (a) make an order concerning -
 - (i) the execution or the administration of any trust,
 - (ii) the trustee of any trust, including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and payments, whether payments into court or otherwise,
 - (iii) a beneficiary or any person having a connection with the trust, or
 - (iv) the appointment or removal of an enforcer in relation to any non-charitable purposes of the trust;
 - (b) make a declaration as to the validity or the enforceability of a trust;
 - (c) rescind or vary any order or declaration made under this Law, or make any new or further order or declaration.
- (3) An application to the court for an order or declaration under paragraph (2) may be made by the Attorney General or by the trustee, the enforcer or a beneficiary or, with leave of the court, by any other person.
- (4) Where the court makes an order for the appointment of a trustee it may impose such conditions as it thinks fit, including conditions as to the vesting of trust property.
- (5) Subject to any order of the court, a trustee appointed under this Article shall have the same powers, discretions and duties and may act as if the trustee had been originally appointed as a trustee.”

88. No doubt the court could be asked to make all sorts of orders dealing with the appointment and retirement of the trustees and so on; but on Advocate Franckel’s analysis, this would be necessary in every case of merging trust companies if one of his other routes did not work. That would seem unduly burdensome and again, only becomes necessary if one adopts his interpretation. As with the other routes suggested, I do not think that this provides an easy answer to the problems caused by his interpretation and in particular as to the position of B2.

89. I now turn to what Advocate Franckel had to say about *Capita* and the other materials referred to in paragraphs 58-63 above. As for *Capita*, Advocate Franckel made the fair point that, as indicated above, the issue of the effect of the merger was not actually disputed before the Bailiff. But as for the Bailiff’s reasoning he also said that it was simply wrong. On that point, and having regard to *Capita* and the other materials, Advocate Franckel’s initial position, as set out in his second report, was that there were “two schools of thought” about the applicability or otherwise of A127G to corporate trustees. But that is not a fair representation of the views, at least to judge from the materials before me. When pressed on the point, Advocate Franckel eventually had to accept in the light of the materials that the “widely held view” on this provision was in accordance with Advocate Amy’s interpretation, not his. He said there were still dissenting voices. As to who they were, he did not identify any specific lawyers other than himself, at which point, Ms Langlois, junior counsel for WJ, intervened to say that she, as a Jersey-qualified lawyer, held that view as well. She, of course, is a lawyer on the case, not an expert witness. But the real point is that the true position appears to be that Advocate Franckel is in a distinct minority on this question. He accepted that, because he agreed that the majority view was against him, as it were.

90. Of course, my task in analysing the expert evidence (which has to be considered as a matter of fact since it concerns foreign law) is not to count votes, as it were. But Advocate Franckel’s somewhat disingenuous approach, as I saw it, to the views held by practitioners in Jersey counted against his overall credibility. As did the fact that at some points in his cross-

examination, particularly towards the end of Day 2 and the beginning of Day 3, he came across as somewhat argumentative and not objective, as if he had to pursue his personal point of view, come what may.

91. Overall, I did not find Advocate Franckel to be a persuasive witness and I did not find his arguments persuasive. I now turn to the core evidence of Advocate Amy. I thought it was generally impressive. He was clear in his views and made concessions where appropriate. In particular, he accepted that his field of expertise was Jersey corporate law including its law of mergers, and that he was not a trusts lawyer. He accepted that he did not have English law expertise.
92. A key element of his cross-examination focused on the issue as to whether a trusteeship attached to a particular company could form part of its attributes for the purposes of the merger given effect by A127G. Advocate Franckel's point, of course, was that it did not. Advocate Amy accepted that trust companies like B2 and B3 were regulated financial institutions because, among other things, of the services they provided as professional trustees. This is why they would require a licence or similar authority from the JFSC. He also accepted, as is obvious, that A127G says nothing about the transfer of any licence held by a company like B2 into Newco, assuming that Newco would need a new licence even though it retained its previous company number, as to which no evidence was adduced before me.
93. However, the practical point he made on a number of occasions was that what happened in mergers of this kind was that, although the merger would be approved by the Jersey Registrar of Companies (usually in practice his Deputy) the JFSC would inevitably be involved to ensure that there were no regulatory matters that needed to be attended to. Although he had not seen any evidence of licences being obtained or discussed in connection with the Merger here, "it would absolutely be the case that they would have got the necessary consents under Jersey law to facilitate the merger first". The Registrar would not allow the merger to go ahead without seeing that the necessary approvals were in place. Indeed, the Jersey Companies Registry itself forms part of the JFSC and the Head of each of those bodies is actually the same person. Further, notwithstanding the use of the word "shall" in A127G as regards the Registrar's issue of a certificate on the merger, the Registrar would not in practice issue a certificate if he was not completely satisfied about any licensing issue. While it was true that A127G did not make any specific reference to the licence position with regard to merging trustee companies, the way it works in Jersey, as he described it, came from his own knowledge and experience. See further paragraphs 8.1-8.3 of his first report. Advocate Franckel did not suggest otherwise, nor could he, since his expertise did not lie in corporate law including mergers.
94. Advocate Amy did not accept that if English lawyers wanted to know what the position was, they could simply look at the statute. They would consult a firm of Jersey lawyers like his own, and receive the explanation which he gave to the court. That is obviously correct, in my view.
95. I appreciate that this is a question of practice in Jersey which does not directly go to the interpretation of A127G. However, it does explain why the unattractive consequences said by Advocate Franckel to flow from Advocate Amy's interpretation, were not ones likely to arise in practice. Indeed, Advocate Amy accepted that in theory, and putting licensing to one side, it would be possible for a trustee company to merge with another company which happened to

be a fraudulent operator, and was entirely unsuited to act as a trustee. Provided the documents specified in A127G were supplied, then there would be a merger. But this was an extreme example and while it might be possible in theory, it seems very unlikely in practice since certainly, with professional corporate trustees there would then be the need for an appropriate licence to be put in place. In truth, there is nothing inherently odd in the position that the effect of a merger from the point of view of corporate identity property and obligations is one thing, while questions of licensing are another. One also has to remember that none of the supposed concerns about the effect of the merger provisions on trusts articulated by Advocate Franckel ever seem to have emerged, at least not formally, in any consultation response or in the trust lawyers working group minutes.

96. Further, and as Advocate Amy pointed out more than once, the issue here is not about transfer from one company to another; it is about merger by operation of law which is very different. This is why Advocate Amy did not accept the point made to him in cross-examination about Clause 29 of the TI referred to in paragraph 70 above. This dealt with the appointment and removal of trustees. He accepted that B2 was not removed by an extraordinary resolution, or retired. He also accepted that sub-paragraph (c) said that the retirement or removal of the trustee could not happen until the appointment of a new trustee approved by the JFSC. He also agreed that Newco needed to be approved by the JFSC, but not because of this clause - rather, because of the operation of financial services law as a precursor to merger. Clause 29 (c) was not relevant because it was dealing with the removal or appointment of trustees and not merger. He added later that the terms of a trust instrument could prohibit any kind of merger between trustees although this TI did not do so. But it would not necessarily stop the merger itself.
97. A further point made concerned the references to “original” and “current” trustees made in the documents referred to in paragraph 20 above. Advocate Franckel refers to these in his second report. B3’s name now needed to be added and B2’s removed, from further trust documents because of the Merger. But using this terminology was no doubt convenient and from any objective point of view, and with knowledge of the Merger, I do not think one can draw from this language that there had been some (on WJ’s case, invalid) retirement and appointment of trustees which should have been governed by Clause 29 of the TI. The language used does not entail the fact that must have been a “transfer”. Accordingly, this point does not assist WJ.
98. On a related point, Advocate Amy also said that A127G should be interpreted widely so that there was no question but that, for example, the fiduciary duties of a trustee in the position of B2 became the duties of Newco without more. He referred to the fact that in other contexts, legislation would, for example, specifically exclude trust property if this exclusion was required - as occurs in Jersey’s bankruptcy laws. This shows that if there was a need to make some sort of carve-out in respect of merging corporate trustees, it could and would have been done expressly.
99. A related matter concerns the particular language used in A127G (a) – (c). His view was that the fact that the merging companies then continue as one company (i.e. Newco) meant that no separate transfer was required. This did not mean that the language of sub-paragraphs (b) and (c) was redundant. These sub-paragraphs explain or clarify what is happening in a merger under this section. And if he had to point to something that would encompass the notion of duties previously held by B2 *qua* trustee now being in Newco, he would refer to the use of the word “obligations” in the phrase “contract, debt and other obligations”. I agree with him when

he said that fiduciary duties would fall under that expression and that it should not be construed *eiusdem generis* with “contract”. Indeed, he thought it would be perverse if, after the merger, a group of duties still somehow remained with B2 even though it had now become part of B3. I also agree with that.

100. However, I need also to refer to Advocate Amy’s evidence about the word “entitled”. This was in the context of whether trust property became the property of Newco without more. WJ’s position was that A127G (b) relating to how the merged company has the property and rights to which the prior merging company was “entitled” had no effect for corporate trustees. That is because they had no “entitlement” to trust property in the first place. He did not at that point agree with that proposition. It is right that he then went on to agree with Ms Parkin KC that the words of Article 54 reflected the position that trust lawyers do not recognise trustees as being entitled to trust properties. But of course, it depends for what purpose one is talking about entitlement to trust property. He returned to the topic later on when he observed that while, absolutely, he was not a trust law expert, there was a whole raft of partners and other Jersey trust lawyers who had concluded as he did, and had not interpreted “entitled” in A127G, as Advocate Franckel would have it.
101. What I have said thus far, in relation to the evidence of Advocates Franckel and Amy is sufficient for me to conclude that on the first key question as to whether A127G applies to corporate trustees as well as other companies, it clearly does. Or to put it in a more nuanced way, it covers the extent to which a company acts as a trustee in addition to any other way in which it acts.
102. In addition to the above matters, there was a particular submission made by Ms Parkin KC on the interpretation of A127G which derived from the House of Lords case of *Nokes v Doncaster Amalgamated Collieries* [1940] AC 1014. The starting point for the argument was that there was no material difference between English and Jersey law as to the proper construction of a statute and as already noted, the experts did not suggest otherwise and neither do I.
103. *Nokes* was a case about s154 of the Companies Act 1929. The original Article 127 of the CJL (which is still in force) is in substantially the same terms. It provides as follows:

“Provisions for facilitating company reconstruction or amalgamation

- (1) This Article applies where application is made to the court under Article 125 for the sanctioning of a compromise or arrangement proposed between a company and any persons mentioned in that Article;
- (2) If it is shown
 - (a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of a company or companies, or the amalgamation of 2 or more companies; and
 - (b) that under the scheme the whole or part of the undertaking or the property of a company concerned in the scheme ("a transferor company") is to be transferred to another company ("the transferee company"),
 the court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters -
 - (i) the transfer to the transferee company of the whole or part of the undertaking and of the property or liabilities of a transferor company,
 - (ii) the allotting or appropriation by the transferee company of shares, debentures, policies or other similar interests in that company which under the compromise or arrangement are to be allotted or appropriated by the company to or for any person,
 - (iii) the continuation by or against the transferee company of legal proceedings pending by or against a transferor company,

- (iv) the dissolution, without winding up, of a transferor company,
- (v) the provision to be made for persons who, within a time and in a manner which the court directs, dissent from the compromise or arrangement,
- (vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.

(3) If an order under this Article provides for the transfer of property or liabilities, then -

- (a) that property is by virtue of the order transferred to, and vests in, the transferee company; and
 - (b) those liabilities are, by virtue of the order, transferred to and become liabilities of that company, and property (if the order so directs) vests freed from any hypothec, security interest or other charge which is by virtue of the compromise or arrangement to cease to have effect.
- (4) Where an order is made under this Article, every company in relation to which the order is made shall cause the relevant Act of the court to be delivered to the registrar for registration within 14 days after the making of the order; and in the event of failure to comply with this paragraph, the company is guilty of an offence.
- (5) In this Article, "property" includes property, rights and powers of every description and "liabilities" includes duties."

104. In *Nokes*, there had been a transfer of a colliery from one company to another under a scheme of arrangement. One of the employees of the transferred colliery was fined by the Magistrates for non-attendance at work. He argued that he could only be fined if he was indeed employed by the transferee company. He then argued that he was not, because the scheme of arrangement was ineffective to transfer his contract of employment from the transferor company without his consent. At first instance and in the Court of Appeal, this argument was rejected, but it was accepted by a 4:1 majority in the House of Lords. Section 154 permitted the Court to provide for the transfer of the undertaking, property and liabilities of the transferor company and sub-section (4) thereof stated that property included "property, rights and powers of every description and the expression 'liabilities' includes duties". This is replicated in Article 127 (5). The transferor company was dissolved following the transfer.
105. In his judgment, Viscount Simon LC observed that many kinds of contract could not in fact simply be transferred by such an order without more. Further, the word "contract" did not appear in section 154. Rather, when the section referred to "transfer" it was not contemplating the transfer of rights (in particular the right to the services of an employee) which are themselves incapable of transfer. Certainly (and he limited himself to this) it did not cover the transfer of contracts of personal service. If the legislature had intended that employees should be transferred to a new employer without their consent, plainer words could have been devised to say so.
106. Lord Atkin took a somewhat broader view. He thought that if there had been a transfer permitted here, it would mean that it would cover all sorts of contracts of employment or other aspects of personal service or leases of property held without a right of assignment, or rights to sue for defamation and other rights too. He considered that such legal consequences would be "remarkable" and a "revolution in the law". Prior to the enactment of the 1929 Act, none of that would have been possible. He then said this:

"Much stress has been laid on the general words in the definition clause, s. 154, sub-s. 4 : "In this section the expression 'property' includes property rights and powers of every description and the expression 'liabilities' includes duties." But it has been the duty of the Court on countless occasions to construe general words cutting down the generality to the obvious intention of the Legislature. The words of the learned author of Maxwell on Statutes, 8th ed., p. 73, appear to me to afford a true canon of construction. After saying that there are certain objects which the Legislature is presumed not to intend, and that a construction which would lead to any of them is therefore to be avoided, he continues : " One of these presumptions is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express, terms or by clear implication,

or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act. The general words of the Act are not to be so construed as to alter the previous policy of the law.”

107. *Nokes* was followed in *Re Skinner* [1958] 1 WLR 1043 by Sachs J (as he then was). The issue here was whether Grindleys Bank was still entitled to pursue an action for probate of a will of which it was executor. This arose because Grindleys had entered into a scheme of arrangement whereby all of its assets and liabilities would be transferred to another bank but not any property vested in Grindleys as personal representatives of any deceased person. Sachs J noted that the scheme did not vest any property of the deceased in the trustee bank. First, this was because the office of executor was one of “personal trust” and could not be properly assigned by the executor unless in the course of carrying out the duties of that office. Second, he said that *Nokes* had made clear that only those rights which were capable of being lawfully transferred could be transferred by sections 206 and 208 of the Companies Act 1948 (which succeeded section 154 of the 1929 Act). The result was that Grindleys, which remained in existence, retained its position as executor, and could continue the underlying probate action.
108. Finally, in *Re Cater Allen* [2002] EWHC 3147, Laddie J was asked to approve a scheme of arrangement under section 111 of the Financial Services and Markets Act 2002 (“FSMA”) by which the banking business of one company could be transferred to another. There was no actual objection to the proposed scheme of arrangement but Counsel drew Laddie J’s attention to *Nokes*. Laddie J accepted the import of what Lord Atkin had said there, but noted the reference to the fact that express terms could be used by the legislature if the intention was to give the court the power to sanction the transfer of that which was not transferable. Here, section 112 (2) of FSMA provided that:

“An order under subsection (1)(a) may ~

(a) transfer property or liabilities whether or not the authorised person concerned otherwise has the capacity to effect the transfer in question; ..”.
109. Laddie J construed this position widely and said that it:

“gives the court power to sanction, where it considers in all the circumstances that it is justified, the transfer of property or liabilities even in cases where those properties or liabilities might otherwise be non-transferable, for example by reason of express contractual provision. In my view section 112(2) does therefore provide a distinct and clear difference as between the provisions under the FSMA and the equivalent provisions under the Companies Act which were considered in *Nokes*. It bestows on the court the power to transfer just the sort of banking business which is at issue before me.”
110. Accordingly, he approved the scheme of arrangement.
111. From all of this, WJ contends as follows:
 - (1) The position under A127, prior to the 2002 amendments which introduced A127G, was such that it would not have been possible to transfer an obligation or rights of a company acting as a trustee;

(2) A127G should be interpreted in such a way as to maintain that position notwithstanding its apparently wide wording.

112. I follow the argument, but there is a fundamental flaw in it, in my view, on the basis that the approach in *Nokes* would have applied to A127. The flaw is this: A127 is not about merger even though at one stage in the argument Ms Parkin KC referred to it as a form of “administrative merger”. The word “merger” is not used at all (nor is it in section 154). Notwithstanding expressions like “amalgamation”, the process is essentially one of transfer and not merger. And the results, in principle, are plainly different. That is because under A127 the transferor is, at least in principle, left behind as a separate legal entity, albeit divested of much if not all of its property. That is so even if it is then dissolved later, as part of the overall scheme, as in *Nokes*. In *Skinner*, of course, it was very much to remain and carry on the role of executor. By contrast, in the A127G merger, as already stated, there is no “remaining” transferor as a separate entity, because of the merger. And while Advocate Franckel postulates the case of B2 somehow remaining but unable to act, that has the difficulties already referred to.
113. The difference between A127 and A127G was put to Advocate Franckel. He did not have much to say about it, although at one stage appeared to think that the original A125-127 had been replaced by the 2002 amendments but in fact they were not. He said that one could view A127G as being about transfer even though it did not use that word but I think that misses the point which is that it is about merger and here, the continuation of B2 now within Newco.
114. So in my judgment, the context is very different from that in *Nokes*. And therefore it does not follow that there is a need to cut down the wide words of A127G because not to do so would mean giving effect to a “revolution in the law” due to a fundamental departure from pre-existing law. There was no “pre-existing law” on merger, as distinct from transfer.
115. In conclusion, I am quite satisfied that following the Merger, B3 became co-trustee with B1 in place of B2 by operation of law and without the need for any form of transfer. The property and rights of B2 likewise became vested in B3. This meant that there was no defect in the “chain of title” as it were from B1 and B3 down to C3 and also, as applicable, to C1 and C2.
116. In the light of that I can now turn directly to my analysis of the individual Preliminary Issues on the Trust Element (“PIs”).

PI 1

117. This asks: **In determining whether the merger between BNP Bank Co and BNP Jersey Trust Co ("2009 Merger") operated so as to have the effect that BNP Bank Co's rights under the Collateral Warranty were thereafter held by BNP Jersey Trust Co, is the Court required to apply Jersey law or English law?**
118. WJ contends that English law applies to this question because the governing law of the CW is English law. The Claimants say that it is Jersey law because the real question is about the nature and effect of the Merger which itself is provided for by A127G, and of course the companies in question are Jersey companies.

119. Here, the Claimants rely on the decision of the House of Lords in *National Bank of Greece and Athens v Metliss* [1958] AC 509. In this case, a Greek bank, X, issued bonds, themselves governed by English law. They were guaranteed by Greek bank Y. The Greek government then issued a moratorium on payments on the bonds by the banks. Later, by an act of Government, bank X was amalgamated with a further Greek bank, Y, and it was enacted that Y was the "universal successor" to the rights and obligations of the amalgamated companies
120. Bank Z resisted enforcement of the guarantee against it first, on the basis of the original moratorium. That argument was rejected. Second, it said that it was effectively a different company from Y and did not assume its guarantee liabilities. The House of Lords rejected this argument and in so doing, it clearly applied the law of Greece, recognising the various acts which had given rise to the status of bank Z. This can be seen first from the following part of the judgment of Viscount Simmonds at p525:
- “But, my Lords, in the end and in the absence of authority binding this House, the question is simply: What does justice demand in such a case as this? I believe that justice will be done if your Lordships think it right not only to recognize the fact that the new company exists by the law of its being but to recognize also what it is by the same law. It is conceded that its status must be recognized. That is a convenient word to use. But what does it include or exclude? If a corporation exists for no other purpose than to assume the assets, liabilities and powers of another company, what sense is there in our recognizing its existence if we do not also recognize the purposes of its existence and give effect to them accordingly. If, for reasons of comity, we recognize the new company as a juristic entity, neither the Greek Government, the creator, nor the new company, its creature, can complain that we too clothe it with all the attributes with which it has been invested. Thus and thus alone, as it appears, justice will be done...
- I conclude, therefore, that the appellants fail in their first contention that they are not liable upon the bonds which were guaranteed by the old company. If I have to base my opinion on any principle, I would venture to say it was the principle of rational justice.”
121. To that may be added the observations of Lord Tucker, at p529:
- “The decree provided that the two former banks " shall " cease to exist and the entire property of each of them in its whole " (assets and liabilities) on the day of publication is considered " as being automatically contributed to the new limited liability " banking company constituted by virtue of these presents."
- English law will look at the Greek decree to determine the status of this new entity. It is contended, however, that the transfer of liabilities from the old bank to the new is no part of its status. It is said that " status " is confined to the existence, powers and dissolution of the new corporation.
- My Lords, I think the result of this appeal really turns upon this short point. It is devoid of authority... The identity of the old bank has become merged in the amalgamation by a process which is by no means alien to English legal conceptions. It is of the very essence of the transaction that the liabilities and assets of the former should attach to the latter, and to recognize the existence of the new entity but to ignore an essential incident of its creation would appear to me illogical. Why an English court should be compelled to recognize that part of the decree which has extinguished the old bank but refuse to give effect to matters which are of the essence of the process of amalgamation I find it difficult to understand. In my view, the fact that this liability was attached to it at birth by its creator can properly be regarded as a matter pertaining to the status of the appellant company and accordingly governed by the law of its domicile.”
122. In other words, it is accepted that the court must look to the foreign law to see what the nature and attributes of the entity in question are. The House of Lords reach that conclusion notwithstanding the fact that the governing law of the bonds themselves was English law.
123. There is, in my judgment, a direct parallel with the situation here. English law is nothing to the point because the question does not concern the operation or interpretation of the CW. It concerns which entity had the benefit of it. Although National Bank of Greece was about the

party liable under the instrument, rather than the party able to enforce it, that makes no difference as a matter of principle.

124. I should add that this conclusion is consistent with, and indeed supported by the discussion in *Dicey, Morris & Collins* on the Conflict of Laws (16th Ed.) at paragraphs 30R-009 to 30R-113. In particular, the latter paragraph says that:

“Whether a corporation has been amalgamated with another corporation must also be determined by the law of its place of incorporation. If that law provides for a *succession in universum jus* then the amalgamated company will be recognised in England as succeeding to the assets and liabilities of its predecessors...”

125. The other section in *Dicey, Morris & Collins* which forms part of the parties’ joint authorities, covers the transfer or assignment of intangible property. Here, the answer as to which is the proper law is not straightforward. However, it does not matter because this is not a case of assignment or transfer, for the reasons already given.
126. Accordingly, the answer to PI 1 is “Jersey law”.

PI 2

127. This asks: **If the answer to Issue 1 above is English law:**

(a) As a matter of English law does the 2009 Merger have the effect that BNP Bank Co's rights under the Collateral Warranty were held thereafter by BNP Jersey Trust Co?

(b) If the answer to Issue 2(a) is "No" what happened to BNP Bank Co's rights upon the 2009 Merger and does this affect the Claimants' ability to bring the Collateral Warranty Claims in this action?

128. In the light of my conclusion on PI 1, this issue does not arise.

PI 3

129. This asks: **If the answer to Issue 1 above is Jersey law, do the provisions of Article 127G(2) of the Companies (Jersey) Law 1991 (as amended by the Companies Law (Amendment No 6) etc.) ("CJL 1991") operate so as to have the effect that BNP Bank Co's rights under the Collateral Warranty were thereafter held by BNP Jersey Trust Co?**

130. Here, in my view, the answer, in the affirmative, is clear, having regard to my analysis and conclusions in paragraphs 51-116 above. In particular, having preferred the evidence of Advocate Amy, there is no question here of any “transfer” of the benefit of the CW. It became vested in B3 (jointly with B1) because of the Merger. It is therefore irrelevant that there was no novation of the CW or assignment of the benefit therein (cf paragraphs 51-56 of WJ’s Skeleton Argument).
131. The only further submissions arguing against the benefit of the CW being vested in B3 by reason of the Merger rested upon the proposition that A127G does not apply to trust property

and so in this respect and for the purposes of that provision, B2 was never “entitled” to the benefit thereof. But I have also rejected all such arguments above.

132. Accordingly, the answer to PI 3 is “Yes”.

PI 4

133. This asks: **If the answer to Issue 3 above is "No", what happened to BNP Bank Co's rights upon the 2009 Merger and does this affect the Claimants' ability to bring the Collateral Warranty claims in this action?**

134. In the light of my answer to PI 3, this does not now arise.

135. However, it is worth noting WJ’s summary of what it said would be the consequence if the answer to PI 3 had been “No”. It is an answer also given in relation to PI 8. What it said was that:

“The Collateral Warranty rights remained vested in B1 and B2 jointly in their capacity as co-trustees of the P18UT and that accordingly B1 was not capable of dealing with the same without B2 being party to any transaction.”

136. This answer really illustrates the difficulties of WJ’s position (and the evidence of Advocate Franckel). It is based on the same assumption that notwithstanding the Merger, B2 still existed as a separate entity. Although WJ says that B2 could not deal with the benefit of the CW without B2 being a party to any transaction, B2 could not be such a party after the Merger as it had no separate identity.

PI 5

137. This asks: **In determining whether the 2009 Merger operated so as to have the effect that BNP Bank Co's title to the long lease in the Property was thereafter held by BNP Jersey Trust Co, is the Court required to apply Jersey law or English law?**

138. Here, we return to the question of the applicable law. WJ says that it is English law because that is the *lex situs* of the Property. The Claimants, again, say that it is Jersey law essentially because this is not a question of transfer of any title but merger.

139. Again, I consider that the Claimants are correct. It is difficult to see why the logic of *National Bank of Greece* does not also apply here. One applies the local law of the corporate entities to see what in fact happened as a result of the Merger. Since there has been no form of transfer, no question of English law arises. Although the Merger did involve more than a change of name, because B2 was also absorbed into Newco, the change of name analogy is still useful on the question of the applicable law. The change of name was still needed to be recorded on the Land Registry here but that does not mean that English law governs the substantive question of the attributes of the entity in question i.e. here, Newco.

140. In fact, the title documents from the Proprietorship Register at the Land Registry show that initially, on 7 April 2008, B1 and B2 were shown as registered proprietors of the Lease. But a later version of the Proprietorship Register from 12 May 2010 (i.e. after the Merger) shows B1 and B3 as the registered proprietors and moreover does so as from 7 April 2008. In other words, at least as far as the Land Registry was concerned, it treated the change of reference

from B2 to B3 as no more than a change of name. That would indeed reflect the position on ownership of the Lease following the Merger.

141. The answer to PI 5 is therefore: Jersey law.

PI 6

142. This asks: **If the answer to Issue 5 above is English law, as a matter of English law:**

(a) Did the 2009 Merger have the effect that BNP Bank Co's title in the long lease was thereafter held by BNP Jersey Trust Co?

(b) On the basis that s. 58 of the Land Registration Act 2002 confers upon the First and Second Claimants "deemed" title to a property which forms part of assets held as part of the PT18UT, are the First and Second Claimants persons who "acquire an interest (whether legal or equitable) in the dwelling" and, as such, persons to whom a duty is owed under (and can bring proceedings for breach of) s.1(1)(b) of the Defective Premises Act 1972?

143. In the light of the answer to PI 5 above, PI 6 does not arise. In any event, the result would be the same as that entailed by the application of Jersey law (see PI 7 below). This is because WJ's answer to PI 6 (a) is No but this relies on the same reasons given in answer to PI 3, where I have found the answer is Yes. Accordingly, had it arisen, the answer to PI 6 (a) would have been Yes. Equally, the answer to PI 6 (b), had it arisen, would have been Yes. That is because WJ's only reason for saying that C1 and C2 are not persons who have a legal interest in the Property (through the Lease) is because they are bringing proceedings expressly as nominees for C3 and C3 is not validly appointed (see paragraphs 46-49 of WJ's Skeleton Argument). However, I have found that it was validly appointed. Therefore, WJ's objection here must fail.

PI 7

144. This asks: **If the answer to Issue 5 above is Jersey law, as a matter of Jersey law, do the provisions of Article 127G(2) of the CJL 1991 operate so as to have the effect that BNP Bank Co's title to the long lease was thereafter held by BNP Jersey Trust Co?**

145. It follows from my analysis above that, as with PI 3, the answer must be "Yes".

PI 8

146. This asks: **If the Answer to Issue 7 is "No" what happened to BNP Bank Co's rights to the title to the Property upon the 2009 Merger and does this affect the Claimants' ability to bring the DPA and tortious claims in this action?**

147. This does not now arise.

PI 9

148. This asks: **Do the provisions of Art 127G(2) CJL 1991 operate so as to have the effect that BNP Jersey Trust Co was thereafter the co-trustee of the P18UT with BNP Trust Co, such that Pavilion and the Third Claimant thereafter were validly appointed trustees of the P18UT?**

149. Yet again, on the basis of my analysis above, the answer here must be “Yes”.

PI 10

150. This asks: **If the answer to Issue 9 is "No", could BNP Trust Co nonetheless continue to act as a "sole trustee" following the 2009 Merger such that Pavilion and the Third Claimant thereafter were validly appointed trustees of the P18UT?**

151. This does not now arise.

PI 11

152. This asks: **If the answer to Issue 10 is "No", does the Third Claimant nevertheless have standing to bring these proceedings on behalf of the beneficiaries of the P18UT?**

153. Likewise, this does not now arise. Accordingly, it is not necessary for me to decide the issue as to whether C3 would have had *locus* if it was simply a *trustee de son tort*.

CONCLUSIONS ON THE TRUST ELEMENT OF THE QUESTION OF TITLE TO SUE

154. It follows from all of the above that thus far, there is no impediment to the right of C1 and C2 to bring the CW and DPA Claims against WJ. Further, there is no impediment to the right of C3 to bring the Negligence Claim.

155. Insofar as any argument as to the *locus* of C1 and C2 was based on the fact that C3, for which they hold their claims on trust as bare nominees, was not a validly appointed trustee, that argument fails because C3 was validly appointed. For that reason, it is not necessary to delve further into the question as to whether C1 and C2 could bring the claims nonetheless, simply because they hold the benefit of the CW and the Lease. Nor has it been necessary to explore the question as to whether there had always to be two trustees under the TI or the position as to surviving trustees.

156. I now turn to the second element of the Title to Sue Dispute.

THE SECURITY ELEMENT

157. There is a distinction between what may be called “absolute” assignments and other forms of assignment like those by way of charge or which are conditional. That distinction applies whether the assignment is legal (i.e. under section 136 of the LPA 1925 (“section 136”)) or equitable.

158. The key dispute underlying the Security Element is that WJ contends that the relevant assignments given by the Claimants under Clause 2.1(c) were absolute, while the Claimants contend that they were not and were, at best, forms of charge. It is common ground that if the purported assignments were not absolute but only by way of charge, then there is no impediment to the Claimants bringing these claims in their own names (albeit as trustees) resulting from any agreements made with WF. If they were absolute, then there will be some form of impediment, as described below.

159. With that brief introduction, I turn to the relevant PIs.

PI 12

160. This asks: **What was the nature of the interest in (i) The Collateral Warranty and (ii) the long lease held by each of the Claimants immediately prior to their execution of the Security Agreement with Wells Fargo in August 2016?**

(a) On the assumption that notice of the First Assignment to Pavilion was given to the Defendant on or around 21 July 2014?

(b) On the assumption that such notice was not given?

161. I deal first with the Lease because the answer does not depend on whether notice of the First Assignment was given or not. Both sides agree that C1 and C2 in any event held (and hold) the Lease on (express) trust for C3.

162. As for the CW, the Claimants' position is that, regardless of whether notice of the First Assignment (from B1 and B3 to Pavilion) was given, C1 and C2 never became the legal assignees of the CW. This is because notice of the Second Assignment (from Pavilion to C1 and C2) was not given at the relevant time. This meant that C1 and C2 never became legal assignees of the CW as at August 2016. However, they did become equitable assignees, holding equitable interests in the rights under the CW. If notice of the First Assignment had been given, then Pavilion retained legal title in the CW. If such notice was not given, then it was B1 and B3 who retained such title.

163. WJ also contends that C1 and C2 were equitable assignees only and regardless of whether notice of the First or Second Assignments was given or not. That contention essentially depended on WJ's position on the effect of the Merger, which I have now rejected.

164. But the upshot is that, whatever may have thereafter been assigned by C1 and C2 to WF (or not) it was an equitable interest in the CW. Further, on what I have found thus far, prior to the dealings with WF, C1 and C2's interest in the CW was held by them on trust for C3, because that is what the Second Assignment expressly provided for.

PI 13

165. This asks: **Does clause 2.1(c) of the Security Agreement assign to Wells Fargo Bank N.A all (or any) of such rights, title and interests that each of the Claimants then had in:**

(a) The Collateral Warranty; and/or

(b) Any claims and causes of action the Claimants may otherwise have had against the Defendant for breach of the Collateral Warranty, negligence, and/or breach of s. 1(1) of the Defective Premises Act 1972 — including, for the avoidance of doubt, in relation to claims and causes of action for breach of s.1(1) of the Defective Premises Act 1972, was it possible to effectively so assign such claims and causes of action or was such assignment prohibited by reason of s.6(3) of that Act; and/or

(c) The long lease?

The Law

166. For legal assignments, the requirement that they be absolute is spelled out in section 136 itself which requires the assignment to be an:

“absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action...”

167. If there has been a legal assignment, it is common ground that only the assignee can sue in respect of the assigned right or interest. If this was the position here, then WF would have to be joined, for it would be the only proper claimant. The Claimants accept this (see Day 2/182).
168. As for an “absolute” equitable assignment, the Claimants at paragraph 74 of their Skeleton Argument say that this requires
- “a communication from the assignor to the assignee which manifests or expresses “a final and settled intention to transfer the property to the assignee there and then”...; see re Williams [1917] 1 Ch 1, at 8, and Guest on the Law of Assignments (4th edition) at paragraphs 1-57 and 3-13. Or to put it another way, “For property to be assigned in equity what is needed is the sufficient expression of an intention to assign in the context of a transaction from which it can be inferred that the property was intended to pass.”
169. WJ did not disagree with this way of putting it, although it used a different formulation – see paragraph 75 of its Skeleton Argument.
170. Hereafter, where I refer to whether there has been an “absolute” assignment or not, I am referring to whether the tests set out for legal and equitable assignments in paragraphs 166 and 168 above, have been met.
171. If there has been an equitable assignment, the assignee can sue in its own name, and the assignor may (but does not have to be) joined. If (as here on this hypothesis) only the assignor has sued, then usually, the assignee will have to be joined. However, the alternative is that the assignor sues not on its own account but on behalf of the assignee as trustee therefor, and with the assignee’s consent.
172. Here, WJ says that the Claimants have not brought these proceedings as trustee for WF. C1 and C2 brought them as trustees for C3, and C3 brought them as trustee for the beneficiaries of the Trust. Nor has there actually been a consent from WF to bring the claims for it. As to that, the Claimants accept that there would have to be an amendment to (at least) the Claim Form to describe correctly the capacities in which they sue as trustees. The Claimants also agree that WF’s consent would have to be obtained. However, they go on to say that such consent has in fact already been given in a letter sent by WF on 19 January 2023 (“the WF Letter”). I deal below with the WF Letter and whether (if required) it constitutes the relevant consent.
173. The leading case on the distinction between absolute assignments and those which are merely by way of charge, as the distinction occurs in the context of financing agreements, is the decision of the Court of Appeal in *Bexhill v Razzaq* [2012] EWCA Civ 1376. There are some similarities between the underlying facts in that case and those pertaining here, and for that reason, it is necessary to refer to it in some detail.
174. Bexhill carried out the business of lending money to insurance brokers to enable them to offer finance to their insured clients to enable them in turn to pay their insurance premiums on an instalment basis rather than a lump sum upfront. For the purposes of funding its business,

Bexhill made a number of agreements with Barclays Bank Plc (“Barclays”) pursuant to which Barclays lent a total of £5m to Bexhill and took relevant security.

175. One of the companies to whom Bexhill had provided funding was a broker called RSA which was owned and/or controlled by Mr Razzaq. He had provided a personal guarantee to Bexhill to secure the company’s liabilities and also a charge over a property owned by him to secure his guarantee liabilities. In the light of arrears on the part of RSA, Bexhill brought proceedings for possession of the property pursuant to the charge. One of the arguments raised by Mr Razzaq was that Bexhill had no title to sue because the claim for possession of the property which had been charged had been assigned absolutely to Barclays.
176. Under the Facility Agreement made with Barclays, Bexhill had to make all repayments received from the brokers of the loans made to them into a special collection account from which Bexhill repaid Barclays in turn. Bexhill also covenanted to act as principal and not as agent when making its financing agreements with the brokers and without any reference to Barclays. A separate Debenture made with Barclays secured all sums payable by Bexhill to Barclays. Clause 3.1 thereof, headed “Assignments by [Bexhill]” provided as follows:
- “3.1.1 As a continuing security for the payment of the Secured Obligations...[Bexhill] assigns and agrees to assign absolutely in favour of [Barclays] all of [Bexhill’s] rights, title, interest and benefit in the Receivables.
- 3.1.2 As a continuing security for the payment of the Secured Obligations, [Bexhill] hereby with full title and guarantee assigns and agrees to assign absolutely in favour of [Barclays] all of its rights, title, interest and benefit in and to each Relevant Contract and all collateral and rights thereunder.”
177. Clause 3.2 was sub-titled “Fixed Charges given by [Bexhill]”. By it, Bexhill charged and agreed to charge in favour of Barclays, “by way of first fixed charge” all its “...right, title, interest and benefit in and to the Collection Account...”. By clause 3.2.13, Bexhill charged and agreed to charge “to the extent not effectively assigned under clause 3.1.1 by way of first fixed charge all of the Receivables”.
178. Clause 3.3, headed “Notice of Assignment”, provided that Bexhill undertook:
- “Immediately upon execution of this Deed (and immediately upon the obtaining of any Insurance or the execution of any Relevant Contract after the date of this Deed) [Bexhill] shall:
- 3.3.1 in respect of each Relevant Contract, deliver a duly completed notice of assignment to each other party to that Relevant Contract (with a copy to [Barclays]), and use its best endeavours to procure that each such executes and delivers to [Barclays] an acknowledgement, in each case in the respective forms set out in schedule 2 (Forms of notice to and acknowledgement by party to Relevant Contract) (or in such other form as [Barclays shall agree]);...”
179. By clause 7.1.2 Bexhill agreed to execute a legal assignment “in such form as [Barclays] may reasonably require over all or any of the Receivables and give notice of such assignment to the relevant Debtors and/or [QRFs]”. Further, Bexhill undertook to ensure that all payments received under “Bexhill Facility Agreements” were paid directly into the Collection Account. As explained in paragraph 20 of the judgment of Aikens LJ (with whom Ward and Black LJJ agreed) clause 13 “placed severe limitations on what Bexhill could do with any sums deposited in the Collection Account.... Effectively, Barclays had complete control over the sums credited to the Collection Account which had to be established by Bexhill in accordance with the BBFA [i.e. the Facility Agreement]”.

180. By clause 11.1.3 Bexhill undertook to “collect all other Receivables in the ordinary course of trading as agent for [Barclays]” and immediately upon receipt “pay directly all monies which it may receive in respect of the Receivables into the Collection Account or such other account as [Barclays] may from time to time direct”, but in the meantime to hold all monies so received in trust for Barclays.
181. Clause 16.1 provided that
- “...the security constituted by this Debenture shall become immediately enforceable upon the occurrence of an Event of Default which is continuing unremedied and unwaived...After the security constituted by this Debenture has become enforceable, [Barclays] may in its absolute discretion enforce all or any part of this security in such manner as it sees fit”.
182. Aikens LJ held first that the sums owed to Bexhill by Mr Razzaq as guarantor were themselves Receivables, as were Bexhill’s rights against him and in respect of the property, pursuant to the charge.
183. I turn first to the general points made in paragraphs 44 and 45 of the judgment which are pertinent to this case:
- “44. As a preliminary remark on this issue, it is important to recall the effect of an assignment of a right, whether or not it is a statutory legal assignment. The assignee becomes either the legal or beneficial owner of the thing in action and its benefits. He does not become a party to any contract or deed which contains or gives rise to the right. The assignee will only become a party to the contract (or deed) if there is a novation of the instrument containing or giving rise to the right.
45. Whether a particular instrument creates an “absolute” assignment or an assignment “by way of charge only” is a question of construction of the relevant instrument taken as a whole. That principle and the consequences of an assignment being “absolute” or “by way of charge only” were explained by Mathew LJ in *Hughes v Pump House Hotel Co*. In that case a builder sued to recover debts from his client under a building contract, but the defendant client asserted that the builder had assigned absolutely his right to sue for the debts to the builder’s bank, by virtue of the terms of an instrument between the builder and his bank, that assignment having been given in consideration of the bank agreeing to continue to provide the builder with finance facilities. Mathew LJ said:
- “In every case of this kind, all the terms of the instrument must be considered; and, whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument it is clear that the intention was to give a charge only, then the action must be in the name of the assignor; while on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within section 25 and the action must be brought in the name of the assignee”.
- Mathew LJ concluded that, upon the correct construction of that instrument, the intention of the parties was to pass to the assignees “complete control of all monies payable under the building contract” and that notice of the instrument had been given to the debtor client, so that there was an “absolute assignment” within the statute. Cozens-Hardy LJ gave a concurring judgment. The same approach on how to determine the legal effect of a security document was adopted by Millet LJ in the more recent case of *Orion Finance Ltd v Crown Financial Management*. He emphasised the need to look at the “substance of the parties’ agreement” as found in the language that they have used in the document, in order to determine what the parties intended would be the legal effect of the document. In a subsequent case, Rimer J emphasised the need to prefer a construction which “makes commercial sense”.
184. It was common ground that on the face of the language of clause 3.1.1 (quoted at paragraph 176 above) taken by itself, what was provided for was an absolute assignment of the Receivables. The question then was whether the wider contractual provisions and commercial considerations entailed a different result, as Mr Razzaq contended.

185. Mr Razzaq submitted that provisions like clause 16 and clause 7.1.2 (quoted at paragraphs 179 - 181 above) showed that the security created was consistent with rights being transferred only upon a default. Aikens LJ rejected this, stating that the words of clause 3.1.1 were simple and clear. He said that clause 7.1.2 “is consistent with there being an existing “absolute” assignment in equity of a thing in action”. As for clause 11.1.3 (quoted at paragraph 180 above), he said that this provision

“is concerned only with the collection of Receivables, not with the issue of whether any interest in them has been assigned “absolutely” to Barclays. It is common in the commercial world for A to act as agent for B to collect money or other property that belongs to B.”

186. As for the argument that an absolute assignment in this context would be uncommercial because it was inconsistent with a lender-borrower relationship, Aikens LJ rejected this also. He said that both assignments and charges can be characterised as “continuing security” for the loan facility with Barclays. He said this at paragraph 54:

“In my view the requirement in clause 17.1.10 of the BBFA that Bexhill must ensure that it is clearly stated to be acting as principal and not agent in respect of each Bexhill Facility and all documentation relating to it, does not point to an intention that there should be no “absolute” assignment of rights. Bexhill can be stated as being the principal to a contract with a third party, but the benefit of the rights under that contract can still be transferred to another. As already noted above, there is a difference between being assignee of a right under a contract and being the party who entered into that contract as principal. It is understandable that Barclays would not wish to take on any of the burdens of contracts with third parties, but only have the advantage of any benefits as assignee of rights.”

187. He then said this at paragraph 55:

“To my mind the deciding factor is the obligation of Bexhill in clause 3.3 of the BB Debenture to give a notice of assignment to other parties to “Relevant Contracts” and the terms of that notice, as set out in schedule 2 of the BB Debenture. The standard form of letter is much more consistent with an absolute assignment rather than one by way of charge only. Further, the standard form of letter stipulates expressly that “all rights and remedies in connection with” any agreement that is made between Bexhill and its customers (such as RSA) and “all proceeds and claims arising from” such an agreement are also assigned. The phrases “in connection with” and “arising from” are broad. To my mind they would include RSA’s rights on the Charge and the right to sue Mr Razzaq in respect of it.”

188. Accordingly, he held that there was an absolute assignment here although, because no express notice of it had been given by Bexhill to Mr Razzaq, section 136 did not apply to make it a legal assignment and it took effect as an equitable assignment.

189. I now turn to two first-instance decisions which have been referred to. The first is *The Balder London* [1980] 2 Lloyd’s 489. Here, the vessel had been time sub-chartered to the plaintiff by the defendant. However, after 9 months, the next instalment of hire was not paid and the defendant withdrew the vessel. The plaintiff sought an injunction to stop the withdrawal. One of the arguments raised was that the defendant was debarred from withdrawing the vessel because of an assignment made between it and CLS, the builder of the vessel.

190. The relevant clauses read as follows:

“3. . . . [The defendants] HEREBY ASSIGNS to CLS all [the defendants’] rights title and interest to and in [the charter-party dated Apr. 20, 1979] and any moneys whatsoever payable [to the defendants] under the [time] Charterparty . . . PROVIDED HOWEVER that except during any Notice Period . . . all such moneys shall be payable to [the defendants] . . . and all such other rights and benefits shall accrue to and be enforceable by [the defendants],

4 (ii) [The defendants] will not except with the previous written consent of CLS agree to any material variation of the [time] Charterparty or release . . . or waive . . . the [plaintiffs] obligations . . . or consent to any such act or omission of [the plaintiffs] as would otherwise constitute such breach.

7. IT IS FURTHER AGREED that. . . (a) the [time] Charterparty shall not in any circumstances be determined by [the defendants] by reason of any breach . . . by [the plaintiffs] unless CLS shall first have given its consent in writing to such determination . . .”

191. The agreement further provided that a notice period would commence when the defendant or CLS notified the plaintiff that from then on, payments under the sub-charter would be made to CLS. The defendant further agreed with CLS to send to the plaintiff a notice of the assignment, and this was duly done.
192. Moccatta J held that, absent the proviso to clause 3, there was clearly an assignment which was a legal assignment since notice had been given. But he concluded that the proviso changed all of this, since it suspended the assignment save during the notice period. Accordingly, the purported assignment did not affect the ability of the defendant itself to withdraw the charter party.
193. It may be said (although Moccatta J did not express it this way) that the assignment in this case was only conditional. It was not on any view an absolute assignment.
194. The second case is *The Halcyon* [1984] 1 Lloyd's Rep. 283. Here, the relevant clause read:

“8 ASSIGNMENT OF THE CONTRACT

(A) AS security for the payment of all moneys becoming due to the Bankers in respect of the loan and the Overdraft and interest thereon or otherwise under the terms of this Agreement THE OWNER as BENEFICIAL OWNER HEREBY ASSIGNS AND CHARGES to the Bankers:—

(i) all its beneficial interest and all its benefits rights and titles in and under the Contract and all moneys (if any) payable by the Builder to the Owner thereunder and

(ii) all moneys payable to the Owner in respect of the insurances effected by the Builder under the Contract and all the Owner's interest in connection with such insurances PROVIDED ALWAYS as follows:—

(a) The Owner shall keep the Bankers fully and effectually indemnified from and against all actions losses claims proceedings costs demands and liabilities which may be suffered or incurred by the Bankers under or by virtue of the Contract or in respect of the Vessel . . .

(b) Unless and until the Owner shall fail to observe and perform the obligations on its part to be observed and performed under the Contract and this Agreement in such a manner as in the opinion of the Bankers shall prejudice their interest hereunder and the Bankers shall have given notice to the Builder and the Owner the Owner shall be entitled to exercise all its rights under the Contract (subject as provided in this Agreement) in all respects as if this Agreement had not been made . . .”

195. Staughton J held that this was an assignment by way of charge only. He first referred to the reference to “security for the payment of all moneys becoming due...” But he recognised that this was not sufficient by itself. However, he went on to rely on the expression “assigns and charges” and also the fact that the owner remained entitled to exercise all of its rights over the property until and unless certain events of default occurred under the loan agreement. In other words, and as with *The Balder*, there was a conditional element to the assignment.
196. I would conclude with the following observations. First, it is clear that the exercise of determining whether there has been an absolute assignment or not is highly fact-sensitive. Further, and in particular in the context of the Security Agreement here, it may be that on a proper analysis, Clause 2.1 (c) operates as an absolute assignment in relation to some of the relevant interests and not others. Further, there may be circumstances where, within a particular class of interests purportedly assigned, some would be the subject of an absolute assignment and others would not. It all depends on the exercise of contractual interpretation in the relevant context. In other words, this is not a “one size fits all” exercise.

197. Thus, I am concerned, and only concerned, with the question of whether there was an absolute assignment in relation to the particular interests contended for by WJ.
198. Second, I bear in mind in what follows, that the Security Agreement was drafted by Linklaters and was obviously the subject of agreement between what might be described as sophisticated commercial parties, properly advised.

Relevant Provisions in the Facility Agreement

199. There are numerous parties to this agreement but the borrower is expressed to be USAF No. 18 Limited Partnership (“USAF 18LP”) acting through USAF GP No. 18 Limited (“USAF 18GP”). For present purposes, the lender can be taken to be WF. The Claimants were also parties, under the description “Original Obligors”. The principal amount lent was £100m to be applied for the general purposes of the borrower’s group and for financing acquisitions of additional properties. Clause 17 is a set of detailed provisions concerned with the operation of bank accounts. The overall scheme was that the various forms of income obtained in respect of the provision of student accommodation, whether from individual students or colleges, would be paid into blocked bank accounts from which relevant costs and expenses could be deducted before the income was remitted to a further blocked account which would then be used for the payment of interest etc to WF.
200. In particular, there were the Rent Account, the Deposit Account, the Disposal Account and the General Account. The first three would receive rental and deposit payments and monies from the disposal of properties. Here, WF had sole signing rights. They are referred to in the Security Agreement as “Blocked Accounts”. As for the General Account, this was dealt with by clause 17.8 which provided as follows:
- “17.8 *General Account*
- (a) Except as provided in paragraph (d) below, the Borrower has signing rights in relation to the General Account.
- (b) Each Obligor must ensure that any other amount received or receivable by it, other than any amount specifically required under this Agreement to be paid into any other Account, is paid into the General Account.
- (c) Except as provided in paragraph (d) below and subject to: (i) any restriction in any Subordination Agreement; and (ii) the requirement that amounts paid into the General Account for a particular purpose must be used for that purpose,
- the Borrower may withdraw any amount from the General Account for any purpose.
- (d) At any time when a Default is continuing or the Repeating Representations are not correct, the Security Agent may:
- (i) operate the General Account;
- (ii) notify the Account Bank and the Borrower that the Borrower’s rights to operate the General Account are suspended, such notice to take effect in accordance with its terms; and
- (ii) withdraw from, and apply amounts standing to the credit of, the General Account in or towards any purpose for which moneys in any Account may be applied.”
201. Accordingly, on this account, WF could only “step in” once there had been a default by the borrower, rather like the position in *The Halcyon*.
202. The General Account is referred to in the Security Agreement as an account which is not a Blocked Account or which is an “Unblocked Account”.

Relevant Provisions in the Security Agreement

203. I start with Clause 2.1 (a) and (c). Part of the latter has already been set out at paragraph 30 above, but it now needs to be reproduced in full and alongside, as it were, Clause 2.1 (a) to set out the context.

“2. SECURITY INTERESTS

2.1 Creation of Security Interests

(a) Each Chargor, with full title guarantee and as security for the payment of all Secured Liabilities, charges in favour of the Security Agent:

(i) by way of first legal mortgage, all Real Property in England and Wales (including that described in Schedule 3...owned by it on the date of this Deed;

(ii) by way of first fixed equitable charge, all other Real Property owned by it on the date of this Deed, all Real Property acquired by it after the date of this Deed and, to the extent not validly and effectively mortgaged under sub-paragraph (i) above, all Real Property in England and Wales owned by it on the date of this Deed;

(iii) by way of first fixed charge, all its Bank Accounts to the extent not validly and effectively assigned under paragraph (c) below;

(iv) by way of first fixed charge, all its Receivables to the extent not validly and effectively assigned under paragraph (c) below;

(v) by way of first mortgage, all its Shares;

(vi) by way of first fixed charge, all its Investments;

(vii) by way of first fixed charge, to the extent not validly assigned under paragraph (c) below, all LP Partner's Interests owned by it;

(viii) by way of first fixed charge, to the extent not validly assigned under paragraph (c) below, all of its rights, title and interest in and to:

(i) the Partnership Deed; and

(ii) any and all LP Related Rights;...

(xiii) by way of first fixed charge, all its Lease Documents and all Operating Income, to the extent not validly and effectively assigned under paragraph (c) below;

(xiv) by way of first fixed charge, all its Assigned Agreements, to the extent not validly and effectively assigned under paragraph (c) below are; and

(xv) by way of first floating charge, all its undertaking and all its assets... not otherwise validly and effectively mortgaged, charged or assigned by way of fixed security pursuant to this Clause 2.1)...

(c) Each Chargor, with full title guarantee and as security for the payment of all Secured Liabilities, assigns to the Security Agent by way of security:

(i) all its Bank Accounts;

(ii) all its Receivables;...

(iv) all LP Partner's Interests owned by it;

(v) all its rights, title and interest in and to:

(i) the Partnership Deed; and

(ii) any and all LP Related Rights;

(vi) all its Lease Documents and all Operating Income; and

(vii) all its Assigned Agreements.”

204. It is clear that there is a typographical error in those parts of Clause 2.1 (a) which refer to “paragraph (b) below”. The reference should be to paragraph (c) and that correction has been made in what is quoted above.

205. Pausing here, in terms of the definitions used there is some common ground as to their applicability. First, “Real Property” includes the Lease which is itself specifically referred to in Schedule 3. Second, the CW and all rights to bring claims for breach of duty are “Receivables”. That is because the definition thereof includes, apart from book and other debts, “Related Rights” which in turn include any rights or claims in relation to any Security Asset which itself includes the Lease. Third, WJ contends that the Lease also constitutes an “Assigned Agreement”. This is because the latter expression, as defined in Clause 1.1 of the Security Agreement, includes “Headlease”. That expression is in turn defined in the Facility Agreement (whose definitions are imported into the Security Agreement by Clause 1.2 thereof) as “a lease under which an Obligor holds title to a Property” and the latter in turn includes the Lease. The Claimants do not challenge this proposition. Rather, their point is that there has been no absolute assignment of any Assigned Agreement, including the Lease.
206. I now turn to some other provisions within the Security Agreement.
207. Clause 5 provides for the borrower to ensure that relevant property is registered at the Land Registry, along with any relevant mortgages and charges over property.
208. Clause 6 deals with documents. It includes the provision of relevant Land Registry documents to WF in relation to any Security Interest which has been registered, executed originals of Assigned Agreements and any other documents reasonably required by WF in relation to, among other things, Bank Accounts, Receivables and Assigned Agreements.
209. Clause 7 is headed “Notice of Assignment”. Clause 7.2 requires notice to be given to tenants of the charge over Lease Documents and Operational Income. Clause 7.3 deals with the bank accounts. The notice of assignment for Blocked Accounts is at Schedule 8. In effect, it mandates the relevant bank to deal only with WF in the operation of those accounts. The notice of assignment for the unblocked accounts is at schedule 9. It instructs the bank to comply with all instructions given to it by WF. In both cases, the bank is notified of the assignment by way of security of all the assignor’s rights title and interest in the bank accounts.
210. Clause 7.4 deals with Assigned Agreements. These include, specifically, Nomination Agreements whereby higher education providers agreed terms for the provision of a certain amount of student accommodation, Rent Collection Agreements (by which rent is collected by an agent) and the Operating Agreement made around the same time. It requires the sending of a notice of assignment in the form set out in Schedule 11.
211. Clauses 7.5 and 7.6 are important and provide as follows:
- “7.5 Receivables
Each Chargor shall promptly collect all Receivables and shall hold the proceeds of collection on trust for the Secured Parties, subject to their application in accordance with the Finance Documents.
7.6 Restrictions on dealing with Receivables
No Chargor shall enter into a single transaction or a series of transactions (whether related or not and whether voluntary or involuntary) to sell, factor, transfer, discount or otherwise dispose of all or any part of any of its Receivables, except as permitted by the Facility Agreement.”
212. Finally, Clause 19.1 provides as follows:
- “Final redemption

Subject to Clause 19.2 (Retention of security), if all amounts which may be or become payable by the Obligors or the Chargors under or in connection with the Finance Documents and Hedging Agreements have been irrevocably paid in full and that all facilities which might give rise to Secured Liabilities have terminated, the Security Agent shall:

(a) as soon as practicable, following the request of and at cost of the Chargors release, reassign or discharge (as appropriate) the Security Assets from the Security Interests, without recourse to, or any representation or warranty by the Security Agent or any of its nominees; and

(b) return all Title Information Documents and other original documents delivered to the Security Agent under or in connection with this Deed."

The Position of WF

213. Although WF is not a party to these proceedings and no application has been made thus far to join it, it has expressed its own view in the WF Letter dated 19 January 2023 as follows:

"Dear Sirs

£150,000,000 Facility Agreement originally dated 11 August 2016 as amended pursuant to an amendment and restatement agreement dated 20 April 2022 and further amended and restated pursuant to an amendment and restatement agreement dated 12 October 2021 (the "Facility Agreement")

Security Agreement dated 11 August 2016 in favour of Wells Fargo Bank NA London Branch (the "Security Agreement")

As you are aware, Wells Fargo Bank N.A. ("Wells Fargo") acts as agent and security agent under the Facility Agreement and the Security Agreement (collectively the "Agreements"). Terms and expressions used in this letter have the meaning given to them in the Agreements. We are writing to you in your capacity as Borrower and Obligor's Agent.

We understand that legal proceedings (the "Proceedings") have been commenced before the High Court in London between: (i) USAF Nominee No 18 Limited, USAF Nominee No 18A Limited and Sanne Trustee Services Limited as managing trustee of USAF Portfolio 18 Unit Trust (as "Claimants"); and (ii) Watkin Jones & Son Limited (as "Defendant"), relating to defects at a property known as Jennens Court, Queensway, Birmingham (the "Property"). Each of the Claimants are respectively Obligors under the Facility Agreement and Chargors under the Security Agreement. The Property is listed in Schedule 3 to the Security Agreement as one of the properties over which security has been granted in connection with the Facility Agreement - with the Claimants listed as the legal and beneficial holders of the long leasehold interests in the Property.

We understand that, during the course of the Proceedings, it has been suggested that the Claimants have, by way of the Security Agreement, assigned absolutely to Wells Fargo their rights under various contracts with the Defendant and their interest in the Property.

We do not agree with that suggestion. The Security Agreement is based on a precedent form security agreement produced by the Loan Market Association. It creates security interests over the assets (including the Property) that are the subject of that agreement - principally by way of charge or mortgage. It does not include any absolute assignments of the assets charged. It is enforceable upon an Event of Default under the Facility Agreement. Pending enforcement, Wells Fargo accepts no responsibility and has no involvement in the operation or management of the Property or the other rights or assets over which security has been granted. That remains the responsibility of the Claimants or other relevant party appointed.

It is also the Claimants' responsibility to pursue their rights under the relevant third party contracts relating to such operation and management of the Property. In particular, Wells Fargo does not consider that the effect of the Security Agreement is to assign absolutely to it title to pursue any such claims in relation the Property (including as against the Defendant). Wells Fargo considers that it is for the Claimants, as registered proprietor of the leasehold interests in the Property, to pursue any such claims. The proceeds of any such claims may fall within the terms of the Security Agreement.

This letter is prepared without prejudice to Wells Fargo's rights under the Facility Agreement, Security Agreement and all related documentation, whether in connection with this dispute or otherwise. All such rights are reserved."

214. Of course, WF's own subjective views as to whether or not there was an absolute assignment are irrelevant but, as already stated, there is an issue as to whether the WF Letter can

constitute a consent from WF to the Claimants to bring the present claims on its behalf. I deal with this below.

Analysis 1: PI 13 (a) and (b) - the CW and the Claims

215. I deal first with these parts of PI 13 which concern the alleged assignment of the CW itself and then all the claims made here including that made under the CW. The parties did not in any significant way distinguish between the position in relation to (a) and (b) and neither do I.
216. The starting point is that the claims are all agreed to be Receivables for the reasons already given. I then turn to the language of the opening part of Clause 2.1 (c) set out at paragraph 203 above. While the word “assigns” is used, the further word “absolutely” is not present, as it was in *Bexhill*. On the other hand, the word “charges” does not appear, as it did in the clause in *Halcyon*. Like both *Bexhill* and *Halcyon*, there is a reference to the assignment being “as security for the payment...” of the relevant debts. In fact, there is then a further similar expression “by way of security” as well. References to “security”, however, do not themselves necessarily connote a charge, as both sides accept and as is implicit in *Bexhill* and *Halcyon*.
217. If one takes the opening words of Clause 2 (1) (c) by itself, I do not consider that it is clear on its face that it was creating an absolute assignment. In any event, it must be construed in context.
218. The most immediate context is Clause 2 (1) (a), also set out at paragraph 203 above. The structure of that provision, when taken with Clause 2 (1) (c) suggests that the parties’ intentions were to create assignments over the relevant interests, including Receivables, as distinct from “mere” charges. But if for some reason, assignments were not created then there would be a charge. This is demonstrated by the words “to the extent not validly and effectively assigned under paragraph (c) below”. This also demonstrates that the parties were well aware of the distinction between an assignment (if absolute) and a charge.
219. All of this might be thought to be a strong contextual indicator that the assignments referred to in Clause 2.1 (c) were absolute assignments with what might be described as a “fallback” position in Clause 2.1 (a) even though that provision came first. I see the force of this but do not think it makes redundant the exercise of looking at the whole context of Clause 2.1 (c), to see whether in truth there was an absolute assignment. The parties were obviously alive to the fact that notwithstanding Clause 2.1 (c) there was a possibility that one or more of the 7 different purported assignments might not amount to absolute assignments. Nor is this possibility simply about whether any purported assignment was a legal or equitable one. That is because the distinction is rather between an assignment and a charge, which goes to the substantive characterisation of the security purportedly granted. So while the scheme of Clause 2.1 (a) and (c) is a pointer in favour of a desire to create an assignment it is not a strong one in my view.
220. I then turn to Clause 7, set out at paragraph 209 above. This deals with required notices of assignment and other matters. Of course, there is no need for the agreement which creates an assignment to stipulate that a notice of assignment must be given, whether under section 136 or otherwise. If none is given, the only point is that the assignment cannot be a legal one. Nonetheless, I think that the absence of a notice of assignment requirement so far as

Receivables are concerned as a factor pointing towards a charge. It is to be recalled that Aikens LJ regarded the fact that a notice of assignment was required in relation to the purported assignment in *Bexhill* was a critical factor for him.

221. Within Clause 7, Clause 7.5 (see paragraph 211 above) is material here. The Claimants argue that this provision indicates a charge because if there had been an absolute assignment of the Receivables, it would not be the chargor who would collect them - it would be the “owner” i.e. WF. As against that, WJ relies on what Aikens LJ said about a similar though not identical clause in *Bexhill* to the effect that such a clause was simply dealing with the mechanics of collection not the nature of the underlying assignment and it was not unusual for a principal who owned property, to appoint the assignor as agent to make collections under it. See paragraph 185 above. I see that, especially in the context of the clause in *Bexhill*, which referred expressly to the assignor acting as agent but also where it mandated payment of the receivables to be collected into the Collection Account over which Barclays had effectively “complete control” - see paragraphs 10 and 20 of the judgment of Aikens LJ.
222. However, in this case, it is important to understand how Clause 7.5 works. While the proceeds of the Receivables were to be held initially on trust, they were then to be applied in accordance with the Finance Documents. These included the Facility Agreement. If there was a Receivable which had to be paid into the Rent Account, for example, then that is where it would go, and pending that it would be held on trust for WF.
223. The Receivables in question here would be the proceeds of any claims which were to be “collected” by the Claimants. On any view, the claims, while strictly within the definition of “Receivables” are not paradigm examples of receivables which is why the duty to “promptly collect” them sounds somewhat odd. Nonetheless, neither side suggested that Clause 7.5 did not apply to the proceeds of any claims. But once “collected” (if the Claimants succeed on their claims against WJ) Clause 17.8 (b) of the Facility Agreement (see paragraph 200 above) mandated that they were to be paid into the General Account, after which the borrower could do what it wanted with them. This is because there is no other particular Bank Account into which they must be paid. It is correct that there is a proviso here in sub-paragraph (c) (ii) to the effect that “amounts paid into the General Account for a particular purpose must be used for that purpose”. But there is no purpose stated for which these payments (i.e. the proceeds of the claims) are to be used here. So in the case of these Receivables, the real control lay with the borrower.
224. WJ has made the general point that, as with *Bexhill*, WF is given extensive control over the Bank Accounts. That is true for the Blocked Accounts, but not for the General Account which is an Unblocked Account. Of course, in the event of default, WF can step into the General Account and that is certainly consistent with there being a charge over it. But it is not consistent with an absolute assignment.
225. For all of those reasons, I consider that Clause 7.5 and the treatment of the proceeds of the Receivables pertinent to this case are strong pointers against an absolute assignment.
226. One then turns to Clause 7.6 (cited at paragraph 211 above). The Claimants also rely on this provision on the basis that if WF was the “true owner” as it were, of the Receivables, then there would be no need to create an obligation on the chargor not to deal with the Receivables in a certain way because they were not now its receivables to deal with anyway. I see the

force of that. Of course, even with an absolute assignment, it might be a useful express restriction even if strictly unnecessary. Nonetheless, Clause 7.6 is in my judgment a pointer towards a charge.

227. A further provision is Clause 19, cited at paragraph 212 above. This refers to release, reassignment or discharge of the Security Assets “as appropriate”. In other words, if the security was a charge, there would be a release or discharge and if it was an assignment, there would be a re-assignment. Since Clause 2.1 contemplated either or both forms of security, this general provision does not really assist either party here.
228. There are then some broader commercial points. First, it is said by the Claimants that if there was an absolute assignment of receivables, then it would be difficult for the Claimants to carry on their business meaningfully. A similar though not identical argument was made in *Bexhill* when it was suggested that an absolute assignment was inconsistent with a borrower-lender relationship. Aikens LJ rejected that broad proposition, saying that an assignment made by way of security was still consistent with the borrower-lender relationship. He also pointed to the fact that while there were some absolute assignments, there were charges as well.
229. In fact, in the present context, there was considerable flexibility granted to the borrower because of its right to use the General Account for its own purposes. So I do not think that there is a separate commercial point which is in favour of the Claimants here.
230. On the other hand, WJ makes a counter-point, as it were, which is that the amount of money being lent here i.e. £100m for general corporate purposes, constituted a considerable risk for WF as lender and therefore objectively, it was more likely that WF wanted to have assignments rather than charges so as to be afforded maximum protection. I do not think that there is anything in this; an extensive array of securities, even if all provided by way of charge, is hardly to be dismissed as being of no real significance.
231. Having regard to all of the matters noted above, and applying the tests set out in paragraphs 166 and 168 above, in my view, there was no absolute assignment of the Receivables, which encompassed the CW and the Claims here.
232. In the light of that conclusion it is not necessary to decide the separate point about the effect of s6(3) of the DPA.

Analysis 2: PI 13 (c) - the Lease

233. WJ does not suggest that there has been an assignment of the legal title to the Lease which was and remains with C1 and C2. And here, section 58 of the LRA 2002 is conclusive on that point.
234. However, WJ contends that the equitable interest in the Lease has been assigned by reason of Clause 2.1 (c) (vii) which relates to “Assigned Agreements”. It is common ground that the Lease is an Assigned Agreement although again, in my view, it is hardly a paradigm example of it.

235. It is necessary to be clear about the relevance of this argument. According to WJ, if it is correct, it means that C1 and C2 hold their legal title in in the Lease on bare trust not for C3 but for WF. WJ goes on to say that this means that they cannot bring the DPA Claim in their own capacity - see paragraph 161 of WJ's Skeleton Argument.
236. WJ essentially argues for the conclusion that there has been a transfer of the equitable interest in the Lease in two ways. First, at paragraph 160 of its Skeleton Argument, it submits that an equitable lease has been created in favour of WF because there has been a failed attempt at a transfer of the legal title. Reliance is placed on paragraphs 18.19 and 15.01 to 15.03 of *Smith and Leslie*. The latter passages deal with the operation of the "rule" in *Walsh v Lonsdale* (1882) 2 ChD 9.
237. There was no extended discussion of these passages at the trial but having been referred to them and considering them in context, I fail to see what they have to do with the situation here. This is not a case of a failed transfer or assignment of the legal interest. Any purported assignment by C1 and C2 of their legal interest in the Lease would be completely inconsistent with their obligation to create a first legal mortgage over the Lease pursuant to clause 2.1 (a) (i). Nor is this a case of an agreement to assign (as opposed to an actual assignment) where equity might step in.
238. So I reject the contention made in paragraph 160 that an equitable lease in favour of WF has been created.
239. Paragraph 161 contends that the result of WJ's argument for an equitable lease is that "there are clear implications for the Claimants' right to claim for breach of s 1 (1) of the DPA". But first, I have rejected that argument. Second, and in any event, C1 and C2 clearly have a legal interest in the Property through the Lease, so I fail to see why they do not qualify under section 1 (1) in any event. If the argument is no more than that the Claimants have assigned the DPA Claim itself *qua* Receivable, I have already rejected that argument.
240. A second point made by WJ at paragraph 162 of its Skeleton argument is that, in any event, and regardless of the positions of C1 and C2, it was open to C3 to assign its equitable interest in the Lease to WF and has done so.
241. I do not agree, for the reasons given below, which would also stand as further reasons for rejecting the notion of the creation of an equitable lease on the basis of a failed assignment of the legal interests by C1 and C2.
242. I turn first to the provisions of Schedule 11 which set out the form of notice of assignment which is mandated by Clause 7.4 (a) of the Security Agreement. This provides as follows:

"From: Wells Fargo Bank, N.A. ... and [1 (the
"Assignor)
To: [Party to the Assigned Agreement]...

Dear Sirs

...We give notice that by an assignment contained in the Security Agreement the Assignor assigned to the Security Agent by way of security all its right, title and interest from time to time in and to the Assigned Agreements, details of which are set out in the attached schedule (the "Assigned

Agreements"), including all moneys or proceeds paid or payable deriving from the Assigned Agreements.

3. Until you receive written instructions from the Security Agent to the contrary, all moneys payable by you to the Assignor in respect of the Assigned Agreements shall be paid [into the following account: ... unless and until you receive written notice from the Security Agent to the contrary, in which event you should make all future payments as then directed by the Security Agent]/[to the account notified to you by the Assignor.]

4. Despite the assignment referred to above or the making of any payment by you to the Security Agent pursuant to it:

- (a) the Assignor shall remain liable to perform all its obligations under each Assigned Agreement; and
- (b) neither the Security Agent nor any receiver, delegate or sub-delegate appointed by it shall at any time be under any obligation or liability to you under or in respect of any Assigned Agreement.

5. The Assignor shall remain entitled to exercise its rights, powers and discretions under each Assigned Agreement, except that the Assignor shall not and you agree that the Assignor shall not, without the prior written consent of the Security Agent:

- (a) amend, supplement, vary or waive (or agree to amend, supplement, vary or waive) any provision of any Assigned Agreement;
- (b) exercise any right to rescind, cancel or terminate any Assigned Agreement;
- (c) release any counterparty from any obligations under any Assigned Agreement;
- (d) waive any breach by any counterparty or consent to any act or omission which would otherwise constitute such a breach; or
- (e) except as provided in the Security Agreement, novate, transfer or assign any of its rights under any Assigned Agreement...

9. Please acknowledge receipt of this notice of assignment and confirm that:

- (a) you will pay all moneys in respect of each Assigned Agreement as directed by or pursuant to this notice of assignment;
- (b) you have not received any other notice of any assignment of any Assigned Agreement;
- (c) you will not claim or exercise any set-off or counterclaim in respect of any Assigned Agreement; and
- (d) you will comply with the other provisions of this notice of assignment, by signing the acknowledgement on the attached copy of this notice of assignment and returning that copy to the Security Agent."

243. Clearly, this notice is intended to be addressed to the other party to the Assigned Agreement in question, which here would be the lessor. Paragraph 4 of the notice stipulates that the assignor remains liable to perform all of the obligations under the agreement and there would be no liability on the part of WF to the lessor. WJ makes the point that it is perfectly possible to assign the benefits of a contract and not the burdens, and indeed, that if the latter were transferred, this would amount to a novation. I quite see that, but it then raises the question of what, exactly, was being assigned here.

244. If, for example, the correct position in relation to this Assigned Agreement is that what was being assigned was any income stream due to the Claimants under the Lease (the existence of which is dubious, since it would have to be payments from the lessor) that is not the same as a transfer of C3's equitable interest therein. Moreover it would have nothing to do with the ability of any of the Claimants to make the DPA Claim which is the only relevance of the argument about the transfer of the Lease.

245. I also think there is force in the Claimants' point about paragraph 5 of the notice. It is very difficult to see how there could be an absolute assignment where the Claimants remain entitled to exercise all of their rights and powers under the Lease which would, of course,

include possessory rights. Equally, the prohibition on certain dealings with the Lease also within paragraph 5 (including transferring or assigning rights under the Lease) without the consent of WF pre-supposes that the Claimants would otherwise have such powers, which they would not if there had been an absolute assignment.

246. The provisions of paragraphs 4 and 5 might well be consistent with the making of a charge, but not an absolute assignment. Yet further, in this case even a charge does not make much sense where there is already an express first legal mortgage of the Lease in any event.
247. Indeed, in relation to the Lease, I find it difficult to see how (save perhaps for something like an income stream) it can have been objectively intended to do anything other than create the first legal mortgage so far as it was concerned. On any view, I cannot see that whatever might have been assigned could in any way affect the Claimants' title to sue under the DPA claim.
248. A point made by the Claimants is that the obligation to register the Lease and the mortgage pursuant to Clause 5.1 of the Security Agreement is itself inconsistent with any intention to create an absolute assignment of the Lease. I would agree with that in relation to WJ's first argument about a failed transfer of the legal interest. In relation to its second argument about the transfer of C3's equitable interest I accept that there could, in theory, be such a transfer, notwithstanding those provisions. The same position pertains in relation to Clause 6 of the Security Agreement. However, as already noted, there are other strong arguments against an absolute assignment of C3's equitable interest anyway.
249. For all those reasons, I do not consider that there was an absolute assignment of the Lease by any of the Claimants in the sense contended for by WJ.

Conclusions on PI 13

250. It follows that the answer to PI 13 is "No" in all respects, save for the issue concerning section 6 (3) of the DPA which did not arise.

PI 14

251. This asks as follows: **If and to the extent that the answer to Issue 13 is "Yes" was such an assignment a legal or equitable assignment? In respect of the Collateral Warranty only, this question is to be answered: (a) On the assumption that notice of the First Assignment to Pavilion was given to the Defendant on or around 21 July 2014 (b) On the assumption that such notice was not given.**
252. Strictly, this issue does not arise since I have found that there was no underlying absolute assignment anyway. However, since this is mostly common ground subject to one short point, I will deal with it.
253. It is common ground that C1 and C2 were only equitable assignees of the CW. See paragraphs 162 and 163 above. The question as to whether notice of the First Assignment was given on or around 21 July 2014 makes no difference because of the lack of a notice of the Second Assignment as at the time of the Security Agreement. Further, WJ accepts that there could be no assignment of C1 and C2's legal interest in the Lease. C3's interest was, of course, equitable.

254. While, technically it might be possible nonetheless to have a legal (as opposed to equitable) assignment of an equitable interest (including one held by the beneficiary of an equitable assignment) this point is academic. That is because, in my judgment, there was no notice of any assignment that may have been made, as required by section 136.
255. The only document upon which WJ relies to support its contention that there was such a notice is the letter dated 19 October 2022 sent by the Claimants' solicitors to WJ's solicitors ("the October 2022 Letter"). This was written in response to WJ's application to strike out the claims on the basis of a lack of title to sue, which application was later withdrawn.
256. The October 2022 Letter stated, in part, as follows:
- "Whilst the very clear language of the Security Agreement demonstrably is only creating a charge over these assets and/or an assignment by way of security only, we note that Mr Giles' statement does not address the notice requirements of section 136(1) of the Law of Property Act 1925. A legal assignment can only take place when express notice in writing has been given to the debtor, i.e. your client. Please therefore confirm what notice of assignment (if any) your client purports to rely on in support of its application, and provide a copy of the same."
257. This point was made because in the strike-out application, it was never suggested that there had been a notice of assignment. WJ now contends that the October 2022 Letter is itself a notice of assignment. That suggestion is misconceived. The whole point of the October 2022 Letter was to say, first, that there had been no assignment at all, as opposed to a charge, and second, that there was no notice anyway. As the Claimants say, this is the obverse of a notice of assignment. Its content does not fulfil the requirements of section 136, as summarised *Guest on the Law of Assignments* (4th edition) at paragraph 2-30 (cited at paragraph 119 of the Claimants' Skeleton Argument):
- "But it is submitted that, to amount to express notice, the terms of the notice must be such as to indicate with sufficient certainty to the person to whom the notice is given that there has been an assignment and it should identify the debt or other subject-matter of the assignment and sufficiently identify the assignee."
258. Accordingly, there never was any legal assignment here of any interest covered by the Security Agreement even if (contrary to my findings above) there was an absolute assignment.
259. Thus, the answer to PI 14 is: if there had been any relevant absolute assignment, it would have been an equitable and not a legal assignment.

PI 15

260. This asks as follows: **If and to the extent that the answer to Issue 14 is that the assignment to Wells Fargo operated as a "legal assignment" do any of the Claimants have standing to bring these proceedings?**

261. This does not arise.

PI 16

262. This asks as follows: **If and to the extent that the answer to Issue 14 is that the said assignment was equitable in nature do any of the Claimants have standing to bring these proceedings: (a) on their own account? (b) as trustees for Wells Fargo?**

263. Again, this point does not now arise but as there is common ground subject only to another short point, I deal with it.
264. WJ's answer to this issue is that the Claimants do not have standing to bring these proceedings on their own account, but they do as trustees for WF, provided that WF consents. See the Appendix to its Skeleton Argument under PI 16. As to capacity, the Claimants accept that amendments to the Claim Form would be necessary to show the capacity in which C1 and C2 sue.
265. As for consent, the Claimants contend that the WF Letter (set out at paragraph 213 above) amounts to such consent. I disagree. It is merely stating WF's position as to the effect of the Security Agreement here. It does not authorise the Claimants to bring the claims on its behalf as beneficiary, as the result of an equitable assignment. That is not to say that it could not do so, if that turned out to be the position, but no doubt, there would have to be an agreement between it and the Claimants as to who bears the costs etc. So a separate consent would be required.
266. In the event, of course, this point is academic.

PI 17

267. This asks: **If (which is to be determined at trial) notice of the First Assignment to Pavilion was not given to the Defendant on or around 21 July 2014 then was notice of the First Assignment either on or around 22 September 2020 or 22 July 2021 capable of being effective, notwithstanding the occurrence of events between 21 July 2014 and 22 September 2020 and/or 22 July 2021?"**
268. This point is also now academic in the light of the absence of any absolute assignment. On this issue, the parties disagree and the issue raises questions of law on which it is said that there is no relevant authority. In addition, there was no real oral argument. In those circumstances, I do not consider it necessary or appropriate to decide this point on a hypothetical basis.

CONCLUSION

269. The overall conclusion is therefore that there is no impediment to the Claimants' title to sue and the action will now proceed to trial on the substantive issues.
270. I am very grateful to Counsel for their assistance and submissions.



Neutral Citation Number: [2024] UKUT 59 (LC)

Case No: LC-2024-59

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

FTT REF: LON/00BG/HY1/2023/0022

15 March 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

BUILDING SAFETY – ACCOUNTABLE PERSON – whether a tribunal appointed manager is an accountable person – whether manager’s functions which overlap with building safety functions are discharged or continue – Part 4 and Schedule 7, Building Safety Act 2022; section 24(2E), Landlord and Tenant Act 1987 – appeal dismissed

BETWEEN:

SOLOMON UNSDORFER

Appellant

-and-

OCTAGON OVERSEAS LIMITED (1)

CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED (2)

RIVERSIDE CREM 3 LIMITED (3)

CIRCUS APARTMENTS LIMITED (4)

JOSEPHINE SWABY

(ON BEHALF OF THE RESIDENTS’ ASSOCIATION OF CANARY RIVERSIDE) (5)

Respondents

Canary Riverside Estate,
Westferry Circus, London E14

Martin Rodger KC,
Deputy Chamber President

29 February 2024

Daniel Dovar, instructed by Wallace LLP, for the appellant

Timothy Morshead KC, instructed by Freeths LLP, for first to third respondents

Philip Rainey KC made submissions in writing on behalf of the fourth respondent

Jonathan Upton made submissions in writing on behalf of the fifth respondent

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The following cases are referred to in this decision:

FirstPort Property Services Ltd v Settlers Court RTM Company Ltd [2022] UKSC 1

General Medical Council and others v Michalak [2017] UKSC 71; [2017] 1 WLR 4193

K Group Holdings Inc v Chuan-Hui [2021] 1 WLR 5981

Maunder Taylor v Blaquiere [2003] 1 WLR 379

Moore v Gad [1997] BCC 655

O (a minor), R (on the application of) v Secretary of State for the Home Department [2022] UKSC 3

Orchard v Mooney [2023] UKUT 78 (LC)

Pepper v Hart [1993] AC 593

Royal Borough of Kensington & Chelsea v Lessees of 1-124 Pond House [2015] UKUT 395 (LC); [2016] L&TR 10

Sadeh v Mirhan [2015] UKUT 428 (LC)

Introduction

1. Can a manager appointed by the First-tier Tribunal under section 24, Landlord and Tenant Act 1987, be an “accountable person” within the meaning of section 72, Building Safety Act 2022?
2. That is the question which arises in this appeal against a decision of the First-tier Tribunal (Property Chamber) (Judge Vance and Judge Rushton KC) (the FTT) made on 21 December 2023. It was answered by the FTT as a preliminary question of law in an application made on 4 October 2023 by the first, second and third respondents for a determination under section 75, Building Safety Act 2022 (the 2022 Act) identifying the accountable persons and to select one of them as the principal accountable person in respect of each of the higher-risk buildings comprising the Canary Riverside Estate in East London.
3. The FTT’s answer to the question was that a tribunal appointed manager could not be an accountable person within the meaning of section 72, 2022 Act. That conclusion enabled it to answer the first of the questions raised by the application by identifying all those who are accountable persons in respect of the higher-risk buildings on the Estate. The second part of the application, in which the FTT must determine who is the principal accountable person in respect of each of the buildings, remains to be determined.
4. The FTT granted permission to appeal.
5. Canary Riverside is a large mixed estate comprising both residential and commercial premises in the docklands area of East London. It includes five buildings which, because of their size, are classified as “higher-risk buildings” for the purpose of the 2022 Act. These buildings have been the subject of disputes between the owners of the Estate and its residents since at least 2005 and their residential parts have been under the management of a manager appointed by the FTT pursuant to Part 2, Landlord and Tenant Act 1987 since 2016.
6. The appellant, Mr Unsorfer, was appointed by the FTT as the manager of the Estate in September 2019 to replace Mr Alan Coates who had held that position since October 2016.
7. The first, second and third respondents are all members of the Yiannis Group of companies. Octagon Overseas Ltd, the first respondent, owns the freehold of the Estate. Canary Riverside Estate Management Ltd, the second respondent, holds part of the reversion to a long lease from Octagon now comprising four of the higher-risk buildings on the Estate (Belgrave Court, Berkeley Tower, Eaton House and Hanover House). Riverside CREM 3 Ltd, the third respondent, holds the severed remainder of the reversion to the same long lease comprising Circus Apartments, the fifth higher-risk building. I will refer to the first, second and third respondents as “the Landlords”.

8. The fourth respondent, Circus Apartments Ltd, holds a sublease of Circus Apartments from Riverside CREM 3 Ltd for a term of 999 years. It is entitled to use the building as serviced apartments.
9. The fifth respondent named by the Landlords in their application to the FTT was the Residents Association of Canary Riverside, which represents the long leaseholders of the residential buildings on the Estate. For the purpose of the appeal the Association has nominated Ms Josephine Swaby, the fifth respondent, as its representative member.
10. Whether Mr Unschorfer's appointment should be renewed, and if so on what terms, is the subject of applications to the FTT under section 24, Landlord and Tenant Act 1987 which are due to be heard over eight days beginning on 7 May. The question posed in this appeal is very relevant to the FTT's consideration of those applications and the appeal has therefore proceeded on an expedited basis.
11. Written submissions in support of the Manager's appeal were provided on behalf of the fifth respondent by Mr Jonathan Upton and on behalf of the fourth respondent by Mr Philip Rainey KC. At the hearing of the appeal the Manager was represented by Mr Daniel Dovar and the Landlords by Mr Timothy Morshead KC. I am grateful to all those who have participated.

Part 4 of the Building Safety Act 2022

12. The 2022 Act was enacted following the Grenfell Tower fire of 14 June 2017 and as section 1(1) states, it contains provisions intended to secure the safety of people in or about buildings and to improve the standard of buildings. The Act was preceded by the report of the Independent Review of Building Regulations and Fire Safety, led by Dame Judith Hackitt, and gave effect to many of the report's recommendations.
13. The 2022 Act is in six Parts. Part 1 is introductory. Part 2 creates the post of building safety regulator (the Regulator) and describes its functions. Part 3 amends the Building Act 1984 to confer powers and duties on the Regulator. Part 4 is about higher-risk buildings in England and creates the status of "accountable person" and the duties which go with it which are the subject matter of this appeal. Part 5 is about leaseholder protections and Part 6 contains general provisions.
14. Part 4 of the 2022 Act is titled "Higher-Risk Buildings" and contains provisions about the management of "building safety risks" in relation to such buildings. Most of its substantive provisions came into force on 6 April 2023.
15. "Building safety risks" are risks to the safety of people in or about a building arising from the spread of fire or structural failure or any other matter prescribed by regulations (section 62(1)).
16. A building in England is a "higher-risk building" if it is at least 18 metres in height or has at least 7 storeys, and contains at least 2 residential units (section 65(1)). A residential unit means a dwelling or any other unit of living accommodation (section

115). A higher-risk building is “occupied” if there are residents of more than one residential unit in the building (section 71(2)).

17. Responsibility for the management of building safety risks in higher-risk buildings falls on an “accountable person” and the greater part of Part 4 is concerned with the duties of such a person. One recommendation of the Hackitt report was that there should be a clear duty holder in respect of buildings who can be held to account and will have statutory obligations for building safety. The accountable person is that person.
18. Although the definition of accountable person is quite complex, the basic point is that an accountable person is someone who owns or has obligations to repair any of the common parts of a higher-risk building.
19. The status of accountable person is not granted by a determination of a tribunal or by an agreement between owners or occupiers of the building; it applies by virtue of the 2022 Act, and it carries with it duties, breach of which exposes the accountable person to the risk of criminal sanctions. Nor can the accountable person decline or renounce the status (other than by disposing of the interest or obligation which gives rise to it).
20. Section 72(1) defines “accountable person” and is reproduced in full, together with section 73 which defines “principal accountable person”, in the appendix to this decision. The key provision is section 72(1), as follows:

72 Meaning of "accountable person"

(1) In this Part an "accountable person" for a higher-risk building is—

- (a) a person who holds a legal estate in possession in any part of the common parts (subject to subsection (2)), or
- (b) a person who does not hold a legal estate in any part of the building but who is under a relevant repairing obligation in relation to any part of the common parts.

This subsection is subject to subsection (5) (special rule for commonhold land).

21. This basic provision is qualified by definitions and exceptions. The most significant of these, for the purpose of this appeal, are the definitions of “common parts” and “relevant repairing obligation”.
22. Section 72(6) provides that the “common parts” of a building are the structure and exterior of the building (except so far as they are included in the demise of a single dwelling or of premises to be occupied for the purpose of a business), or any part of the building which provided for the use, benefit or enjoyment of the residents of more than one residential unit. It will therefore normally include both the main structure and installations (lifts, fire alarms, lighting etc) and the internal circulation areas, hallways, corridors, staircases etc which are used by the occupants of more than one flat or apartment in the building.

23. Section 72(6) also contains the following explanation of “relevant repairing obligation”:
- a person is under a relevant repairing obligation in relation to anything if the person is required, under a lease or by virtue of an enactment, to repair or maintain that thing.
24. It can therefore be seen that section 72(1) provides two alternative bases on which a person may be accountable.
25. The first is that the person holds a “legal estate in possession” in any part of the common parts. Section 72(6) explains that for this purpose, “possession” does not include the receipt of rents and profits or the right to receive them. To qualify as an accountable person under section 72(1)(a), a person must therefore hold the common parts in hand and must not have let them to someone else. This limb is subject to section 72(2) which provides that a person, referred to as “the estate owner”, who holds a legal estate in possession in all or part of the common parts is not an accountable person in two circumstances. The first will typically apply where responsibility for the repair of the common parts has been conferred on a management company, and the second where all repairing obligations relating to the relevant common parts have been taken from the estate owner by an RTM company.
26. The other basis on which someone may be an accountable person is under section 72(1)(b). A person who does not hold a legal estate in any part of the building but who is nevertheless under a relevant repairing obligation in relation to any part of the common parts (such as a management company or an RTM company) will be an accountable person. Circumstances in which this limb will apply will include where one or other of the exceptions in section 72(2) prevents the person who holds the legal estate in possession from being an accountable person. Whether it has a wider application, including to tribunal appointed managers, is the issue in the appeal. It is noteworthy at this stage that there is no equivalent of section 72(2) specifying that where a tribunal appointed manager has responsibility for the repair of the common parts the estate owner is not an accountable person.
27. Section 72(3)-(4) covers the situation in which the common parts of a building are demised by one or more leases in a chain, with the relevant repairing obligation being retained by a landlord further up the chain than the person in possession. In that situation the landlord which is under the repairing obligation in relation to the common parts is treated as being the landlord in possession for the purpose of determining who is the accountable person.
28. Part 4 of the Act imposes duties on the accountable person to take a variety of steps to manage building safety risks. The purpose of the definitions in section 72 is to identify those who are in a position to take those steps. Thus, the essence of being an accountable person is that one must either be in possession of the common parts of the building (including the structure and exterior) or be under a relevant repairing obligation in relation to the common parts.

29. It is possible that more than one person may be an accountable person for a building as, for example, where one estate owner is under a relevant repairing obligation in relation to the structure and exterior of the building, and a different person is under a relevant repairing obligation in relation to the interior common parts. I was told, for example, that Octagon, as freeholder, has retained responsibility for repairs to the foundations of Canary Riverside, but has passed on responsibility for the repair of the rest of the common parts to the other Landlords. To avoid duplication of responsibility and the confusion or delay which might result, section 73 provides for one accountable person to be identified as the “principal accountable person”.
30. Where a building has only one accountable person, they are the principal accountable person (section 73(1)(a)). Where a building has more than one accountable person, the principal accountable person is the one who holds a legal estate in possession in the relevant parts of the structure and exterior of the building, or who is within section 72(1) (b) because of a relevant repairing obligation in relation to the structure and exterior of the building (section 73(1)(b)). Once again, the Act seeks to assign responsibility to the person in the best position to take necessary steps to manage building safety risk and assumes that to be the person who controls or is already obliged to repair the structure and exterior of the building.
31. The Higher-Risk Buildings (Key Building Information etc) Regulations 2023, made under section 74, allocate responsibility for different parts of a building which has more than one accountable person. As this appeal does not raise any issue to which the Regulations relate it is not necessary to consider them.
32. Section 75(1)(a) and (b) provides that any interested person may apply to the FTT for it to determine who are accountable persons and who is the principal accountable person as regards a higher-risk building; an application may also be made under section 75(1)(c) to determine the part of the building for which any accountable person is responsible. For this purpose, interested persons include the building safety regulator, anyone who holds a legal estate in the common parts, and anyone who is under a relevant repairing obligation in relation to any part of the common parts. The application which has given rise to this appeal was made by the landlords under section 75(1)(a) and (b) (as the FTT pointed out, it did not ask for a determination under section 75(1)(c)).
33. The appeal raises no issue about the scope of the duties of an accountable person and it is not necessary to refer to these in detail, but I mention them in outline to draw attention to the extent of the duties and the role of the Regulator in ensuring they are complied with.
34. The most significant duty for the purpose of this appeal, because it is where the functions of a manager appointed under section 24, 1987 Act and the duties of an accountable person might be expected to coincide most closely, is the duty of the accountable person under section 84 to take all reasonable steps to prevent a building safety risk materialising or to reduce the severity of any incident resulting from such a risk materialising, steps which “may in particular involve the accountable person carrying out works to the part of the building for which they are responsible”.

35. I was told that in this case it is common ground that substantial work is required to the cladding of the buildings at Canary Riverside (which may include its complete replacement). That work is likely to fall squarely within the accountable person's duty under section 84 to take all reasonable steps to prevent a building safety risk materialising. But it would also appear to fall just as squarely in the functions of the Manager under the FTT's Management Order, and indeed the Manager has taken steps to prepare to carry out the work including applications to the Building Safety Fund to cover the very considerable costs.
36. The accountable person's numerous other duties include ensuring that a completion certificate is issued and that the building is registered with the Regulator before it is occupied (sections 76 and 77); applying to the Regulator for a building assessment certificate (section 79); carrying out an assessment of building safety risks after the building first becomes occupied and at regular intervals thereafter (section 83); preparing a "safety case report" for the building recording risks and steps taken to reduce them (section 85); keeping prescribed information and making it available to the Regulator (sections 88 and 89); and engaging with residents of the building and consulting them on building safety decisions (section 91).
37. Sections 98 to 101 are concerned with enforcement of the accountable person's duties by the Regulator (as well as other duties placed on residents). By section 101, an accountable person commits an offence if, without reasonable excuse, they contravene any requirement of Part 4 or regulations made under it (subject to prescribed exceptions) and the contravention places one or more people in or about the building at a significant risk of death or serious injury arising from a building safety risk. The penalties for such an offence include up to two years imprisonment.
38. Section 102 and Schedule 7 to the 2022 Act strengthen the Regulator's powers by creating a scheme of "special measures". The Regulator is entitled to apply to the FTT under paragraph 4 of Schedule 7 for a special measures order appointing a "special measures manager" for the building. The circumstances in which a special measures order may be made by the FTT are specified in paragraph 4(4) of Schedule 7, as follows:

The tribunal may make a special measures order if it is satisfied that there has been a serious failure, or a failure on two or more occasions, by an accountable person for the building to comply with a duty imposed on that person under, or under regulations made under, this Part.

If this condition is satisfied a special measures manager may be appointed by the FTT to carry out "the functions of all accountable persons for the building". For as long as the order is in force, the functions of each accountable person are treated as functions of the special measures manager and rights under existing contracts entered into by any accountable person which relate to those functions become rights of the special measures manager.

39. The 2022 Act includes provisions, at section 110 and paragraphs 8 and 9 of Schedule 7, dealing specifically with the subject of tribunal appointed managers and orders under section 24, 1987 Act. These are considered below.

40. Finally, the Secretary of State was given power by section 170(6) to make transitional or saving provisions, but none have been made dealing with the position of a tribunal appointed manager, or allowing an accountable person's track record of non-compliance with building safety obligations before the commencement of the 2022 Act to be taken into account as grounds for the appointment of a special measures manager.

Part 2 of the Landlord and Tenant Act 1987

41. Part 2 of the Landlord and Tenant Act 1987 (the 1987 Act) gives the FTT power to appoint a manager of premises comprising the whole or part of a building containing two or more flats. The power is to "appoint a manager to carry out in relation to any premises to which this Part applies – (a) such functions in connection with the management of the premises, or (b) such functions of a receiver, or both, as the tribunal thinks fit." Management includes repair, maintenance, improvement or insurance of premises (section 24(11)).
42. In *K Group Holdings Inc v Chuan-Hui* [2021] 1 WLR 5981, at [38], Henderson LJ described the problem which the Act was intended to address as "the failure of the landlord of a multi-tenanted block of flats to perform its obligations."
43. The FTT may only exercise the power to appoint a manager in the circumstances described in section 24(2). There will usually have been some form of mismanagement by the landlord or other person responsible for the management of the premises and the FTT must be satisfied that in all the circumstances it is just and convenient to appoint a manager. Under section 24(2)(a) a relevant person will be in breach of an obligation relating to the management of the premises owed to the tenant under his tenancy; under section 24(2)(ab) unreasonable service charges will have been levied, while under section 24(2)(ac) there will have been a failure to comply with a relevant code of management practice. There is also a more general power under section 24(2)(b), not explicitly based on fault, where other circumstances exist which make it just and convenient for a manager to be appointed.
44. Three broad points are relevant to this appeal. First, that the FTT is given power to appoint a manager to carry out "such functions in connection with the management of the premises" as it thinks fit (section 24(1)(a)). Secondly, it may only make an order where it is satisfied that one of the conditions in section 24(2) is made out, almost all of which depend on the landlord or other person responsible for management of the building having failed to perform to a satisfactory standard. Thirdly, each of those conditions additionally requires the FTT to be satisfied that it is just and convenient to make the order.
45. The Tribunal has emphasised the importance of a manager adhering to the highest professional standards, as is to be expected of an officer of the tribunal. Before any manager is appointed the FTT will wish to satisfy itself that they have the necessary experience, competence and integrity to be entrusted with the role (*Sadeh v Mirhan* [2015] UKUT 428 (LC), at [51]; *Orchard v Mooney* [2023] UKUT 78 (LC), at [19]).

The relationship between Part 4, 2022 Act and section 24, 1987 Act

46. Section 24, 1987 Act has now been amended by section 110, 2022 Act by the addition of new subsections apparently intended to separate the two statutory regimes and to give effect to the recommendation of the Hackett Report that clear lines of responsibility should exist in relation to building safety matters.
47. A new section 24(2ZB) now stipulates that a breach of a building safety obligation owed by an accountable person under Part 4 of the 2022 Act cannot be relied on as a breach of an obligation owed to the tenant for the purpose of satisfying the ground for appointment of a manager in section 24(2)(a).
48. A new section 24(2E) creates a further separation by providing that:

(2E) An order under this section may not provide for a manager to carry out a function in relation to a higher-risk building where Part 4 of the Building Safety Act 2022 or regulations made under that Part provide for that function to be carried out by an accountable person for that building.
49. Further relevant amendments to section 24 are contained in paragraphs 8 and 9 of Schedule 7 to the 2022 Act, as part of the regime of “special measures” and the appointment of special measures managers. A special measures order is a means by which the Regulator may take responsibility for compliance with Part 4 away from the accountable person and give instead to a special measures manager appointed by the FTT in a procedure comparable to an application under section 24, 1987 Act.
50. Paragraph 8 of Schedule 7, 2022 Act is concerned specifically with the relationship between a special measures manager and a manager appointed by the FTT under section 24, 1987 Act. Paragraph 8(1) provides that where a special measures order is made by the FTT in relation to a higher-risk building at a time when an order appointing a manager under section 24 is in force, paragraph 8(2) applies, as follows:

(2) The tribunal may amend the section 24 order so as to ensure that the functions to be carried out by virtue of that order do not include any function that the special measures order provides is to be carried out by the special measures manager.
51. Paragraph 9(3) of Schedule 7 inserts a new section 24ZA into the 1987 Act which creates a procedure by which a special measures manager may themselves apply to the FTT for an order under section 24 appointing a manager. The grounds for such an application are specified in the new section 24ZA(4)(b), which provides:

The appropriate tribunal may only make an order under this section where it is satisfied –

(a) that –

(i) the relevant person is in breach of any obligation owed by the person to the special measures manager by virtue of a special measures order, and

(ii) it is just and convenient to make the order in all the circumstances of the case; or

(b) that other circumstances exist which make it just and convenient for the order to be made.

52. It is not at all clear how the duties of the special measures manager and a section 24 manager are intended to relate to one another, but the opportunity for a special measures manager to seek the appointment of a section 24 manager does not provide a route by which a section 24 manager appointed before the commencement of the 2022 Act may assume responsibility for the functions of an accountable person. That is for two reasons.
53. First, an appointment under section 24ZA is a new appointment, and a newly appointed section 24 manager cannot be given any of the functions of an accountable person (section 24(2E), 1987 Act). The thinking may perhaps be that the new section 24 manager will be responsible for management functions other than those which are also functions of an accountable person (such as in relation to insurance, routine maintenance or the collection of service charges). If so, it is not obvious why those matters are any concern of a special measures manager or why the appointment should have been made conditional on breaches by the accountable person of their obligations under a special measures order, which are unlikely to relate to such matters.
54. Secondly, the defaults by an accountable person which are preconditions to the appointment of a manager under section 24ZA can only occur after the commencement of the 2022 Act. Before a special measures manager can be appointed there must first have been a serious or persistent failure by the accountable person to comply with a Part 4 duty; further non-compliance, this time with an obligation imposed on the accountable person by the special measures order, must then occur before the appointment of a new section 24 manager can be requested by the special measures manager. It is clear, therefore, that whatever section 24ZA is intended to achieve, it is not a transitional provision allowing existing section 24 managers to be accommodated within the new regime of building safety functions.
55. The purpose of the amendments to section 24 was explained in Explanatory Notes prepared under the authority of Parliament by the drafters of the Building Safety Bill. Paragraph 859 explained the background to section 110 and refers to the FTT's power to appoint a manager to take over management functions where a landlord has failed to comply with its obligations. It continues:

“If that principle were to be carried through into building safety, it could compromise the authority of the Building Safety Regulator. The amendments to section 24 ensure that the new regime is compatible with existing legislation and provides clarity as to avenues of redress for breach of obligations. Under the Act, redress should be sought through the residents' complaints mechanism to the Building Safety Regulator who can arrange for the appointment of a Special Measures Manager if there have been persistent breaches of building safety obligations by the Accountable Person.”

56. The commentary on section 24(2E) and section 24(2ZB) is uninformative. Paragraph 858 simply paraphrases the latter provision: “a tribunal cannot appoint a manager under section 24 where the breach of obligations complained of by tenants is a breach of the Accountable Person’s building safety obligations”. Nor “when appointing a manager under section 24” can the tribunal confer on the manager “any building safety functions which are due to be carried out by an Accountable Person”.
57. The Explanatory Notes do not directly address the situation which exists at Canary Riverside where a manager with responsibility for the maintenance of the building and compliance with statutory obligations was appointed by the FTT before the commencement of the 2022 Act. That possibility is alluded to at paragraphs 1598 to 1601 of the Notes, where it is explained that the power to amend a section 24 management order given to the FTT by paragraph 8 of Schedule 7 will “ensure there is no overlap of functions of the two types of managers in situations where two separate managers have been appointed”. This contemplates that an order under section 24 may already be in force in relation to a building at a time when the FTT makes a special measures order; in those circumstances the FTT may amend the section 24 order to avoid duplication of functions as between the section 24 manager and the special measures manager. For that combination of circumstances to exist the section 24 order must have continued to have effect after the commencement of Part 4, and the tribunal appointed manager must have been performing functions under the management order which are functions of an accountable person under Part 4. The only functions given to a special measures manager by an order under paragraph 4(2) of Schedule 7 are those of accountable persons and the separation of functions contemplated by paragraph 8(2) must therefore be a separation of building safety functions which have previously been included in the section 24 order and are now included in the special measures order. This appears to be confirmed by the example given after paragraph 1601 in the Explanatory Notes, which refers to an application being made for a special measures manager to be appointed at a time when an existing manager appointed under a section 24 order “is carrying out functions which relate to the fire and structural safety of the building”.
58. The effect of these amendments, and in particular the new section 24(2E), 1987 Act are the subject of argument in the appeal. They demonstrate conclusively that Parliament had not lost sight of the FTT’s jurisdiction under Part 2, 1987 Act to appoint a manager with a wide range of functions and responsibilities when it created the status of accountable person. They also seem to me to envisage that, after the commencement of the 2022 Act, a section 24 manager may have continued to perform functions which Part 4 provides are to be carried out by an accountable person and which Schedule 7 envisages will be taken over by a special measures manager if they are appointed.

The Landlords’ application under section 75, Building Safety Act 2022

59. The Landlords’ application to the FTT of 4 October 2023 sought a determination under section 75(1), 2022 Act identifying the accountable persons and the principal accountable persons in relation to the higher-risk buildings on the Estate. The application stated that the Landlords considered themselves to be accountable persons under both section 72(1)(a) and section 72(1)(b). It also suggested that the Manager was

also arguably an accountable person under section 72(1)(b) “as he is under relevant repairing obligations under the management order”.

60. The application proposed that Octagon, the freeholder, was the most appropriate person to be the principal accountable person. The application also suggested that the Manager was arguably a principal accountable person.
61. By the time matter came before the FTT for hearing the Landlords’ position had changed. They argued that they alone were accountable persons and that the Manager was not. For his part, the Manager did not admit that the Landlords were accountable persons and argued that he was an accountable person and should be designated by the FTT as the principal accountable person. The Residents Association and Circus Apartments supported the Manager’s claim to be designated the principal accountable person.
62. The Landlords issued their application under section 75, 2022 Act at a time when the Residents’ Association and Circus Apartments had each applied separately under section 24, 1987 Act for the extension and variation of the existing order, or for a new order, and the Manager had applied for different variations. The applications were originally to be heard together but when some were delayed the FTT made use of a scheduled hearing to determine whether, in principle, a manager appointed by it under section 24, 1987 Act could be an accountable person. Although both the Manager and the Residents’ Association opposed that course, its good sense is obvious. If the answer to the question of principle is negative, it will inevitably bear on the functions which the Manager can be re-appointed to perform and perhaps even on whether he should be re-appointed at all.

The FTT’s decision

63. The FTT first recorded that all parties agreed that because the Manager does not hold a legal estate in any part of the buildings, he does not fall within section 72(1)(a) - the first limb of the definition of accountable person. If he is an accountable person it can only be because he satisfies the requirements of section 72(1)(b) i.e. that he is “under a relevant repairing obligation in relation to any part of the common parts”.
64. The Manager undoubtedly had repairing obligations in relation to the common parts and the FTT therefore considered whether these were “relevant repairing obligations” within the meaning of section 72(6). That required that they be obligations “under a lease or by virtue of an enactment”.
65. The FTT held that the Manager’s repairing obligations were not “under a lease” because, in accordance with the Court of Appeal’s analysis of Part 2 of the 1987 Act in *Maunders Taylor v Blaquiare* [2003] 1 WLR 379, the Manager’s rights and duties derive from the tribunal’s order appointing him although they may in part be defined by reference to a lease.
66. The FTT also accepted the Landlords’ case that the Manager was not under an obligation to repair the common parts “by virtue of an enactment”. It considered that those words

were apt to refer to statutory repairing obligations, such as (it suggested) under regulation 4 of the Management of Houses in Multiple Occupation (England) Regulations 2006; they were not intended to refer to obligations imposed by an order of a tribunal exercising a jurisdiction under statute. No statute imposed obligations on the Manager to repair the common parts of the Estate and his repairing functions were not “by virtue of an enactment”. In reaching that conclusion the FTT relied on the statement in the Explanatory Notes that the purpose of section 110 was to “ensure that building safety is kept discrete from other management functions” by preventing the FTT from appointing a manager under section 24, 1987 Act to carry out building safety functions.

67. The FTT rejected the Manager’s submission that, notwithstanding section 110, he could be appointed under section 24 to carry out functions that include repairing obligations falling within the remit of an accountable person. It concluded that a manager appointed under section 24 cannot be an accountable person for the purpose of Part 4 of the 2022 Act. It then addressed a submission by the leaseholder’s counsel, Mr Upton, that the 2022 Act does not affect existing management orders. At paragraph 80 of its decision it said this:

“We do not accept that submission. Nothing in s.24(2E) suggests that it only prohibits new s.24 orders from requiring a manager to carry out building safety risk functions which are functions of an AP. We agree with Mr Morshead and Mr Bates that there was no need for express provision to be made for s.24(2E) to take retrospective effect because the duties in Part 4 of BSA 2022 Act did not subsist before its enactment, and so cannot have featured in any extant management order.”

68. The FTT then made the determinations under section 75, 2022 Act which the Landlords had requested, finding that Octagon is an accountable person for all five higher-risk buildings on the Estate under section 72(1)(a) (having regard to section 72(3) and(4) and its repairing obligations regarding structural elements), Canary Riverside Estate Management Ltd and Riverside CREM 3 Ltd are each accountable persons section 72(1) (a) in respect of the buildings of which they hold long leases (because they are in possession of the common parts), and Circus Apartments Ltd is an accountable person in respect of Circus Apartments under section 72(1)(a), because it holds the legal estate in possession of some of the common parts.

The arguments on the appeal

69. There was no dispute between the parties on the proper approach to statutory interpretation. The Tribunal’s task is to identify the meaning of the words used by Parliament in the light of their context and the purpose of the provision. In *O (a minor), R (on the application of) v Secretary of State for the Home Department* [2022] UKSC 3, at [30], Lord Hodge DPSC stressed the primacy of the language enacted by Parliament, read in its immediate and wider statutory contexts, and the secondary role of external aids to interpretation. Although I was also reminded of *Pepper v Hart* [1993] AC 593, the only extract from Hansard to which I was referred was at best peripheral to Mr Morshead’s argument and did not seem to me to be sufficiently specific or material to meet the stringent test which would allow it to be admitted. In any event, I have not

found the language of section 72 to be ambiguous such as to make reference to Hansard necessary or permissible.

70. Mr Dovar prefaced his submissions by referring to what Lord Briggs JSC said in *Settlers Court RTM Co Ltd v First Port Property Services Ltd* [2022] 1 WLR 519, SC, at [54], that:

‘It is well established that the court will lean against a construction of legislation which produces absurd or unworkable results, if there is an alternative construction which does not do so.’

71. Mr Dovar submitted that the Manager was an accountable person because he was under repairing obligations in relation to the common parts as a result of the FTT’s management order and those obligations were both “under a lease” and “by virtue of an enactment” and were therefore relevant repairing obligations. The FTT had taken too narrow a view of the statutory language and had paid insufficient regard to the “absurd” consequences of finding that a tribunal appointed manager could not be an accountable person.
72. He suggested that the exclusion of a tribunal appointed manager from the status of accountable person produced such an absurd and inconvenient result that it cannot have been the intention of Parliament. The consequence of the FTT’s construction, Mr Dovar submitted, was that “managers of higher risk buildings would at a stroke be stripped of the majority of their management responsibilities, in particular those relating to the most serious risks in the building”. Management of those parts of a building which represented the greatest safety risk would revert to the original landlord. A professional manager, vetted by the FTT before appointment and held by it to high professional standards, would be replaced by a landlord whose past conduct had warranted them being stripped of the management of their own property.
73. If the landlord then failed to adhere to its duties as accountable person, the leaseholders would be obliged to seek redress through the Regulator, as they are unable themselves to seek an appointment of a special measures manager. Meanwhile, the manager would be left to manage the parts left to them. The divide between the Part 4 duties and those retained by a section 24 manager were far from clear and would at the very least necessitate a high degree of co-operation and co-ordination between the manager and the landlord. Mr Dovar referred to what Lord Briggs had said in *Settlers Court*, at [50], about “the very real problems of making workable a shared management concept in relation to estate facilities”; these were “so great as to amount to absurdity” if the statute there under consideration (the Commonhold and Leasehold Reform Act 2002) was construed in such a way as to require different interests to co-operate in managing the same property.
74. The FTT itself had acknowledged the ‘significant practical consequences’ of its decision in this case, including the ‘risk of disagreement’ between the Manager and the principal accountable person over how the cladding-removal works should be progressed.

75. As for the statutory language, in the context of the management regime of the 1987 Act it was perfectly possible to refer to a manager's obligations as being conferred "by virtue of" the 1987 Act. Given the consequences of the alternative construction, that reading should be preferred.
76. For the same reason, Mr Dovar submitted that it was apt to view a manager's obligations as arising "under a lease". In *K Group Holdings Inc v Chuan-Hui* [2021] 1 WLR 5981 at [56], in considering whether the statutory provisions regulating service charges applied to a tribunal appointed manager, Henderson LJ had analysed the manager's rights as arising both under the tribunal's order and under the lease itself:
- "It is true that the manager's right to recover the charges is dependent upon the order made under section 24, but in a case (such as the present) where the manager is directed to operate the service charge machinery in the lease, it also remains true to say that the charges are paid under the lease. The important point, in my judgment, is that the provisions contained in an order made under section 24 of the 1987 Act are superimposed on the existing contractual framework of the lease, ..."
77. The Residents' Association made submissions supportive of the Manager's appeal, settled by Mr Upton. He additionally suggested that a specific provision excluding managers from being accountable persons would have been included if that had been intended. He acknowledged that section 24(2E) precludes a management order from imposing the statutory obligations of an accountable person on a manager but submitted that it does not preclude an order under section 24 imposing general management functions (which may include a "relevant repairing obligation"). Nor does it prohibit a manager from being an accountable person or from being responsible in that capacity for managing building safety risks. Where a manager is under relevant repairing obligations, and is therefore an accountable person, compliance with the building safety functions would be enforced by the Regulator under the 2022 Act, and not through the FTT, which would achieve the statutory objective of a single duty holder and enforcement route.
78. Further written submissions in support of the appeal were made on behalf of the fourth respondent, Circus Apartments Ltd, by Mr Rainey KC. He submitted that the Manager plainly has all the obligations of the Landlords in respect of repairs. There is a sufficient nexus or connection between those obligations and the order appointing the Manager for those obligations to be said to be "under a lease" or "by virtue of an enactment". Moreover, a manager is in an analogous position to an RTM company; nothing in section 72 says specifically that an RTM company may be an accountable person but it is clear enough from section 161, 2022 Act and section 30E, Landlord and Tenant Act 1985 that an RTM company does have that status. That is because the acquisition of the right to manage confers repairing obligations of the RTM company "by virtue of an enactment".
79. For the Landlords, Mr Morshead KC submitted that the FTT's decision had been correct and that the statutory scheme envisaged that a tribunal appointed manager would have no role to play concerning building safety. The obligations imposed on the accountable person were onerous and on its true construction section 72 "protected" a manager from them. As performance of the functions of the accountable person was backed by

criminal sanctions, Mr Morshead KC submitted that they could only be imposed by clear language. It was ironic, he suggested, that the Manager in this case should be so anxious to assume those functions for himself.

80. The legislative purpose which could be discerned from the structure of Parts 4 and 5 and from the Explanatory Notes was to allocate responsibility for those new functions to the freeholder or other person with repairing obligations closest to the top of the chain of property interests, and to maintain a clear demarcation between those functions (with their own regulator and enforcement regime) and other property management functions including those of a tribunal appointed manager.
81. The statutory duties in respect of building safety created by Part 4 were entirely new and did not depend on any contractual allocation of repairing obligations. Where the functions of the accountable person overlapped with a manager's duties it had been necessary for Parliament to decide which was to take priority, and Mr Morshead KC suggested that it was clear from section 110 and from paragraph 8 of Schedule 7 that the manager was intended to "yield" to the accountable person. He vigorously resisted any suggestion that a manager's functions could coexist with those of the accountable person (a possibility which he referred to as a "third way"), even for a temporary period between the commencement of the 2022 Act and the manager seeking directions from the FTT. That would subvert the intention that there should be a single duty holder who could be held to account for building safety.
82. The Manager's obligations did not arise "under a lease". His powers and duties come from the management order, as the Court of Appeal had explained in *Maunders Taylor v Blaquiére* [2003] 1 WLR 379. Nothing which Henderson LJ said in *K Group v Chuan-Hui* was directed to the question whether a tribunal appointed manager was appointed "under a lease" for the purposes of section 72 of the 2022 Act.
83. Nor did the manager's repairing obligations arise "by virtue of an enactment". That expression was a reference to repairing obligations imposed by statute including, most relevantly, sections 9A, 10A and 11, Landlord and Tenant Act 1985 (which imply covenants on the part of a landlord concerning fitness for human habitation, compliance with prescribed repairing requirements, and repair of the structure and exterior of the dwellings and buildings containing them). Mr Morshead KC acknowledged that the context in which that expression was used was critical to its meaning. Nevertheless, in *General Medical Council and others v Michalak* [2017] UKSC 71 (when considering whether the right to apply for judicial review arises "by virtue of an enactment"), the words "by virtue of an enactment" were said to be "... directed to cases in which specific provision is made in legislation ..." (Lord Kerr JSC at [33]).
84. Mr Morshead KC also relied on sections 47A(3) and 49A(3), 1987 Act, which had been inserted by section 113, 2022 Act, as demonstrating that the drafters of the 2022 Act did not treat tribunal appointed managers as appointed by virtue of a statute (instead referring to their appointment as being "by virtue of an order of any court or tribunal"). Similarly, the heading of section 110, 2022 Act refers to managers "appointed under" the 1987 Act, not "by virtue" of it.

Discussion

85. While I do not agree with the whole of the FTT’s analysis of Part 4, I have no doubt that it was correct when it determined that the Manager is not an accountable person for the purpose of Part 4, 2022 Act. That conclusion seems to me to reflect the clear intention of Parliament and the proper construction of section 72.
86. Before considering the key definition of “relevant repairing obligation” in section 72(6) it is helpful to look first at the structure of section 72 as a whole. It begins in sub-section (1) by identifying two circumstances in which a person will be an accountable person; they must either be a person who holds a legal estate in possession in any part of the common parts, or they must be a person who does not hold a legal estate, but who is under a relevant repairing obligation in relation to any part of the common parts. A third category is identified in sub-section (5), almost as an afterthought: a commonhold association will be the accountable person for a higher-risk building on commonhold land. Section 72 does not provide for any other person to be an accountable person.
87. Section 72(2) then identifies two exceptions to section 72(1)(a). A person who would otherwise fall within section 72(1)(a) is not an accountable person if someone else, who does not have a legal estate, is under a relevant repairing obligation in relation to all of the relevant common parts, or if all repairing obligations relating to the relevant common parts have become functions of an RTM company. The first of these exceptions is apt to cover a management company or other third party whose status is conferred by the occupational leases in the building; it cannot have been intended to refer to a tribunal appointed manager (nor was that suggested) because the relevant obligation must be included “in each long lease of which the estate owner is lessor”. The second exception is self-explanatory and is limited to the case of an RTM company, but it should be noted that the requirement is that the RTM company has “all repairing obligations”, and not “all relevant repairing obligations”.
88. Section 72(3) and (4) go together and provides a further exception by means of a statutory deeming, the effect of which is that the estate owner with relevant repairing obligations who is furthest up a chain of leases is treated as holding the legal estate in possession in the common parts.
89. No other exception to section 72(1) is identified; in particular, an estate owner who falls within section 72(1)(a) is not prevented from being an accountable person by the fact that a manager has previously been appointed under section 24 to carry out all of the estate owner’s obligations. Thus, if a tribunal appointed manager can be an accountable person, it will be in addition to the freeholder or other estate owner, not in substitution for them. That contrasts with the other circumstances where a third party has the relevant repairing obligations and for which specific exceptions are made in section 72.
90. In this case it is agreed that section 72(1)(a) does not apply to the Manager, because he does not hold a legal estate. If the Manager is an accountable person, it can only be because he falls within section 72(1)(b), which requires that he be under a relevant repairing obligation. A person is only under a relevant repairing obligation if they are

required, “under a lease or by virtue of an enactment”, to repair or maintain the subject of the obligation.

91. The Manager is under extensive repairing obligations in relation to the common parts of the Estate. By paragraph 4(e) of the FTT’s management order (the most recent iteration of which is dated 16 September 2019) he was given “the power and the duty to carry out the obligations of the Landlord contained in the Leases ... and in particular ... the Landlord’s repair and maintenance obligations”. By paragraph 5(b) the Manager was directed by the FTT “to manage the premises in accordance with ... the respective obligations of all parties – landlord and tenant – under the Leases and in particular with regard to repair, decoration, provision of services to the Premises ...”. The order also includes a schedule of functions which includes, at paragraph 16, undertaking major works required under the terms of the leases. The occupational leases themselves require the Landlords to “maintain” the common parts (which includes improving, rebuilding, renewing and replacing them), and to maintain fire alarms and fire-fighting equipment.
92. The determinative questions are therefore whether these obligations of the Manager are either “under a lease” or “by virtue of an enactment”.
93. The expression “under a lease” seems to me to refer to an obligation imposed by a lease, whether by the contract itself or by the acquisition of the estate created by the contract or the reversion to it, and not to extend to obligations imposed or assumed by some other less direct route. It may be that the meaning depends on the context in which it is used, and in different contexts the words “under a ...” might signify a tighter or a looser connection. It is used here specifically of repairing obligations (“a person is under a relevant repairing obligation in relation to anything if the person is required, under a lease ... to repair or maintain that thing”). In that context it is obvious the obligations being referred to are obligations imposed by the lease itself and the definition is not apt to describe the obligation of a tribunal appointed manager to comply with the terms of the order appointing them. That view is, as the FTT pointed out, consistent with the operation of the statutory scheme, as explained by the Court of Appeal in *Maunder Taylor v Blaquiére*.
94. In *Maunder Taylor* the issue was whether the manager’s claim to recover service charges was impeached by the leaseholder’s right to set off a claim for damages he had against the landlord. Aldous LJ explained the statutory scheme at [41]:

“In my view the purpose of Part II of the 1987 Act is to provide a scheme for the appointment of a manager who will carry out the functions required by the court. That manager carries out those functions in his own right as a court-appointed official. He is not appointed as the manager of the landlord or even of the landlord’s obligations under the lease. That being so, Mr Maunder Taylor was a court-appointed manager appointed to carry out those duties required by the order appointing him.”

He continued, at [42]:

“In this case the duties and liabilities laid down in the order are defined by reference to the lease, but do not alter his capacity. In my view Mr Maunder Taylor’s right to the money arose from his appointment not from the lease. It follows that there was no mutuality between his claim and that of Mr Blaquiére. That being so, set off is not possible.”

95. The same understanding of how section 24 is intended to operate is implied in the drafting of section 47A(3), 1987 Act, inserted by section 113, 2022 Act.
96. I therefore do not accept Mr Dovar’s characterisation of the effect of an appointment under section 24. He submitted that “the manager is inserted into the lease” and the obligations contained in the lease become those of the manager. That is not how section 24 operates. The functions which are taken on by the manager are those and only those which the FTT determines the manager should have. Section 24(5)(a), to which Mr Dovar referred, provides only that an order “may provide – (a) for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager; ...”. It is the FTT, through the order it considers it just and convenient to make, which imposes obligations on the manager, not the lease. Nothing said by Henderson LJ in *K Group v Chuan-Hui* about the source of the tenant’s underlying obligation to pay for services provided by the manager detracts from that analysis.
97. The FTT would therefore be perfectly entitled to confer functions on the manager which are different from those conferred on the landlord by the lease. But in view of the statutory objective of ensuring that each higher-risk building has a clearly identified duty holder in relation to building safety matters, it is very unlikely that the status of accountable person can have been intended to turn on the precise terms of an order under section 24 appointing a manager.
98. Mr Rainey KC referred to *Royal Borough of Kensington & Chelsea v Lessees of 1-124 Pond House* [2015] UKUT 395 (LC), a case under section 20ZA, Landlord and Tenant Act 1985, in which the question was whether costs of work had been incurred by a local authority “under” a framework agreement or “under” subsidiary “call-off contracts”. The Tribunal (Judge McGrath, Chamber President FTT) accepted that the costs of work were incurred “under” the framework agreement after considering whether there was a “sufficient factual nexus between the subject matter of the agreement and the works themselves”. There was a “sufficient nexus” as the various agreements could not be viewed in isolation. The *Pond House* case supports the view that context is important, but it is not otherwise of assistance. The requirement that there must be a “sufficient nexus” does not help in determining what is or is not sufficient in this context.
99. Nor can the repairing obligations conferred on the Manager by the FTT’s order be said to be obligations arising “by virtue of an enactment”. Once again, it is the order and not either the lease or the Act which imposed duties on the Manager. The order itself is clearly not an enactment (by section 23(2), Interpretation Act 1978 an “enactment” means primary or secondary legislation). I agree with Mr Morshead KC that this is mainly a reference to repairing obligations implied by statute into certain leases or tenancies of residential property, such as section 11, Landlord and Tenant Act 1985,

which requires a landlord to maintain the structure and exterior of the property. It is also apt to refer to the position of an RTM company.

100. No tribunal order or judicial decision is required for an RTM company to acquire the right to manage under the Commonhold and Leasehold Reform Act 2022. It is conferred by the statute on completion of the qualifying steps. As Lord Briggs JSC explained in *Settlers Court*, at [17]: "... a qualifying RTM company is entitled to acquire the right to manage the relevant premises (i.e. the qualifying premises within which at least half its members are qualifying tenants), provided only that it follows the specified procedure ...". That is a good example of a repairing obligation acquired "by virtue of an enactment" and is fundamentally different from position of a manager appointed under section 24 by the FTT. The analogy drawn by Mr Rainey KC with the route by which an RTM company acquires the status of an accountable person is not persuasive.
101. Mr Upton suggested that the correct question to ask in this context was "by virtue of what is the manager obliged to repair the common parts". That enquiry was modelled on a question asked by Peter Gibson LJ in *Moore v Gad* [1997] BCC 655 when considering whether money which a company director was liable to pay for wrongful trading under a discretionary order made under section 214, Insolvency Act 1986, was "a sum recoverable by virtue of an enactment" within the meaning of section 9, Limitation Act 1980. If the question to be asked in this context is "by virtue of what is the Manager liable to repair the common parts", the answer to my mind is "by virtue of the order of the FTT" and not "by virtue of section 24, 1987 Act".
102. I do not think there is any doubt about the meaning of section 72(6), but were there to be, I agree with the submission of Mr Morshead KC that the principle against doubtful penalisation would justify a narrower rather than a wider interpretation of "accountable person". I do not agree with Mr Upton's submission that, in the absence of some specific exclusion, an unrestricted interpretation of the phrase is appropriate. The applicable principle is explained in *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed, (2020) at section 26.4 as follows:

"It is a principle of legal policy that a person should not be penalised except under clear law. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account."
103. The main argument advanced by Mr Dovar in support of treating the Manager's obligations as arising either under the leases or by virtue of the 1987 Act was the improbability that Parliament intended "at a stroke" to strip tribunal appointed managers of their existing responsibilities for maintaining the common parts of higher-risk buildings and to cause building safety responsibilities to revert immediately on the commencement of the 2022 Act to the delinquent landlord whose past default had led to the making of a section 24 order. That was an absurd and unworkable result and compelled a wider interpretation of the expression "relevant repairing obligation" in section 72(6).

104. Mr Morshead KC disputed that there was anything improbable, let alone absurd, in Parliament having intended that (to the extent of any overlap) the new regime of building safety obligations should entirely replace any former scheme of management. He nevertheless agreed with Mr Dovar that the consequence of a section 24 manager not being an accountable person within section 72 was that, from the commencement of the 2022 Act on 6 April 2023, building safety functions ceased to be functions of the Manager and reverted to the Landlords in their capacity as accountable persons.
105. If Mr Dovar and Mr Morshead are right that, if a section 24 manager cannot be an accountable person, responsibility for building safety matters reverts “at a stroke” to the landlord whose default led to the making of the section 24 order, there would be something to be said for viewing that outcome as absurd. But neither of them was able to point to any provision of the 2022 Act which has the suggested effect on existing orders.
106. Part 4 was clearly drafted with some appreciation that managers may in the past have been appointed by the FTT under section 24 to undertake functions which, after the commencement of the 2022 Act, have become functions of the accountable person. Section 110 deals specifically with the division between the existing and new regimes as far as the future is concerned. By the new section 24(2ZA) any breach of a building safety obligation may not be relied on as a ground for the appointment of a manager under section 24. By the new section 24(2E) an order under section 24 may not confer functions on a section 24 manager where Part 4 provides that those functions are to be carried out by an accountable person. But neither section 24(2ZA) nor section 24(2E) purports to have any effect on orders which have already been made. No order made before the commencement of Part 4 could have been based on a breach of a “building safety obligation” as that expression is defined in section 24(ZZC). Nor does section 24(2E) rewrite existing orders or cause them no longer to apply. It is directed solely to the content of orders which have not yet been made and is concerned only with what they may not contain.
107. Any possible doubt about the restricted application of section 24(2E) is dispelled by paragraph 8(2) of Schedule 7. As discussed above (paragraphs 50 and 57-58), this presupposes the continued effectiveness of section 24 orders made before the commencement of the 2022 Act, and the inclusion in them of functions which can be conferred on a special measures manager by a special measures order made under paragraph 4 of Schedule 7. If section 24(2E), or anything else in Part 4, had the effect of depriving a section 24 manager of building safety responsibilities conferred by an order made before 6 April 2023, why would it have been necessary for paragraph 8(2) to authorise the FTT to amend the original section 24 order when appointing a special measures manager to ensure no overlap in their functions? Section 24(2E) has prevented any such overlap since it came into force, so any section 24 order which the FTT may wish to amend under paragraph 8(2) can only be an order made before the commencement of the 2022 Act. The only functions that a special measures manager may be required to carry out are functions which Part 4 imposes on an accountable person. It follows that, insofar as functions conferred on a manager by a section 24 order made before the commencement of the 2022 Act became functions of an accountable person when the Act came into force, nothing in the Act took those functions away from the section 24 manager “at a stroke” or within any specified period.

108. The FTT dismissed an argument by Mr Upton, which he repeated in his written submissions and which Mr Rainey KC supported, that the 2022 Act does not affect existing management orders. The FTT rejected that argument on the grounds that “nothing in section 24(2E) suggests that it only prohibits new section 24 orders from requiring a manager to carry out building safety functions which are functions of an AP”. I disagree that that is the effect of section 24(2E), because it would be inconsistent with paragraph 8(2) of Schedule 7.
109. In my judgment the coherent operation of Part 4 is not interfered with, and no intolerable result is produced, if the definition of “relevant repairing obligation” in section 72(6) is given the straightforward, unforced meaning attributed to it by the FTT. On that basis a section 24 manager is not an accountable person and is not required by Part 4 to carry out the duties of an accountable person. That is why section 72 does not excuse the estate owner from being an accountable person where there is already a tribunal appointed manager, as it does in 72(2) where a management company or an RTM company is responsible for all repairs. But for so long as an order made by the FTT before the commencement of the 2022 Act continues in force, the manager remains obliged to comply with it, including by the performance of any functions which Part 4 confers on the accountable person which are already functions of the manager under the order. When the order expires responsibility for all management functions will return to the landlord. If an application is made to vary or extend the order, any new order the FTT may make will take away from the manager those functions which Part 4 confers on the accountable person and these will then revert to the landlord. This is the third way, to which Mr Morshead KC took such exception, but which seems to me to be the correct construction of Part 4.
110. I acknowledge that, on this construction, for a period of time a manager may be required to carry out functions concerning the maintenance of the building and compliance with statutory obligations concerning health and safety, which are also building safety obligations of the accountable person within Part 4. There is nothing new in those functions, as the manager will have been carrying them out since the management order was made. It cannot have been intended that the manager should stop doing so straightaway, rather than arranging an orderly handover to the accountable person. But nor does this interpretation make the manager an accountable person or require him to discharge any of the obligations in Part 4 which are not already provided for by the management order (the order will not, for example, have required the manager to register the building with the Regulator, as section 78 requires the accountable person to do). From the commencement of the 2022 Act the landlord or other estate owner who satisfies section 72(1) will have become an accountable person and will be required to comply with the obligations which that status imposes (breach of which is an offence).
111. It is possible, as in this case, that the section 24 order may prohibit the estate owner from carrying out functions which the order confers on the section 24 manager, but even if it does not do so expressly, there is potential for an uncomfortable and impractical overlap between the responsibilities of the manager and the landlord. Some simple transitional provisions could have avoided the uncertainty which will inevitably be created by this overlap, but none have been provided. I recognise that the objective of a clear division of responsibility and a single route for enforcement of building safety obligations is not achieved for so long as this overlap exists. But the overlap is temporary and will

continue only until management orders which pre-date the 2022 Act expire or the FTT makes another order in relation to the same building, which it may do either on the application of the manager, or of the landlord, or of another interested person.

112. Section 24(9A) requires that, on an application by a landlord, the FTT may not vary or discharge a management order unless it is satisfied that that will not result in a recurrence of the circumstances which led to the order being made, and that it is just and convenient to do so. Thus, if a manager does not apply to the FTT for directions, the onus will be on the landlord to satisfy the FTT that it can be trusted to perform the obligations of which it may previously have been in breach. On such an application it will be relevant that for so long as the landlord is prevented by the terms of the order from complying with its Part 4 obligations it is at risk of prosecution, except to the extent that the management order itself provides it with a reasonable excuse for not doing so. That factor will have to be taken into consideration when determining whether it is just and convenient to vary the existing order.
113. I recognise that there is a potential impasse between section 24(2E) and section 24(9A), the first prohibiting any new or modified order which has the effect of conferring building safety functions on the manager, and the latter preventing the FTT from modifying or discharging an order on the application of the landlord unless it is satisfied that the circumstances which led to the making of the management order will not recur. In the absence of transitional provisions, and for so long as the FTT is not satisfied that the section 24(9A) conditions for modification or discharge are met, the only way to resolve this impasse may be for the FTT to make no order on an application by the landlord, leaving the manager to continue to perform the functions originally conferred by the order until either the manager themselves or another interested person applies for discharge or modification free of the section 24(9A) restrictions.
114. When a management order expires no new order made by the FTT may require the manager to perform functions which Part 4 imposes on the accountable person. Mr Dovar hinted that at Canary Riverside, because the FTT is being asked to vary the existing order (by extending it), rather than make a new order, it might be possible to avoid the restrictions in section 24(2E). Although I heard no argument on that proposition, the FTT will not be able to confer functions on the Manager which Part 4 provides are to be carried out by an accountable person and it appears to me to be far-fetched to suggest that it has power, by extending the Manager's term, to continue functions falling into that category which the Manager already has.
115. In this case the FTT is due to hear an application to vary or continue the management order in a few weeks' time, so it is not necessary to consider whether a manager whose appointment predates the 2022 Act and whose functions overlap with those of the accountable person for the purposes of Part 4 should make their own application to the FTT for further directions. That question will only be of concern to section 24 managers of higher-risk buildings whose appointment is due to continue. I doubt that there is any obligation on a manager to make their own application to the FTT, but practical considerations may make it impossible for them to continue without seeking further directions. In this case, for example, the Manager's application to the Building Safety Fund for financial assistance in carrying out remedial work to the exterior cladding of the buildings was unsuccessful because the manager is not an accountable person.

Whatever course a manager decides to take, it is likely to be prudent to inform the Regulator (notwithstanding that they have no jurisdiction over tribunal appointed managers) and the landlord (who will have functions to perform under Part 4).

Disposal

116. In summary, I am satisfied that the FTT was correct in its conclusion that the Manager is not an accountable person for the higher-risk buildings at Canary Riverside. He is nevertheless obliged by the management order to continue to carry out the functions conferred on him by the order, notwithstanding that those include building safety responsibilities which are also duties of the accountable person under Part 4 of the 2022 Act. He is not obliged to carry out building safety functions which are not required of him by the management order.
117. There is no appeal from the remainder of the FTT's determination as to the identity of the accountable persons, and they are under the obligations imposed by Part 4, notwithstanding that they may be prohibited by the management order from performing some of them.
118. It is open to any of the parties to apply to the FTT for it to modify or discharge the management order to eliminate the duplication of functions which currently exists.
119. For these reasons I dismiss the Manager's appeal.

Martin Rodger KC,
Deputy Chamber President
15 March 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

Appendix

72 Meaning of “accountable person”

- (1) In this Part an “accountable person” for a higher-risk building is—
 - (a) a person who holds a legal estate in possession in any part of the common parts (subject to subsection (2)), or
 - (b) a person who does not hold a legal estate in any part of the building but who is under a relevant repairing obligation in relation to any part of the common parts.This subsection is subject to subsection (5) (special rule for commonhold land).
- (2) A person (“the estate owner”) who holds a legal estate in possession in the common parts of a higher-risk building or any part of them (“the relevant common parts”) is not an accountable person for the building by virtue of subsection (1)(a) if—
 - (a) each long lease of which the estate owner is lessor provides that a particular person, who does not hold a legal estate in any part of the building, is under a relevant repairing obligation in relation to all of the relevant common parts, or
 - (b) all repairing obligations relating to the relevant common parts which would otherwise be obligations of the estate owner are functions of an RTM company.
- (3) Subsection (4) applies where—
 - (a) under a lease, a person (“the estate owner”) holds a legal estate in possession in the common parts of a higher-risk building or any part of them (“the relevant common parts”), and
 - (b) a landlord under the lease is under a relevant repairing obligation in relation to any of the relevant common parts.
- (4) For the purposes of this section and section 73—
 - (a) the legal estate in possession in so much of the relevant common parts as are within subsection (3)(b) is treated as held by the landlord (instead of the estate owner), and
 - (b) if (and so far as) the landlord’s actual legal estate in those common parts is held under a lease, the legal estate in possession mentioned in paragraph (a) is treated as held under that lease (and, accordingly, subsection (3) and this subsection may apply in relation to it).
- (5) Where a higher-risk building is on commonhold land, the commonhold association is the accountable person for the building for the purposes of this Part.
- (6) For the purposes of this section—

“common parts”, in relation to a building, means—

 - (a) the structure and exterior of the building, except so far as included in a demise of a single dwelling or of premises to be occupied for the purposes of a business, or
 - (b) any part of the building provided for the use, benefit and enjoyment of the residents of more than one residential unit (whether alone or with other persons);

“commonhold association” and “commonhold land” have the same meaning as in Part 1 of the Commonhold and Leasehold Reform Act 2002 (see sections 34 and 1 respectively);

“long lease”: for the meaning of “long lease” see section 115;

“possession”: a reference to “possession” does not include the receipt of rents and profits or the right to receive the same;

“relevant repairing obligation”: a person is under a relevant repairing obligation in relation to anything if the person is required, under a lease or by virtue of an enactment, to repair or maintain that thing;

“RTM company” has the same meaning as in Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 (right to manage).
- (7) The Secretary of State may by regulations amend this section (other than this subsection).

73 Meaning of “principal accountable person”

- (1) In this Part the “principal accountable person” for a higher-risk building is—
 - (a) in relation to a building with one accountable person, that person;
 - (b) in relation to a building with more than one accountable person, the accountable person who—
 - (i) holds a legal estate in possession in the relevant parts of the structure and exterior of the building, or
 - (ii) is within section 72(1)(b) because of a relevant repairing obligation (within the meaning of that section) in relation to the relevant parts of the structure and exterior of the building.
- (2) For the purposes of this section—
 - (a) the reference to “the relevant parts of the structure and exterior” of a building is to its structure and exterior except so far as included in a demise of a single dwelling or of premises to be occupied for the purposes of a business;
 - (b) the reference to “possession” does not include the receipt of rents and profits or the right to receive the same.
- (3) Subsection (1)(b) is subject to section 75(2) (powers of tribunal where more than one accountable person is within subsection (1)(b)).

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
[2024] EWHC 1190 (TCC)

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Thursday, 21 March 2024

BEFORE:

MRS JUSTICE JEFFORD

BETWEEN:

WILLMOTT DIXON CONSTRUCTION LIMITED

Claimant

- and -

- 1. PRATER & ORS**
- 2. LINDNER EXTERIORS HOLDING LIMITED**
- 3. SHEPPARD ROBSON LIMITED**
- 4. AECOM INFRASTRUCTURE AND ENVIRONMENT UK LIMITED (formerly URS SCOTT WILSON LIMITED).**
- 5. AIS SURVEYORS LIMITED (formerly APPROVED INSPECTOR SERVICES LIMITED)**

Defendants

-and-

LINDNER PRATER LIMITED

Third Party

-and-

LINDNER BUILDING ENVELOPE GmbH

Fourth Party

-and-

LINDNER FASSADEN GmbH

Fifth Party

-and-

LINDNER GROUP KG

Sixth Party

Sean Brannigan KC (instructed by **Beale & Company Solicitors LLP**) for the **Fourth Defendant**.

Paul Cowan (instructed by **Kennedy's Law**) for the **Third Party**.

Nicola Timmins (instructed by **Wedlake Bell LLP**) for the **Fourth, Fifth and Sixth Parties**.

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

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1. MRS JUSTICE JEFFORD: This is an application of the fourth to sixth parties, Lindner Building Envelope GmbH, Lindner Fassaden GmbH and Lindner Group KG ("the German parties") for a stay of the additional claim made against them by the fourth defendant, Aecom.
2. The claim made in the additional claim is also made against the third party, Lindner Prater Ltd ("LPL"), which is an English company. LPL has not made a similar application for a stay, but the German parties' application extends to LPL, and LPL now supports the application. As I read the correspondence to which I was referred a short time ago, LPL did seem to consider that the additional claim could be dealt with, and indeed would be dealt with, together with the main claim but I do not propose to determine this application on the basis that there was any kind of agreement to that effect. Mr Brannigan has accepted that it is open to LPL to change its position.
3. The application has been heard as a matter of urgency because it was made on or about 14 March 2024, and the Defences of the third to sixth party to the additional claim were, by agreement of an extension of time, due on 20 March. An extension of time has been given for the defences until after the hearing of this application, although yesterday and in time LPL served its Defence in any event.

Background

4. The background to this application and these proceedings is as follows. The main claim concerns a project for the design and construction of a mixed-use commercial and residential development in Woolwich, which incorporates a Tesco Extra store together with a number of residential units. The claimant was the design and build contractor for the development. Prater, defendant 1, was a specialist design and build envelope subcontractor, and defendant 2, Lindner Exteriors Holding Ltd, guaranteed Prater's services. It is, putting it neutrally, not, I think, in issue that both defendant 1 and defendant 2, which I shall refer to as Prater and Lindner, are part of the same corporate group as the third to sixth parties. The fourth defendant, Aecom, was the building services engineer but also provided fire engineering services including the preparation of fire strategy reports. The third and fifth defendants were also involved in the provision of services on the project.

5. The claimant, Willmott Dixon, claims over £46 million from the defendants on various bases, the claims being said to arise out of the use of materials for the external wall construction of the development, which are alleged to have been unsuitable or defective from a fire safety perspective. Each of the defendants to the main claim denies liability to the claimant, and there are contribution claims amongst the defendants, including a claim for contribution by Aecom against Prater and Lindner.

The statutory regime

6. The additional claim is made against LPL and the German parties for a Building Liability Order under section 130 of the Building Safety Act 2022. I had understood that to be a claim that would be made in the event that Prater and Lindner were liable in contribution to Aecom. Mr Brannigan says that, as pleaded, the claim is also made in respect of the liability to Willmott Dixon. It is not necessary for me to consider today whether such an application is either open to Aecom or likely to succeed, and I am more concerned with the claim and the arguments that relate to the claim that would arise in the event that Prater and Lindner were found liable by way of contribution to make payment to Aecom.
7. A Building Liability Order may be sought under section 130 of the Building Safety Act, in the circumstances set out in this section. I observe that it is a relatively new piece of legislation and the Building Liability Order is a relatively new creation on which there is little if any authority.
8. In any event, section 130 provides as follows:

"(1) The High Court may make a building liability order if it considers it just and equitable to do so.

(2) A 'building liability order' is an order providing that any relevant liability (or any relevant liability... of a body corporate ('the original body') relating to a specified building is also—

(a) a liability of a specified body corporate, or

(b) a joint and several liability of two or more specified bodies corporate."

9. Subsection (3) defines the meaning of "relevant liability" for the purposes of this section as:

"a liability (whether arising before or after commencement) that is incurred—

(a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or

(b) as a result of a building safety risk."

10. In subsection (6) a building safety risk is defined as "a risk to the safety of people in or about the building arising from the spread of fire or structural failure".
11. A specified body corporate as referred to in subsection (2) is also the subject of further definition in subsection (4), which provides that:

"A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body."

12. A subsequent section, that is, section 131 of the Act, defines the meaning of the term "associate" or "associated", which it is not necessary for me to set out on this application, but provides the basis on which the Building Liability Order is sought in the additional claim against the third to sixth parties. In other words, Aecom's case is that LPL and the German parties are all such associated companies.

Aecom's position

13. In short, it is Aecom's position that Prater and Lindner have divested themselves of assets, as set out in Mr Brannigan's skeleton argument starting at paragraph 12. He says that on or about 15 April 2021, after the claim against Prater had been intimated, Prater disposed of its business and assets to the third party, LPL, for a little over £6 million, which left Prater as a shell company that is not actively trading. The published accounts covering the period up to December 2021 showed Prater to have net assets of approximately only £2.25 million, having paid a dividend in that accounting year of £17,989,000, and Lindner was reported as having net assets of approximately £22.4 million. However, on 7 March 2022 Lindner divested itself of its subsidiaries, Lindner

Interiors Ltd and LPL. LPL was transferred to the fourth party, Lindner Building Envelope GmbH, and Prater was transferred to a company not so far involved in this litigation. On 16 March 2022 Lindner acquired the shares of Prater for £3.29 million and on 12 April 2002 Lindner disposed of its interest in the company to which the Prater assets had been transferred for a sum of just over £2 million. Mr Brannigan submits that the publicly available accounts show that the financial positions of both Prater and Lindner deteriorated thereafter such that Prater has considerable net liabilities and Lindner has no significant assets, with the result that neither of them will be likely to satisfy any judgments against them.

14. That is the background to and the reason for the making of the additional claim for Building Liability Order against the German parties and LPL, whom Aecom plainly consider to be more financially viable.

The positions of LPL and the German parties

15. LPL's case is now set out in its Defence. There is no evidence from the German parties to contradict the facts as set out in Mr Brannigan's skeleton on this application. Ms Timmons says that that is because the purpose of this application is to seek to save rather than expend costs, and it would not have been appropriate to go into any further detail or provide any further evidence, because that would have been to a large extent tantamount to setting out some or part of the applicants' defence. She does not accept that the true position is that either Prater or Lindner would be unable to pay a judgment against them. Quite simply, she submits, these are matters to be determined in the future and at this stage the matters relied on by Aecom simply explain why the additional claim has been brought and no more than that.
16. In summary, Ms Timmons' submission on behalf of the German parties is that the additional claim should be stayed such that no further steps are taken until after judgment has been delivered in respect of the main claim. Her submission is that the application for a Building Liability Order is wholly contingent on the court finding (a) liability on the part of Prater and Lindner and, indeed, Aecom, and (b) a liability of Prater and Lindner to make contribution to Aecom because they are all liable in respect of the same damage. It follows, she submits, that the circumstances in which a

Building Liability Order might be made may never, in fact, arise. Further she submits that if Prater and/or Lindner were to pay the amount of any relevant judgment against them, the need for a Building Liability Order in favour of Aecom would not arise. In those circumstances, she submits, better case management, consistent with the overriding objective, would be achieved by treating the additional claim as a matter to be heard separately, if indeed it ever needs to be heard, following judgment on the main claim.

Discussion

17. As a matter of principle, it seems to me that the legislation does not require a party against whom a Building Liability Order is sought to be made a party to what I would call the main claim or to participate in those proceedings. That is because, for example, the company against whom the order is sought may be one that does not even exist at the time of the proceedings, or because the circumstances in which the order is sought are not even in contemplation at the time of those proceedings. However, if the making of an application for a Building Liability Order is contemplated, it will generally be sensible and efficient for the company against whom that order is going to be sought to be made a party to the litigation and for that application to be heard together with the main claim, although, as I indicated during the course of this hearing, that does not and would not in any way bind a judge to determine that application as part of the main claim and leave it open to the judge as a matter of case management to direct a further hearing in that respect.
18. There are a number of reasons why it would generally be sensible and efficient for matters to progress with the main claim and additional claim being heard together. Firstly, it seems to me that the legislation assumes that the associated company will not be able to challenge a finding or even an agreement establishing liability of the original entity. But that does not mean that it may not be open to the associated company to argue that the circumstances in which that liability was established mean that it is not just and equitable to make a Building Liability Order. Such arguments are avoided if the associated company is party to the proceedings.

19. The applicants in this case meet that point by offering to agree in any order made that "the fourth defendant and the fourth, fifth and sixth parties are to be bound by the final judgment in the main claim as regards the liability of the first defendant and the second defendant insofar as that liability is relevant to the alleged liability of the fourth, fifth and sixth parties in respect of the additional claim". In other words, they agree to be bound by the findings of liability in the main claim and I infer that LPL would also agree so to be bound if this applications were granted.
20. That is, however, only part of the matter because the liability also has to be a relevant liability as defined in the Act. Ms Timmons and Mr Cowan, on behalf of LPL, say that this is an issue which would best be determined after judgment and when, so to speak, all the findings are in. Ms Timmons submitted that there is, in any event, simply a legal argument as to whether there is a relevant liability, although Mr Cowan's position seemed to me to be somewhat different. Ms Timmons also emphasised that her clients would be bound not only by findings on liability, as set out in the proposed draft order, but also as to responsibility or culpability. She said that that position would extend to the position where Prater or Lindner had a "technical defence". As I understood it that position extended to circumstances in which, for example, Prater or Lindner's liability to the claimant might be limited by a contractual term but the court expressed views about these parties responsibility for damage which would be relevant to the contribution sought by Aecom in respect of the same damage.
21. The obvious difficulty with that position is that it assumes that the judge will make the relevant findings such that the answer to the question of whether there is a "relevant liability" is simply a matter of law or a matter that follows inexorably from the judgment which has already been given. That does not follow, particularly where the issues as to what is a relevant liability are not, almost by definition, part of the main claim. Nor does it follow that the judgment will make what the associated company may contend are the material findings as to the extent of responsibility or culpability in so far as those are relevant to the issue of whether it is just and equitable to make the Building Liability Order.
22. Mr Brannigan submits that if the additional claim is hived off, then whether the liability is a relevant liability will not be an issue in the main claim. It may or may not be the

case that the judgment will address and will turn on the issues that the defendants say or may say arise, and it follows that it may or may not be the case that the sorts of findings to which Ms Timmons referred are made. As Mr Brannigan points out, if the relevant issues have not been determined, the court will either have to make further determinations on the basis of the evidence already covered or hear further evidence. It will be doing so inevitably some considerable time after the main hearing, and that is, in my view, patently not satisfactory.

23. Mr Cowan submits further that Mr Brannigan's concern is overstated because in this case whether or not there is any building safety risk will, in effect, be determined in the main claim because the claim against Prater is put in part on the basis of breach of a contractual obligation to comply with the Building Regulations. Prater says in its defence that those are only a matter for the court if there is a risk to health and safety and there is not. So, it is submitted, the issues relevant to whether there is a building safety risk will inevitably be addressed in the judgment.
24. I am not persuaded by that argument. There are other bases of the claim against Prater and contractual obligations that do not require that issue to be resolved. It is entirely possible that the judge might decide the case against Prater on the breach of such obligations and not consider it necessary to determine the particular issue relating to the Building Regulations and whether or not there is a risk to health and safety. Judgments do not have to provide an answer to every issue that might appear to be raised on the pleadings. That possibility, that is, that those findings are not made, is all the greater if the issue of whether there is a relevant liability is not before the court.
25. As Mr Brannigan submits, the same points arise in respect of what is just and equitable, and I agree. I simply do not see the sense in Ms Timmons' position that she would be content to abide by whatever may or may not be decided in the main claim if there is a stay, because there will be a judgment and she will then in any future hearing know what decisions have been made and what they now need to address, but would not be content with that position if there was no stay. In other words, if there is no stay, she says that her clients will then feel the need to participate fully in the trial but, if there is a stay, they would not feel the same need. The reality is that if there is no stay and the applicants are content to be bound by any findings that are made, there is no particular

need for them to participate fully in the trial of the main claim. However, if they wish to make submissions or cross-examine or whatever it may be in relation to issues that may arise as to whether there is a relevant liability or whether it is just and equitable to make a Building Liability Order, it is far more sensible and efficient that they do so in the context of the main claim and not in a subsequent and separate hearing dealing with a series of discrete points that are now said to arise that have not perhaps appeared to arise in the main claim and be the subject matter of the judgment.

26. All those matters militate against the granting of the stay, and I note, although it is not the basis of my decision and it is not a question of the number of votes in the proceedings, that the claimant and the other defendants support Aecom's position and also oppose the stay. Having said all of that, the applicants argue that it would impose an undue burden on them to participate in the trial of the main claim. The answer to that point is that it is often the case in respect of contingent claims. But it is also often the case that the party against whom a contingent claim is made needs or wants actively to participate in the main proceedings, that is, calling its own expert evidence and so forth. It may consider that the principal defendant it is not properly advancing the defence; it may wish to make different points; it may have different contractual matters that it needs to raise. That is not seem to be or certainly does not need to be the case here, and it seems to me that the objection to the costs of participation in the trial of the main claim can be met both by proper case management and any costs order that may be made in the future. As I have said, the applicants are willing to be bound by findings on liability and, indeed, it appears from the submissions made to me, by any other findings of fact including findings as to responsibility and culpability. The result of that is that any evidence that these parties adduce or cross-examination they undertake can be anticipated to be limited to the issues that they say arise in respect of the Building Liability Order or which may arise in that respect.

27. I simply do not see, as I have already said, how not staying the additional claim and having the participation of the third to sixth parties in the main claim will somehow require them to take a more active part than they would have done if simply accepting that they will be bound by any findings made. Further, if they do take such an active part or an active part to the limited extent appropriate, that will also enable the court to know what the issues are in relation to the application for a Building Liability Order

and to make the appropriate findings and to do so in one go. The fact that there may be a variety of possible outcomes does not change that. It is often the case that a party's position is advanced on the basis of different possible outcomes of the judgment, and, as I have observed in the course of argument, if the judge in due course considers that there is a scenario that has not been addressed, it is always open to him or her to direct a further hearing to deal with it.

28. In those circumstances and with that anticipation, counsel does not need for example to sit through an entire trial. A transcript will be available and can be reviewed. Indeed, that is what Ms Timmons anticipates would happen if the additional claim was stayed and before any further hearing on the Building Liability Order took place. If there are issues in respect of which the German parties need to be involved, it is more efficient to have them involved at trial and not have the issues raised at a hearing later. If they do not need that level of involvement, the trial can be managed accordingly.

Conclusions

29. For all those reasons, I would decline to grant the stay that is sought. I also bear in mind that the practical position is that Aecom has at this stage set out its position as to why this order will be sought against these parties. It was submitted to me that Aecom has no entitlement to know what is said in response and what the issues are that may be raised in response and can simply wait until after the trial. That does not seem to me to be a practical proposition for all the reasons I have already given.
30. I therefore refuse the application.
31. The additional claim will proceed with the intention that it should be heard at the same time as the main claim. I note that Aecom's solicitors have already made proposals for a procedural timetable to accommodate that. It seems to me there will need to be a case management conference in that respect unless a substantial measure of agreement breaks out because it will be necessary to address some of the issues that I have already indicated may need to be addressed - that is as to the scope of disclosure and witness evidence that may need to be given,. Probably any issues as to precise participation in the trial can await the pre-trial review. But a case management conference, unless, as I

say, some measure of agreement breaks out, will I think I think be necessary, and there needs to be a date for defences of the fourth to sixth parties, the third party's having already been served. In fairness that needs to take account of the fact that this application was made and has only now been determined. It will I think have been a little unreasonable to have been expecting those parties to be preparing their Defences in anticipation that they would not succeed on this application, so a sensible period of time needs now to be provided to them to respond.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Email: civil@epiqglobal.co.uk

(This judgment has been approved by the judge)



Neutral Citation Number: [2024] UKUT 0135 (LC)

Case No: LC-2023-622

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

**AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER)**

FTT REF: LON/00BE/LSC/2021/0375

17 May 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

BUILDING SAFETY – LEASEHOLDER PROTECTION – qualifying lease – contribution condition – replacement of insulation and installation of fire stopping – whether cladding remediation – whether relevant measures – ss.119, 120, 122 and Sch, 8, Building Safety Act 2022 – appeal allowed

BETWEEN:

MR MARKUS LEHNER

Appellant

-and-

**LANT STREET MANAGEMENT
COMPANY LIMITED**

Respondent

**Flat 44, 4 Sanctuary Street,
Borough,
London SE1**

Martin Rodger KC, Deputy Chamber President and Peter D McCrea FRICS FCI Arb

25 March 2024

Dr Alfred Lehner represented the appellant

Ashley Pratt, instructed by Rradar, Solicitors, represented the respondent

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The following cases are referred to in this decision:

Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point [2023] UKUT 271 (LC)

The Dunelm (1884) 9 PD 164

Triathlon Homes LLP v Stratford Village Development Partnership [2024] UKFTT 26 (PC);
LON/00BB/HYI/2022/0018-22

1.

Introduction

1. This appeal is about the leaseholder protections provided by Schedule 8 of the Building Safety Act 2022.
2. Section 122 and Schedule 8 of the 2022 Act contain provisions designed to protect leaseholders under “qualifying leases” from liability to pay some or all of the service charges which would otherwise be due from them as their contribution towards costs connected with “relevant defects”. The most comprehensive of these protections protects all leaseholders from liability to contribute towards the cost of “relevant measures” if their landlord was “responsible for” the relevant defect. Where the landlord satisfies a “contribution condition”, “qualifying” leaseholders are protected from all liability to contribute towards the cost of relevant measures. Where the contribution condition is not satisfied, the qualifying leaseholder’s liability is nevertheless limited to a permitted maximum. Qualifying leaseholders also have protection from any liability to contribute towards “cladding remediation” costs, and in respect of the cost of certain legal or other professional services
3. In this case the appellant, Mr Markus Lehner, owns the lease of Flat 44, at 4 Sanctuary Street, London SE1. The appeal concerns his liability, as leaseholder, to contribute towards the cost of removing and replacing combustible insulation and installing additional fire stopping in the cavities between the interior and exterior surfaces of the walls of certain parts of the building.
4. In a decision given on 12 April 2023, the First-tier Tribunal, Property Chamber (“the FTT”), determined that Mr Lehner was liable to pay £1,244.85 demanded on 8 February 2021 as a service charge contribution towards the cost of the insulation and fire-stopping work intended to be undertaken to the walls of the building. Mr Lehner’s appeal against that decision is brought with the permission of this Tribunal; he was represented by his father, Dr Alfred Lehner, at the hearing of the appeal as he had been before the FTT.
5. The respondent to the appeal is Lant Street Management Co Ltd (“LSMC”), which was responsible for commissioning the works and is entitled to collect any service charges due. It is Mr Lehner’s immediate landlord, although the capacity in which it originally joined in the lease of his flat was as the management company for the building. It was as management company that Mr Lehner named it as respondent to his application to the FTT for a determination under section 27A, Landlord and Tenant Act 1985, of his liability to contribute towards the costs of the proposed works. At the hearing of the appeal the respondent was represented by counsel, Mr Ashley Pratt, who did not appear before the FTT. Mr Veneik of the respondent’s managing agents, Houston Lawrence, who had previously represented the company also attended the appeal.

Basic facts

6. Flat 44 is in Block A, 4 Sanctuary Street (“the Block”), one of three built by Wimpey in the early 2000’s. The others are Block B, known as Isaac Way, and Block C, known as Gaitskell Way. The five-storey block is of concrete framed construction with flat roofs

and projecting concrete balconies. The main elevations are faced with brick, but in part, largely at the back of the balconies, include areas of cladding.

7. Mr Lehner purchased the long leasehold interest in Flat 44 on 26 July 2019. His lease was dated 23 June 2004, and had originally been granted by Wimpey to Gavin Fox and Iain Bryan Perry, with LSMC participating as management company. The term was 125 years less seven days from 1 January 2003 at an annual rent of £150. We have not seen a complete copy of the lease, but we assume that it adopted a conventional tri-partite structure, with LSMC covenanting to keep the building in repair in return for a service charge payable by the leaseholders.
8. On 28 September 2007, Wimpey granted an intermediate lease of the block to LSMC, for a term of 125 years from 1 January 2003. Shortly afterwards, on 5 October 2007, Damgate Freeholds Limited (“Damgate”), who we understand originally sold the land to Wimpey, exercised an option to reacquire the freehold interest in the block.
9. Following the Grenfell Tower fire of 14 June 2017 the safety of all modern high-rise buildings came under scrutiny. On 21 February 2018 the respondent obtained a fire risk assessment report, which assessed the Block’s fire risk as low, but in October 2019 a further report recommended that the cladding and balconies be inspected by a specialist contractor. This was put in hand, and on 26 November 2019 Efectis UK/Ireland Ltd (“Efectis”) recommended the replacement of the insulation behind the vertical cladding panels on the exterior of the Block and the addition of vertical cavity barriers between each flat.
10. In January 2020, the Ministry of Housing Communities & Local Government (“MHCLG”) issued a document titled Advice for Building Owners of Multi-storey Multi-occupied Residential Buildings (since withdrawn). After considering it, LSMC wrote to the leaseholders on 14 February 2020 indicating that it intended to carry out works to ensure the blocks complied with the MHCLG advice, and to ensure that the flats were mortgageable. The actions proposed involved (i) the appointment of a contractor to open up the cladding; (ii) a review of the base wall and fixtures by an engineer; (iii) the agreement of a suitable and compliant outline scope of works; (iv) to address identified breaches in respect of the cladding, insulation and party wall and fire breaks; and (v) to prepare a specification of the required works.
11. These works were put out to tender, and on 5 February 2021 leaseholders were notified that the total cost would be £211,119, of which £61,119 would be met from reserves. The amount due to be collected from the leaseholders was therefore £150,000.
12. On 8 February 2021, Mr Lehner received a demand for his contribution of £1,244.85. The demand included a statement for the purposes of sections 47 and 48, Landlord and Tenant Act 1987 that his landlord was Damgate Freeholds Limited.
13. By its decision of 12 April 2023, the FTT determined that Mr Lehner was liable to pay the sum demanded. He applied for permission to appeal but was refused by the FTT. Permission was subsequently granted by this Tribunal.

The Building Safety Act 2022

14. The 2022 Act is in six Parts which, as section 1(1) explains, contain provisions intended to secure the safety of people in or about buildings and to improve the standard of buildings. Only Part 5 is concerned with leaseholder protections. Part 5 is supplemented by The Building Safety (Leaseholder Protections) (England) Regulations 2022 (as amended) (“the Leaseholder Protections Regulations”).
15. Part 5 begins at section 116 which introduces sections 117 to 125 by explaining that, together with Schedule 8, they “make provision in connection with the remediation of relevant defects in relevant buildings”.
16. Before looking at these complex provisions in detail we draw attention to the fact that in a number of places in Part 5 and in the regulations made under it, Parliament has made use of “deeming” provisions, or presumptions, by which particular facts are assumed to be true unless some condition is satisfied. Usually the relevant condition requires the landlord to take the initiative in providing relevant information, or in requesting that leaseholders provide relevant information known to them. The presumptions operate where the landlord has failed to take the required step, and generally have the effect that information which has not been supplied or requested is assumed to be favourable to leaseholders. Another way of looking at these presumptions is to see them as tools for displacing the usual burden of proof in relation to specific matters; ordinarily the person who wishes to rely on a particular fact is required to prove it, but where one of the presumptions applies certain facts will be assumed in favour of the leaseholder unless the landlord has taken the steps required to oust the presumption. We draw specific attention to this device because these provisions are a trap for unwary parties and decision makers, as this case will illustrate.

Key definitions

17. A “relevant building” is defined in section 117 and includes any self-contained building in England containing at least two dwellings which is at least 11 metres high or contains at least 5 storeys.
18. A “relevant defect” is defined in section 120(2), as follows:

““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.”
19. “Relevant works” are defined in section 120(3) and include works relating to the construction or conversion of the building concerned, provided it was completed in the “relevant period”, that being the period of 30 years ending with the commencement of the section (on 28 June 2022).

20. A “building safety risk” is defined in section 120(5). In relation to a building, it means 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 any part of it.
21. In summary, therefore, any defect in a residential building over 11 metres or 5 storeys high, constructed between 1992 and 2022 which arises out of the original construction and causes a risk from the spread of fire or building collapse is likely to be a relevant defect for the purpose of the Part 5 leaseholder protections. Those protections are described in Schedule 8. They are detailed and complex so, after focusing on those which are relevant to this appeal, we will provide a suggested route through them which parties and decision makers may find useful in seeking to apply them.
22. Section 122 introduces Schedule 8, as follows:

“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).”
23. Schedule 8 is titled “Remediation costs under qualifying leases etc” and most of its provisions apply only to service charges payable under a “qualifying lease”. That expression is defined in section 119(2) as follows:

“A lease is a qualifying lease if –

(a) it is a long lease of a single dwelling in a relevant building,

(b) the tenant under the lease is liable to pay a service charge,

(c) the lease was granted before 14 February 2022, and

(d) at the beginning of 14 February 2022 (“the qualifying time”) –

(i) the dwelling was a relevant tenant’s only or principal home,

(ii) a relevant tenant did not have owned any other dwelling in the United Kingdom, or

(iii) a relevant tenant owned no more than two dwellings in the United Kingdom apart from their interest under the lease.”
24. By paragraph 13 of Schedule 8 a lease which satisfies the conditions in paragraphs (a), (b) and (c) of section 119(2) will be treated as a qualifying lease unless the landlord has taken all reasonable steps to obtain a “qualifying lease certificate” from a tenant under the lease and no certificate has been provided. This is the first of the “deeming” provisions to which we have previously referred.
25. A qualifying lease certificate is one certifying that the condition in section 119(2)(d) was met in relation to the lease on 14 February 2022.

26. Schedule 8 affords protection to qualifying leaseholders against charges in respect of any “relevant measure” relating to a relevant defect. The definition of “relevant measure”, an expression repeated throughout the leaseholder protections, is found in paragraph 1(1) of Schedule 8, as follows:

““relevant measure”, in relation to a relevant defect, means a measure taken –

- (a) to remedy the relevant defect, or
- (b) for the purpose of –
 - (i) preventing a relevant risk from materialising, or
 - (ii) reducing the severity of any incident resulting from a relevant risk materialising;

“relevant risk” here means a building safety risk that arises as a result of the relevant defect.”

In summary, therefore, a measure will be a relevant measure if it is taken to remedy a relevant defect, or to diminish the harm which it might cause.

The paragraph 2 protection

27. The first of the protections provided by paragraph 2 of Schedule 8 is an exception to the general rule that the leaseholder protections are available only to the owners of qualifying leases. Paragraph 2 applies “in relation to a lease of any premises in a relevant building”. It provides that no service charge is payable under such a lease in respect of a “relevant measure” relating to a relevant defect if the landlord under the lease on 22 February 2022 (the “qualifying time”) or a superior landlord was “responsible for the relevant defect” or was “associated with” a person responsible for the relevant defect (paragraph 2(2)).
28. For the purpose of paragraph 2 a person will be taken to be “responsible for” a relevant defect (i.e. one arising out of the original construction or conversion of the building which creates a building safety risk) if they were the developer or undertook or commissioned the construction or conversion of the building, or they were in a joint venture with the developer (paragraph 2(3)). A “joint venture” includes a partnership (paragraph 1(1)), and a “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” (paragraph 2(4)).
29. The circumstances in which one person will be “associated with” another person for the purpose of the 2022 Act are explained in section 121(2) to (5). It is not necessary to consider these provisions in detail in this appeal.
30. In summary, paragraph 2 of Schedule 8 provides for all leaseholders of premises in self-contained residential buildings of at least 11 metres or 5 storeys to have full protection from liability to pay service charges if their landlord or superior landlord on 22 February 2022 was the original developer of the building (or an associate) and the service charge

is payable for work to remedy or mitigate a defect in the building which gives rise to a risk from fire.

31. The paragraph 2 protection is the subject of another important deeming provision. Paragraph 14(2) permits the Secretary of State to make regulations providing that (in some or all cases) the condition in paragraph 2(2) is to be treated as being met unless the landlord under the lease provides a certificate to the leaseholder that complies with prescribed requirements.
32. Regulation 6 of the Leaseholder Protections Regulations is made pursuant to the power in paragraph 14(2). It makes provision for the contents of a certificate, referred to as a “landlord’s certificate”, which the current landlord is required to provide to leaseholders in specified circumstances. Those circumstances include when the current landlord becomes aware of a relevant defect not covered by a previous landlord’s certificate. Regulation 6(1)(c) requires that the landlord’s certificate be provided within four weeks of the landlord acquiring that knowledge.
33. The landlord’s certificate is required to be in the form set out in Schedule 1 of the Leaseholder Protections Regulations and it must contain the detailed information and relevant documents identified in regulation 6. The consequence of a current landlord not providing a certificate in the prescribed form is specified in regulation 6(7) and is that “the condition in paragraph 2(2) of Schedule 8 to the Act is to be treated as met in accordance with paragraph 14(2) of Schedule 8 to the Act”. In other words, if the current landlord has not complied with the requirement to provide a landlord’s certificate, it is taken to be responsible for the defect for the purpose of paragraph 2, with the result that no service charges will be payable in respect of relevant measures.
34. The Leaseholder Protections Regulations came into force on 20 July 2022, 17 months after the demand for the disputed service charge in this case but 9 months before the FTT made its decision that the charge was payable. A landlord’s certificate was first provided to Mr Lehner a few days before the hearing of this appeal.

The paragraph 3 protection

35. The first of the protections available only to qualifying leaseholders is provided by paragraph 3 of Schedule 8. By paragraph 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 on 14 February 2022 (“the qualifying time”) met the “contribution condition”. The contribution condition is that the landlord group’s net worth at the qualifying time was more than $N \times £2m$, where N is the number of relevant buildings of which the landlord or a member of the landlord group was, at the qualifying time, a landlord (paragraph 3(2)).
36. The contribution condition is also subject to an important evidential presumption. By paragraph 14(1) of Schedule 8, the contribution condition is to be treated as having been met by the person who was the landlord at the qualifying time (the “relevant landlord”) unless the landlord under the lease provides the tenant with a certificate, complying with any prescribed requirements, and stating that the relevant landlord did not meet the

condition. The landlord's certificate provided for by regulation 6 of the Leaseholder Protections Regulations is required to deal with this issue and to include confirmation whether or not the relevant landlord met the contribution condition.

37. In this appeal the parties disagree over a fundamental question as to the identity of the relevant landlord on 14 February 2022. We will return to that issue shortly.

The paragraph 4 protection - low value leases

38. No service charge is payable under a qualifying lease in respect of relevant measures relating to any relevant defect if the value of the lease on 14 February 2022 (determined in accordance with paragraph 6 of Schedule 8 and any regulations made under the power it confers) fell below certain limits (those limits are £325,000 if the premises are in Greater London and £175,000 if they are elsewhere).

The paragraph 8 protection – cladding remediation

39. Paragraph 8 of Schedule 8 says this:

“8. No service charge payable for cladding remediation

(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.”

40. This further protection is afforded only to qualifying leaseholders and applies only to the cost of cladding remediation, as defined in paragraph 8(2). In this case the FTT decided that it did not apply to the work carried out by LSMC because it did not involve “cladding remediation”. Whether that conclusion was correct is the subject of one of Mr Lehner's grounds of appeal.

The paragraph 9 protection – legal or professional services

41. Paragraph 9 of Schedule 8 provides protection against service charges which would otherwise be payable 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 (including the cost of obtaining legal advice, or in connection with proceedings before a court or tribunal, arbitration or mediation). This protection has already been considered by the Tribunal in the first appeal determined under the 2022 Act, *Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point* [2023] UKUT 271 (LC).

Protections in other cases – paragraphs 5, 6 and 7

42. Where none of the other protections apply, paragraphs 5, 6 and 7 of Schedule 8 provide a degree of protection from service charges otherwise payable in respect of relevant measures relating to relevant defects. These protections are in the form of a limit on the total payable in respect of charges over a period beginning up to five years before a disputed demand and, separately, an annual limit. Each limit is determined by reference to a permitted maximum which varies according to the value of the qualifying lease on 14 February 2022. If the value of the lease was less than £1 million, the permitted maximum is £15,000 where the premises are in Greater London and £10,000 if they are elsewhere. If the value of the lease (wherever the premises are located) was between £1 million and £2 million, the permitted maximum is £50,000, or if greater than £2 million, £100,000. Paragraph 6 confers a power to make regulations concerning the determination of value and also deals with shared ownership leases.

Leaseholder protection – a suggested approach

43. The complexity of the new statutory provisions is obvious, but it is essential that they be grappled with in any case where liability to pay a service charge relating to building safety defects is in issue. It was suggested by Mr Pratt that the FTT had not been required to consider any issue under the Act which had not specifically been raised by Mr Lehner, but that is a misunderstanding of the role of the FTT, which was to determine the amount of the service charge payable. It is incumbent on the FTT to consider whether there is some statutory provision (of which the parties may be unaware) which affects the answer to that question. That responsibility is particularly engaged where the parties' rights may be affected by new or complex legislation, such as the 2022 Act.
44. It may assist in other cases if we suggest a sequence of questions which a decision maker should address when determining whether service charges are payable in respect of work to which the leaseholder protections may apply. We identify the headline issues below and provide a fuller list of the questions and sub-questions which may arise in the appendix to this decision. The headline list addresses the issues in this appeal and additional questions may need to be considered in other cases.
45. The headline questions in this appeal seem to us to be these:

Step 1 – preliminary conditions

1. Is the building a relevant building (section 117)?
2. Does the disputed service charge relate to a relevant defect (section 120)?
3. Is the disputed service charge a charge in respect of a relevant measure relating to the relevant defect (paragraph 1(1), Schedule 8)?

Step 2 – paragraph 2 protection

4. Did the disputed service charge become payable after 20 July 2022?

5. If so, did any of the circumstances listed in regulation 6(1), Leaseholder Protections Regulations occur between 20 July 2022 and the date the disputed service charge became payable?
6. If so, did the current landlord provide a landlord's certificate which complied with regulation 6? If not, regulation 6(7) applies, the paragraph 2(2) condition is taken to be satisfied and the service charge is not payable.
7. If the current landlord provided a landlord's certificate, or if the disputed service charge became payable before 20 July 2022, was the landlord or any superior landlord on 14 February 2022 responsible for the relevant defect, or associated with a person responsible for the relevant defect? If so, the paragraph 2(2) condition is satisfied, and the service charge is not payable. If the landlord or any superior landlord or an associate was not responsible for the defect, the paragraph 2 protection does not apply.

Step 3 – qualifying lease

8. Does the lease satisfy the conditions in section 119(2)(a) to (c)?
9. If so, has the landlord taken all reasonable to obtain a qualifying lease certificate from the tenant for the purpose of paragraph 13 of Schedule 8? If not, the lease is to be treated as a qualifying lease and the protections in paragraphs 3 to 9 of Schedule 8 may apply.
10. If the landlord has taken all reasonable steps to obtain a qualifying lease certificate, and either no certificate has been provided, or the leaseholder has certified that the conditions in section 119(2)(d) were met, were those conditions in fact met? If so, the lease is a qualifying lease and the protections in paragraphs 3 to 9 may apply. If not, none of those protections apply.

Step 4 – paragraph 3 protection – the contribution condition

11. Has the landlord provided a certificate to the leaseholder that the person who was the landlord on 14 February 2022 (the relevant landlord) did not meet the contribution condition? If not, the contribution condition is taken to be satisfied and no service charge is payable (paragraph 14(2) and regulation 6(7)).
12. If the landlord did provide such a certificate, did the relevant landlord in fact meet the contribution condition on 14 February 2022? If so, no service charge is payable (paragraph 3(1)).

Step 5 – paragraph 4 protection - low value leases

13. On 14 February 2022 was the value of the qualifying lease less than £325,000 (Greater London) or less than £175,000 (elsewhere)? If so, no service charge is payable.

Step 6 – paragraph 8 protection – cladding remediation

14. Do the relevant measures in respect of which the service charge is claimed comprise the removal or replacement of any part of a cladding system?
15. If so, (a) does the cladding system form the outer wall of an external wall system, and (b) was the cladding system unsafe? If so the paragraph 8 protection applies, and no service charge is payable in respect of the removal or replacement works.

Step 7 – paragraphs 5, 6 and 7 – other protections

16. If after considering the previous steps the FTT is satisfied that a service charge is payable in respect of relevant measures, is that sum capped because it exceeds the maximum payable under a qualifying lease permitted by paragraph 5 and 6 of Schedule 8, or the annual limit permitted by paragraph 7?

The FTT's decision

47. The FTT was required to determine applications by Mr Lehner and by the leaseholders of another flat in the development, Mr Pechev and Mrs Pecheva. It determined that the Pechevs were liable to pay £1,562.85 and that Mr Lehner was liable to pay £1,244.85 towards the cost of the work recommended by LSMC's building safety consultant, Efectis. Mr Lehner was partially successful in his application, in that he was found not to be liable to contribute an additional sum as an administration charge and obtained an order under section 20C, Landlord and Tenant Act 1985 providing protection against any service charge liability relating to the costs of the proceedings. Both Mr Lehner and the Pechevs applied for permission to appeal, but only Mr Lehner complied with conditions set by the Tribunal and only he became entitled to pursue this appeal against the FTT's decision.
48. The FTT recorded in its decision that both when giving procedural directions and at the hearing it had suggested to Mr Lehner and the Pechevs that, because of the complexity of the 2022 Act, it may be preferable for them not to rely on its provisions but effectively to reserve their position until another occasion. It was said that adopting that approach would not prejudice their right to rely on the leaseholder protections at a later stage. We do not consider that to have been correct advice, and we do not see how it would have been open to Mr Lehner to rely on those protections at a later date to defeat a claim for service charges which the FTT had already decided he was liable to pay (we express no view on the effect of a determination of liability under section 27A, Landlord and Tenant Act 1987 on a subsequent claim for a remediation contribution order under section 124, 2022 Act).
49. The FTT was quite right to warn of the complexity of the 2022 Act and prudent to suggest that the leaseholders seek legal advice, but such advice is not always available at proportionate expense. It is for the FTT to determine in every case whether the leaseholder protections apply, and the burden on it is particularly heavy where one or both of the parties is unrepresented.

50. The FTT identified seven issues, only the last of which concerned the impact of the 2022 Act. In addressing one of the earlier issues it quoted what it referred to as “the best description of the works”, taken from an email from the managing agents of 14 February 2020. According to that description the works involved:

“(i) The removal of the cladding and insulation, replacing the insulation with material that meets current standards. It seems that there was no need to replace the cladding which was reinstated after the insulation had been upgraded.

(ii) The inspection of the current cavity barrier to establish if any are in place and install a safety barrier (if required) between each dwelling. It seems that it was necessary to install these safety barriers.”

Although the FTT did not explain what it meant by a “cavity barrier” or a “safety barrier”, we understand those terms to refer to the same building component, namely an intumescent strip installed in the gap between the cladding system and the concrete face of the building which is either a ‘closed state’ cavity barrier, which forms a tight seal between cavities within the cladding system, or an ‘open state’ barrier which allows ventilation and drainage but is designed to expand on exposure to heat and thereby to seal that gap and prevent the passage of fire between floors and apartments.

51. Having decided that the leaseholders were liable under the terms of their leases to contribute towards the cost of the work, and that LSMC had complied with its obligation to consult on the works, the FTT arrived finally at the issue with which this appeal is concerned. It recorded the first submission of counsel for LSMC as being that the protections in paragraphs 3, 4 and 8 of Schedule 8 apply only to “qualifying leases”. The leaseholders were said to have adduced no evidence that their leases were qualifying leases. It was also asserted that neither LSMC nor Damgate was a developer, nor were they associated with the developer (Wimpey) on the relevant date of 14 February 2022. It is not clear to us whether there was any evidence about these matters, or whether they simply asserted by counsel (but in at least one respect they are inconsistent with the landlord’s certificate served by LSMC just before the hearing of the appeal).
52. At paragraph 94 of its decision the FTT addressed the contribution condition in paragraph 3 of Schedule 8, as to which it said this:

“A landlord meets a “contribution condition” when the landlord’s net worth exceeds £2 million in respect of each of the buildings of which it is landlord. The ground rents of Sanctuary Street are £150 per annum. The Tribunal therefore accepts that it is highly unlikely that the Respondent [LSMC] meets the criteria of £2 million per year.”

The FTT did not refer to paragraph 14(2) of Schedule 8 or to the potential significance of the fact that no landlord’s certificate complying with regulation 6 of the Leaseholders Protections Regulations had been served.

53. The FTT next quoted paragraph 8 of Schedule 8 and noted that cladding remediation involved the removal or replacement of part of cladding system which forms the outer

wall of an external wall system, and which is unsafe. At paragraph [97] it recorded and agreed with LSMC's submission that neither of these requirements was satisfied, as follows:

“(i) The fire remedial works did not involve the “removal or replacement” of any part of a cladding system. The works rather involved the replacement of the insulation and the addition of a cavity barrier. The cladding system itself was neither removed nor replaced. We accept this argument.

(ii) The cladding system was not itself unsafe. The Efectis Report rather identified the lack of cavity barriers behind the aluminium cladding system as unsafe. This did not require any removal or replacement of part of the cladding system and was therefore not “cladding remediation” for the purposes of this paragraph. Again, we accept this argument.”

54. Finally, in paragraph [98] the FTT said that it agreed with LSMC that none of the Schedule 8 protections applied and added, for good measure:

“Neither have the Applicants established that their leases are “qualifying leases” for the purposes of paragraphs 3, 4 and 8.”

In making that observation, the FTT did not refer to paragraph 13 of Schedule 8 or to the potential significance of the fact that no landlord's certificate had been served.

Additional facts concerning a landlord's certificate and responsibility for the defects

55. Until a few days before the hearing of the appeal, Mr Lehner was unaware of the grant of the intermediate lease of the Block by Wimpey to LSMC in 2007 and understood that his immediate landlord was the freeholder of the Block, Damgate, and that LSMC was the management company. The disputed service charge demand of 8 February 2021, and all other demands which Mr Lehner has received, appeared to confirm that understanding. They each referred to sections 47 and 48, Landlord and Tenant Act 1987 and gave the address of Damgate as the address at which notices in proceedings may be served on the landlord. Section 47 requires that demands served on a tenant must include the name and address of the landlord.
56. A landlord's certificate under regulation 6 of the Leaseholder Protections Regulations is required to confirm whether the landlord under the lease on 14 February 2022 met the contribution condition. The earliest occasion on which any landlord's certificate was served on Mr Lehner was shortly before the hearing of the appeal. The facts stated in that certificate are different from those stated in the service charge demand.
57. The certificate is in the form prescribed by the Leaseholder Protections Regulations. It was given by LSMC and signed by its director, Mr Meads, on 20 March 2024. It begins by identifying the lease to which it relates, which is Mr Lehner's lease of Flat 44. It then states that LSMC was the landlord on 14 February 2022 (and therefore the “relevant landlord”) and that it is the current landlord. Damgate is stated to have been a superior

landlord on 14 February 2022. The certificate also explains that Wimpey had granted an intermediate lease to LSMC in 2007, and that Damgate had then exercised its option and completed the purchase of the freehold on 5 October 2007 and has held it ever since.

58. The second part of the certificate is concerned with the “developer criteria” and is directly relevant to the paragraph 2 protection. It begins by identifying the relevant defect to which the information provided relates, as “the installation of cavity barriers and fire stops in the metal cladding and glazing systems at the building”. The prescribed form then contains four statements about the relevant defect, only one of which has been completed in this certificate. It states:

“On 14th February 2022 at least one superior landlord was responsible for the relevant defect or was associated with a person responsible for a relevant defect.

The superior landlords responsible for the defect are Damgate Freeholds Limited (“DFL”)

59. The prescribed form does not ask for an explanation of the statement of responsibility, but in this case LSMC chose to add information justifying its conclusion that Damgate is a person responsible for the defects. It described Damgate as responsible on the basis that it may have been in a joint venture with the developer or may itself have been a developer. Thus, Damgate “may have sold the site” to Wimpey for the purpose of the development and been granted an option to reacquire the freehold reversion at a predetermined price once all of the flats had been sold. LSMC stated that it did not have copies of the relevant documents, but that if its “beliefs” were correct, it considered the question to be determined would be whether Damgate “participated in the undertaking or commissioning of the development”.
60. During the hearing of the appeal we were shown an official copy of the register of title for the leasehold interest in the Block created by the intermediate lease, showing the state of the Land Register on 1 December 2022. This confirmed that LSMC has been the landlord of the occupational leaseholders of the flats in the building since 2007, including on 8 February 2021 when the disputed service charge demand was made. Dr Lehner disputed the suggestion that LSMC could be his son’s landlord, but the documents which we were shown (but which, it appears, were not provided to the FTT) establish that that is the case.
61. The demand of 8 February 2021 naming Damgate as Mr Lehner’s landlord was therefore inaccurate. Section 47(2), Landlord and Tenant Act 1987, provides that where the information concerning the name and address of the landlord required by section 47(1) is not contained in a written demand given to a tenant, any part of the amount demanded which consists of a service charge or an administration charge is treated as not being due from the tenant at any time until the required information is provided by the landlord. It follows that the sum of £1,244.85 demanded on behalf of LSMC was not payable. Nor will it be payable (if at all) until a demand correctly identifying the landlord is provided to Mr Lehner (the landlord certificate is not such a demand).

62. LSMC's status as landlord at the date of the service charge demand is established by credible evidence (in the form of the official copy of the register of title) which it has produced for the first time at the hearing of the appeal and relies on. There is no reason why we should not take account of that material.
63. LSMC's failure to comply with section 47(1), 1987 Act is enough to dispose of the appeal. It enables us to make a determination under section 27A, Landlord and Tenant Act 1985 at this stage of the analysis that nothing is currently payable in respect of the works to the building which gave rise to the disputed demand of 8 February 2021 in which Damgate was wrongly identified as landlord. But, as LSMC remains entitled to serve a compliant demand, it is appropriate for us to consider the other issues in the appeal.
64. We can now consider how the 2022 Act applies on the facts of this case.

Applying the suggested steps to the facts of this appeal

Step 1 – preliminary conditions

65. *Relevant building (section 117)* - It is not disputed that 4 Sanctuary Street is a relevant building (the possibility that the development may comprise more than one building was alluded to by Mr Pratt but not developed in argument). It is self-contained, contains at least two dwellings, and is both at least 11 metres high and has at least five storeys above ground level.
66. *Relevant works and relevant defect (section 120)* - The disputed service charge is claimed in respect of the works found by the FTT to comprise the removal of the cladding and insulation, the replacement of the insulation with material meeting current standards, and the reinstatement of the cladding using the original panels. While the cladding was off the building the exposed structure was inspected to establish if cavity safety barriers were in place between each dwelling and barriers were installed where they had not originally been provided.
67. The insulation which was replaced dated from the original construction of the Block, and the risks associated with its use therefore arose as a result of something used in connection with the original construction; the risks associated with the absence of cavity barriers arose as a result of things not done at the same time. All of those works were completed within the period of 30 years ending on 14 February 2022 and they were therefore relevant works within the meaning of section 120(3)(a).
68. The leaseholders did not contest the LSMC's justification for the works, which was that the absence of cavity barriers in the original construction, combined with insulation of the type originally employed, gave rise to an unacceptable building safety risk, namely the risk to the safety of people from the spread of fire. The defects to which the disputed service charges relate are therefore relevant defects for the purpose of sections 122 to 125 and Schedule 8, as defined in section 120.

69. *Relevant measure (paragraph 1(1), Schedule 8)* – The purpose of the works was to remedy the relevant defects, and the works were therefore relevant measures for the purpose of Schedule 8.

Step 2 – paragraph 2 protection

70. The paragraph 2 protection applies if the relevant landlord (i.e. the landlord or any superior landlord on 14 February 2022) was responsible for the defects or was associated with a person responsible for the defects. The starting point in considering whether that condition is met is paragraph 14(2) of Schedule 8, and regulation 6(7) of the Leaseholder Protections Regulations made pursuant to it, by which any person who was a relevant landlord on 14 February 2022 is to be treated as having been responsible for the relevant defect if they have not provided a landlord’s certificate which complies with regulation 6.
71. The Leaseholder Protections Regulations, and the obligation to provide a landlord’s certificate, came into force on 20 July 2022. The obligation does not apply in all circumstances, but only in those identified in regulation 6(1)(a) to (e). Regulation 6(1)(a) creates the obligation “when the current landlord makes a demand to a leaseholder for the payment of a remediation service charge”. The demand relied on by LSMC in this case was dated 8 February 2021, before the Regulations came into force, so there was no requirement on it to have given a landlord’s certificate within four weeks of making that demand. It does not appear to us to be possible to treat the condition in paragraph 2(2) of Schedule 8 as being satisfied on account of a failure to provide a landlord’s certificate, unless the obligation to provide such a certificate was in force when the relevant demand was made.
72. It was not argued before us that, after the Leaseholder Protections Regulations came into force, a relevant landlord then came under an obligation to serve a landlord’s certificate in respect of any demand which had been made before that date. Regulation 6(1)(a) would not appear to have that effect, but it could be argued that regulation 6(1)(c) might. That requires that the current landlord must provide a certificate within four weeks of becoming aware of a relevant defect not covered by a previous landlord’s certificate. Our provisional view is that the language is not apt to impose a duty to provide a certificate on a landlord who was already aware of a defect at a time, before the Regulations took effect, when the demand was made. We prefer to express no concluded view on that point, because it was not argued and because (as will become apparent) it will not be determinative, and to leave it open for future consideration if it arises.
73. Subject to the possibility of an argument based on regulation 6(1)(c), service charges demanded before 20 July 2022 would appear therefore to be outside the scope of the deeming effect of regulation 6(7) unless one of the other circumstances in regulation 6(1) giving rise to the duty to provide a landlord’s certificate was satisfied after that date. Regulation 6(1)(b) and (d) respectively require a certificate within four weeks of the landlord (b) receiving notification from the leaseholder that the lease is to be sold, or (d) being requested to provide one. Neither of those conditions was satisfied in this case after the Regulations took effect.

74. We therefore conclude that, when the matter came before the FTT, regulation 6(7) was not engaged and the absence of a landlord's certificate did not affect the availability of the paragraph 2 protection in relation to the demand made on 8 February 2021.
75. Having decided that the condition in paragraph 2(2) cannot be treated as being satisfied by virtue of any deeming effect of regulation 6(7), it is next necessary to consider whether it was established on the facts (independently of any statutory presumption) that the landlord on 14 February 2022 was responsible for the defects or was associated with a person responsible for the defects; if so, the paragraph 2(2) condition will be satisfied and no service charges will be payable in respect of the remediation of relevant defects.
76. Where one is required, the absence of a certificate stating whether or not the relevant landlord was responsible for the relevant defect or was associated with a person who was responsible, gives rise to a presumption of fact, but the certificate itself is not proof of the facts which it certifies. Where a compliant certificate has been provided the presumption that the contribution condition is met is dispensed with, but the facts remain to be determined if they are in dispute. If a leaseholder challenges statements made in an apparently compliant certificate, it is for them to demonstrate that the relevant landlord or an associate was responsible for the relevant defect.
77. Similarly, if there was no obligation to provide a certificate at the time a service charge became payable the absence of a certificate will not give rise to any presumption that the paragraph 2(2) condition is satisfied. But the absence of the presumption will not prevent a leaseholder from proving that the landlord or a superior landlord or their associate was in fact responsible for the relevant defect.
78. Nor do we think a leaseholder who contests a service charge demanded before the Leaseholder Protections Regulations came into force on 20 July 2022 is prevented from requesting a certificate under regulation 6(1)(d), which may lead to the presumption being engaged if the certificate is not supplied. The Tribunal determined in *Hippersley Point* (at [119] to [170]) that the paragraph 9 leaseholder protection applied to service charges demanded before the commencement of the 2022 Act liability for which was determined after commencement. In *Triathlon Homes LLP v Stratford Village Development Partnership* [2024] UKFTT 26 (PC), the First-tier Tribunal concluded that a remediation contribution order under section 124, 2022 Act could be made in respect of costs incurred before the commencement of the Act. Similarly, in principle, we consider that the other leaseholder protections are available in respect of costs incurred before the commencement of the 2022 Act.
79. Since the FTT made its decision LSMC has provided a landlord's certificate in which it has stated that the freeholder, Damgate, is, or may be, "responsible for" the relevant defects by virtue of its original contract of sale with Wimpey and the related option to reacquire the freehold reversion at a predetermined price once all of the flats had been sold. Wimpey was the developer and was therefore responsible for the relevant defects by virtue of paragraph 2(3)(a), but for this purpose Damgate could also be responsible for the same defects on one of two alternative grounds: it will itself have been the "developer" within the meaning in paragraph 2(4) if it "commissioned the construction or conversion of the building ... with a view to granting or disposing of interests in the

building or parts of it”; it will also be responsible under paragraph 3(2)(a) if its arrangement with Wimpey amounted to a “joint venture”.

80. The material is not available to enable us to make a determination whether Damgate was a developer or whether its relationship with Wimpey was a “joint venture” but we are satisfied that it is not necessary for us to consider those questions. This is an appeal against the decision of the FTT and falls to be determined on the evidence provided to it. No application has been made to admit additional evidence, and the certificate itself is not evidence of the arrangements to which it refers. For the reasons already given concerning section 47, 1987 Act, this issue will not be determinative of the appeal. We therefore say nothing more about the effect of the landlord’s certificate provided by LSMC shortly before the appeal.
81. On the material provided to the FTT it was entitled to find, at paragraph 93, that neither LSMC nor Damgate was a developer of the Block, or associated with the developer, Wimpey. On that basis it was therefore correct to conclude that the paragraph 2 protection was not available to Mr Lehner.

Step 3 – qualifying lease

82. Mr Lehner’s lease was granted before 14 February 2022 for a term of more than 21 years and includes a service charge. It therefore satisfies the first three of the four conditions in section 119(2) and may be a qualifying lease and eligible for the remaining leaseholder protections. Whether it is or not will depend on the fourth condition, section 119(2)(d), which concerns the relationship between the leaseholder and the flat and the extent of the leaseholder’s other property interests. The text of section 119(2)(d) has already been reproduced above (at paragraph 23). It requires either that the dwelling must have been the leaseholder’s only or principal home on 14 February 2022, or that on the same date the leaseholder did not own any other dwelling in the UK or owned no more than two dwellings in the UK apart from under the lease in question. These conditions are not as clear as they might be but they allow for three alternative conditions, any one of which may be satisfied to secure the status of qualifying lease (although, the second alternative seems to be entirely included within the third and would appear to be redundant).
83. The FTT dealt with the question of whether Mr Lehner’s lease was a qualifying lease by accepting the submission of LMSC’s counsel that he had produced no evidence to support a finding that it was. That was an important conclusion because, if it was correct, it would mean that none of the leaseholder protections from paragraph 3 onwards would be available to him.
84. The FTT’s approach to this issue was clearly wrong and Mr Pratt conceded that it should have determined that the lease was a qualifying lease. That concession was correctly made. From the copy of Mr Lehner’s lease it was apparent that the conditions in section 119(2)(a), (b) and (c) were satisfied (i.e. the lease was a long lease of a single dwelling which included a service charge and had been granted before 14 February 2022). Paragraph 13 of Schedule 8 therefore applied, and the lease was to be treated as a qualifying lease unless the landlord “has taken all reasonable steps (and any prescribed

steps) to obtain a qualifying lease certificate from a tenant under the lease, and ... no such certificate had been provided” (paragraph 13(2)).

85. Once again, we think it irrelevant that the demand relied on by LSMC was dated 8 February 2021, before the 2022 Act came into force. For the reasons explained in *Hippersley Point* and *Triathlon*, the leaseholder protections have effect in relation to service charges which became payable before the commencement of the Act. It was therefore necessary for the FTT to consider whether LSMC had taken reasonable steps to obtain a qualifying lease certificate from Mr Lehner. Had it done so it would have discovered that no such steps had been taken and it should therefore have concluded, in accordance with paragraph 13(2), that Mr Lehner’s lease must be treated as a qualifying lease.
86. We would add that there is now evidence before this Tribunal, which was not provided to the FTT, that Mr Lehner owns no other property in the UK, and that his lease is a qualifying lease by virtue of satisfying the section 119(1) conditions, and not simply by virtue of paragraph 13(2) of Schedule 8. Mr Lehner had authorised his father, Dr Lehner, to speak on his behalf at the FTT hearing, and it is surprising that the FTT did not ask him whether his son lived at the flat. The documents which were before the FTT showed that LSMC communicated with Mr Lehner at the flat.

Step 4 – paragraph 3 protection – the contribution condition

87. The effect of paragraph 3 of Schedule 8 is that no service charge is payable under a qualifying lease in respect of a relevant measure where the landlord at the qualifying time met the contribution condition. The first step in determining whether this protection is available is to consider whether the presumption that the condition is met in paragraph 14(1) applies. The presumption applies unless the landlord provides a certificate to the tenant, complying with any prescribed requirements, that the person who was the landlord on 14 February 2022 (the relevant landlord) did not meet the contribution condition. If the presumption applies, it is not necessary to consider whether the qualifying condition was in fact met.
88. The FTT’s treatment of the contribution condition was comprised in paragraph 94 of its decision, which we have quoted above, and its conclusion that LSMC did not meet the condition was based entirely on the fact that the ground rents of each individual flat was only £150 a year. It did not consider the effect of the paragraph 14(1) presumption.
89. Whether the paragraph 14(1) presumption applies in this case is an issue on which we did not receive detailed argument. We have explained (at paragraph 71 above) that we do not consider that a landlord can be said to have failed to provide a landlord’s certificate for the purpose of paragraph 14(2) when the Leaseholder Protections Regulations were not in force at the time the relevant demand was made. That is because the requirement to provide a certificate within four weeks of a demand was created by regulation 6(1)(a) and cannot be said to have been breached when the regulation was not yet in force. But the paragraph 14(1) presumption is expressed in different terms and does not depend on the making of any regulation. It may be that the making of a regulation which requires a landlord’s certificate dealing with the

contribution condition only when one of the circumstances described in regulation 6(1) has occurred, and the reference in paragraph 14(1) to a certificate “complying with any prescribed requirements”, means that the presumption only applies where the demand was made after the prescribed requirement came into force. But we are not satisfied that an alternative interpretation could not properly be given to paragraph 14(2), requiring a certificate dealing with the contribution condition notwithstanding that there was no occasion to serve a landlord’s certificate because none of the conditions in regulation 6(1) had occurred since the Leaseholder Protections Regulations came into force.

90. Because the contribution condition is not determinative of the appeal, and because the issue is a tricky one on which we have not heard proper argument, we prefer to say nothing further about it.
91. Had the FTT found that the lease was a qualifying lease and that the paragraph 14(1) assumption was engaged so that the contribution condition must be taken to have been satisfied, the proper conclusion would have been that the paragraph 3 protection applied and that no the disputed service charge was not payable (because it was in respect of relevant measures relating to relevant defects). If the presumption did not apply the FTT would have been entitled to conclude that the contribution condition was not satisfied and that the paragraph 3 protection did not apply.

Step 5 – paragraph 4 protection - low value leases

92. It was not suggested by Dr Lehner that the value of his son’s lease on 14 February 2022 was less than £325,000 and it is clear that the paragraph 4 protection is not available in this case.

Step 6 – paragraph 8 protection – cladding remediation

93. By paragraph 8 of Schedule 8, no service charge is payable under a qualifying lease in respect of “cladding remediation”. The provision is quoted in full at paragraph 39 above and gives rise to the question whether the service charge is claimed in respect of the removal or replacement of any part of a “cladding system” which formed “the outer wall of an external wall system”, and which was unsafe? If so, the service charge is not payable in respect of the removal or replacement works. To the extent that the relevant measures comprise work other than the removal or replacement of any part of the cladding system, the protections in paragraphs 5, 6 and 7 may apply to the cost of that part of the work.
94. The FTT’s conclusion on this issue was that the removal of the external cladding panels, the stripping out of the original insulation, its replacement with new insulation, the installation of fire safety barriers where these were missing, and the reinstatement of the original cladding panels, was not “cladding remediation”. It accepted the submission on behalf of LSMC that although the works “involved the replacement of the insulation and the addition of a cavity barrier [t]he cladding system itself was neither removed nor replaced”. Its approach therefore involved distinguishing between the “cladding system” on the one hand, and the insulation and cavity barriers behind the external skin on the other.

95. From the photographs and drawings we were shown we understand that most of the façade of the Block comprises brickwork panels and glazed windows, with only a few areas on each floor, mostly around balconies and above and between some of the windows, being fitted with cladding. Houston Lawrence Professional Services, who prepared the tender documents for the remediation works, included a diagram illustrating the current construction of the façade of the building. From that diagram we understand that in those locations where cladding was present, it was fitted into openings in the façade, rather than being fitted on to a continuous structural component, or as a facing on a concrete panel or beam. The fixing arrangement is not clear from the material we were shown, but the composition of the cladding in these parts of the Block is. It comprised ten layers in all, namely, from its outer face, a 2mm aluminium cladding panel, behind which were layers successively comprising an air gap of 37mm, a 6mm sheet of fibre board, an air gap of 33mm, a first 25mm Kingspan xps insulation board, a 10mm air gap, a second 25mm Kingspan xps insulation board, a 12.5mm sheet of plasterboard, an air gap of 100mm, and a final 12.5mm sheet of plasterboard, the internal face of which formed part of the interior wall of the adjacent room to which we assume one or more finishing coats of plaster or other coating would be applied.
96. In addition to the installation of fire-stopping, the remedial works undertaken to the Block removed and replaced some of these layers, reducing the original ten to eight. The aluminium cladding panel was taken off, the fibre board was removed and replaced with 6mm Magply board, and the two layers of xps insulation were removed and replaced with 75mm of Rockwall slab. The aluminium cladding panel was then reinstalled.
97. Dr Lehner submitted that the “cladding system” comprised the whole of the original construction between the external face of the aluminium cladding panel and the internal surface of the last layer of plasterboard. It therefore included the Kingspan insulation boards with the result that the replacement of that insulation was “cladding remediation” and was within the scope of the paragraph 8 protection.
98. Mr Pratt submitted that the “cladding system” comprised only the 2mm aluminium cladding sheet which formed the outermost skin of the Block in these locations. Alternatively, even if the insulation and other components behind the aluminium cladding could be considered part of a “cladding system”, they did not form the “outer wall” of that system and so their replacement was not “cladding remediation” within the meaning of paragraph 8(2).
99. We understand “cladding” to refer to material attached to the structure of a building to provide a protective or decorative outer skin. But the expression with which we are concerned is not “cladding”, but “cladding system”.
100. The 2022 Act contains no definition of a “cladding system”, but we have no doubt that the FTT’s narrow interpretation of that expression was wrong. We have reached that conclusion for the following reasons.
101. First, the reference to a “cladding system” is clearly not intended to be limited simply to a single building component such as the final layer of cladding panels visible on the

facade of a building. Any “system” has a number of components, and each component is within the scope of paragraph 8(2): cladding remediation comprises the removal or replacement of “any part of a cladding system”.

102. Secondly, where an expression is used in a statute dealing with a technical subject, such as fire safety, it is legitimate to consider how that expression is usually understood in that context. In *The Dunelm* (1884) 9 PD 164, at 171, Brett MR said:

"My view of an Act of Parliament which is made applicable to a large trade or business is that it should be construed, if possible, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing."

103. We are aware that the expression “cladding system” is often used in technical literature concerned with fire safety in a way which includes the layers of insulation commonly found behind the outermost sheet of cladding material. For example, in the prospectus for the Building Safety Fund published by the Department for Levelling Up, Housing and Communities in May 2021, a footnote on page 11 explains that:

“A cladding system includes the components that are attached to the primary structure of a building to form a non-structural external surface. The cladding system includes the weather-exposed outer layer or ‘screen’, fillers. Insulation, membranes, brackets, cavity barriers, flashing, fixings, gaskets, and sealants.”

104. On 1 May 2024 the RICS updated its guidance to surveyors engaged to certify that the safety of a building’s external wall system has been assessed. The publication addresses the question ‘What is an external wall system?’ and advises that ‘The external wall system (EWS) is made up of the outside wall of a residential building, including cladding, insulation, fire break systems, etc.’¹

105. The RICS guidance also makes reference to the British Standards Institution code of practice BSI PAS9980:2022 – *Assessing the external wall fire risk in multi-occupied residential buildings*. This defines “cladding” at paragraph 3.1.4, and includes an explanation of a cladding system:

“cladding

system of one or more components that are attached to, and might form part of the weatherproof covering of, the exterior of a building

NOTE Such systems are normally attached to the primary structure of a building to form non-structural, non-loadbearing external surfaces and can comprise a range of facing materials/cladding panels, including metal composite panels or non-loadbearing masonry, along with insulating materials, rendered insulation systems (ETICS) and insulated core sandwich

¹ <https://www.rics.org/news-insights/current-topics-campaigns/fire-safety/cladding-external-wall-system-ews-faqs>

panels, which are attached to a substrate. Combinations of, for example, cladding panels and insulation form cladding systems and such systems might include cavities, which can be ventilated or non-ventilated. The cladding system also encompasses the supporting rails and bracketry, as applicable, to attach the cladding to the building, and cavity barriers where applicable. Systems that constitute the entire thickness of the external wall, by definition, cease to be cladding systems and are the external wall, e.g. curtain walling.

(our emphasis)

106. Annex M to BSI PAS9980:2022 also explains:

“External cladding systems involve the combination of several different components, including cladding panels, ventilated cavities, thermal insulation, breather membranes, cavity/fire barriers and support systems.”

107. These examples shed light on the meaning of a “cladding system” and support the conclusion that the ordinary meaning of that expression includes materials installed behind the external screen. This usage is consistent with the definition of “cladding system” relied on by Dr Lehner, which he attributed to the National Fire Chiefs’ Council (but without a specific source citation).

108. Finally, where the expression “cladding system” is used elsewhere in the 2022 Act, it appears to us to support the conclusion we have reached about its meaning. Section 149 is concerned with liability for past defaults relating to “cladding products”. A “cladding product” is defined as “a cladding system or any component of a cladding system” (section 149(12)). One condition of liability for cladding products includes that the “the cladding product is attached to, or included in, the external wall of a relevant building” (section 149(3)). No attempt has been made by Parliament to distinguish between different building components which might be attached to or included in the external wall of a building; that seems to us to invite a wider, rather than a narrower, interpretation of “cladding product” and “cladding system”.

109. We therefore conclude that the FTT was wrong to dismiss Mr Lehner’s reliance on the paragraph 8 protection on the basis that the insulation was not “part of a cladding system”.

110. The work done to the Block comprised the removal of the original two sheets of insulation and their replacement with a new single sheet of a different material with improved fire-resistant properties. We are satisfied that this part of the work involved the removal and replacement of part of the cladding system. The work also included the installation of cavity barriers where these had previously been omitted. The FTT said that the installation of these new components was not the removal or replacement of part of a cladding system, but we consider that in this respect also it took too narrow a view of the scope of paragraph 8. The original insulation was part of the cladding system; it was removed and replaced as part of a single package of works with new insulation and new cavity barriers. The fact that the original construction of the cladding system may not have included cavity barriers, or that cavity barriers which were originally included were defectively installed and had to be replaced (the evidence does not show which was

the case), does not prevent the whole package of work from being viewed as the replacement of part of a cladding system. The replacement was not on a strictly like for like basis and included both materials of an improved specification and materials which had been absent or poorly fitted, but in our judgment the whole of the work nonetheless comprised the replacement of part of the cladding system. The replacement of the insulation panels with a less flammable substitute would not in itself make the building compliant – the introduction, where absent, or the improvement, where defective, of cavity barriers constituted an important element of making the building safe.

111. We do not consider that paragraph 8 can sensibly be interpreted as covering only the removal of part of a cladding system and its replacement with an identical component, and we see no reason either as a matter of language, or having regard to the policy of the Act, why the replacement of part of a cladding system with something quite different, or additional, should not fall within the paragraph 8 protection. “Replacement” need not mean replacement with something identical. The policy of the Act of providing leaseholders with protection against the cost of putting cladding systems into a safe condition would be frustrated if it was necessary to divide essential remedial work into those parts which involved the replacement of components which were there before and those which involved the introduction of something new. We therefore regard the whole of the work done to the Block as comprising the removal or replacement of part of a cladding system.
112. The definition of “cladding remediation” in paragraph 8(2) gives rise to two further issues of interpretation. Both questions concern the conditions in sub-paragraphs (a) and (b) of paragraph 8(2). The first is, what is meant by the expression “the outer wall of an external wall system”? The second is: is it the cladding system as a whole which must form the outer wall of an external wall system, and which must be unsafe? Or is it the part of the cladding system that is being removed or replaced which must do so?
113. Cladding remediation involves the removal or replacement of any part of a cladding system that forms the outer wall of an external wall system. Modern buildings are complex structures and the use of the expression “the outer wall of an external wall system” reflects that complexity. The first characteristic of a cladding system which is covered by paragraph 8 is that it is part of an “external wall system”. We received no detailed submissions on the meaning of this expression, but as currently advised we interpret it as signifying that paragraph 8 is only concerned with the external walls of a building, and not with internal walls, separating different areas within a building. Plasterboard or other coverings applied to internal dividing walls are not within the scope of paragraph 8.
114. The other requirement of paragraph 8 is that the cladding system must form the “outer wall” of the external wall system. Paragraph 8 is not concerned with a cladding system which forms the inner wall of an external wall system. If an external wall comprised an outer wall and an inner wall, with a cavity between them, only a cladding system which formed the outer wall would be covered by paragraph 8.
115. On the relatively limited information available in this case we consider that the outer wall of the external wall system includes the aluminium rainscreen panel, the framework on which it is supported, the insulation behind it and the newly installed cavity barriers;

we do not consider that the two internal plasterboard sheets, separated by a small cavity, are part of the outer wall of the external wall system.

116. As to the second question, we consider that the conditions in paragraph 8(2)(a) and (b) must be satisfied by the cladding system as a whole, and not simply by the parts of the system which are to be removed or replaced. That seems to us to be the natural consequence of the reference to the removal or replacement of “*any* part” of a cladding system that forms the outer wall of an external wall system. If the intention had been to confine the scope of paragraph 8 to the removal or replacement of the outer wall of an external wall system, the reference to “any part” of the system would be both redundant and misleading. The appropriate way to express the narrower intention would be to refer to “so much of” or “such part of” a cladding system as forms the outer wall of an external wall system.
117. We also consider that it is the cladding system as a whole which must be unsafe, and not simply the part which is to be removed or replaced. It is difficult to imagine circumstances in which the use of a building component which is itself unsafe will not also render the system of which the component is part unsafe. In this case the FTT did not take a different view, but it nevertheless decided that the cladding system was not unsafe. It explained at paragraph 97(ii) that the Efectis report had “identified the lack of cavity barriers behind the aluminium cladding system as unsafe” and reasoned that “this did not require any removal or replacement of part of the cladding system” and was therefore not cladding remediation. We read that finding as being a consequence of the narrow view the FTT took of the meaning of “cladding system”, which we have already rejected.
118. There is no doubt that the cladding system was “unsafe” in the sense that it failed to meet the standards required to comply with Government’s Advice for Building Owners of Multi-storey Multi-occupied Residential Buildings issued in January 2020. It lacked adequate cavity barriers and, without them, the increased risk of a fire spreading meant that the form of insulation which had been employed in the cladding system was inadequate and failed to meet the appropriate safety standard.
119. In our judgment the FTT was wrong to conclude that the works were not covered by the paragraph 8 protection. We are satisfied that the works in their entirety were cladding remediation. That conclusion provides an additional reason why no service charge is payable in respect of the works by Mr Lehner or any other qualifying leaseholder.
120. In view of this conclusion it is unnecessary for us to consider whether the protections in paragraphs 5, 6 or 7 apply.

Conclusion

121. Our conclusion is that the service charge of £1,244.85 demanded on 8 February 2021, was not payable by Mr Lehner, and will not be payable even if a proper demand is made for it in future. That is for two reasons. First, because the 2021 demand failed to state the name and address of the landlord (referring to Dangate rather than to LCMS) so that section 47 of the Landlord and Tenant Act 1987 meant that the amount demanded was

not due. And second, because the work in respect of which the demand was made was “cladding remediation” and, as the owner of a qualifying lease, Mr Lehner has the benefit of the paragraph 8 protection and is not liable to pay such a charge.

122. For these reasons we allow the appeal, set aside the FTT’s decision of 12 April 2023, and substitute a determination that no service charge is payable by Mr Lehner in respect of the works.

Martin Rodger KC,
Deputy Chamber President

Peter D McCrea FRICS FCI Arb

17 May 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal’s decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

Appendix

Step 1 – preliminary conditions

1. Is the building a relevant building (s.117)?
 - Is it self-contained (i.e. structurally detached) or a self-contained part (as defined by s.117(5)) of a building in England?
 - Does it contain at least two dwellings?
 - Is it at least 11 metres high (from the ground to the finished surface of the top floor), or has at least five storeys above ground level?
 - Does it fall outside each of the excluded categories in s.117(3)?

If all of these questions are answered affirmatively the building is a relevant building.

2. Does the disputed service charge relate to a relevant defect (s.120)?

- Did the defect arise as a result of anything done (or not done) or anything used (or not used) in connection either with the construction or conversion of the building, or with works undertaken or commissioned by a landlord or management company?
- If so, were the construction or conversion of the building or the works by the landlord or management company from which the defect arose completed between 14 February 1992 and 14 February 2022?
- If so, does the defect cause 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 any part of it (a building safety risk)?

If all of these questions are answered affirmatively the defect is a relevant defect.

3. Is the disputed service charge a charge in respect of a relevant measure relating to the relevant defect (para 1(1), Sch.8)?
 - Was the measure taken to remedy the relevant defect, or for the purpose of preventing a building safety risk that arises as a result of the defect from materialising, or for the purpose of reducing the severity of any incident resulting from the risk materialising?

Step 2 – paragraph 2 protection

4. Did the disputed service charge become payable before or after 20 July 2022?
5. If so, had any of the circumstances listed in regulation 6(1), LP Regulations occurred between 20 July 2022 and the date the disputed service charge became payable?
6. If so, has the current landlord provided a landlord's certificate which complies with regulation 6? If not, regulation 6(7) applies, the paragraph 2(2) condition is taken to be satisfied and the service charge is not payable.
7. If the current landlord has provided a landlord's certificate, or if the disputed service charge became payable before 20 July 2022, was the landlord or any superior landlord on 14 February 2022 responsible for the relevant defect, or associated with a person responsible for the relevant defect? If so, the paragraph 2(2) condition is satisfied, and the service charge is not payable. If the landlord or any superior landlord or an associate was not responsible for the defect, the paragraph 2 protection does not apply.

Step 3 – qualifying lease

8. Does the lease satisfy all three conditions in section 119(2)?
 - Was it granted for a term of more than 21 years?
 - Does it includes a service charge?
 - Was it granted before 14 February 2022?

9. If so, has the landlord taken all reasonable or prescribed steps to obtain a qualifying lease certificate from the tenant (i.e. has the landlord asked the tenant if, on 14 February 2022, the dwelling was their only or principal home, whether they owned any other dwelling in the UK, and whether they owned not more than two other dwellings in the UK apart from the lease)? If not, the lease is to be treated as a qualifying lease.
10. If the landlord has taken all reasonable/prescribed steps to obtain a qualifying lease certificate, and either no certificate has been provided, or the tenant has certified that the conditions in section 119(2)(d) were met, were those conditions in fact met i.e. on 14 February 2022, was the dwelling the tenant's only or principal home, did they own no other dwelling in the UK, or did they owned not more than two other dwellings in the UK apart from the lease? If any of the conditions is satisfied, the lease is a qualifying lease and the protections in paragraphs 3 to 9 of Schedule 8 are applicable. If not, none of those protections are applicable.

Step 4 – paragraph 3 protection – the contribution condition

11. Has the landlord provided a certificate to the tenant that the relevant landlord did not meet the contribution condition on 14 February 2022? If not, the contribution condition is taken to be satisfied and no service charge is payable.
12. If so, did the landlord in fact meet the contribution condition on 14 February 2022? If so, no service charge is payable.

Step 5 – paragraph 4 protection - low value leases

13. On 14 February 2022 was the value of the qualifying lease less than £325,000 (Greater London) or less than £175,000 (elsewhere)? If so, no service charge is payable.

Step 6 – paragraph 8 protection – cladding remediation

14. Do the relevant measures in respect of which the service charge is claimed comprise the removal or replacement of any part of a cladding system?
15. If so, (a) does the cladding system form the outer wall of an external wall system, and (b) was the cladding system unsafe? If so the paragraph 8 protection applies and no service charge is payable in respect of the removal or replacement works. To the extent that the relevant measures comprise work other than the removal or replacement of any part of the cladding system, the protections in paragraphs 5, 6 and 7 will apply to the cost of that part of the work.

Step 7 – paragraph 9 protection – legal or professional services

16. Is the disputed charge in respect of legal or other professional services (including obtaining legal advice, proceedings before a court or tribunal, or ADR) relating to the liability or potential liability incurred as a result of a relevant defect? If so that element of the service charge is not payable.

Step 8 – paragraphs 5, 6 and 7 – other limits

17. What was the value of the qualifying lease on 14 February 2022?
18. What is the ‘permitted maximum’ as defined in paragraph 6 of Schedule 8?
19. When did the person who was the tenant on 28 June 2022 become the tenant under the qualifying lease?
20. What is the pre-commencement period (i.e. the period beginning on 28 June 2017 or, if later, on the day the tenant on 28 June 2022 became the tenant under the qualifying lease, and ending on 28 June 2022)?
21. What was the aggregate of the service charges in respect of relevant measures relating to any relevant defect which fell due under the lease during the pre-commencement period and which fell due after 28 June 2022 but before the disputed charge fell due (the relevant service charge)?
22. Does the sum of the disputed service charge and the relevant service charge exceed the permitted maximum? If so, the excess over the permitted maximum is not payable (paragraph 5, Schedule 8).
23. Does the sum of the disputed service charge and the total service charges in respect of relevant measures relating to any relevant defect which fell due in the period of 12 months ending with the day on which the disputed service charge fell due, exceed one tenth of the permitted maximum? If so, the excess over one tenth of the permitted maximum is not payable (paragraph 7, Schedule 8).



Neutral Citation Number: [2024] EWHC 1579 (KB)

Case No: QB-2022-001762

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 June 2024

Before :

MASTER DAGNALL

Between :

**THE OCCUPIERS OF SAMUEL GARSIDE
HOUSE**

Claimants

- and -

**(1) BELLWAY HOMES LIMITED
(2) SHEPPARD ROBSON ARCHITECTS LLP**

Defendants

David Sawtell (instructed by Edwards Duthie Shamash) for the **Claimant**
Tim Calland (instructed by Gateley Legal LLP) for the **First Defendant**
James Frampton (instructed by Mayer Brown International LLP) for the **Second Defendant**
(and Sheppard Robson Architects LLP and Sheppard Robson Limited)

Hearing date: 8 November 2023; further submissions received in and up to 27 March/22April
2024

Approved Judgment

This judgment was handed down at 10.00am on 25 June 2024 at a non-attendance hearing
and subsequent circulation to the parties or their representatives by e-mail and by release to
the National Archives.

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MASTER DAGNALL:

Introduction

1. There are before me two applications made by the Claimants:
 - (1) An Application Notice dated 28 April 2023 (“the April Application”) seeking a Declaration that the Claim Form has been validly served, alternatively relief from sanctions in relation to its not having been validly served, and extensions of time for service of (a) the Claim Form and (b) the Particulars of Claim
 - (2) An Application Notice dated 23 August 2023 (“the August Application”) seeking (i) to add various Claimants who are minors (“the Additional Claimants”), and (ii) “that the Second Defendant’s name be amended to “Sheppard Robson Limited”.
2. The Claim arises from the event of a serious fire (“the Fire”) at a block of flats (“the Building”), originally constructed in 2013, known as Samuel Garside House, 2 De Pass Gardens, Barking, Essex IG11 0FQ on 9 June 2019. The Claimants are occupiers or former occupiers of various of the flats in the Building. The First Defendant is the developer and constructor of the Building. The corporate architect of the Building was a company with the name Sheppard Robson Limited (“SRL”) and which is an associated entity of another company Sheppard Robson Architects Limited (“SRAL”). The Claimants seek damages against the Defendants at common-law and under the Defective Premises Act 1972 (“the 1972 Act”) for alleged negligence and breach of statutory duties. Those damages are both for physical damage and economic loss, and for personal injuries. All but one of the original Claimants is an adult, but three of the five Additional Claimants are, or are said to be, minors.
3. The Claim Form was issued on 6 June 2022 and against the First Defendant and “Sheppard Robson Architects LLP”. Various extensions of time for service of the Claim Form were agreed but steps for service were only taken in April 2023. The Defendants assert that those steps were insufficient to comply with the relevant Civil Procedure Rules (“CPR”). The Claimants contend that they were but also that there was a further agreed extension of time for service to June 2023; and so that they should be granted a Declaration that there has been good service; and, if they fail on both contentions in relation to a relevant Defendant, that they should be granted some relief from resultant sanctions.
4. The Claimants further contend that the naming of “Sheppard Robson Architects LLP” as the Second Defendant was a misnomer, or a mistake, for “Sheppard Robson Limited, and which should be corrected by an amendment of the name to “Sheppard Robson Limited”. SRAL and SRL contend that it is SRAL which has been sued and to substitute SRL at this point would be impermissible for limitation reasons.
5. There is a further difficulty, if the Claimants fail at least in relation to the April Application, as to what should be the consequence, and, in particular, in the light of the very recent Court of Appeal decision in *R (on the application of Rezq Allah Koro) v The County Court at Central London* [2024] EWCA Civ 94 (“Koro”). This raises the question of whether the Defendants can actually complain about improper service on the facts before me.

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6. The addition of the Additional Claimants is not opposed as such but is dependent upon what else occurs.

Applicable Limitation Provisions

7. The Applications exist within a particular context of the law relating to limitation.
8. Section 11 of the Limitation Act 1980 (“the 1980 Act”) provides for a time-limit for the bringing of any claim for negligence or breach of duty where the claim includes damages in respect of personal injury to have a time-limit of 3 years from the acquiring of relevant knowledge. This provision applies even if other non-personal injury damages are claimed. However, it is subject to a power for the Court to disapply the time-limit where such is just and equitable under section 33 of the 1980 Act. That power is often exercised especially where there will be no substantive prejudice to a defendant due to a delay beyond the expiry of the three-year limitation period.

9. Section 135 of the Building Safety Act 2022 has inserted a new section 4B into the 1980 Act, and provides as follows:

“135 (1) After section 4A of the Limitation Act 1980 insert—

“4B Special time limit for certain actions in respect of damage or defects in relation to buildings

(1) Where by virtue of a relevant provision a person becomes entitled to bring an action against any other person, no action may be brought after the expiration of 15 years from the date on which the right of action accrued.

(2) An action referred to in subsection (1) is one to which—

(a) sections 1, 28, 32, 35, 37 and 38 apply;

(b) the other provisions of this Act do not apply.

(3) In this section “relevant provision” means—

(a) section 1 or 2A of the Defective Premises Act 1972;

(b) section 38 of the Building Act 1984.

(4) Where by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the commencement date, to bring an action against any other person, this section applies in relation to the action as if the reference in subsection (1) to 15 years were a reference to 30 years.

(5) In subsection (4) “the commencement date” means the day on which section 135 of the Building Safety Act 2022 came into force.”

(2) In section 1(5) of the Defective Premises Act 1972, for “the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963” substitute “the Limitation Act 1980”.

(3) The amendment made by subsection (1) in relation to an action by virtue of section 1 of the Defective Premises Act 1972 is to be treated as always having been in force.

(4) In a case where—

(a) by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the day on which this section came into force, to bring an action against any other person, and

(b) the period of 30 years from the date on which the right of action accrued expires in the initial period, section 4B of the Limitation Act 1980 (inserted by subsection (1)) has effect as if it provided that the action may not be brought after the end of the initial period.

(5) Where an action is brought that, but for subsection (3), would have been barred by the Limitation Act 1980, a court hearing the action must dismiss it in relation to any defendant if satisfied that it is necessary to do so to avoid a breach of that defendant's Convention rights.

(6) Nothing in this section applies in relation to a claim which, before this section came into force, was settled by agreement between the parties or finally determined by a court or arbitration (whether on the basis of limitation or otherwise).

(7) In this section—

“Convention rights” has the same meaning as in the Human Rights Act 1998;

“the initial period” means the period of one year beginning with the day on which this section comes into force.”

10. In principle, it was common-ground before me that the effect of this new section 4B of the 1980 Act was that the limitation period for bringing claims under section 1 of the 1972 Act has not yet expired; and that this would apply to resultant claims for physical damage and economic loss.
11. However, the position may be different in relation to claims brought in common-law negligence as section 4B only applies to section 1 of the 1972 Act claims. I was not specifically addressed on when those claims might expire or have expired except that it was common-ground (at least to some extent) that a claim at common-law which included a claim for personal injuries would initially attract section 11 of the 1980 Act so that its limitation period would be three years (from knowledge of injury), in this case expiring shortly after the issue of the Claim Form, albeit subject to potential extension under section 33 of the 1980 Act.
12. There also seemed to be some mutual agreement that claims for personal injuries were simply governed by section 11 (and section 33) of the 1980 Act and therefore did not fall within and were not assisted by the new section 4B of the 1980 Act. That may be correct either generally or at least if such claims cannot be made the subject of claims under section 1 of the 1972 Act (although even then there would be a tension between the two sections, as section 11 of the 1980 Act applies to any claim which includes a claim for damages for personal injuries). I am not at all sure that either proposition is

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correct not having been addressed in any detail on them or the construction of new section 4B.

13. It was common-ground that the claims of the existing minor claimant and of the Additional Claimants (insofar as they are children as they assert), being all claims brought by minors, have the benefit of section 28 of the 1980 Act which effectively postpones the starting date from which limitation is to run for their claims (assuming that they were alive when the relevant right of action accrued and they are not claiming under some other person to whom the right of action had previously accrued when that other person was an adult) to the dates when they respectively attain 18.
14. As I have said, I was only addressed on those statutory provisions in outline as it was common-ground that their consequences include that:
 - i) in relation to at least some of the personal injury claims, the Claim Form was issued within the initial limitation period (under section 11) but that initial limitation period has now expired so that if any of the relevant Claimants were to issue a new Claim Form claiming in respect of personal injuries they would, or at least might, have to rely on section 33 and seek for the court to disapply the limitation period; and, further,
 - ii) in relation to the common-law claims for loss other than in respect of personal injuries, it is at least arguable that the Claim Form was issued within the initial limitation period but that it has now expired so that if any of the relevant (non-adult) were to issue a new Claim Form advancing those claims they would be met by a limitation defence.
15. I am not entirely sure that the above analysis is necessarily correct, at least in relation to the 1972 Act claims and claims for personal injuries, and I should not be taken as having affirmed it to be correct by this judgment; but it is at least arguable, and that, it seems to me, is sufficient to trigger various of the relevant rules (in particular section 35 of the 1980 Act as carried into effect by CPR17.4 and CPR19.6) to which I will come in this judgment.
16. I add that there would seem, at first sight, to be a substantial argument that, even if section 11 applies, a section 33 disapplication would be granted in relation to any new Claim Form. However, no submission was made to me that I could take that as being self-evident and so I have proceeded on the basis that such a section 33 case would only be arguable rather than certain.
17. I further must, and do, proceed on the basis that even if the Defendants' assertions of these various limitation points were to turn out eventually to be bad in law (or overridden by a section 33 disapplication), the Defendants are entitled to require the relevant rules, those within the 1980 Act and the CPR, to be complied with. If the procedural law is that the result on the facts which I come to find is that this Claim Form must be struck-out as against one or more of the Defendants, then that is what I must do even if it may well turn out that the only real consequence is that the Defendants obtain costs orders against the Claimants.

The Procedural History

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18. The Claimant's solicitors, Edwards Duthie Shamash ("EDS") sent a Pre-Action Protocol Letter of Claim to the First Defendant's solicitors Gateley Legal LLP ("GL") at their Leeds office ("Leeds") dated 18 December 2020. GL replied by letter of 22 January 2021 from Leeds giving an email address of Andrew.johnson@gateleylegal.com ("the Johnson Email Address") and containing a Document Exchange address ("the Leeds DX Address") but no fax number.
19. EDS also sent a Pre-Action Protocol initial Letter of Claim addressed to "Sheppard Robson Architects LLP" stating that Sheppard Robson Architects LLP were the architects of the Building and intimating a claim against them dated 18 December 2020. On 14 January 2021 Mayer Brown International LLP solicitors ("MB") replied to say that they were instructed by "Sheppard Robson Limited ("Sheppard Robson")" and referred "to your letter of claim to Sheppard Robson dated 18 December 2020..." and then sent a more (and highly) detailed letter on 20 January 2021 which started "We refer to your letter of claim to Sheppard Robson Limited ("Sheppard Robson") dated 18 December 2020...". That and subsequent letters contained both a fax number ("the MB Fax Number") and a DX address ("the MB DX Address") for MB.
20. On 9 May 2022, EDS sent by email to GL at the Johnson Email Address a letter (which I infer must have been addressed to the Leeds Address, as this was EDS's ordinary practice, and although I do not have a copy of it in evidence, I regard that as proved by the Claimants as being more likely than not on the balance of probabilities having considered all the evidence and the inherent probabilities) which asked for them for confirmation as to whether they would accept service. GL replied by an email of 9 May 2022 which did not bear any fax number, stating that "I can confirm that we are authorised to accept service of proceedings."
21. On 11 May 2022 EDS sent a letter to MB headed "Your Client: Sheppard Robson Architects LLP" and asking "whether you have instructions to accept service of proceedings on behalf of your client." MB responded by letter of 12 May 2022 to complain that the Protocol process was not being followed including by reference to "our Letter of Response on 20 January 2021", but also saying "we can confirm that we are instructed to accept service of proceedings on behalf of our client in relation to the Development", although they did not there identify what entity was "our client".
22. On 19 May 2022 EDS sent a letter to MB again headed "Your Client: Sheppard Robson Architects LLP" and proposing a limitation standstill agreement and attached a draft which referred to a party being "Sheppard Robson Architects Limited". On 26 May 2022 MB responded with a draft which altered that name to "Sheppard Robson Limited". The standstill agreement was never finally agreed.
23. On 6 June 2022 EDS issued the Claim Form with the Second Defendant being "Sheppard Robson Architects LLP". The Claim Form stated:

"The Claimants' claim is for damages and interest together with any other relief for personal injury and property damage, direct loss and consequential loss and expenses sustained as a result of the fire on 9 June 2019 at [the Building] due to the professional negligence and/or breach of statutory duty of the Defendants."
24. On 7 June 2022 EDS notified MB by a letter headed "Your Client: Sheppard Robson Architects LLP" that the Claim Form had been issued.

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25. On 22 September 2022 EDS wrote to MB by a letter headed “Your Client: Sheppard Robson Architects LLP”, asking for them to agree a Consent Order for a stay of the Claim until 6 January 2023 and to extend time for service of the Claim Form and Particulars of Claim to 24 February 2023. On the same day they sent a similar letter to GL.
26. GL replied by letter of 30 September 2022 giving an email address of rakshinda.nazir@gateleylegal.com (“the Nazir Email Address”) bearing a physical address of Gateley’s Belfast office (“the Belfast Address”) and with no Document Exchange address and no fax number. The relevant fee earners were then and remained located in Leeds and no explanation has been given for the sending of this or other letters bearing the Belfast Address. EDS responded by letter sent by DX to the Leeds Address and email to the Johnson Email Address with a revised proposed consent order proposing service of the Claim Form and Particulars of Claim by 4pm on 3 March 2023.
27. On 22 September 2022 EDS also wrote to MB by a letter headed “Your Client: Sheppard Robson Architects LLP”, asking for them to agree extended deadlines leading to a Protocol meeting of the parties by 3 April 2023. They referred to the existing Consent Order having extended time for service to 4pm on 21 April 2023.
28. MB responded by letter of 30 September 2022 which stated amongst other things “You have issued a claim form against the wrong entity. As we confirmed in our Letter of Response and when we subsequently provided our comments on your proposed standstill agreement Sheppard Robson Limited (not Sheppard Robson Architects LLP) was instructed by Bellway Homes on the Development. Therefore any claim in tort is now time barred under the Limitation Act 1980.” They then proposed that there be a timetable leading to a Protocol discussion meeting.
29. On 3 October 2022 GL sent a signed (by both GL and MB) copy of the proposed consent order by email from the Nazir Email Address and asked that all further correspondence to GL should be sent to the Nazir Email Address copying in Andrew Johnson. The email bore a Leeds telephone number.
30. On 1 November 2022 the Court made, and on 2 November 2022 sealed, the proposed consent order (“the November Order”), which was headed with the name of the Second Defendant as “Sheppard Robson Architects LLP” and which provided “The deadline for the Claimants to file and serve the Claim Form and Particulars of Claim shall be extended to 4pm on 21 April 2023.” and was signed by MB for “Sheppard Robson”.
31. On 2 December 2022 EDS wrote to both GL (by DX to the Leeds DX Address and email to the Johnson Email Address) and MB (by email) asking for certain extensions and stating that given the November Order extended time for service of the Claim Form and the Particulars of Claim to 21 April 2023, those extensions would not prejudice the timetable.
32. On 8 December 2022, MB sent a letter to EDS, which letter bore the London Fax Number. It stated that the current timetable provided for the Claim Form and Particulars of Claim to be served by 21 April 2023.
33. It said in its paragraph 2(d) that given that the Claimants were unlikely to send their Letter of Claim until 16 February 2023 “the dates of the subsequent steps in the

timetable will most likely need to be adjusted as follows... Claim Form and Particulars of Claim to be filed and served by 8 June 2023...".

34. It said in its paragraph 4 that "Notwithstanding the above, we propose that the dates set out at paragraph 2(d) are considered further in due course i.e. after your clients have procured the necessary evidence from their fire-engineering expert and if appropriate sent a revised Protocol Letter of Claim. We think that is a sensible approach because:
 - (a) unless and until your clients have received the expert evidence, they will not be able to reach a decision on whether or not to continue with the claim; and
 - (b) it is possible that you will be delayed further in finalising and sending the Letter of Claim, in which case this would, as explained above, impact upon the subsequent deadlines."
35. GL then sent an emailed letter of 16 December 2022 from the Johnson Email Address again bearing the Belfast Address and no DX address and no fax number. They said "4. If you are not in a position to serve the Letter of Claim by 16/12/2022, it seems logical to delay the subsequent steps in the timetable to the following dates... Claimant's Claim Form and Particulars of Claim to be filed/served by 8/6/2023. 5. Mindful that you are yet to receive the expert's evidence (and to allow for any further delays) it is suggested that the dates in paragraph 4 are further reviewed on receipt of the same."
36. EDS responded to GL by letter of 19 December 2022 sent by DX to the Leeds DX Address and email to the Johnson Email Address saying "We agree with your paragraph 5 and with that in mind, we propose to update you once the expert evidence is received so that we can confirm a timetable. We would hope that that timetable coincides with the same set for [MB]. We attach a copy of correspondence with [MB] dated 2 and 19 December 2022 and we will endeavour to update you as soon as we have further insight from the expert in order to discuss the timetable further."
37. EDS responded to MB by letter also of 19 December 2022 saying "We consider your approach in paragraph 4 to be most sensible. We are content to notify you once we have received the expert evidence and have a clearer date for the necessary next steps i.e. for the revised Letter of Claim in the first instance. The parties can then liaise further on the timetable."
38. By letter of 18 January 2023 sent by EDS to GL by DX to the Leeds DX Address and email to the Johnson Email Address, and also sent by email to MB, EDS referred to further delay with the fire expert and asked "Can you please confirm that you are content for us to provide you with an update closer to the 4 week mark to ensure the report is due on time, and then we can agree revised dates, hopefully within the stay, and if not review the stay. We will endeavour to keep you updated."
39. MB responded by email of 19 January 2023 (copied to GL) to say "... we confirm that our client is content with the approach which you have proposed therein. For the reasons which were set out in [MB's letter of 8 December 2022], if and to the extent

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that your clients elect to proceed with this claim... the current timetable (and stay in the proceedings) will certainly need to be adjusted.”

40. Nazir of GL responded by email (which bore a Leeds telephone number), copied to MB, of 20 January 2023 to say “We confirm... that if on receipt of the expert evidence your client chooses to proceed with the claim, our client agrees your approach.”
41. On 7 February 2023 GL wrote to MB to request a copy of “the architect’s retainer” but by letter of 9 February 2023 MB refused the request, seeking various explanations first.
42. By letter of 15 February 2023 sent by EDS to GL by DX to the Leeds Address and email to the Johnson Email Address, and also sent by email to MB, EDS referred to further delay with the fire expert and said “... we would prefer to provide a timetable that can be made and once we have a firm date for the report. We therefore propose to update you once the expert’s report has been received, and then set a timetable to be agreed by all parties in respect of the revised letter of claim... We invite you to kindly agree to this, with the view that you should be hearing from us by the end of the month with an update and thereafter we can review the timetable and, if necessary, execute a further Consent Order.”
43. MB responded by email of 15 February 2023 to say that “we have no objection to your proposal.”
44. On 21 April 2023 at 2.17pm EDS emailed GL to the Nazir Email Address stating “The deadline for service of the claim is today. Can you confirm whether you will agree to execute a consent order to postpone the deadline by three months... We are due the final expert’s report by the beginning of May...Forgive us for the time constraints but may we have your reply by 2.45pm after which time we will serve the claim and would be content to continue the discussions on the stay thereafter.” At 15.22pm EDS emailed a proposed consent order. At 3.53pm a Roger McCourt of GL, with an email which bore the Leeds Telephone Number, responded to refuse in circumstances “where you are proceeding to serve a claim form...” At 4.18pm EDS responded to say that their Salma Hussain had confirmed with a “Barbara” at GL their fax number but that “That fax number has not been recognised.” and said “given the issues with the fax at your end, can you confirm that our email timed at 15.44... can be accepted as service of the claim.”
45. On 21 April 2023, EDS sent or purported to send, by way of service, the Claim Form to GL by DX to the Leeds DX Address and by fax under cover of a letter of 21 April 2023 which also referred to Service by Fax (giving a Leeds Fax Number) and which stated that it was sent “(by way of copy only)” to the Johnson Email Address; and invited a stay. EDS contend that they sought to send the Claim Form to GL by fax at 4pm, but which failed, and by DX (and I deal with what actually happened further below).
46. Also on 21 April 2023, EDS sought to send the Claim Form by fax (and also by email) to MB. EDS contend that they then sought to send the Claim Form to MB by fax at 15.49pm, but which failed, and by DX (and I deal with what actually happened further below).

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47. On 27 April 2023, GL replied by emailed letter which bore the Leeds Address and did not have any fax number to say that: (i) the Claim Form had not been served in accordance with the November Order and where there had been no previous indication of a preparedness to accept service by fax or electronic means (ii) there was also a serious failure to serve Particulars of Claim in time and (iii) they would be applying to strike-out the claim under CPR3.4(2)(c).
48. On 27 April 2023, MB sent EDS a letter referring to emails on 21 April 2023, and stating that they had not received any fax, and saying that the Claim Form (and Particulars of Claim) had not been served in time and any application for leave to serve them would be resisted and they would apply to strike out the Claim. They repeated that the Claimants had issued and attempted to serve the wrong entity.
49. On 28 April 2023, the Claimants applied for a declaration that the Claim Form had been served, alternatively for relief from sanctions for any failure to serve the Claim Form and Particulars of Claim in time and/or for an extension of time. The application was supported by a witness statement of Kavita Rana (“Rana”) of EDS of 28 April 2023 and which referred to the past events and which I have considered in its entirety but which in particular (i) stated there had been an agreement to extend time for service to 8 June 2023 (ii) referred to the history (iii) said that Salma Hussain of EDS had spoken to a “Barbara” at GL at 15.22 on 21 April 2023 and asked for confirmation of the Leeds Fax Number, which Barbara gave (iv) stated that EDS sought to fax the Claim Form to GL at around 3.45pm but received an error message and then tried and failed again (v) stated that Ms Hussain confirmed the fax number with Barbara at about 3.45pm (vi) stated that the fax did not deliver to GL (vii) said that attempts had been made to fax the Claim Form to MB on 21 April 2023 but had failed (viii) stated that relief from sanctions was sought in relation to all matters, should such be required, and including because EDS were seeking to comply with a Protocol process but the Defendants had refused to accept the agreed extension to 8 June 2023.
50. On 4 May 2023 EDS responded to GL to state (i) the effect of *Jones v Chichester* 2017 EWHC 2270 (“*Jones*”) was that the Claimant merely needed to have carried out a relevant service step in time and (ii) this had been done in any event by the Claim Form having been placed in the DX on 21 April 2023 and (iii) in any event there had been an agreed extension to 8 June 2023 and (iv) they sought a further extension for the Particulars of Claim to 10 May 2023. GL asserted by letter of 4 May 2023 from Leeds that the Claim Form had not been effectively served.
51. On 10 May 2023, EDS sent the Particulars of Claim and the Claim Form to both GL and MB by DX. The Particulars of Claim referred to an intention to amend the name of the Second Defendant to “Sheppard Robson Limited.”.
52. I note that no-one has filed any Acknowledgment of Service or made any application under CPR Part 11 for the Court to declare that it lacks jurisdiction or should not exercise any jurisdiction that it does have.
53. By letter of 17 May 2023 sent from Leeds, GL asserted that the Claim Form had not been served and that there was no obligation to file an Acknowledgment of Service “unless the Court grants the Claimants permission to serve the Claim Form and Particulars of Claim.” and referred to *North Midland v Geo Networks* [2015] EWHC 2384 (“*North Midland*”).

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54. The April Application was listed for hearing before me on 8 November 2023.
55. The August Application was issued on 23 August 2023 to change the name of the Second Defendant to Sheppard Robson Limited and to add the various proposed minor Claimants. It was listed for hearing before me on 8 November 2023.
56. On 27 September 2023, MB wrote to EDS to refuse permission to amend unless all claims in negligence for personal injury were deleted, on the basis that SRL had not yet been sued and such claims against SRL were time-barred (albeit that this would be absent a section 33 of the 1980 Act extension). On 3 October 2023 EDS wrote to MB (albeit with a title stating “Your Client” as being SRAL) to say that there had been a genuine mistake as to the name of the Second Defendant and it was clear as to which entity was meant.
57. On 24 October 2023 Nazir for GL provided a witness statement which I have considered in its entirety and which in particular stated that as at 28 April 2023 EDS had not attempted to serve on the First Defendant and that GL was not authorised to accept service on behalf of the First Defendant and had not suggested that it was. In the light of the GL email of 9 May 2022, those contentions have not been pursued.
58. Also on 24 October 2023, the Claimants adduced a second witness statement from Rana. This (i) referred to the 9 May 2022 GL email and its stating that GL was authorised to accept service (ii) stated that the Claim Form letters were sent (but without stating when) by DX to GL and had not been returned (iii) stated that the Claim Form and Particulars of Claim were also served on GL by DX and post on 12 May 2023.
59. On 30 October 2023, MB adduced a witness statement of Robert Hobson of MB, stating that he was acting on behalf of both “the Second Defendant and Sheppard Robson Limited”. The witness statement was drafted on the basis that it was SRAL which was “the Second Defendant”. I have considered it in its entirety but note in particular that it stated that: (i) the Claim Form had been received on 24 April 2023 and it was not known when it had been left at the DX (ii) MB had no records of receiving any fax from EDS on 21 April 2023 or on any other date, and had no record of any conversations with EDS about fax (iii) there was no agreement made to extend time for service to 8 June 2023 (iv) the Particulars of Claim were served late on any basis (v) the Court lacked jurisdiction as a result of failures to serve the Claim Form and Particulars of Claim in time (vi) EDS had deliberately named SRAL as the Second Defendant when they had been told it should have been SRL, and in the circumstances it was not clear that they had intended to sue SRL, and they had unreasonably delayed and it was too late for them to correct their errors.
60. I heard oral submissions (supplementing written skeleton arguments) in relation to the two applications on 8 November 2023 but time proved insufficient and I adjourned the matter to 8 February 2024. The parties then, shortly before that hearing, asked me to vacate the hearing and to deal with the matter purely on the basis of their written submissions. I agreed to that course.
61. In the meantime, the Claimant served the third and fourth witness statements of Rana of 27 November 2023 and 17 January 2024; and the Second Defendant a second witness statement of Hobson of 21 December 2023. I have considered them and the other witness statements in their entirety, but note in particular that:

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- i) The third witness statement from Rana referred to: the documents being sent to both GL and MB by DX on 21 April 2023; the documents having been prepared for DX following 3.40pm then being placed in a designated area of the EDS office reception for collection by the DX courier and such usually occurring “after office hours” with the DX courier having a key to the office; a series of Fax transmissions having been sought to be made to the Fax numbers obtained for GL and MB before (MB) at (GL) and shortly after (MB) 4pm on 21 April 2023 and such having all failed; a print-out for the first (15.49pm to MB fax) with an error code ##280 which the relevant machine supplier indicated suggested an error at either the sending fax machine or the receiving fax machine or inbetween them; print-outs for the second and third faxes suggesting that the faxing failed because of feeding problems into the EDS system; the fax machine having sent faxes that day to other fax numbers successfully; and there having been on other subsequent days problems in sending faxes to GL and MB
 - ii) The second witness statement from Hobson referred to the ##280 error code being said to have a number of potential causes, and to MB’s employees not being aware of any problems with their fax machine on 21 April 2023
 - iii) The fourth witness statement from Rana stated that the ##280 error code had not been identified on 21 April 2023.
62. However, the Court of Appeal then decided the case of *Koro*. It seemed to me that that raised further questions as to what was the effect of there being no Acknowledgments of Service or CPR Part 11 applications on the part of any of the Defendants, and I invited further written submissions. These were eventually provided with the last being submitted to the Court’s electronic CE-File on 27 March 2024 but only being processed on 22 April 2024.
63. I have considered all the parties’ submissions and evidence in coming to this judgment.

The Relevant Civil Procedure Rules and Provisions of the Limitation Act 1980

64. I have considered in particular the following elements of the CPR. The overriding objective is contained in CPR1.1 (although it tends to take a secondary place to specific rules):
- “1.1
- (1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
- (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
- (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
- (b) saving expense;

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- (c) dealing with the case in ways which are proportionate –
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly;
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
- (f) enforcing compliance with rules, practice directions and orders.”

65. CPR2.11 provides that parties can usually vary CPR time-limits by written agreement:

“2.11 Unless these Rules or a practice direction provide otherwise or the court orders otherwise, the time specified by a rule or by the court for a person to do any act may be varied by the written agreement of the parties.

(Rules 3.8 (sanctions have effect unless defaulting party obtains relief), 28.3 (variation of case management timetable – fast track and intermediate track) and 29.5 (variation of case management timetable – multi-track), provide for time limits that cannot be varied by agreement between the parties)”

66. CPR3.9 deals with relief from sanctions and provides:

“3.9

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence.”

67. CPR Part 6 deals with service generally. CPR6.7 is the rule which renders service on a party's solicitor mandatory when a solicitor acting for that party has notified the claimant in writing of a business address in England & Wales or Scotland or Northern Ireland:

“6.7

(1) Solicitor within the jurisdiction: Subject to rule 6.5(1), where –

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(a) the defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form; or

(b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction,

the claim form must be served at the business address of that solicitor.

(‘Solicitor’ has the extended meaning set out in rule 6.2(d).)

(2) Solicitor in Scotland or Northern Ireland: Subject to rule 6.5(1) and the provisions of Section IV of this Part, and except where any other rule or practice direction makes different provision, where—

(a) the defendant has given in writing the business address in Scotland or Northern Ireland of a solicitor as an address at which the defendant may be served with the claim form;

(aa) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within Scotland or Northern Ireland;

(b) [Omitted]

(c) [Omitted]

the claim form must be served at the business address of that solicitor.”

68. CPR Practice Direction 6A supplements CPR6 in relation to methods of service regarding document exchange, post, fax and e-mail as follows (the provisions have changed slightly since the purported service in this case but not so as to be material to what I have to decide):

“When service may be by document exchange

2.1 Service by document exchange (DX) may take place only where –

- (1) the address at which the party is to be served includes a numbered box at a DX, or
- (2) the writing paper of the party who is to be served or of the solicitor acting for that party sets out a DX box number, and
- (3) the party or the solicitor acting for that party has not indicated in writing that they are unwilling to accept service by DX.

How service is effected by post, an alternative service provider or DX

3.1 Service by post, DX or other service which provides for delivery on the next business day is effected by –

- (1) placing the document in a post box;

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(2) leaving the document with or delivering the document to the relevant service provider; or

(3) having the document collected by the relevant service provider.

Service by fax or other electronic means

4.1 Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means –

(1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –

(a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and

(b) the fax number, e-mail address or e-mail addresses or other electronic identification to which it must be sent; and

(2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) –

(a) a fax number set out on the writing paper of the solicitor acting for the party to be served;

(b) an e-mail address or e-mail addresses set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address or e-mail addresses may be used for service; or

(c) a fax number, e-mail address or e-mail addresses or electronic identification set out on a statement of case or a response to a claim filed with the court.

(3) Where a party has indicated that service by email must be effected by sending a document to multiple e-mail addresses, the document may be served by sending it to any 2 of the e-mail addresses identified.

4.2 Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received).

4.3 Where a document is served by electronic means, the party serving the document need not in addition send or deliver a hard copy."

69. It is noticeable (and which was affirmed in *Barton v Wright Hassall* [2018] UKSC 12) that: where a fax number is given by a solicitor, it is deemed that service can take place by fax without more; while, where an email address is given by a solicitor, the solicitor has to state that it can be used for service (and there should be made an advance enquiry regarding document sizes) and that in the absence of such a statement email cannot be used. I believe that this differentiation is presently being considered and may be

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consulted on by the Civil Procedure Rules Committee but I am concerned with the law in its present form.

70. CPR7.5 deals with time for taking a service step:

“7.5

- (1) Where the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form.

Method of Service	Step Required
First class post, document exchange or other service which provides for delivery on the next business day.	Posting, leaving with delivering to or collection by the relevant service provider.
Delivery of the document to or leaving it at the relevant place.	Delivering to or leaving it at the relevant place.
....	
Electronic method.	Sending the email or other electronic transmission.

- (2) Where the claim form is to be served out of the jurisdiction, the claim form must be served in accordance with Section IV of Part 6 within 6 months of the date of issue.”

71. I note that CPR7.5 does not require the taking of a relevant service step to have been successful. CPR6.14 deems service within the UK to have occurred upon the second day after the taking of the relevant service step; but for the purposes of CPR7.5 only the service step needs to have been taken.

72. CPR7.6 deals with the seeking of extensions for service of the claim form:

“Extension of time for serving a claim form

7.6

- (1) The claimant may apply for an order extending the period for compliance with rule 7.5.

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(2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made –

(a) within the period specified by rule 7.5; or

(b) where an order has been made under this rule, within the period for service specified by that order.

(3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if –

(a) the court has failed to serve the claim form; or

(b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and

(c) in either case, the claimant has acted promptly in making the application.

(4) An application for an order extending the time for compliance with rule 7.5

(a) must be supported by evidence; and

(b) may be made without notice.”

73. CPR7.4 deals with time for service of Particulars of Claim:

“ 7.4

(1) Particulars of claim must –

(a) be contained in or served with the claim form; or

(b) subject to paragraph (2) be served on the defendant by the claimant within 14 days after service of the claim form.

(2) Particulars of claim must be served on the defendant no later than the latest time for serving a claim form.

(Rule 7.5 sets out the latest time for serving a claim form)...”

74. CPR10 contains provisions for filing by a defendant with an acknowledgment of service following service of a claim form and particulars of claim, and refers to the ability of a claimant to obtain default judgment if that does not occur:

“ 10.1

(1) This Part deals with the filing of an acknowledgment of service.

(2) Where the claimant uses the procedure set out in Part 8 (alternative procedure for claims) this Part applies subject to the modifications set out in rule 8.3.

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(3) A defendant must file an acknowledgment of service if—

- (a) they are unable to file a defence within the period specified in rule 15.4; or
- (b) they wish to dispute the court's jurisdiction.

(Part 11 sets out the procedure for disputing the court's jurisdiction.)

Consequence of not filing an acknowledgment of service

10.2 If—

- (a) a defendant fails to file an acknowledgment of service within the period specified in rule 10.3; and
- (b) does not within that period file a defence in accordance with Part 15 or serve or file an admission in accordance with Part 14, the claimant may obtain default judgment if Part 12 allows it.

The period for filing an acknowledgment of service

10.3

(1) The general rule is that the period for filing an acknowledgment of service is—

- (a) 14 days after service of the particulars of claim where the defendant is served with a claim form which states that particulars of claim are to follow; and
 - (b) 14 days after service of the claim form in any other case.
- (2) ...”

75. CPR11 deals with disputing the court's jurisdiction and provides as follows:

“11

(1) A defendant who wishes to –

- (a) dispute the court's jurisdiction to try the claim; or
- (b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

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(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

(4) An application under this rule must –

(a) be made within 14 days after filing an acknowledgment of service; and

(b) be supported by evidence.

(5) If the defendant –

(a) files an acknowledgment of service; and

(b) does not make such an application within the period specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim.

(6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including –

(a) setting aside the claim form;

(b) setting aside service of the claim form;

(c) discharging any order made before the claim was commenced or before the claim form was served; and

(d) staying(GL) the proceedings.

(7) If on an application under this rule the court does not make a declaration –

(a) the acknowledgment of service shall cease to have effect;

(b) the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct; and

(c) the court shall give directions as to the filing and service of the defence in a claim under Part 7 or the filing of evidence in a claim under Part 8 in the event that a further acknowledgment of service is filed.

(8) If the defendant files a further acknowledgment of service in accordance with paragraph (7)(b) he shall be treated as having accepted that the court has jurisdiction to try the claim.

(9) If a defendant makes an application under this rule, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file –

(a) in a Part 7 claim, a defence; or

(b) in a Part 8 claim, any other written evidence.”

76. CPR Part 17 deals with amendments. CPR17.1 provides:

“17.1

(1) A party may amend their statement of case, including by removing, adding or substituting a party, at any time before it has been served on any other party.

(2) If his statement of case has been served, a party may amend it only –

(a) with the written consent of all the other parties; or

(b) with the permission of the court.

(3) If a statement of case has been served, an application to amend it by removing, adding or substituting a party must be made in accordance with rule 19.4.

(4) A party who files a notice under Part 38 discontinuing all or part of a claim may amend their statement of case without the court’s permission to give effect to the discontinuance.

(Part 22 requires amendments to a statement of case to be verified by a statement of truth unless the court orders otherwise).

77. There is no issue as to the Claimants having complied with CPR19.4 in relation to their amendment application, but the Defendants rely on CPR17.4 which reads:

“17.4

(1) This rule applies where –

(a) a party applies to amend their statement of case in one of the ways mentioned in this rule; and

(b) a period of limitation has expired under –

(i) the Limitation Act 1980;

(ii) the Foreign Limitation Periods Act 1984; or

(iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

(3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question.

(4) The court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings started or has since acquired.

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(Rule 19.6 specifies the circumstances in which the court may allow a new party to be added or substituted after the end of a relevant limitation period(GL))”

78. The Defendants further rely upon CPR19.6 which reads:

“19.6

(1) This rule applies to a change of parties after the end of a period of limitation under –

(a) the Limitation Act 1980;

(b) the Foreign Limitation Periods Act 1984; or

(c) any other enactment which allows such a change, or under which such a change is allowed.

(2) The court may add or substitute a party only if –

(a) the relevant limitation period(GL) was current when the proceedings were started; and

(b) the addition or substitution is necessary.

(3) The addition or substitution of a party is necessary only if the court is satisfied that –

(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;

(b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or

(c) the original party has died or had a bankruptcy order made against them and their interest or liability has passed to the new party.

(4) In addition, in a claim for personal injuries the court may add or substitute a party where it directs that –

(a)

(i) section 11 (special time limit for claims for personal injuries); or

(ii) section 12 (special time limit for claims under fatal accidents legislation), of the Limitation Act 1980 shall not apply to the claim by or against the new party; or

(b) the issue of whether those sections apply shall be determined at trial.”

79. Those last rules reflect various provisions of the Limitation Act 1980, section 33(1) of which provides that the court has a discretion to disapply sections 11 and 12:

“33

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(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

(a) the provisions of section 11 [F1, 11A, 11B] or 12 of this Act prejudice the plaintiff or any person whom he represents; and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.”

80. Section 35 of the Limitation Act 1980 provides that:

“35 New claims in pending actions: rules of court.

(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—

(a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and

(b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—

(a) the addition or substitution of a new cause of action; or

(b) the addition or substitution of a new party;

and “third party proceedings” means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.

(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.

For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

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(5) The conditions referred to in subsection (4) above are the following—

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and

(b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

(6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as necessary for the determination of the original action unless either—

(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or

(b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.

(7) Subject to subsection (4) above, rules of court may provide for allowing a party to any action to claim relief in a new capacity in respect of a new cause of action notwithstanding that he had no title to make that claim at the date of the commencement of the action.

This subsection shall not be taken as prejudicing the power of rules of court to provide for allowing a party to claim relief in a new capacity without adding or substituting a new cause of action.

(8) Subsections (3) to (7) above shall apply in relation to a new claim made in the course of third party proceedings as if those proceedings were the original action, and subject to such other modifications as may be prescribed by rules of court in any case or class of case.”

Whether the Claim Form was served in compliance with CPR7.5

81. The Claimants seek a determination that the Claim Form was validly served i.e. in accordance with the Civil Procedure Rules. The Defendants say that such has not occurred; and, further, SRAL and SRL contend that SRL is not and should not be treated as being a party and that there has been no service ever on SRL.

Whether Service was to be on Solicitors

82. It is now common-ground, I think although in any event I consider that it is the case, that both GL (by their email of 9 May 2022) and MB (by their letter of 12 May 2022) provided solicitor confirmations for the purposes of CPR6.7 that they were authorised to accept service. Those confirmations rendered it mandatory for service to take place on the solicitor and not the client (see e.g. *Nanglegan v Royal Free [2001] EWCA Civ 127*).

83. I note that CPR6.7 requires the solicitor to confirm that they will accept service “at a business address within [the jurisdiction/Scotland/Northern Ireland]”. The GL email did not give any business address.
84. The general law as to construction of documents is not in dispute (and is applicable to these circumstances – see the final paragraph of the White Book notes at 6.7.1 and such cases as *Actavis v Ely Lilly* [2013] EWCA 517 and *Higgins v ERC* [2017] EWHC 2190). As stated in such cases as *Arnold v Britton* 2015 UKSC 36 and *Lukoil Asia Pacific Pte Ltd v. Ocean Tankers (Pte) Ltd (The "Ocean Neptune")* [2018] EWHC 163 (Comm) the Court asks itself how a reasonable reader would interpret the document and the words used in the light of the factual matrix known to the parties and the apparent commercial purpose, giving proper weight to the words themselves and ignoring the parties’ subjective understandings, and weighing up the various possible interpretations together (as opposed to in some sort of order so as to leave a default meaning if others are not accepted) in order to come to the answer.
85. Here the wording of the 9 May 2022 email on its own is unclear. However, the construction process has to take place in the context of the factual matrix. Here, the previous letter from GL of 22 January 2021 gave the Leeds Address, and also gave the Leeds Email Address which was being used by both EDS and GL for the purposes of these communications, and I infer (see above) that the letter of 9 May 2022 from EDS to GL seeking confirmation that GL would accept service was addressed to the Leeds Address (although sent by email). That factual matrix seems to me to favour the correct interpretation of the 9 May 2022 email as being that the Leeds Address, being a business address of GL, was being said to be where service should take place. Further, the commercial purpose of the 9 May 2022 email was to provide for service in accordance with CPR6.7, and that also favours it as being interpreted to be stating that the Leeds Address (being the only one so far identified for GL) was the relevant business address for service, as otherwise the 9 May 2022 email would not have the obviously intended effect. Having considered the words, the factual matrix and the commercial purpose, and all the possible constructions, I conclude that the reasonable reader would construe the 9 May 2022 email as stating that the Leeds Address was the business address for service.
86. I further consider that, even if the correct interpretation on construction principles of the 9 May 2022 email was not that the Leeds Address was being stated as the business address for service, such a statement would be implied to be within it. Such a statement is clear, reasonable, and also both obvious (as I consider that the reasonable bystander would consider that it was obvious that both EDS and GL would have answered the question of whether GL was saying that service should at the Leeds Address within a resounding “Yes”) and necessary to give business efficacy to the 9 May 2022 email (which would otherwise not have its intended effect of satisfying CPR6.7), and there was no other realistic possible address at that point in time. I consider that the principles for such an implication (and see e.g. *BNY v Cine-UK* [2022] EWCA 1021 @ 55, 135-139) are clearly satisfied.
87. A further question arises as who was meant to be “our client” by MB’s statement in the letter of 11 May 2022 that “we can confirm that we are instructed to accept service of proceedings on behalf of our client in relation to the Development”.

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88. Here the wording “our client” is potentially ambiguous as the MB letter of 12 May 2022 does not refer to any entity by name. I have borne in mind that the MB letter was sent in reply to that of GL of 11 May 2022 which was headed “YOUR CLIENT: SHEPPARD ROBSON ARCHITECTS LLP” and asked whether MB had “instructions to accept service of proceedings on behalf of your client.” However, I regard the factual matrix as extending to the entire chain of correspondence (and to which the MB letter of 12 May 2022 expressly referred) and where the original 18 December 2020 letter from GL was sent to SRAL but where MB had replied on 14 January 2021 to state that they were “instructed by Sheppard Robson Limited (“Sheppard Robson”)” and to “refer to your letter of claim to Sheppard Robson”; and where MB had then sent the highly detailed letter of 20 January 2021 saying again “We refer to your letter of claim to Sheppard Robson Limited (“Sheppard Robson”)” and responding throughout with regard to “Sheppard Robson”.
89. In my judgment, a reasonable reader would interpret the MB letter of 12 May 2022 as referring to SRL as being “our client” and not SRAL. That is in particular, although I have considered all the circumstances, because: (1) MB had only ever identified SRL (and not SRAL) as their client (2) the letter of 12 May 2022 by referring to the previous correspondence made clear that it was dealing with refutation of a claim (and service of any claim form) against SRL being the entity specifically identified by MB in the previous correspondence. While the GL letter of 11 May 2022 identified SRAL as being MB’s client, I am here concerned with MB’s letter and that has to be seen in the overall context where MB clearly regarded themselves as acting on behalf of SRL and had not ever suggested that they acted on behalf of SRAL.

Time for taking of a service step

90. It is common-ground that the November Order extended the time for the taking of a service step under CPR7.5 to 4pm on 21 April 2023. That is essentially what was decided by Master McCloud in *Jones*. In any event, I regard that decision as being correct and applicable here, notwithstanding that the wording of the November Order was “time for service is extended until...” Applying the general principles of construction set out above, I regard that interpretation as being correct, in particular as:
- i) The words “time for service” are ambiguous as they could mean either the deemed date of service under the CPR (CPR6.14 provides it is the second business day after the taking of the relevant service step where service takes place within the jurisdiction as was clearly contemplated here) or the taking of one of the prescribed service steps;
 - ii) The more natural focus of the extension of time order is an extension of time for doing what is actually required by the CPR i.e. the taking of a prescribed service step; rather than its eventual deemed consequence (i.e. deemed service on a particular date which then triggers the running of time for further steps such as the filing of an Acknowledgment of Service);
 - iii) The decision in *Jones* is itself part of the factual matrix. The Order, and which was itself a Consent Order embodying an agreement between the parties, should be interpreted in the light of that relatively recent and published decision;

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- iv) I agree with Master McCloud that the previous decision in *Brightside v RSM 2017 EWHC 6* is fully distinguishable as relating to the interpretation of CPR7.7 rather than of an Order.

I would add that it is much to be preferred if these extension orders referred expressly to the taking of a CPR7.5 step (as is my usual practice, but where here I was making a consent order which contained the parties' agreement) but I regard the true construction of this Order as being to the same effect.

91. However, I do add that the time for the taking of the prescribed step for service was expressly limited by the November Order to 4pm, and not midnight, on 21 April 2023. While CPR7.5 provides for a midnight deadline, I see no reason to ignore the particular time expressly stated in the November Order.
92. The questions then arise as to whether what happened on 21 April 2023 was sufficient to amount to the taking of a prescribed service step in accordance with the November Order in time in relation to each Defendant (and assuming at this point that the Second Defendant is in fact to be treated as being SRL).

Taking of Service Steps regarding the First Defendant within the time set out in the November Order

93. As far as the First Defendant is concerned, service was purportedly effected by Fax and by DX.

Service by Email

94. I note that references have been made to service by email but that has not been pursued as a contention by the Claimants, and rightly in my view as:
- i) The relevant emails did not state that they were purporting to amount to service but rather simply "(by way of copy only)"
- ii) CPR PD6A paragraph 4.1(2)(b) is clear that email can only be used as a service method where the solicitor has positively stated that they will accept service by way of email, and an email address, whether or not it has been used to correspond in relation to the dispute is not enough – see above and *Barton v Wright Hassall [2018] UKSC 12*.

Service by Fax on the First Defendant

95. As far as service by Fax is concerned, questions arise as to (i) whether and if so what Fax number could be used (ii) whether a relevant Fax was actually sent and (iii) if so whether a relevant Fax was actually received and, if not, why that was. I note that in relation to both the Defendants, the Claimants' application of 28 October 2023 and the supporting evidence did not rely upon service by Fax. However, no objection has been taken to the Claimants seeking to rely on service by Fax and I would consider it to be contrary to the overriding objective for them to be prevented from seeking to do so as (i) no prejudice has been suggested (ii) such would not be fair if service had occurred

within time by Fax and (iii) it could lead to the Court potentially reaching a conclusion which was not justified on the true facts by the CPR.

96. The first question is one of interpretation and evaluation of the correspondence. The email which contained the confirmation of authorisation to accept service from GL of 9 May 2022 did not contain any Fax number although it was sent bearing a Leeds telephone number from the Johnson Email Address (and to which EDS' letter seeking to know whether GL were authorised to accept service had been sent). The previous letter from GL (and which bore the Johnson Email Address) was that of 22 January 2021 which bore the Leeds Address but no Fax number; and subsequent letters from GL bore the Belfast Address but no Fax number.
97. In those circumstances, I cannot see any written indication as to service by Fax on the part of GL sufficient to satisfy CPR PD 6A paragraph 4. That provision requires the indication to be "in writing" and permits it to be by a Fax number "set out on the writing paper of the solicitor". However, there is simply nothing in writing at all which bears or refers to any Fax number.
98. Mr Sawtell for the Claimants sought to rely on the conversations with "Barbara" on 21 April 2023 in which GL's Leeds Fax number was ascertained. Those conversations were not in writing and so cannot satisfy CPR PD 6A paragraph 4.
99. It might be arguable that, if a sufficiently clear express or implied statement was made that GL would accept service by fax, some estoppel might arise, although that is dubious where the CPR rule requires there to be a written indication. However, I do not see there as being sufficient in the witness evidence or the emails of 21 April 2023 or the evidence before me as a whole, and having considered inherent probabilities, to render it more likely than not (that is to say applying the balance of probabilities test where the burden of proof (but only to greater than 50.00...% likelihood) here is on the Claimants who would be seeking to assert the existence of the relevant facts) that "Barbara" or some other person at GL who might be said to have authority accepted, expressly or impliedly, that the Claim Form could be served by Fax (as opposed to merely supplying a Fax number by which communications could be made to GL). It seems to me that there would need to be something clear to that effect for an estoppel to be possible, as an oral statement that a particular number was GL's fax number would go no further than that and would not in my view amount to a representation or give rise to a convention that service of a Claim Form could take place by a sending to such number, but I do not regard the evidence as being sufficient.
100. If I was wrong and that service by sending to the Leeds fax number was sufficient; it would seem sufficiently clear to me that attempts were made to send the Claim Form by fax before 4pm on 21 April 2023 were made, and that they did not succeed (the Claimant's own evidence being that the sendings failed).
101. That gives rise to a factual question of whether (a) EDS's fax machine failed to send, (b) EDS's fax machine did send but the message was lost in transit between the EDS fax machine and the GL fax machine/system or (c) the message reached the GL fax machine/system but which could not process it. Again I have had to consider all the evidence on the balance of probabilities and ask myself simply whether it is more likely than not that what the Claimant requires to have taken place did do so (the burden of proof being on the Claimant but only to a standard of greater than 50.00...% likelihood).

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102. Here I have the Claimants' evidence of numerous failed attempts to send, so that there were actually received and processed, by Fax to both GL and MB during the afternoon of 21 April 2023 around 4pm. The only attempt to GL was at 4pm (that being what was said with specificity in Rana's third witness statement although an earlier time may have been suggested in Rana's first witness statement) and the error report stated that it was due to problems with the feed into the EDS fax machine and overloading of it. In all the circumstances and having considered all the evidence, and having considered inherent probabilities, I conclude that the Claimants have not discharged the burden of proof to show that it is more likely than not that the EDS fax machine sent out into the transmission network the Claim Form to GL. Rather, the evidence suggests that the feed problem resulted in there being nothing which can be described as a sufficient "sending" of the fax material. That renders it unnecessary for me to decide in relation to the First Defendant: (a) whether any "sending" took place "by 4pm" being the terms of the extension granted by the November Order or (b) whether mere "sending" is sufficient irrespective of the extent to which the electronic material passes through the transmission network (and which I consider below in relation to MB).
103. I therefore conclude that the Claim Form was not validly served on the First Defendant by Fax to GL.

Service by DX on the First Defendant

104. The Claimants also contend that EDS took a relevant CPR7.5 service step in time by sending the Claim Form by DX. I note that CPR7.5 provides that the relevant service step is "Posting, leaving with, delivering to or collection by the relevant service provider." Here there are two questions being (i) whether service by DX was permissible and (ii) whether the relevant service step took place in time.
105. With regard to the first question, the Claimants contend that they can rely on paragraph 2.1 of CPR PD 6A and that GL's writing paper (by the 20 January 2021 letter) set out the Leeds DX Number and GL had not indicated that they were unwilling to accept service by DX. Mr Calland for the First Defendant responds to say that: the GL email of 9 May 2022 did not contain any DX number; and the subsequent GL letters (from 30 September 2022 onwards) were on the Belfast Address notepaper with no DX number and were inconsistent with any preparedness on the part of GL to accept service by DX.
106. It seems to me that if the matter had remained as it was at 9 May 2022, the answer would be simple. The GL 9 May 2022 email is simply a continuation of the previous correspondence sent by the same person (Andrew Johnson) with the same email address (the Leeds Email Address), that correspondence contains the Leeds DX Number on the GL solicitors writing paper, there is no requirement in the PD that the DX number be set out in the letter which contains the confirmation, and I have already held (see above) that the 9 May 2022 email is to be construed (by way of construction or implication) as providing for the Leeds Address to be the address for service and to which address belongs the Leeds DX Number. Thus the Leeds DX Number would satisfy Paragraph 2.1 of CPR PD 6A.
107. However, it does seem to me that the relevant solicitor can change what has been stated previously with regard to service. Were that not to be the case, a solicitor could not safely give an address for service under CPR6.7 for fear that they might change address or other communication details. Such a change should be capable, in my judgment, of

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being communicated simply by a clear communicated statement and where, ordinarily, a change in writing paper would be sufficient to imply such a communication (although, obviously, it would be best to have an express statement).

108. However, the difficulty here is that the use of the Belfast Address notepaper was an error as the relevant fee earners were not operating from the GL Belfast office which had no connection with the dispute, or its handling, apart from the use of its notepaper (that being for reasons and in circumstances which Mr Calland, for the First Defendant, was unable to explain). Further, while EDS communicated by email, it did so by sending letters addressed to (and which were also sent by post to) the Leeds Address without any demur or complaint from GL.
109. In all those circumstances, I conclude that the use by GL of the Belfast Address notepaper was such a clear and obvious error that it should be ignored for all (including CPR) purposes; in accordance with the general principle that obvious errors are to be disregarded – see e.g. *Mannai v Eagle Star [1997] AC 749* (and while that decision is in the context of interpretation of notices, I do not see why its principles should not be applied to interpretation of correspondence in this context).
110. I therefore conclude that sending to the Leeds DX Address was an appropriate means of service on the First Defendant.
111. However, the second question is whether such a sending occurred within time; being by 4pm on 21 April 2023. Here the evidence from Rana is that the Claim Form was left in the EDS reception for collection by the DX courier which took place on the usual basis after office hours i.e. after 4pm. That evidence has not been challenged and I accept it and regard those matters as having been proved on the balance of probabilities. However, I note that Rana does not identify precisely when the documents were printed out and left for collection (although it would have been after 3.40pm).
112. Nevertheless, even if the printing out etc. took place before 4pm, I do not regard that as sufficient for the relevant service step to have been taken in time under CPR7.5. The leaving of the material in the EDS reception cannot, in my judgment, amount to a “delivering to... the relevant service provider” and the “collection by the relevant service provider” only took place after the 4pm time limit contained within the November Order. While the position might be different (although I have reached no conclusion on the point) if the material had been placed in a box owned by the DX provider (and possibly to which only the DX provider had a key), Rana only states that the material was left in reception and that the DX courier had a key to the office enabling access after office hours.
113. I therefore do not regard there as having been valid service on the First Defendant by DX (or fax or otherwise) in compliance with CPR7.5 within the extended time allowed for by the November Order.

Service on the Second Defendant within the time set out in the November Order

114. The Claimants again contend that service on the Second Defendant (assuming that it is SRL) was effected by Fax and DX to MB. They do not assert that it was effected by email, rightly in my view for the same reasons as to why service was not effected by email to GL in relation to the First Defendant.

Service on Second Defendant by Fax

115. Here the evidence of Rana, which I accept as to this and other matters (and which has not been challenged as such with no application having been made for cross-examination), is that EDS sought to serve MB by sending a Fax to the MB Fax Number at 15.49pm on 21 April 2023 which generated a ##280 error message and a Fax to the MB Fax Number after 4pm on 21 April 2023 which failed with an error message relating to document feeding problems. The evidence of Hobson, which is consistent with that of Rana, and which I also accept as to this and other matters (and which has not been challenged as such with no application having been made for cross-examination), is that MB did not receive any fax from EDS on 21 April 2023. I regard those matters as proved on the balance of probabilities.
116. I therefore have to consider in relation to each of those two attempts at what point in the transmission sequence the failure occurred; and have considered all the evidence and the inherent probabilities.
117. In relation to the second attempt (i.e. that after 4pm), I consider that the Claimants have not proved on the balance of probabilities that the Fax was sent from the EDS Fax machine at all into the transmission network. That conclusion is consistent with the error message received which appears at first sight to relate to a problem which the EDS Fax machine had with the documents which were being sought to be sent. It is also consistent (although there are other explanations for the following) with the fact that MB did not receive any fax from EDS. I do not consider that the Claimant has proved there occurred what would be sufficient to amount to the taking of a CPR7.5 service step at all. However, in any event, whatever did happen only occurred after the 4pm deadline in the November Order and therefore did not take place in time.
118. The first attempt (i.e. that at 15.49pm) was within the time limited by the November Order. Here the evidence as to what occurred; being, in particular (although I have considered all of the evidence), the ##280 error message which I am satisfied on the evidence of both Rana and Hobson only meant that a problem had occurred somewhere in the process (which could be at the EDS Fax machine or at the MB fax machine or anywhere in between), the fact that where there were document feeding problems a different error message would be generated, the fact that the EDS Fax machine was successfully sending faxes to other destinations, the fact that the fax was not received by MB, and the fact that no problems were reported with the MB fax machine; is finely balanced. However, the burden of proof is on the Claimants, and I do not consider that the Claimants have discharged it on the balance of probabilities. All I can really tell is that the attempted transmission failed and I do not have sufficient to conclude that it is more likely than not that the transmission failed at some electronic point after the EDS machine had "sent" it. That it does not seem to me can have been sufficient to amount to a "Sending the... other electronic transmission" within the meaning of CPR7.5.
119. If I had concluded that the transmission had failed at some later electronic point, I would then have had to ask myself whether what had occurred was sufficient to comply with CPR7.5 where the wording of "Sending" might be capable of being contrasted with "Receiving" and suggest that all that was necessary was for the Fax to leave the EDS Fax machine electronically and enter into the transmission network even if it did not reach its destination (rather than its being rejected by the MB Fax machine). That would

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involve me having to construe CPR7.5 in accordance with the usual construction principles, such to include what appeared to be the underlying statutory purpose.

120. I note that the current wording of the CPR (and which was in place as at 21 April 2023) is that the CPR7.5 service step for “Electronic method” is “Sending the e-mail or other electronic transmission.” Before 1 October 2022 (and the coming into force of the Civil Procedure (Amendment No. 2) Rules 2022 SI 2022/783, the rule read “Fax... Completing the transmission of the fax. Other electronic method... Sending the email or other electronic transmission.” The rule amendment involved combining all forms of electronic transmission into one, essentially as part of the CPRC’s process of simplification of the CPR. The previous (pre-1 October 2022) wording might be said to suggest a need at least for the transmission to reach the receiving (MB) fax machine although it can be read to merely require the electronic data to be transmitted out of the EDS Fax machine. Moreover, there are dangers in using a previous version of the rule to seek to construe the amended version as the actual intention of the CPRC in amending the rule is inadmissible when construing it. I therefore do not find the fact of the rule change or the previous version of the rule as being of particular assistance.
121. In my view the key word is “Sending” and this part of the rule has to be seen in the context of other parts of CPR7.5(1) which are framed in terms of considering what the serving claimant has to have done themselves rather than what others (e.g. the post office or a relevant service provider or the internet) have done (successfully or otherwise) themselves. I therefore would have concluded that it would have been sufficient for the full electronic information (i.e. the Claim Form itself [rather than just a machine enquiry from the EDS Fax machine to the MB Fax machine as to whether the latter would accept a transmission – the electronic fax equivalent to dialling a phone number and getting some tone in response] to have left the EDS Fax machine and entered into the transmission network whether or not it had then reached (but not been accepted by) the MB Fax machine; rather than there having to be shown that the MB Fax machine had actually rejected or failed to process the transmitted Claim Form electronic data. However, I am not satisfied on the balance of probabilities, for the reasons given above, that that occurred.
122. Accordingly, I do not consider that the Claim Form was served by Fax on the Second Defendant within the time limited by the November Order.

Service on the Second Defendant by DX

123. In relation to the contention that the Claim Form was served in compliance with CPR7.5 by DX to the MB DX Address; I accept Rana’s evidence that at some time shortly after 15.49pm it was left at the EDS reception for collection by the DX courier but that it was only collected after office hours that day, and find those facts as having been proved on the balance of probabilities. However, for the same reasons as I have stated regarding the First Defendant above, that meant that the service step was not completed within the time limited by the November Order.

Conclusion in relation to service within the time limited by the November Order

124. For the reasons given above, I conclude that the Claimants have failed to show that they completed a CPR 7.5 service step before the time limited by the November Order.

Whether time for service was extended by Agreement to 8 June 2023

125. However, the Claimants contend that the time for taking the CPR7.5 service step (or for service) was further extended by agreement to 8 June 2023. CPR2.10 provides that a variation to a rule or court ordered time-limit can occur by “the written agreement of the parties”.
126. That provision was considered in relation to the CPR7.5 time-limits in *Thomas v Home Office* [2006] EWCA 1355 (“*Thomas*”), where at paragraphs 13-21 it was held that CPR2.11 did enable agreed extensions of CPR7.5 time-limits (and I consider that, and which has not been challenged by the Defendants, the same will apply if such time-limits have been extended by order as here in the case of the November Order).
127. The Court of Appeal in *Thomas* then considered what was required for there to be such an extension. At paragraph 24 it was held that every variation (and not just an initial one) had to be in writing.
128. At paragraphs 25-29 it was said:

“25. That brings me, then, to the question of what constitutes a “written agreement of the parties”. Clearly, it would encompass a single document signed by both parties. However, contrary to Mr Serr’s submissions, I see no grounds, either in principle or as a matter of language, for limiting it to a single document. I can see no reason why an exchange of letters between the two solicitors concerned, in which the extension of time is agreed, would not constitute a “written agreement”.

26. An oral agreement which is then confirmed in writing by both sides appears to me also to be within the concept of a “written agreement”. The oral agreement itself would not, of course, be capable of being a written agreement. However, it seems to me that where, following the oral agreement, the two solicitors exchange letters confirming what they have agreed, the exchange of letters amounts to an agreement in writing that they have agreed (albeit orally) an extension of time: to my mind, it would, at best, be no more than a quibble to contend that an agreement in writing that the parties have agreed something orally does not constitute a “written agreement of the parties”. If the oral agreement, because of the very fact that it was oral, could not validly effect a variation, then it seems to me that there is no reason why it cannot be said that the time limit has been “varied by the written agreement of the parties” even though that written agreement was an agreement between the parties that they had orally agreed the variation.

27. I think things get more difficult where the parties, having orally agreed a variation, each subsequently refer to what has been agreed in correspondence passing between them. An example, albeit of a slightly unusual nature, may be found in the facts of the present case. The claimant’s solicitors effectively confirmed the extension to the 1 April in their letter of 24 February 2005 (and if the defendant’s had replied in a letter confirming this extension, then there would, for the reasons I have just given, have been a written agreement in my view). However, what happened is that, almost four weeks later, the defendant’s solicitor wrote to the claimant’s solicitors in connection with a different matter, namely the expert evidence, and enclosed a letter to the expert in which the solicitor stated that an extension to 1 April 2005 had been agreed.

28. With some hesitation, I have reached the conclusion that this was simply insufficient to amount to a “written agreement” as contemplated by r. 2.11. First, it seems to me to involve an impermissible stretching of the expression to cover the contents of a letter, whose purpose had nothing whatsoever to do with agreeing, but was merely communicating to a third party what had been orally agreed. Secondly, it appears to me undesirable that the question of whether or not there has been a valid agreement should turn on what a solicitor happens to write in subsequent correspondence which was not intended to bear on the question of agreement at all. To my mind, the concept of a “written agreement between the parties”, particularly in the context of the CPR, involves a document or exchange of documents which is intended to constitute the agreement or to confirm or record the agreement. Because one cannot envisage every possibility which might eventuate, I would not want this to be seen as being entirely prescriptive.”

129. The Court of Appeal then went on to consider the question of a possible estoppel in paragraphs 30-33:

“30. In the claimant’s notice of appeal and in Mr Grover’s skeleton argument in support, it was contended that, if the facts of the present case mean that there was no sufficient “written agreement” for an extension of time for service of the claim form into June 2005, then the defendant was nonetheless estopped from denying that there was such an agreement, or, to put it another way, the defendant was estopped from relying on the time limit contained in r. 7.5, on the basis that there had been an oral representation that the claimant need not serve the claim form, upon which the claimant had relied by not serving the claim form until June 2005.

31. Such an argument would face obvious difficulty on the basis that it would effectively render nugatory the express requirement of r. 2.11 that any agreement to extend time be “written”. Furthermore, there would be obvious force in the argument that, by entering into an oral agreement to extend time, it could not clearly be said that, without more, the defendant was unequivocally indicating that it would not insist on the strict legal requirement that any such agreement, in order to be effective, be in writing.

32. In the event, when faced with the reasoning of the House of Lords in *Actionstrength Ltd –v- International Glass Engineering IN. GL. EN SpA* [2003] UKHL 17 (especially at paragraphs 9, 28, 35 and 52-3), on a not dissimilar estoppel argument in relation to section 4 of the Statute of Frauds 1677, Mr Grover abandoned the point.

33. In these circumstances, while it is only right to say that, as at present advised, it seems to me that Mr Grover was entirely realistic in abandoning the argument, it is inappropriate formally to rule on it.”

130. The Claimants contend that the parties had clearly reached a consensus in their communications in December 2022 and early 2023 that time for service of the Claim Form and Particulars of Claim would be extended to 8 June 2023. They contend that there was sufficient to amount to a “written agreement” for the purposes of CPR2.11, and where *Thomas* permits that to be by multiple documents. The Defendants contend that there was no agreement, and in any event not enough to constitute a “written agreement”.

131. With some reluctance, I have concluded that there was not sufficient in this case for there to have been a “written agreement” with regard to either Defendant although the correspondence was clearly proceeding on the basis that any agreement would be tripartite. This is for the following reasons:
- i) Although it was also stated that this was not to be prescriptive in all circumstances, in paragraph 28 of *Thomas* it was said “... , the concept of a “written agreement between the parties”, particularly in the context of the CPR, involves a document or exchange of documents which is intended to constitute the agreement or to confirm or record the agreement...”
 - ii) The initial letter from MB of 8 December 2022 merely said that “... the dates will most likely need to be adjusted as follows...” and then indicated that “... they will need to be considered further in due course...” The initial letter from GL of 16 December 2022 said that “... it seems logical to delay the subsequent steps in the timetable to the following dates... it is suggested that the dates... are further reviewed on receipt of [expert evidence]...”
 - iii) EDS replied to GL in their 19 December 2022 letter to say that they agreed with the expert evidence point and “... we propose to update you once the expert evidence is received so we can confirm a timetable...”; and to MB in their 19 December 2022 letter to say that “We consider your approach... to be most sensible. We are content to notify you once we have the expert evidence and have a clearer date for the necessary next steps... The parties can then liaise further on the timetable.”
 - iv) The EDS letter of 18 January 2023, referred to an intention for there to be clarification of the date of the expert report “and then we can agree revised dates, hopefully within the stay, and if not review the stay”; and the MB response of 19 January 2023 stated that if the Claimants were to pursue their claims “... the current timetable (and stay in the proceedings) will certainly need to be adjusted”
 - v) I do not consider that the objective bystander would, or that the evaluative judge should, consider the correspondence to amount to any agreement between any of the parties other than that the question of dates should be the subject of review and discussion leading to some restructured timetable. While the need for a new timetable (including for service of the Claim Form and the Particulars of Claim) was identified, I do not consider that any dates were actually agreed. The parties proceeded on the basis that the Claimants would be providing further information as to when their expert evidence was available, and it was once that information had been received that a new timetable could be discussed and set. I do not see that the usual objective tests for an agreement are met, and all the more so where *Thomas* seems to require there to be an apparent intention that there should be such an extant agreement on the part of all (relevant) parties appearing within the documents
 - vi) Further, the correspondence generally made reference to the need for there to be liaison as to and agreed revisions of the timetable, and clearly contemplated that such was yet to happen. It seems to me to be wholly inconsistent with there

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already being an agreed revision of the date for service of the Claim Form and Particulars of Claim

- vii) Further, various of the correspondence (e.g. EDS's letter of 18 January 2023) expressly considered the fact that the "stay" (which is clearly a reference to the extension of the CPR7.5 service period) was limited and there might become a need to review it. That is inconsistent with there being an agreement to have extended the stay
- viii) I have asked myself as to whether the correspondence can be interpreted as containing a written agreement to extend the service period to 8 June 2023 with other matters and a potential further extension being yet to be decided upon. However, I do not read the correspondence in that way. There is never anything which goes further than EDS saying that MB's "most likely" date of 8 June 2023 was an approach which was "most sensible". However, this was all in letters which treat "the timetable" as being a single matter (rather than being divided up into a number of interim timetables) which was to be discussed and agreed in due (and thus future) course once EDS was more clear as to when they would have their expert evidence (and could produce a more full revised Letter of Claim). I do not see that the usual objective tests for an agreement are met, and all the more so where *Thomas* seems to require there to be an apparent intention that there should be such an extant agreement on the part of all (relevant) parties appearing within the documents.

- 132. I therefore conclude that there was no sufficient agreement for an extension of the time period set out in the November Order.
- 133. The Claimants have not contended, as such, for an estoppel. However, and for similar reasons to those ventilated in *Thomas*, I cannot see scope for an estoppel here. There was nothing unequivocal from the GL or MB, but rather mere proposals for further discussion, and nothing which could be said to waive the need for a written agreement.

Conclusion on whether the Claimants validly served the Claim Form

- 134. In the light of my conclusions above, I hold that the Claimant did not comply with CPR7.5. That has the consequence that I will not grant the declaration sought by the Claimants.

Whether I should grant the Claimants relief from sanctions in relation to their not having served the Claim Form

- 135. The Claimants contend that I have a discretion to grant them relief from sanctions and/or an extension of time for the consequences of their not having served the Claim Form on either Defendant in time. The Defendants contend that I have no jurisdiction to do so and, further, that I should not exercise any discretion which I might have.
- 136. The question as to whether the Court has jurisdiction to grant an extension of time and associated relief from sanctions in relation to a failure to comply with CPR7.5 where the application is made after the CPR7.5 time-limit has expired (as here) has been considered in numerous cases. While I have some considerable sympathy for the Claimants' submission that it would be just in all the circumstances of this case for me

to exercise any applicable discretion, I have first to consider whether I have any jurisdiction which might properly enable me to do so.

137. There are numerous leading decisions in this area including the judgments in (and the judgments cited in) *Good Law Project Limited -v- Secretary of State for Health and Social Care* [2022] EWCA Civ 355 (although that was a specialist Part 8 Claim and so only considered the relevant principles by analogy), *Ideal Shopping Direct Limited -v- Mastercard Inc* [2022] 1WLR 1541 and *Pitalia v NHS* [2023] EWCA 657 (“*Pitalia*”) at paragraph 32. I have also decided such cases as *Joe Macari Servicing Limited -v- Chequered Flat International Inc.* [2021] EWHC 3175 and *Fit Kitchens v Relx* [2023] EWHC 1954 (although that was only published recently) which set out the previous cases and the law in detail.
138. In paragraph 46 of *Good Law* it was said that:
- “41 As for the importance of valid service, service of a claim form can be distinguished from other procedural steps. It performs a special function: it is the act by which the defendant is subjected to the court’s jurisdiction. This quality is reflected in the terms of CPR r 7.6, with its very strict requirements for any retrospective extension of time. Equally, reliance on non-compliant service is not one of the instances of opportunism deprecated by the courts (see for example *Woodward v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985 (“*Woodward*”) at [48]). The need for particular care in effecting valid service, particularly when there are tight time limits and/or a claimant is operating towards the end of any relevant limitation period, is self-evident.”
139. I consider that all the case-law (including *Barton v Wright Hassall*) makes clear that:
- i) Jurisdiction to grant an extension of time under CPR7.6 in relation to an application made after time has expired only exists (here) where the claimant has taken all reasonable steps to comply with CPR7.5 but has been unable to do so (and has, as here, applied promptly)
 - ii) CPR3.9 and CPR3.10 cannot be used to evade the jurisdictional limits of CPR7.6 whether by way of waiver or granting of relief from sanctions
 - iii) CPR6.15 (alternative service) is generally only available where there is a good reason for not having used CPR7.5 methods of service (in time)
 - iv) CPR6.16 is only available where there is exceptional reason to waive service altogether.
140. Here it has not been, and could not be, suggested that the Claimants had taken all reasonable steps to comply with CPR7.5 in time or would have had any difficulty in doing so. They could simply have served the Claim Form by numerous different methods prior to 21 April 2023. I do not see that I have any jurisdiction to grant relief and, even if I had jurisdiction to do so, that I could exercise it in favour of the Claimants on any principled basis.
141. Insofar as I am asked to grant “relief from sanctions” I have to apply a *Denton v White* [2014] EWCA 906 analysis. The failure to comply with CPR7.5 attracts a very serious sanction and even though the gaps in time here may be very small the result is that the

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breach is serious and substantial. There is no good reason for the failures where service could easily have been effected if the matter had been considered before the last day, and even then by simply taking the Claim Form and an accompanying letter and envelope to the DX office before 4pm. However, whatever the answer to the first two questions, the Claimants cannot show and have not shown that it is just in all the circumstances of the case to grant relief taking into account the CPR3.9 factors which include (as does the overriding objective in CPR1.1(2)(f)) "... the need... to enforce compliance with rules, practice directions and orders..". It would be simply contrary to the jurisdictional framework of CPR7.6 to effectively grant an extension of time contrary to its mandatory provisions (i.e. where the Claimants have not made all reasonable steps to comply with CPR7.5 in time).

142. I therefore refuse relief from sanctions and any other order which (of itself) would validate the service of the Claim Form as being within the time provided for by CPR7.5 (and the November Order).
143. The Claimants have not sought to achieve a similar result of validating service by any of the other means (CPR3.10, CPR6.15 and CPR6.16) identified above, although I consider that they would have failed had they done so as, for the reasons set out above, either the jurisdictional requirements would not have been satisfied or any discretion could not be exercised on a principled basis in their favour.

Claimants' applications for a declaration as to there having been valid service and related relief

144. In the light of the above, I refuse to grant the Claimant (1) a declaration that there has been valid service of the Claim Form (at least in the time limited by CPR7.5(1)); (2) relief from sanctions in relation to failure to serve the Claim Form in term; or (3) an extension of time for serving the Claim Form.

Consequences of there not having been compliance with CPR7.5(1)

145. The Defendants submit that if CPR7.5(1) has not been complied with then the Claim Form can no longer be served and the Claim is at an end and should be struck-out automatically. I had doubts about the correctness of that proposition and drew the parties' attention to various case-law; and with the result that the Claimants contend that this is incorrect, that the Defendants have been served and that the Defendant cannot now (or at least should not now be able to) contest the progression of the Claim.
146. It is common-ground, and clear from the material before me, that:
 - i) The Claim Form was served out of time but otherwise in accordance with CPR7.5 on each of the Defendants (by post to GL and to MB), assuming that the Second Defendant is actually SRL, in later April 2023 and with Particulars of Claim being served by 10/12 May 2023
 - ii) No Acknowledgments of Service have been filed by either of the Defendants
 - iii) No Applications have been made by either of the Defendants (their being no Application Notices issued).

147. The provision of the CPR which deals with a party seeking for the Court to decline or not to exercise jurisdiction in relation to a Claim and to have the Claim in consequence struck-out is CPR Part 11 (cited above).
148. It was held in *Hoddinott v Persimmon* [2007] EWCA 1203 that it was by use of CPR Part 11 that a defendant was (if at all) to seek to have a Claim struck-out for failure to comply with CPR7.5 in time; and that, if a defendant filed an acknowledgement of service but did not make a CPR11 application within the next 14 days, CPR11 operated to effect a statutory waiver so that the defendant could not seek to contest the Claim on the basis of out-of-time or other defective service.
149. In paragraphs 21-25 of *Hoddinott* it was held that CPR11 was engaged in this context:
- “21. Mr Exall submits that CPR 11 has no relevance in the present context. He says that no issue of “jurisdiction” arises here. He argues that the claimants are in difficulty not because the court does not have jurisdiction to determine the claim, but because they have failed to comply with the rules of court as to service. A defendant who seeks to set aside an order made without notice or to argue that the claim form was served out of time is not challenging the court’s jurisdiction, but is merely applying the procedural rules. The court does have jurisdiction to deal with a claim even where the claim form is served out of time. For example, it has jurisdiction retrospectively to extend the time for service under CPR 7.6(3) and to make an order dispensing with service under CPR 6.9. Finally, Mr Exall draws attention to the definition of “jurisdiction” in CPR 2.3: it means “unless the context requires otherwise, England and Wales and any part of the territorial waters of the United Kingdom adjoining England and Wales”.
22. In our judgment, CPR 11 is engaged in the present context. The definition of “jurisdiction” is not exhaustive. The word “jurisdiction” is used in two different senses in the CPR. One meaning is territorial jurisdiction. This is the sense in which the word is used in the definition in CPR 2.3 and in the provisions which govern service of the claim form out of the jurisdiction: see CPR 6.20 et seq.
23. But in CPR 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court’s power or authority to try a claim. There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim (CPR 11(1)(b)). Even if Mr Exall is right in submitting that the court has jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court should not exercise its jurisdiction to do so in such circumstances. In our judgment, CPR 11(1)(b) is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure, namely CPR 7.5(2). It is the breach of this rule which provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim.
24. We would, therefore, hold that CPR 11 is engaged in the present context. This accords with what was said by Tugendhat J in *Mason v First Leisure Corporation Plc* [2003] EWHC 1814 (QB) para 11, HH Judge Havelock-Allan QC in *The Burns-Anderson Independent Network Plc v Wheeler*, (Bristol District Registry Mercantile List, unreported 28 January 2005) para 45 and *Uphill v BRB (Residuary) Ltd* [2005]

EWCA Civ 60, [2005] 1 WLR 2070 para 34 (although in this last case, it was common ground that CPR 11 was engaged).”

150. In paragraphs 26-29 of *Hoddinott* it was held that statutory waiver consequence followed if an acknowledgement of service was filed and no application made in time under CPR11 even if the defendant had applied to set aside an order extending time for service as the wording of CPR11 was clear:

“26. We doubt whether the Rule Committee addressed the problem that has arisen in this case. But in our view, the interpretation adopted by the district judge was not open to him. Subject to the point discussed at para 28 below, the language of CPR 11 is clear. Paragraph (1) permits a defendant to apply to the court for an order declaring that the court has no jurisdiction to try the claim or that the jurisdiction should not be exercised. Paragraph (2) provides that a defendant who wishes to make such an application “must first file an acknowledgment of service in accordance with Part 10” (emphasis added). Paragraph (4) provides that an application under CPR 11 must be made “within 14 days after filing an acknowledgment of service” (again, emphasis added). Paragraph (5) provides that if the defendant files an acknowledgment of service and does not make an application within the period specified in paragraph (4), “he is to be treated as having accepted that the court has jurisdiction”.

27. In our judgment, the meaning of paragraph (5) is clear and unqualified. If the conditions stated in subparagraphs (a) and (b) are satisfied, then the defendant is treated as having accepted that “the court has jurisdiction to try the claim”. The conditions include that the defendant does not make an application for an order pursuant to CPR 11(1) within 14 days after filing an acknowledgment of service. An application to set aside an order extending the time for service made before the filing of an acknowledgment of service is not an application under CPR 11(1) nor is it an application made within 14 days after the filing of the acknowledgment of service. The district judge (rightly) did not hold that the application to set aside the order extending time for service was an application under CPR 11(1). Rather, he said that the earlier application to set aside the order rendered it unnecessary to make an application under CPR 11(1). But in our judgment, there is no warrant for holding that, if an application is made before the filing of an acknowledgment of service to set aside an order extending the time for service, this has the effect of disapplying the requirement for an application under CPR 11(1). There is no such express disapplication, nor does one arise by necessary implication.

28. In our view, a defendant is fixed with the consequences stated in paragraph (5) if the two stated conditions are satisfied. At first sight, there is an apparent difficulty with the application of this approach to a case (such as the present) where the defendant wishes to argue that the court should not exercise its jurisdiction to try the claim, rather than to dispute the court’s jurisdiction to try the claim. The distinction between the two categories of case seems to have been well understood by the draftsman. It is clearly drawn in paragraphs (1) and (6). But paragraph (3) provides that a defendant who files an acknowledgment of service does not, by doing so, lose any right he may have “to dispute the court’s jurisdiction”; and paragraph (5) provides that if the two conditions in (a) and (b) are satisfied, the defendant is treated as having accepted that the court “has jurisdiction to try the claim”. It may, therefore, be argued (although it was not argued before us) that paragraphs (3) and (5) refer to paragraph (1)(a) but not paragraph (1)(b). We would reject such an argument. CPR 11 must be read as a whole. It is clear

that both paragraphs (2) and (4) are referring to applications made under paragraph (1)(a) and (1)(b). Further, paragraph (5) provides that if the defendant does not make “such an application” (ie an application under paragraph (1)(a) or (b)), then the consequences will be as stated. Paragraph (5) cannot mean that, if a defendant does not make an application under paragraph (1)(b), he will be treated as having accepted that the court has jurisdiction to try the claim. It must mean that, if a defendant does not make an application under paragraph (1)(b), he will be treated as having accepted that the court should exercise its jurisdiction to try the claim. In our judgment, the reference to disputing the court’s jurisdiction in paragraph (3) and accepting that the court has jurisdiction in paragraph (5) encompasses both limbs of paragraph (1). The reference to the court’s jurisdiction is shorthand for both the court’s jurisdiction to try the claim and the court’s exercise of its jurisdiction to try the claim.

29. It follows that, since both of the conditions stated in paragraph (5) were satisfied in this case, the defendant is treated as having accepted that the court should exercise its jurisdiction to try the claim, notwithstanding the late service of the claim form. The effect of paragraph (5) was that he was to be treated as having abandoned its application to set aside the order extending the time for service. This conclusion is reinforced by the fact that in this case the defendant indicated on the acknowledgement of service that it did not intend to contest jurisdiction and did intend to defend the claim.”

151. This analysis was affirmed by the Court of Appeal in *Pitalia* where it was also recognised that a defendant could seek to avoid the error of having failed to make a CPR11 application by making an application and seeking an extension of time (CPR3.1) or a CPR waiver (CPR3.10) of the error even though this would tend to involve a need to obtain relief from sanctions (CPR3.9 and *Denton*). In *Pitalia* an application had been made in time but was defective in form. At paragraphs 32 to 38 it was said:

“32. The following principles emerge from the authorities in this area:

(i) *Barton v Wright Hassall LLP* makes clear the particular importance attached by the Supreme Court to the timely and lawful service of originating process. Failure to comply with the Rules about such service is to be treated with greater strictness than other procedural errors. In the present case, if the Respondent’s solicitors had made their application of 24 January 2020 expressly seeking a declaration under CPR 11(1) that the court has no jurisdiction to try the claim, there would have been very little that the Appellants could have said in response.

(ii) On the other hand, the principle established in *Vinos* and followed in cases such as *Ideal Shopping* is that CPR 3.10 cannot be used to override an express prohibition in another Rule. An example of such an express prohibition is in CPR 7.6(3). If a claimant applies retrospectively for an order to extend the time for service of a claim form the court may make such an order only if the remaining conditions laid down by the rule have been fulfilled. If they have not been fulfilled then Rule 3.10 is simply not available. But the *Vinos* principle must not be expanded into saying that CPR 3.10 cannot be used to rectify any breach of the CPR. Otherwise the Rule would be deprived of its utility. When CPR 3.10 is invoked it presupposes that some error of procedure has been made. Without it civil litigation would be even more beset by technicalities than it is already.

(iii) There is a valid distinction between making an application which contains an error, and failing to make a necessary application at all. *Steele v Mooney* [2005] 1 WLR 2819 is a useful illustration. In that case the claimants sought the defendants' consent to a draft order extending time for service of the Particulars of Claim. That consent was forthcoming, but the extension of time was useless since the claimants had omitted to refer to the claim form. This court, distinguishing *Vinos*, held that the application for an extension of time was clearly intended to be for service of the claim form as well as the particulars. The subsequent application for relief was not in substance an application to extend time for service of the claim form, but an application to correct the application for an extension of time which had been made within the time specified for service and which by mistake did not refer to the claim form.

33. *Hoddinott* lays down that if a Defendant acknowledges service without making an application under CPR 11(1) for an order declaring that the court has no jurisdiction (or should not exercise its jurisdiction) to try the case, this is taken to be an acceptance of jurisdiction. Whatever one might think of *Hoddinott*, the decision is binding on us, and like the judge I do not consider that it has been impliedly overruled by *Barton*. The judge was also right to reject the argument, based on the use of the word "expired" in *Barton*, that there is an analogy between the expiry of a claim form and the death of a living creature. Plainly in some circumstances an expired claim form can be revived: see CPR 7.6(3).

34. I agree with the judge that the failure of the Defendant's solicitors, when completing the acknowledgment of service form, to tick the box indicating an intention to contest jurisdiction is not fatal to their application for relief. Even if the box had been ticked an application would still have been required to be made within 14 days. CPR 11(1) does not say that a box on a form must be ticked: it says that an application must be made. As the judge put it, a tick in the box is neither necessary nor sufficient as a basis for challenging jurisdiction.

35. The critical question, therefore, is whether the Defendant's application of 24 January 2020 can, by the use of CPR 3.10, be treated as having been made under CPR 11(1). I do not accept Mr Trotman's argument that such rectification would offend against the *Vinos* principle. CPR 11(1) does not contain clear mandatory wording equivalent to that laid down by CPR 7.6 (3) that a retrospective extension of time may be granted "only if" certain conditions are fulfilled.

36. The failure to make express reference to CPR 11(1) in the letter of 21 January 2020 or the application of 24 January 2020 was in my view an error capable of rectification under CPR 3.10. The three documents - the acknowledgment of service, the covering letter and the application to strike out supported by witness statements – together made the Defendant's intentions clear. This was in substance an application to stop the case on the grounds that the Claimants had failed to serve the claim form in time. The case is much closer to *Steele v Mooney* than to *Vinos* or *Hoddinott*.

37. I am not impressed by the argument on behalf of the Appellants that if their failure to comply with the rules is to be treated so strictly despite the serious consequences, the same procedural rigour should be applied to the Respondent. That argument is contrary to the decision of the Supreme Court in *Barton*. Errors in issuing and serving originating process are in a class of their own.

38. I would also reject the Appellants' alternative argument based on *Denton v TH White Ltd*. I do not regard the failure of the documents served on 21 and 24 January 2020 to make express reference to CPR 11(1) as a serious and significant transgression. It was, rather, just the sort of technical error for which CPR 3.10 was designed."

152. I note that the Court of Appeal's approach in *Pitalia* is to the same effect as my analysis in *Macari* and *Fit Kitchen* although it is, of course, the Court of Appeal's judgment which is the binding statement of the law.
153. This area has, however, been further considered by the Court of Appeal in *R (Koro) v County Court at Central London 2024 EWCA 94* ("*Koro*") where a Part 7 Claim Form had been purportedly served but the service was said not to be in accordance with the rules and no acknowledgment of service had been filed. The court then struck out the claim on its own initiative in response to the informal submissions from the defendant that the Claim Form had not been properly served within time and so was a nullity. The Court of Appeal was mainly concerned with the procedural approach taken by the court which it held was wrong in various respects.
154. In paragraphs 64-70, the Court of Appeal said:

"Relevant principles

Defective service and its consequences

64. It was wrong of Ms Longson to submit and wrong of HHJ Baucher to accept that defective service means that proceedings do not exist. Proceedings that have been properly issued and are properly constituted exist whether or not they have been properly served. They do not cease to exist either because they are not served in time or have been served defectively. We consider this to be axiomatic.

65. The procedure for disputing the Court's jurisdiction is laid down by CPR Part 11. For present purposes, the most relevant provisions of CPR Part 11 are CPR 11 (1)-(4) which should be well known:

[CPR11 was then set out]

66. In *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203 at [23], the Court of Appeal held that the word "jurisdiction" in CPR Part 11 does not denote territorial jurisdiction but is a reference to the court's power or authority to try a claim:

"But in CPR r 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court's power or authority to try a claim. There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR r 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim: CPR r 11(1)(b). Even if Mr Exall is right in submitting that the court has jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court should not exercise its jurisdiction to do so in such circumstances. In our judgment, CPR r 11(1)(b) is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure, namely CPR r 7.5(2). It is the

breach of this rule which provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim. ”

67. In *Caine v Advertiser and Times Ltd and Ors* [2019] EWHC 39 (QB) Dingemans J held that *Hoddinott* was binding authority for the proposition that an application that the court should not exercise its jurisdiction to try a claim must be made by CPR Part 11. Subsequently, Nugee LJ sitting in the Intellectual Property List of the Patents Court expressed a degree of uncertainty about the breadth of the *Hoddinott* principle in a case where a defendant had not served an acknowledgement of service and, as Nugee LJ found, there was a separate route provided by CPR r.7.7(3).

68. Given the breadth of the terms of CPR Part 11 and the absence of any alternative route elsewhere in the CPR which the CPS could have adopted or did adopt, we would hold that CPR Part 11 provides the procedure for disputing the Court’s jurisdiction in a case such as this. Accordingly, if the CPS wanted to assert defective service, it should have followed that procedure, served an Acknowledgment of Service and made an application pursuant to CPR Part 11 within 14 days thereafter.

69. Even if we were to be wrong and there were to be some other route by which the CPS could have or could now raise the assertion of defective service, it would not be safe to speculate about what the outcome of such an application would be. It is not to be assumed (and could not be assumed by HHJ Baucher or the Deputy Judge when considering whether to give permission in these proceedings) that the end result would be that the Court would decline to exercise jurisdiction. Many different considerations might arise of which three of the most obvious are the nature of the defect in service (as to which see [7.iii] above), the promptness (or otherwise) with which the point was taken by the CPS, and whether the CPS had waived the defective service. As Ms Milligan fairly and correctly pointed out, on any such application (whenever and however made) the Court would have a range of case management options from which to select the most appropriate, including (a) retrospectively dispensing with service, (b) extending time for service of an amended Claim Form to cure the defect or (c) making a retrospective or prospective order under CPR 6.15. This is not intended to be an exhaustive catalogue of the Court’s available powers in an appropriate case.”

155. The Court of Appeal then set a procedural course for enabling the matter to be resolved. At paragraph 88 they made clear that they were not deciding as to what should happen at any full hearing of whatever turned out to be the various applications in the case.
156. The Claimants rely on *Koro* to say that there is and (in the absence of an acknowledgment of service and subsequent application) cannot be any challenge to the progress of the Claim, and that the Defendants need permission to file acknowledgements of service late which they should not have other than on condition that the Claim progresses notwithstanding the previous failure to comply with CPR7.5(1) (in relation to the Claim Form) and CPR7.4 (in relation to the Particulars of Claim) and the November Order.
157. The Defendants have asserted that the reasoning in *Koro* should be confined to the facts of that case and in any event kept without bounds and including in particular as:

Approved Judgment

- i) The facts were unusual and very case-specific relating to the making of a number of inconsistent orders by the county court and what was held to be a refusal to properly hear from the claimant
- ii) The underlying claim was one in judicial review regarding the Part 7 proceedings and what had happened to them. In consequence the Court of Appeal was dealing with the matter in a judicial review context
- iii) The Court of Appeal were really simply concerned with whether the claimant should have an opportunity to have a full contested hearing, and:
 - a) their comments on other matters were mere obiter dicta, and
 - b) there was nothing to stop the defendant in that case at the eventual hearing contending that the county court should decline jurisdiction on ordinary defective service principles
- iv) The Court of Appeal expressed some uncertainty as to their conclusion that for a defendant to seek to challenge the Claim on (non)service grounds it would be necessary for the defendant to first file an acknowledgment of service and then to make an application
- v) In any event, it is the Claimants who require an extension of time for service of Particulars of Claim, and until they obtain that there is no obligation on the Defendants even to file an acknowledgment of service (only after which can they make a CPR11 application).

158. In my judgment, it is clear from these authorities, which are binding upon me, that:

- i) Defective, or even no, service does not render a Claim or the Claim Form a nullity or cause it to be automatically struck-out. The Claim continues in existence unless and until the Court makes an order declining or refusing to exercise jurisdiction (and where CPR11 provides that a consequential striking-out order can then be made)
- ii) Such an order (as far as one arising from defective or non-service is concerned) will only be made if there is an acknowledgment of service from a relevant defendant and subsequent application under CPR11. While the need for an acknowledgement of service is dealt with only in *Koro* (there having been acknowledgments of service in the other cases), I consider that it is clear from the wording of CPR11 and from the Court of Appeals decisions in *Hoddinott @ paragraph 26* and in *Koro* (which is very highly persuasive even if that element can be said to be obiter)
- iii) If there has been an acknowledgment of service but no application within the 14 days provided for by CPR11 there will be a statutory waiver by the relevant defendant of the service points unless relief from sanctions (and any other appropriate relief) is obtained by that defendant.

159. I note that there can also be a common-law waiver by conduct of the jurisdiction/service points (see e.g. *Fit Kitchen* for the applicable principles) but I cannot see anything in

the material before me to suggest that such could have occurred where the defendants have been very keenly asserting points on service from 21 April 2023 onwards.

160. I have considered an argument advanced by Mr Calland for the First Defendant that these principles and *Koro* have or should have no application where the Claimants have themselves made an application for there to be determined whether or not there has been valid service. I disagree. The CPR and the case-law make clear that it is the CPR11 process which is to be followed and that otherwise a statutory waiver arises. While Claimants may seek a determination (as these Claimants have done) regarding service, the essential question is not as to whether service has occurred in accordance with the rules but whether the claim should proceed, and as is made clear by both the CPR and the case-law.
161. The present position is that there are no acknowledgments of service and no applications on the part of either of the Defendants. In those circumstances, it seems to me that I simply cannot decide the question of whether a jurisdiction challenge would succeed as none has been made. In theory I could waive the various failures to file acknowledgments of service under CPR3.10 and to issue application notices under CPR3.10 and CPR23.3(b) but that has not been argued fully (if at all) before me and would deserve substantial consideration including as to potential prejudice to the Claimants. Taking such a course summarily would also be, at first sight, inconsistent with the Court of Appeal's general statement in *Koro* and also various other decisions such as *Talos v JSC* [2014] EWHC 3977, *Taylor v Giovanni* [2015] EWHC 328 and *Mansard v Beyat* [2021] EWHC 3355 @ paragraphs 17 and 18 to the effect that defendants require permission to file acknowledgments of service out of time and especially where such is to be the first stage of their mounting a jurisdiction challenge.
162. However, I do think that I can decide the question of whether or not the Defendants require permission to file acknowledgments of service out of time. The Defendants submit that they do not because (a) the Claim Form was not served in time (CPR7.5(1)) and the November Order) and (b) the Particulars of Claim were not served in time (CPR7.4 and the November Order). They say that therefore the period in CPR10.3 for filing acknowledgements of service has never started to run.
163. I disagree, for the following reasons:
 - i) The Claim Form is not rendered a nullity by reason of defective or late service (see above). I do not see why it should follow from the CPR7.5(1) or the CPR7.4 time for service requirement that eventual service out of time is a nullity. In my judgment it is service (assuming that it complied with the method of service rules, and which was clearly the case here, in relation to both the First Defendant and, if it is to be held to be SRL, the Second Defendant) albeit late service
 - ii) CPR10.1(3)(b) makes clear that an acknowledgment of service must be filed if a defendant wishes to contest jurisdiction. While I accept that in some circumstances a defendant may wish to make an application (a) where a claim form has not been served properly at all or (b) a claim form has been served in time in accordance with the CPR (e.g. a forum non conveniens or a revocation of permission to serve out of the jurisdiction application – and various cases cited by the Claimants relate to such circumstances which are in my view

potentially conceptually different from that of a claim form which has been served late); it is a common case that a claim form has been served late. There is nothing in CPR10 to indicate that an acknowledgment of service is not required in such circumstances if a jurisdictional point is to be taken in consequence

- iii) For a defendant to have to act within the combined CPR10 and CPR11 time-limits is entirely consistent with the policy of the rules. That policy is that a defendant may seek to challenge jurisdiction on service (or other) grounds but must do at an early first stage (see e.g. *Texan Management v Pacific* 2009 UKPC 46 @ paragraph 69). That results in certainty and avoids the possibility of a claim proceeding with a challenge to jurisdiction only being made at a stage later than close to the start. The rules achieve that objective by requiring a speedy acknowledgment of service followed speedily by an application to challenge jurisdiction. While it may be possible in a case of defective service for a defendant to say that there has been no service at all and that they therefore do not have to do anything until something which amounts to service has taken place, I cannot see it as being consistent with the statutory policy or scheme for them to be able to do nothing where actual service has eventually taken place even if out of time. That would also lead to immense uncertainty in the course of litigation
 - iv) Although *Koro* does not actually pose, or answer, this direct question; my answer is at least consistent with the statements that a defendant who wishes to dispute jurisdiction must get on and do so in accordance with the CPR.
164. In this context I have considered the Defendants' contention that the Claimants require permission to serve the Particulars of Claim out of time (as they should have been served by 4pm on 21 April 2023) and that there has been no service of them at all unless and until that permission is given. That argument has been pressed with greater force with regard to the purported (late) service of the Particulars of Claim but, logically, it can also be applied to the purported (late) service of the Claim Form.
165. I accept that there are various decisions which suggest that late filing or service of procedural material at the early stage of the litigation renders the material itself a nullity. That is said to be the case in relation to late filed acknowledgments of service in *Talos* @ paragraph 33.¹
166. However, I do not see the (late) service of the Particulars of Claim (or of the Claim Form) as rendering them a nullity or, more importantly, such that they prevented the period for filing an Acknowledgment of Service under CPR10.3 from running. In my judgment, when the statutory scheme is considered as a whole, and essentially for the reasons given above, the effect of proper service (even if out of time) is that the statutory

¹ Following handing-down of this judgment, but before any further or consequential hearing, I have located the decision in *Cunico v Daskalakis* [2018] EWHC 3382. At paragraphs 27-34 Andrew Baker J considered the position under CPR11 where an acknowledgment of service had been filed late or not at all and held (paragraphs 31 and 34) that for CPR11 to be used in such circumstances required some judicial discretionary intervention as the requirements of CPR11 had not been met. At paragraphs 32-33 he held that the statements in paragraph 33 of *Talos* either were directed to a court setting aside an acknowledgment of service so as to (only) then render it a nullity or were wrong. I regard those paragraphs, which are in any event binding upon me, as being correct, and entirely consistent with this judgment.

scheme does operate and the time for filing an acknowledgment of service does begin once that service has taken place. This does not result in any unfair prejudice as far as a relevant defendant is concerned, they have been served and the CPR provide that the consequence of service is that the defendant must file an acknowledgment of service (which is not a burdensome matter) and has a period of time to then either defend or to challenge jurisdiction.

167. It therefore seems to me that one way or another the Defendants will have to obtain consent or permission to file acknowledgments of service out of time and where the Claimants are likely to contend that such should only occur on condition that no challenge to jurisdiction (and, perhaps, to the late service of the Particulars of Claim – although I have heard no argument and express no view on that) is made or succeeds (effectively a conditional order under CPR3.1(3)). Those matters are not such that I consider that I can properly, on the limited material and submissions before me, determine in this judgment.
168. In these circumstances, it seems to me that the Defendants will have to decide whether they wish to apply to file acknowledgments of service out of time and to make a jurisdiction challenge (technically, if the defendants simply file them out of time, the Claimants will have to seek to set them aside). This could give rise to some complexity as to order of applications, and I set out below the orders which I am intending to make to seek to ensure that everything can be sensibly advanced before and decided by the court at once.

The Claimants' Application for an extension of time for serving the Particulars of Claim

169. This application is opposed by the Defendants on the basis that the Claimants are in breach of the November Order (and thus also of CPR7.4), where the Claim Form was issued at the end of some (but not other) applicable limitation periods, and where it is contended that the Claimants have delayed generally and this is not an “in-time” application but one made after the relevant time-limit expired. There is some authority – see the White Book notes at 7.4.2 and e.g. *Venulum v Space 2013 EWHC 1242* - that the Court should approach the matter on a relief from sanctions CPR3.9/*Denton* basis, and Mr Sawtell seemed to concede that that was appropriate in these circumstances. The Claimants contend that any delay was short; the Defendants knew perfectly well the general case against them; no prejudice whatsoever has been caused to the Defendants; and the Defendants had indicated a preparedness in correspondence for the Claim Form and Particulars of Claim to be served nearly a month later; and, further, that any limitation problems (at least apart from the common-law non-personal injury claims) can be overcome by the application of section 33 (as well as the new section 4B) of the Limitation Act 1980 and that they would have a strong case under section 33 (including, they would say, because much of the substance of their claims is going to be investigated and fought out anyway). The Claimants contend that, even if there was a serious and substantial breach, and no good reason for it, it is just in all the circumstances of the case for relief from sanctions to be granted and the claim to be allowed to proceed. The Defendants contend that the Claimants are guilty of numerous delays and cannot show that it is just that an extension should be granted.
170. I have decided that it is not appropriate for me to decide this question in this judgment. The jurisdictional issues can be well said to logically come first (and I do not have any formal application to set aside the service of the Particulars of Claim, and it may even

be that any attempt to set them aside would itself have to involve a jurisdiction challenge under Part 11 and/or that the Claimants might seek to make sanctioning the service of the Particulars of Claim a condition of permitting the late filing of an acknowledgment(s) of service – but none of those matters have yet been argued before me and so I do not express any view on any of them); but, and also importantly, the questions of who should be granted what (if any) extensions of time involve considerations of material, merits and prejudice which are heavily inter-related.

171. It seems to me that this aspect and the questions of extension of time for acknowledgments of service and jurisdictional challenge should all be dealt with together; and I have provided below for directions to enable that to occur.

The Second Defendant

172. Mr Frampton for SRL and SARL contends that the Claim has been brought against SARL when it should have been brought against SRL. He resists the Claimants' application to amend the name of the Second Defendant to that of SRL. He contends that:

- (1) The Claim has been brought against SARL, and the Claimants are seeking a true substitution of a new defendant rather than a re-naming of an existing defendant
- (2) There has actually been no service of "the Second Defendant" at all. As I have held, the CPR6.7 confirmation of authorisation of MB to accept service was only given in relation to SRL and service thus only took place (out of time) on SRL. He submits that SARL is the present Second Defendant and there has been no service upon it and therefore no service on "the Second Defendant"
- (3) An amendment is required; and such is only possible if the Claim is not to be disposed of absolutely on jurisdictional or similar grounds against all the existing defendants, as, if that is the case, there will be nothing to amend
- (4) The Claim has been or may have been brought within the primary limitation periods of the common-law non-personal injury claims and of the personal injury claims; but that those primary limitation periods (in relation to adult claimants) have or may have now expired
- (5) For there now to be an amendment to substitute SRL for SARL would result in adult claimants obtaining an impermissible limitation advantage prohibited by CPR17.4(2) and 19.6(3) and section 35 of the 1980 Act
- (6) Accordingly, if the Claim is not simply to be struck-out (on jurisdictional or failure to serve Particulars of Claim in time grounds), any substitution of SARL for SRL, as well as any addition of adult claimants, should only be on what are known as "Mastercard" (a reference to *Mastercard v Deutsche* [201]7 EWCA Civ 272 and see also *Libyan v King* [2020] EWCA 1690 and *DR Jones v Drayton* [2021] EWHC 1971) terms being that all the claims against SARL and/or the claims of the new adults should be deemed only to be brought as at the date of the ultimate order (and

not relate back to the issue of the Claim Form as would otherwise be the case under section 35 of the 1980 Act).

173. Mr Sawtell for the Claimants essentially accepts this analysis except that he contends that the amendment sought as to the name of the Second Defendant is a permissible amendment within CPR17.4(3) (and section 35) because it is the correction of “a mistake as to the name of a party” where “the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question.” He would contend that it is truly SRL which has been sued, and obvious that the claim was intended to be brought against SRL so that all that is involved is a correction of name rather than substitution of a new entity, but otherwise that SRL can be substituted for SARL if, indeed, it is SARL which is the entity which has been sued. I do not think that he is contending that the matter was in some way resolved by the November Order (which referred to SARL as being the Second Defendant and was signed by MB “for Sheppard Robson”).
174. I note that the Court can under CPR19.6(4) authorise an amendment even if the “mistake” provisions do not apply by directing that a section 33 application to disapply the primary limitation periods in relation to a personal injuries claim should be dealt with at trial. However, that provision would not assist in relation to the common-law non-personal injury claims; and the simple solution (if Mr Sawtell is not correct on “mistake” and this Claim is not to be defeated altogether on jurisdictional or similar grounds) is to adopt the Mastercard course.
175. As to the issue regarding the CPR and “mistake”, the parties have cited *Cameron v BDW [2022] BLR 183* where at paragraphs 59-63 it was said:
- “59. The leading case on this area of the law, *The Sardinia Sulcis [1991] 1 Lloyds LR 201*, also arose under the old Rules of the Supreme Court. In that case it was held that the name of a party could be corrected if the court was satisfied that:
- a) there was a genuine mistake;
 - b) the mistake was not misleading;
 - c) the mistake was not such as to cause reasonable doubt as to the identity of the person intending to sue (or be sued);
 - d) it would be just to allow the amendment.
60. The older authorities were reviewed by the Lord Chief Justice in *Adleson & Anr v The Associated Newspapers Limited [2007] 4 All ER 330*. He summarised the principles, and confirmed the relevance of the *Sardinia Sulcis* test:
- "43. These authorities have led us to the following conclusions about the principles applicable to RSC Order 20 rule 5.
- i) The mistake must be as to the name of the party in question and not as to the identity of that party. Such a mistake can be demonstrated where the pleading gives a description of the party that identifies the party, but gives the party the wrong name. In such circumstances a 'mistake as to name' is given a generous interpretation.

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ii) The mistake will be made by the person who issues the process bearing the wrong name. The person intending to sue will be the person who, or whose agent, has authorised the person issuing the process to start proceedings on his behalf.

iii) The true identity of the person intending to sue and the person intended to be sued must be apparent to the latter although the wrong name has been used.

iv) Most if not all the cases seem to have proceeded on the basis that the effect of the amendment was to substitute a new party for the party named."

61. Thereafter, having set out the subsequent authorities under r.19.5, Lord Phillips summarised the position under the CPR :

"55. CPR 19.5(3)(a) makes it a precondition of substituting a party on the ground of mistake that:

"The new party is to be substituted for a party who was named in the claim form in mistake for a new party"

It is clear from this language that the person who has made the mistake must be the person responsible, directly or through an agent, for the issue of the claim form. It is also clear that he must be in a position to demonstrate that, had the mistake not been made, the new party would have been named in the pleading.

56. The nature of the mistake required by the rule is not spelt out. This Court has held that the mistake must be as to the name of the party rather than as to the identity of the party, applying the generous test of this type of mistake laid down in *Sardinia Sulcis*. The 'working test' suggested in *Weston v Gribben*, in as much as it extends wider than the *Sardinia Sulcis* test, should not be relied upon.

57. Almost all the cases involve circumstances in which (i) there was a connection between the party whose name was used in the claim form and the party intending to sue, or intended to be sued and (ii) where the party intended to be sued, or his agent, was aware of the proceedings and of the mistake so that no injustice was caused by the amendment. In *SmithKline*, however, Keene LJ accepted that the *Sardinia Sulcis* test could be satisfied where the correct defendant was unaware of the claim until the limitation period had expired. We agree with Keene LJ's comment that, in such a case, the Court will be likely to exercise its discretion against giving permission to make the amendment."

62. In *Adelson* there was also an issue as to the corporate structure of the claimant group (because they were seeking to substitute one company within the group for another). The LCJ said:

"69. We have explained why *Morgan Est* should not be followed. If those responsible for the Particulars of Claim had knowledge of the corporate structure of the Las Vegas Sands Group and of the part played by each company in the group activities and deliberately decided to sue in the name of the Second Claimant alone, the fact that this decision may have been mistaken will not bring the case within CPR 19.5. To do this the Claimants must establish that those responsible for the Particulars of Claim were under a mistake as to the group structure or the roles played by the members of the

group and, but for that mistake, would have included as claimants the Third and Fourth Claimants. This is the very minimum that they need to achieve if they are to have an arguable case that a mistake of name within the Sardinia Sulcis test occurred.

70. The Particulars of Claim were settled by junior counsel, who no longer represents the Claimants, and a declaration of truth was signed on behalf of the Claimants by a member of Salans. No evidence has been adduced to show that there was a mistake on the part of Salans or counsel as to the roles played by the claimant companies, but for which mistake the Third and Fourth Claimants would have been joined in the action."

63. Reference was also made to *Insight Group Limited & Anr v Kingston Smith (A Firm)* [2012] EWHC 3644 (QB) ; [2013] 3ALL ER 518. In that case, again taking up the point that X may deliberately have sued Y even though it knew that the relevant services had been provided by Z, Leggatt J (as he then was) said:

"57. In order to decide whether the claimant's mistake can be regarded as one of name rather than description, it is thus necessary to distinguish between the following two possible cases:

(1) The claimant sues the LLP in the mistaken belief that the LLP provided the services which are said to have been performed negligently, failing to recognise that the services were provided by the former partnership and not the LLP.

(2) The claimant knows that that the services were provided by the former partnership but mistakenly believes that the LLP is legally liable for the negligence of the earlier firm.

The court has the power to grant relief in case (1) but not in case (2)."

176. Mr Frampton contends that:

- i) The Claimants were told by MB's letter of 14 January 2021 that they acted for SRL, and that MB corrected the draft standstill agreement from SARL to SRL to make it even more clear that the correct defendant was SRL
- ii) The Claimants have provided no witness evidence (beyond a reference to the draft standstill agreement correction being made by MB in Section 10 of the 23 August 2023 Application Notice as to how or by whom the asserted "mistake" came to be made.

177. Mr Sawtell contends that:

- i) It was obvious throughout that the Claimants' intention was to sue the actual architects, and that they had simply overlooked the various references of MB to SRL, and where MB did not correct the Claimants' continued references to SARL expressly except in the correction to the draft standstill agreement
- ii) There is no real prejudice in terms of any real misapprehension on the part of SRL or SARL as to what the Claimants intended
- iii) This is actually a CPR19.6(3) case rather than a CPR17.4(2) case where the additional requirements of "genuine mistake" etc. are not prescribed.

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178. I can see that there is potential force in Mr Sawtell's argument that a genuine mistake was made by someone within the process of drafting the Claim Form. The clear intention was to sue the architects, notwithstanding that the Claimants had been told that it was SRL which was the relevant architect corporate entity. However, it also seems to me that there is considerable force in Mr Frampton's criticisms of the way in which the Claimants have sought to advance this application and the absence of any evidence as to how it came about that SARL were named, who was the person responsible for SARL being named, and what was actually intended by the relevant decision-maker(s). There is also Mr Frampton's argument to the effect that as the Claimants were told that SRL were the correct entity, they may be taken to have deliberately rejected that and chosen to sue SARL and insist that it was the entity in question.
179. Again, I am hesitant to decide questions of this nature where the jurisdictional and similar matters technically come first. This is all the more so as if the Claim is not struck out as against the First Defendant, but were to be struck out as against the Second Defendant, there would remain an extant Claim to which there would be jurisdiction to add a further party (e.g. SRL), if appropriate, but only on the basis that the Claim as against them would be deemed to have been commenced only on the date of their addition to it (i.e. an equivalent consequence to a Mastercard order albeit on a different underlying basis). While I could, in theory, decide whether or not the present Second Defendant is actually SRL (and not SARL), to do so could inhibit my ability to reach decisions on the various permutations which arise in this case and cause difficulties were there to be an appeal. I think that these matters can best be argued and taken together.
180. It also seems to me that it is in accordance with the overriding objective in these circumstances, where there is to be a further hearing in any event, for the Claimants to be given an opportunity to correct asserted deficiencies in their evidence, and all the more so where the matter has been allowed on the last occasion to proceed on written submissions alone rather than a second oral hearing. Any prejudice to SARL and SRL can be dealt with by a costs order should that turn out to be appropriate.
181. Having weighed up all the matters together, I conclude that it would be in accordance with the overriding objective to adjourn this aspect to the further hearing which is going to take place in relation to the other matters. The parties should liaise as to directions with regard to the filing of any further evidence.

Conclusions

182. For all these reasons:
- i) I determine that:
 - a) A relevant step for service of the Claim Form was not taken in time by the Claimants in accordance with CPR7.5 and the November Order in relation to either the First Defendant or the Second Defendant; and the Claimants' application for a determination or declaration to the contrary is to be refused

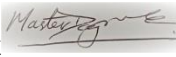
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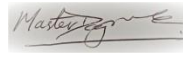
- b) The Claimants should not be granted relief from sanctions or any similar relief (whether under CPR3.1, 3.10, 6.15 or 6.16 or otherwise) in relation to their failures to comply referred to in sub-paragraph (i) above; but this is not to prevent them seeking any appropriate conditions with regard to any application by either Defendant to seek permission to file an acknowledgment of service in time
 - c) The Claimants did serve the Claim Form and Particulars of Claim out of time on the First Defendant and SRL (the Court not yet having decided whether or not the SRL is or is to be or treated as the Second Defendant)
 - d) The First Defendant and SRL (if it is or is to be or treated as the Second Defendant) each require permission to file an acknowledgment of service out of time and which is a precondition of their being able to make any application under CPR11 (and thus to request the court to declare that it has no jurisdiction or to decline to exercise jurisdiction in relation to the Claim)
- ii) I will direct when handing-down this judgment, and adjourning that hearing, that:
- a) The Claimants file and serve any further evidence in support of their applications in relation to their contentions that SRL is or is to be or is to be treated as being the Second Defendant by 4.30pm on 23 July 2024
 - b) The Defendants issue and serve any applications (including for permission to file acknowledgment(s) of service out of time and under CPR11) by 4.30pm on 10 September 2024 and also by then file and serve any witness evidence in support of their applications or in answer to the Claimants' further witness evidence
 - c) The Claimants file and serve any witness evidence in reply to that of the Defendants by 4pm on 1 October 2024
 - d) The hearing shall be adjourned to a further hearing listed for one day not before 14 October 2024; and:
 - i) An agreed Supplemental Bundle be lodged not less than 8 days before the hearing
 - ii) Further Skeleton Arguments be filed and served not less than 4 days before the hearing
 - iii) A further agreed bundle of authorities be filed not less than 2 days before the hearing
 - iv) The parties shall liaise and shall file dates of Mutual Availability for that hearing for the period from 14 October to 20 December 2024 by 4.30pm on 11 July 2024
 - v) All costs are reserved to that hearing

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- e) There be extended until further order (and which is to be considered at the further (adjourned) hearing):
 - i) Time for filing any appeal notice in relation to this Judgment
 - ii) Time for seeking any permission to appeal in relation to this Judgment
- f) There be adjourned to and for consideration at the further (adjourned) hearing all questions as to:
 - i) Time for filing any appeal notice in relation to this Judgment
 - ii) Permission for appeal in relation to this Judgment.

183. The parties should liaise and submit in a usual way a form of order embodying the above.

Approved Judgment  25.6.2024

Amended by insertion of footnote to paragraph 165  1.8.2024



Neutral Citation Number: [2024] EWHC 3235 (TCC)

Case No: HT-2024-000316

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2024

Before :

MRS JUSTICE JOANNA SMITH DBE

Between :

BDW TRADING LIMITED

Claimant

- and -

ARDMORE CONSTRUCTION LIMITED

Defendant

Rupert Choat KC and Max Twivy (instructed by Howard Kennedy LLP) for the Claimant
David Pliener KC (instructed by Mantle Law (UK) LLP) for the Defendant

Hearing date: 5 November 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE JOANNA SMITH DBE

Mrs Justice Joanna Smith:

1. This is a summary judgment application by the Claimant (“**BDW**”) to enforce an adjudication decision (“**the Decision**”) made by Mr John Riches (“**the Adjudicator**”) on 17 September 2024 (as corrected on 18 September 2024), requiring the Defendant (“**Ardmore**”) to pay £14,454,914.45 by way of damages together with £84,329.00 for the Adjudicator’s costs and expenses. The Adjudicator held that Ardmore had breached its duties under a construction contract (and that limitation did not apply by reason of deliberate concealment) and, separately, that Ardmore was liable under the Defective Premises Act 1972 (“**the DPA 1972**”).
2. Ardmore acknowledges that, in the vast majority of cases, the court will enforce the decision of an adjudicator, but it says that this is a rare case in which the court should take a different approach. Specifically, Ardmore raises four grounds of objection to the Decision which it says preclude enforcement. First, that the dispute referred to in the Decision had not crystallised (“**Ground 1**”), second that the Adjudicator had no jurisdiction to determine a tortious claim for breach of the DPA 1972 (“**Ground 2**”); third that the Adjudication was inherently unfair owing to the inequality of arms in terms of documentation (“**Ground 3**”) and fourth that the Adjudicator intentionally failed to consider a material Defence relevant to the allegation of deliberate concealment against Ardmore (“**Ground 4**”). I shall refer to Grounds 3 and 4 together as “**the Natural Justice Challenges**”.
3. If Ardmore has a real prospect of success on either Grounds 1 or 3, then it will successfully resist enforcement by way of summary judgment. However, if these grounds fail, Ardmore accepts that (owing to the nature of the Decision made by the Adjudicator) it must have a real prospect of success on both Grounds 2 and 4 to resist enforcement.
4. Ground 2 raises a point of principle which may be of broad interest to the construction industry as a whole, given the current number of disputes in the industry relating to the fire safety of dwellings. Specifically it requires me to consider whether the reasoning of the House of Lords in *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951, HL (“*Fiona Trust*”), a case in which the court considered the true interpretation of an arbitration clause, also applies to an adjudication provision. Accordingly, I am invited to determine the point even if my decisions on one or more of the remaining three grounds render it unnecessary to do so. **Factual Background**
5. On 30 October 2002, the Basingstoke Property Company Limited (“**BPCL**”), as Employer, and Ardmore, as Contractor, entered into a building contract (“**the Building Contract**”) for the design, erection and completion of the shell and core, primary services and partial fitting out of apartments at Crown Heights, Basingstoke, Hampshire (“**the Development**”). Barratt Southern Counties (“**BSC**”) was appointed as BPCL’s Employer’s Agent. Another Barratt company, Barratt East London (“**BEL**”) appears also to have been involved. The Contract Sum was £22,593,000.

6. The Building Contract is a construction contract within the meaning of section 104 of the Housing Grants, Construction and Regeneration Act 1996 (“**the HGCRA 1996**”).
7. Article 5 and clause 39A of the Building Contract make provision for the reference of a dispute or difference to adjudication. Clause 39A.2, read together with Appendix 1, provides that “[t]he Adjudicator to decide the dispute or difference shall be either an individual agreed by the Parties or, on the application of either Party, an individual to be nominated” by the Royal Institution of Chartered Surveyors.
8. By a Deed of Assignment of Building Contract dated 3 November 2004, BDW took an absolute assignment of the full benefit of all of BPCL’s interests and rights under the Building Contract, together with all rights for BPCL to sue or take action in respect of any breach of the obligations contained in that contract.
9. It seems that practical completion occurred between December 2003 and June 2004. Accordingly, until the coming into force of the provisions of the Building Safety Act 2022 (“**the BSA 2022**”), Ardmore had, for some time, a complete limitation defence under the Limitation Act 1980 (“**the LA 1980**”) to any claims that might be brought against it by BDW under section 1(1) of the DPA 1972, which imposes a duty on “[a] person taking on work for or in connection with the provision of a dwelling” to carry out the work in a “workmanlike” or “professional manner” with “proper materials so that as regards that work the dwelling will be fit for habitation when completed”.
10. However, section 135 of the BSA 2022 inserted a new section 4B into the LA 1980 which had the effect, amongst other things, of increasing retrospectively the limitation period for a claim under section 1(1) of the DPA 1972 from 6 years to 30 years, thereby raising the spectre of a claim being pursued against Ardmore for its work on the Development.
11. This legislative change prompted BDW to write a Pre-Action Protocol letter to Ardmore on 14 July 2022 (“**the Letter of Claim**”), nearly twenty years after practical completion, identifying “fire safety defects at the Development”. I shall return to the detail of the correspondence that then ensued between the parties which is relevant to Grounds 1 and 3, but that correspondence culminated in BDW issuing a Notice of Adjudication dated 21 March 2024. The Notice of Adjudication asserted that a dispute had arisen as to Ardmore’s liability to BDW in respect of fire safety defects in the Development, arising by reason of Ardmore’s breaches of the Building Contract and/or its duties pursuant to section 1(1) DPA 1972. BDW sought damages in the sum of £15,037,615.01 (excluding VAT), or such other sum as the Adjudicator may decide.
12. On 25 March 2024, the President of the Royal Institution of Chartered Surveyors nominated Mr John Riches as the Adjudicator.
13. In its Referral Notice dated 27 March 2024, BDW set out its case on two alternate legal bases: first, breach of the Building Contract, a claim that was said to be “in time” for limitation purposes by reason of the provisions of section 32(1)(b) LA 1980 on the basis that there had been deliberate concealment of Ardmore’s alleged breaches of duty, including a duty to install fire barriers. Second, a claim under the DPA 1972,

limitation no longer being an obstacle owing to the extended limitation period provided by the BSA 2022.

14. On 8 May 2024, Ardmore provided its Response to the Referral. Thereafter, over what was an unusually protracted timetable, the parties exchanged additional documents setting out their respective cases (a Reply, a Rejoinder to the Reply, a Surrejoinder, a Rebutter and a Surrebutter). The Decision, running to 166 pages, was provided to the parties on 17 September 2024. The Adjudicator declared that Ardmore had breached its duties under the Building Contract in respect of fire safety aspects in the Development and that it was also liable under the DPA 1972 in respect of the same fire safety defects. He required Ardmore to pay damages and costs in the sums to which I have already referred.
15. Ardmore subsequently informed BDW that it intended to resist enforcement of the Decision, thereby prompting BDW to issue a claim form seeking enforcement on 1 October 2024, supported by a witness statement from Mr Mark Pritchard of Howard Kennedy LLP, BDW's solicitors. On 3 October 2024, O'Farrell J granted permission to BDW to issue an application for summary judgement prior to service by Ardmore of either an Acknowledgement of Service or a Defence and gave directions for the hearing of the summary judgment application. Further evidence has since been served on both sides in the form of a witness statement from Ms Georgia Whiting, Legal Counsel for the Defendant and a second statement from Mr Pritchard.
16. It is common ground that the court may grant summary judgment "on the whole of the claim or on an issue", if it considers that the relevant party (in this case Ardmore) "has no real prospect of succeeding on the claim, defence or issue" (CPR r.24.3(a)) and "there is no other compelling reason why the case or issue should be disposed of at a trial" (CPR r.24.3(b)). The overall burden of proof rests with BDW to establish that Ardmore has no real prospect of succeeding in the defences it raises against enforcement. However, if BDW adduces credible evidence in support of the application, then Ardmore comes under an evidential burden to prove some real prospect of success or other reason for having a trial (White Book Vol 1 at CPR 24.3.3).
17. At the hearing, Mr Pliener KC advanced Ardmore's four Grounds of objection to the Decision at the outset, with Mr Choat KC replying on behalf of BDW - a tacit acknowledgement from both sides that, in an adjudication enforcement, the existence of a decision in the adjudication will almost inevitably mean that it is for the paying party to satisfy the evidential burden of establishing that it has a real prospect of success on one or more of its arguments against enforcement. **Ground 1: Crystallisation of the Dispute**
18. To address the contention that the dispute had not crystallised at the time it was referred to adjudication, I need to begin by looking in more detail at the correspondence between the parties starting with the Letter of Claim of 14 July 2022.

19. Under the heading “The Legal Framework”, the Letter of Claim identified that the obligations owed by Ardmore to BDW were to be found in various sources. It went on to identify that: “the extant cause of action against you is under the Defective Premises

Act 1972”, but said that “for context and to provide clarity on the true meaning and extent of those obligations, we refer to the broader applicable contractual and statutory framework below”.

20. The Letter of Claim then described Ardmore’s obligations (i) under the Building Contract, together with its standard of care under clause 2.5.1 (to which I shall return in more detail in connection with Ground 2); (ii) under the DPA 1972; and (iii) under the relevant Building Regulations. The claim was said to be based on the use of an inappropriate cladding system (an Alumasc product, rather than the Sto product set out in the design intent) and on the failure to install horizontal fire barriers. BDW set out, at some length, a chronology of what it considered to be relevant extracts from contemporaneous correspondence on the subject of the inclusion of fire barriers, and attached copies of this correspondence to the letter at Appendix 3. BDW asserted a breach of Ardmore’s duty under the DPA and made clear that the identified defects had put BDW “at substantial risk of loss”. BDW stated that it would particularise its losses in due course.

21. On 19 October 2022, Ardmore replied to the Letter of Claim seeking voluntary preaction disclosure “of all and any documents BDW has in its possession...relating to the project” in circumstances where, as Ardmore explained, it no longer possessed all project records. Ardmore also sought some specific documents relating to BDW’s standing to bring the claim, together with details of the remedial works that were required and details of the programme of works envisaged.

22. BDW responded some 9 months later on 20 July 2023. As it recorded in its letter, it had, by this stage, provided Ardmore with certain factual reports as to the condition of the Development together with (on a without prejudice basis) an advice note from its then expert. Beyond these documents, BDW refused to provide anything further, stating that Ardmore now had all that it needed to understand BDW’s position and to “make informed decisions about settlement and how to proceed”. BDW now explained that the basis on which it claimed against Ardmore was threefold: (i) under the DPA 1972; (ii) under the Civil Liabilities (Contribution) Act 1972; and (iii) that “[b]y omitting cavity barriers behind the Ispotherm system above the second storey of the Development, having sought advice from Alumasc who confirmed that cavity barriers were required..., Ardmore deliberately breached its duty under the Building Contract and/or deliberately concealed these defects from BPC and/or BDW (for the purposes of s.32(2) and s.32(1)(b) of the Limitation Act 1980 respectively)”. The letter went on to say that the necessary remedial works would commence on site in October 2023 and it invited Ardmore to inspect the defects before any works were commenced, an offer which Ardmore never took up. The letter provided no particulars as to the nature of the remedial works or their cost.

23. On 25 August 2023, Ardmore responded noting that BDW had not provided details as to, amongst other things, the loss BDW had suffered and the nature and scope of the remedial works. Ardmore observed that this information was essential to enable it to consider BDW's claim and provide a meaningful letter of response and reserved its position pending receipt of such information.
24. After a further 6 months' delay, on 8 March 2024, BDW wrote to inform Ardmore that it considered a dispute to have arisen "as to Ardmore's liability for breaches of (a) the Building Contract...and/or (b) the Defective Premises Act 1972 (and/or clause 2.5.2 of the Building Contract) – in relation to fire safety defects at the Development". This letter went on to provide more detail in relation to what had now been narrowed down to two asserted claims; first the contract claim (which, for the first time identified a number of specific provisions of the Building Contract which it was said Ardmore was in breach of and relied upon the provisions of section 32(1)(b) and 32(2) LA 1980) and second the DPA 1972 claim. Various new particulars of the DPA 1972 claim were provided, including as to automatic opening vents, insulated spandrel panels and the use of silicon mastic. Finally, the letter asserted that BDW intended to procure the carrying out of remedial works and that the loss and damage it was likely to incur in so doing was £14,580,714.76. Attached to the letter was a high level breakdown of this figure. BDW sought payment from Ardmore within 7 days (a period subsequently extended), failing which it expressed the view that it would "proceed to adjudication without further notice".
25. Ardmore responded on 20 March 2024, alleging that an adjudication would be oppressive, unreasonable and in breach of natural justice. It also asserted that no dispute had arisen, essentially because the 8 March 2024 letter had "pivoted in its presentation of [the] claim" from a freestanding DPA 1972 claim to a breach of contract claim and that no, or no sufficient, details had been provided as to the proposed remedial works and the quantum breakdown. Ardmore said that it remained committed to considering the claim "but is not in a position to know whether there is actually a dispute (or its scope) until the further information is provided". Ardmore went on to suggest that the only fair way of resolving any disputes between the parties would be by way of arbitration under the Building Contract.
26. BDW issued its Notice of Adjudication the following day (21 March 2024). BDW's subsequent referral included two expert reports, neither of which had previously been provided to Ardmore.
27. On 28 March 2024, Ardmore wrote to the Adjudicator challenging his jurisdiction on the grounds, *inter alia*, that there was properly 'no dispute' on a major element of the claim. The basis for this challenge was explained by reference to the fact that (i) Ardmore had not been provided (prior to the Adjudication) with the vast majority of the documents relied upon by BDW in its Referral; (ii) these documents "go to the heart of the dispute"; and (iii) Ardmore had not been given a reasonable period of time in which to admit or deny the claim. On the latter point, Ardmore asserted that "[a] period of 13 days before commencing this adjudication is clearly not a reasonable

time in relation to the size, detail and staleness of this claim”. BDW rejected these concerns at some length in a letter dated 2 April 2024.

28. In a short decision on Jurisdiction issued on 4 April 2024, the Adjudicator rejected this challenge to his jurisdiction. At paragraphs 11 and 12 of his decision he said this:

“11. The claim is exactly what it was on 14 July 2022. The dispute is not therefore an unknown entity.

12. In broad terms the nature of the dispute is known and the further documents provided in this adjudication simply go to the claim and are not sufficient to make it an unknown or a new claim”.

29. Against this background, Mr Pliener advances four propositions in support of the contention that no dispute has arisen such that the Adjudicator had no jurisdiction to determine BDW’s claims:

- a. First, he submits that, although Ardmore accepts that in the most generalised sense the essential claim has always been one of fire safety defects, nevertheless the nature of the claim has evolved in the correspondence and it was only set out in the form subsequently used in the Referral in the 8 March 2024 letter.
- b. Second, he submits that at no point did Ardmore actually deny liability. He submits that the stale nature of the claim, the new defects identified in the 8 March 2024 letter and the lack of documentation (taken together) justify Ardmore’s position that it could not determine whether to admit or deny the allegations.
- c. Third, he submits that, even if a dispute on liability had arisen, it could not be said that a dispute had arisen as to the scope or cost of the remedial scheme. He points out that the breakdown given in the 8 March 2024 letter is very high level and that there was no suggestion of a scheme of works.
- d. Fourth, he contends that, even if one takes the view that BDW properly identified its case in the 8 March 2024 letter, given the scope, complexity and size of the dispute, 13 days between that letter and the 21 March 2024 Notice of Adjudication is not a sufficient time for a dispute to crystallise, alternatively is not a sufficient time for a dispute as to the scope and cost of remedial works to crystallise.

The relevant legal principles

30. In considering Ardmore’s arguments, I bear in mind the following observation made by Coulson J (as he then was) as to crystallisation of disputes in *AMD Environmental Ltd v Cumberland Construction Company Ltd* [2016] EWHC 285 (TCC), 165 ConLR 191 (“AMD”) at [8]:

“I have observed before that this argument is frequently advanced and almost as frequently rejected by the courts: see *St Austell Printing Co Ltd v Dawnus*

Construction Holdings Ltd [2015] EWHC 96 (TCC), [2015] BLR 224, [2015] All ER (D) 167 (Jan). The only recent case of which I am aware in which it was successfully argued that the dispute had not crystallised by the time that the adjudication started, was *Beck Interiors Ltd v UK Flooring Contractors Ltd* [2012] EWHC 1808 (TCC), [2012] BLR 417, [2012] All ER (D) 31 (Jul). That was a situation where the claim was sent to the responding party after close of play on Maundy Thursday, and where the notice of adjudication was then served the following Tuesday. Akenhead J had no difficulty in finding that the claim had not been disputed by silence over the Easter weekend, so that crystallisation had not occurred by the following Tuesday. But in general terms, the courts have found that a claim which is not accepted in whole or in part for a reasonable period thereafter, is deemed to be disputed: see *Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd* [2007] EWHC 2421 (TCC), [2007] All ER (D) 333 (Oct)".

31. The applicable law is uncontroversial and (beyond the general observation that it will be very unusual for an argument of this sort to succeed) I am able to draw the following propositions (relevant to the facts of the case before me) from the various authorities to which I was referred by the parties:

- a. The word "dispute" does not have some special or unusual meaning conferred upon it by lawyers, and courts should not adopt an overly legalistic analysis (see *Amec Civil Engineering Ltd v The Secretary of State for Transport* [2004] EWHC 2339 ("*Amec*") per Jackson J at [68(1)] and *Cantillon Ltd v Urvasco* [2008] EWHC 282 ("*Cantillon*") per Akenhead J at [55(a)]).
- b. In considering whether there is a dispute, it is necessary to look at "the essential claim" which has been made and whether it is challenged or opposed (*Cantillon* at [55]).
- c. The disputed claim is neither defined nor limited by the evidence or arguments submitted by either party to the other prior to the referral to adjudication or arbitration (*Cantillon* at [55(b)]).
- d. When a claim is made it is for the paying party to evaluate that claim promptly and "form a view as to its likely valuation, whatever points may arise as to particularisation. Efforts to acquire further particularisation should proceed in tandem with that valuation process" (*AMD* at [14]). The absence of particularisation is not a proper ground for resisting enforcement of an adjudicator's decision (*AMD* at [17]).
- e. While it depends on the circumstances of the case, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted (*Amec* at [68(3)] and *Collins (Contractors) v Baltic Quay Management (1994) Ltd* [2004] EWCA Civ 1757, 99 ConLR 1 ("*Collins*") per Clarke LJ at [63]).
- f. There may be many circumstances in which it can reasonably be inferred (objectively) that a claim is not admitted. These include discussions between the parties and the prevarication or silence of a putative defendant (see *Amec* at [68(4)]).

- g. The imposition of a deadline for responding to the claim does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding (see *Amec* at 68[6]).
- h. Consistent with the observation of Coulson J in *AMD* at [8], the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication (*Collins* at [64]); but
- i. A “possible exception” is where the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it. In such a case neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication (*Amec* at 68[7] and *AMD* at [17]). [Analysis](#)

32. As attractively as Mr Pliener put Ardmore’s arguments on crystallisation of a dispute, I cannot accept them. My reasons are as follows:

- a. BDW set out its “essential claim” in the Letter of Claim, identifying Ardmore’s general obligations under both the Building Contract and the DPA 1972 and making clear that the claim related to fire safety defects. In so doing it provided contemporaneous correspondence relevant to the installation of fire barriers. By the time of its July 2023 letter, it had provided Ardmore with some expert reports and had offered inspection of the site. The allegations raised as to the unsuitable nature of the Alumasc product and the omission of fire barriers are the key allegations that were subsequently advanced in the Adjudication.
- b. Although the Letter of Claim appeared to focus on advancing a case under the DPA 1972, the July 2023 letter identified that BDW also relied upon Ardmore’s deliberate concealment, which, together with the statement that Ardmore “deliberately breached its duty under the Building Contract” was plainly an indication of an intention to pursue a contractual claim. Accordingly I reject the contention that the 8 March 2024 letter amounted to a change to the fundamental premise of BDW’s claim.
- c. Instead of taking steps to instruct an expert to inspect the site, to consider liability and to advise on the potential value of any claim, as it could and should have done, Ardmore continued to maintain in its response to the July 2023 letter that it required further particularisation. By now, however, it was abundantly clear that allegations of defective workmanship (including under the Building Contract) were being made against it in respect of fire safety requirements. Accordingly, it is difficult to conclude that Ardmore’s continuing refusal to respond pending receipt of further information was anything other than prevarication. Indeed it is clear from Ms Whiting’s

witness statement in the Adjudication (dated 8 May 2024) that Ardmore took the positive decision not to “divert significant resources into investigations” until 8 March 2024 “when BDW provided the assignment of the contract and intimated an immediate adjudication”. In the circumstances I am not persuaded by the argument that Ardmore never actually denied liability – it apparently chose not to undertake an investigation into liability.

- d. It is true that the 8 March 2024 letter identified new clauses on which BDW wished to rely for the purposes of its claim under the Building Contract together with some new particulars in respect of its DPA 1972 claim. However, I reject the suggestion that prior to receipt of the 8 March 2024 letter the claim (as it was then formulated) was so nebulous or lacking in clarity that Ardmore could not have responded to it and I infer that, by reason of Ardmore’s continuing failure to respond to the claim, a dispute had plainly crystallised. I repeat that I do not accept that the 8 March 2024 letter amounted to a fundamental change in the nature of the case being intimated by BDW.
- e. Although it could potentially explain Ardmore’s lack of documentation (a point to which I shall return later), the fact that the claim was stale does not appear to me to assist Ardmore on the question of whether a dispute was crystallised. The passage of time should have provided the impetus to investigate the claim that was being advanced as soon as possible, in tandem with continuing to seek additional information in so far as was necessary. As Ardmore must have known, once remedial works had been commenced any physical evidence that might be relevant on site would be lost. Ardmore has provided no explanation in its evidence for its failure to take up the offer to inspect the site.
- f. I have considered whether it may be correct to say that while a dispute had crystallised on liability by 8 March 2024, no dispute had crystallised on quantum, owing to the fact that (prior to 8 March 2024) BDW had provided no information as to the remedial works or as to the quantum of the claim. However, I do not consider that I need to decide the point. On 8 March 2024 BDW provided information about its quantum claim. I agree with Mr Choat that the time that elapsed between the 8 March 2024 letter and the Notice of Adjudication on 21 March 2024, together with the terms of the letter of 20 March 2024 from Ardmore, was plainly sufficient to give rise to a reasonable inference that the quantum element of the claim was not admitted by Ardmore, particularly where the fundamental essence of the liability element of the claim had been known to Ardmore for some considerable time.
- g. By its letter of 20 March 2024, Ardmore continued to insist that it was not in a position (nearly two years after the Letter of Claim) to respond on the substance of the allegations made by BDW but that it remained committed to considering the claim if further information was provided. I consider that

BDW was justified in concluding (and I infer given the background context to which I have referred) that this was a non-admission of its claim which clearly crystallised a

dispute (in so far as that dispute had not already been crystallised).

33. Accordingly I dismiss Ground 1, which has no real prospect of success as a defence to BDW's application for enforcement of the Decision by way of summary judgment.

Ground 2: Jurisdiction over the DPA claim

34. Pursuant to section 108(1) of the HGCRA 1996, an Adjudication is limited to disputes which are "under the contract".

35. Article 5 of the Building Contract mirrors this wording as follows:

"If any dispute or difference **arises under this Contract** either Party may refer it to adjudication in accordance with clause 39A" (**emphasis added**).

36. By contrast, Article 6A of the Building Contract (which deals with referral to arbitration) reads, in so far as material, as follows:

"...if any dispute or difference as to any matter or thing of whatsoever nature **arising under this Contract or in connection therewith**...shall arise between the Parties...it shall be referred to arbitration in accordance with clause 29B and the JCT 1998 edition of the Construction Industry Model Arbitration Rules (CIMAR)" (**emphasis added**).

37. The issue arising between the parties on Ground 2 concerns the meaning of the words "under the contract" in section 108(1) HGCRA 1996. Ardmore's primary case is that they are to be interpreted narrowly; that there is in general terms a difference in meaning and scope between the words "under the contract" and "connected with" the contract – the former being more limited in scope than the latter - and that the difference in wording in Articles 5 and 6A of the Building Contract is a clear indicator that the draftsman of this Building Contract intended the words in Article 5 to have a more limited scope. Accordingly, Ardmore submits that the words "under the contract" are not capable of encompassing a claim under the DPA 1972 and that the Adjudicator had no jurisdiction to decide that claim.

38. Ardmore accepts that in *Fiona Trust*, the House of Lords deprecated linguistic distinctions of this kind in the context of interpreting the wording of an arbitration clause, but it says that the rationale of the court in that case does not apply to adjudications. Alternatively, Ardmore contends that there is, at least, a lack of certainty or consistency over the meaning of the words "under the contract" in various authorities decided since *Fiona Trust* and that this state of affairs is also reflected in the leading text books.

39. BDW rejects these arguments. It points out that the courts have emphasised that the wording of dispute resolution provisions should not be interpreted narrowly and it contends that the overwhelming weight of the authorities tend to the view that the

Fiona Trust reasoning applies equally to adjudication provisions – specifically it rejects the existence of any real uncertainty or inconsistency on this score. Further it rejects the contention that the distinction between the wording in Article 5 and Article 6A of the Building Contract is of any real significance. Alternatively, BDW relies upon clause 2.5.2 of the Building Contract which it submits imports an obligation to comply with the DPA, such that a breach of the DPA amounts to a breach of the Building Contract, albeit a breach which attracts the 30 year limitation period.

40. In order to examine these competing positions, I must first consider the decision in *Fiona Trust*, together with (i) the subsequent authorities on which each party relied in its submissions; and (ii) the leading text books to which I was referred.

Fiona Trust: Analysis

41. *Fiona Trust* concerned the scope and effect of an arbitration clause in eight charterparties; specifically, first, whether the arbitration clause was apt to cover the question of whether the contract was procured by bribery and, second, whether it was possible for a party to be bound by submission to arbitration when he alleged that, but for the bribery, he would never have entered into the contract containing the arbitration clause. The arbitration clause incorporated the words “any dispute arising under this charter” and so the House of Lords was concerned with the interpretation of those words.
42. In his lead speech at [5]-[13], Lord Hoffmann said this:

“[5] ...Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader’s understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

[6] In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. **The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.**

[7] If one accepts that this is the purpose of an arbitration clause its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions

arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

[8] A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause. But the same policy of giving effect to the commercial purpose also drives the approach of the courts (and the legislature) to the second question raised in this appeal, namely, whether there is any conceptual reason why parties who have agreed to submit the question of the validity of the

contract to arbitration should not be allowed to do so

[9] There was for some time a view that arbitrators could never have jurisdiction to decide whether a contract was valid. If the contract was invalid, so was the arbitration clause. In *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63 at 66 Evans J said that this rule 'owes as much to logic as it does to authority'. But the logic of the proposition was denied by the Court of Appeal in *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897, [1993] QB 701, [1993] 3 WLR 42 and the question was put beyond doubt by s 7 of the 1996 Act:

'Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.'

[10] This section shows a recognition by Parliament that, for the reasons I have given in discussing the approach to construction, businessmen frequently do want the question of whether their contract was valid, or came into existence, or has become ineffective, submitted to arbitration and that the law should not place conceptual obstacles in their way.

[11] With that background, I turn to the question of construction. Your Lordships were referred to a number of cases in which various forms of words in arbitration clauses have been considered. Some of them draw a distinction between disputes 'arising under' and 'arising out of' the agreement. In *Heyman v Darwins Ltd* [1942] 1 All ER 337 at 360, [1942] AC 356 at 399 Lord Porter said that the former had a narrower meaning than the latter but in *Union of India v E B Aaby's Rederi A/S, The Evje* [1974] 2 All ER 874, [1975] AC 797 Viscount Dilhorne ([1974] 2 All ER 874 at 885, [1975] AC 797 at 814), and Lord Salmon ([1974] 2 All ER 874 at 887, [1975] AC 797 at 817) said that they could not see the difference between them. Nevertheless, in *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63 at 67, Evans J said that there was a broad distinction

between clauses which referred ‘only those disputes which may arise regarding the rights and obligations which are created by the contract itself’ and those which ‘show an intention to refer some wider class or classes of disputes.’ The former may be said to arise ‘under’ the contract while the latter would arise ‘in relation to’ or ‘in connection with’ the contract. In *Fillite (Runcorn) Ltd v Aqua-Lift* (1989) 26 ConLR 66 at 76 Slade LJ said that the phrase ‘under a contract’ was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract. Nourse LJ gave a judgment to the same effect. The court does not seem to have been referred to *Mackender v Feldia AG* [1966] 3 All ER 847, [1967] 2 QB 590, in which a court which included Lord Denning MR and Diplock LJ decided that a clause in an insurance policy submitting disputes ‘arising thereunder’ to a foreign jurisdiction was wide enough to cover the question of whether the contract could be avoided for non-disclosure.

[12] **I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law.** It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsman of so widely used a standard form as Shelltime 4 obviously regarded the expressions ‘arising under this charter’ in cl 41(b) and ‘arisen out of this charter’ in cl 41(c)(1)(a)(i) as mutually interchangeable. So I applaud the opinion expressed by Longmore LJ in the Court of Appeal (at [17]) that the time has come to draw a line under the authorities to date and make a fresh start. I think that a fresh start is justified by the developments which have occurred in this branch of the law in recent years and in particular by the adoption of the principle of separability by Parliament in s 7 of the 1996 Act. That section was obviously intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration. But s 7 will not achieve its purpose if the courts adopt an approach to construction which is likely in many cases to defeat those expectations. The approach to construction therefore needs to be re-examined.

[13] In my opinion **the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction.** As Longmore LJ remarked, at [17]: ‘[i]f any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.’” (emphasis added).

43. I pause here to observe that Mr Pliener relies heavily on paragraph [6] of Lord Hoffmann’s reasoning. In particular, he says that it explains the rationale for the decision in relation to arbitration clauses but that the factors identified in paragraph [6], which underpin the decision in paragraph [7], are not factors which apply when one is considering adjudication. Mr Choat disagrees. He submits, to the contrary, that

the ‘underpinnings’ in [6] are entirely supportive of the approach taken in *Fiona Trust* being applicable to adjudications. I shall have to return to this issue in due course.

44. Since *Fiona Trust*, there have been four cases in which the court has addressed the question of whether Lord Hoffmann’s rationale applies equally to adjudications.
45. The first, and most helpful to Ardmore, is the case of *Hillcrest Homes Ltd v Beresford & Curbishley Ltd* [2014] EWHC 280, (2014) 153 ConLR 179 (“*Hillcrest*”). This was a Part 8 claim for a declaration that the decision of an adjudicator was unenforceable, *inter alia*, on the grounds that he had no jurisdiction to make declarations of misrepresentation and/or negligent misstatement because claims in respect of those causes of action fell outwith the scope of the adjudication provision. As is clear from [18] of the judgment of HHJ Raynor QC, sitting as a Deputy High Court Judge, the terms of the adjudication provision were, in so far as material, in identical terms to section 108(1) HGCR 1996 and also Article 5 of the Building Contract (“[i]f any dispute or difference arises under this Contract...”). Furthermore, the arbitration clause was in what the judge described as “significantly wider terms” providing for reference to arbitration of any dispute or difference “of any kind whatsoever arising out of or in connection with” the contract.
46. At [50]-[51], after setting out paragraphs [12] and [13] of the speech of Lord Hoffmann in *Fiona Trust*, the Judge dealt with the submission that Lord Hoffmann’s reasoning is inapplicable to adjudication clauses, saying this:

“50. ...Ms Cheng submits that Lord Hoffman’s reasoning in *Fiona Trust* is inapplicable to adjudication clauses, which are present or implied by reason of statutory intervention. In my judgment there is considerable force in this submission.

51. In addition the draftsmen of the JCT Contract have, presumably intentionally, chosen different formulations of disputes that may be referred in the one case to adjudication under Article 7 and in the other to Arbitration under Article 8. As stated in paragraph 18(c) above, Article 8 is expressed in much wider terms (namely “any dispute or difference...of any kind whatsoever arising out of or in connection with this contract”), in contradistinction to the words of Article 7 (“any dispute or difference [arising] under this Contract”). It seems to me that the draftsmen must be taken to have intended that the disputes capable of being referred to arbitration were wider than those capable of being referred to adjudication, where the words of Article 7 simply followed the wording of section 108 of the Housing Grants, Construction and Regeneration Act 1996, which conferred the right to refer disputes to adjudication.

52. ...the claims referred to adjudication included a claim for damages arising under section 2(1) of the Misrepresentation Act 1967, a claim which was upheld by the Adjudicator in Declarations 20 and 21, the claim for loss and expense arising under the Building Contract being rejected. In my judgment that claim under the 1967 Act was not, on the proper construction of the Building Contract, a claim arising “under this contract”. On the contrary, it was a claim arising under the Act. It follows that in my judgment the Adjudicator had no jurisdiction to determine the same”.

47. It would appear from these paragraphs that the primary factor that persuaded the judge of the absence of jurisdiction was the contrast between the wording of the adjudication provision and the wording of the arbitration clause. In so far as the judge considered that Lord Hoffmann's reasoning in *Fiona Trust* did not apply to adjudication provisions, it is clear that his focus was on the fact that the words in the adjudication provision had derived from statute rather than from contract ("**the Statute Argument**"). The judge did not address the factors identified in paragraph [6] of Lord Hoffmann's speech (on which he does not appear to have had any detailed submissions), just as he did not explain his answer to Lord Hoffmann's underlying point that reasonable businessmen must be taken to have agreed that they would only have one forum for all of their disputes (as the learned editor of *Coulson on Construction Adjudication* (4th edn) points out at 7.129).
48. In *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] UKSC 38 [2015] 1 WLR 2961 ("*Aspect*"), the Supreme Court was concerned with the basis of any entitlement to recover sums paid out pursuant to an adjudication decision and the limitation period for any such claim. It held that there was an enforceable right to recover any overpayment to which the adjudicator's decision could be shown to have led, whether by contractual implication or by virtue of an independent restitutionary obligation. During the course of his speech, Lord Mance considered various arguments identified by the parties, including an argument to the effect that a 'coterminous' tort claim was capable of being submitted to adjudication along with a contract claim. He addressed this at [22], observing that he was "very content" to proceed on the basis that the principle in *Fiona Trust* applied to statutory adjudication. He went on to reject a submission that, if the principle did apply to statutory adjudication, then that would mean that a tort claim would be capable of being a claim arising under the contract and that therefore it would not be subject to section 14A or section 2 of the LA 1980, in the following terms:
- "It is unnecessary to say more than that I do not, as at present advised, accept this submission. Assuming, as I am presently prepared to, that a coterminous tort claim can fall within the language of section 108(1) of the 1996 Act and paragraph 1(1), it does not follow that it ceases to be a tort claim for limitation purposes".
49. It is common ground that these observations by Lord Mance were *obiter*. No doubt owing to their *obiter* nature, there is no explanation from Lord Mance as to why he was "very content" to proceed on the basis that the principle in *Fiona Trust* applies to statutory adjudication just as there is no detailed analysis of the decision in *Fiona Trust* or its underlying rationale.
50. At first instance in *J Murphy & Sons v W Maher and Sons Ltd* [2016] EWHC 1148 (TCC), (2016) 166 ConLR 228, [2017] Bus LR 916 ("*Murphy*"), Sir Robert Akenhead addressed the question of whether an adjudicator had jurisdiction to decide a dispute as to whether there had been a full and final settlement agreement. The adjudication

clause with which the judge was concerned included both ‘under’ and ‘in connection with’ the contract.

51. The judge set out paragraphs [5]-[13] of Lord Hoffmann’s speech in *Fiona Trust* at [23] of his judgment, observing immediately that although these paragraphs refer to arbitration and involve questions of construction “there may well be useful analogies to adjudication”. At [31]-[32] he said this:

“[31] The commercial common sense spoken of by Lord Hoffmann in the *Fiona Trust* case has a particular resonance, albeit that it relates to a contract and arbitration, in at least the following ways:

(a) Adjudication is expected to be consensual, albeit underpinned by statute such that one cannot exclude it from construction contracts and that there are basic requirements which must be incorporated (s 108(1)–(4)).

(b) Parliament must be taken to have intended in relation to construction contracts and parties who agree to enter into them must have envisaged that there would be some socio-economic or commercial purpose for there to be adjudication. It is well known that Parliament intended to improve cash flow and a speedy, temporarily binding and relatively uncomplicated dispute resolution process, adjudication, so that the parties could know where they stood in a short period. To borrow Lord Hoffmann’s words by prescient analogy Parliament and the parties ‘want a quick and efficient adjudication and do not want to take the risks of delay’ (*Fiona Trust* at [7]).

(c) It is most doubtful that Parliament and the parties would want as a rational legislature and business people respectively ‘only some of the questions arising out of their relationship were to be submitted to [adjudication] and others were to be decided by’ their chosen tribunal for the final dispute resolution. If there ‘is no rational basis upon which [Parliament and] businessmen would be likely to wish to have questions’ about entitlement under the original contract to be ‘decided by one tribunal and questions about’ whether some or more of claims arising under that contract had been ‘decided by another, one would need to find very clear language before deciding that they must have had such an intention’ (*Fiona Trust* at [7]).

(d) ‘A proper approach to construction therefore requires the court to give effect, so far as the language used by [Parliament] the parties will permit, to the [policy and] commercial purpose of the arbitration clause’ (*Fiona Trust* at [8]).

(e) If there were to remain ‘the distinctions’ between arbitration, and by analogy adjudication, clauses which require arbitration or adjudication for disputes on the one hand ‘under’ and, on the other hand, arising ‘out of’ or ‘in connection with’ the underlying contract between the parties they reflect no credit upon English commercial or statute law (*Fiona Trust* at [11]).

(f) In adjudication cases under the 1996 Act (coincidentally the same year as the Arbitration Act) the court: ‘should start from the assumption that [Parliament] and the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal’ (*Fiona Trust* at [13]).

(g) There is no logical reason for thinking that there should be any difference in meaning or application between dispute resolution clauses (or even dispute resolution arrangements adumbrated in a statutory instrument such as the Scheme) whether in arbitration or adjudication which call for disputes arising ‘under’ the contractual or statutorily imposed dispute resolution regime to be treated jurisdictionally differently from those ‘arising ‘out of’ or ‘in connection with’ the underlying regime.

[32] In this context, I consider that the courts at the highest level have strongly signposted a departure from such previous distinctions and that the courts on adjudication cases should follow this direction. It follows that a dispute as to whether all or some of the alleged entitlements which one contractual party has against the other has been settled in a binding way arises ‘under’ the original contract. That is wholly logical because what is supposedly settled is the alleged entitlement to be paid ‘under’ the original sub-sub-contract (in this case) of Maher. It would be extraordinary and illogical if the parties here or Parliament had intended that an otherwise properly appointed adjudicator would have jurisdiction if addressing what entitlement a contractor or sub-contractor might have to be paid in all circumstances save in relation to where a dispute arises as to whether that entitlement had been settled. If Murphy was right, save by ad hoc agreement, one could never adjudicate in a construction contract on an interim or final account which had been agreed in some binding way; that makes commercial and policy nonsense in circumstances in which such agreements must occur all the time and should be encouraged and supported by retaining the right to adjudicate if one party seeks to challenge the settlement on one basis or another”.

52. Finally, in *Bresco Electrical Service Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, [2021] 1 All ER 697, the Supreme Court decided that a dispute can be referred to adjudication even if one of the parties is in liquidation and there are cross claims, notwithstanding that the Insolvency Rules create a single net balance between the parties; that dispute was still “under the contract”. The *ratio* of the decision turned on the compatibility of the adjudication and insolvency regimes. Lonsdale advanced various arguments in an attempt to persuade the Supreme Court that the single net balance created by the Insolvency Rules was not a claim “under the Contract”, but was instead a claim under Bresco’s insolvency. These included the argument (recorded at [38]) that the liberal construction afforded to similar provisions in agreements to arbitrate (by reason of the *Fiona Trust* principle) was inappropriate in the adjudication context “mainly because adjudication was imposed upon the parties by the 1996 Act, rather than freely agreed [i.e. the Statute Argument], but also because arbitration was different in kind from adjudication”.

53. Lord Briggs (with whom the other members of the court agreed) addressed this argument at [39]-[41]:

“[39] There is some reported authority, but little agreement, on the question whether the liberal construction afforded to jurisdiction provisions in arbitration agreements should inform the construction of s 108 of the 1996 Act and para 1 of the Scheme, in relation to the jurisdiction of an adjudicator. In

the leading arbitration case *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951, [2007] Bus LR 1719, the question was whether an arbitration agreement which conferred jurisdiction in relation to a dispute about repudiation of the contract should extend to the question whether the contract should be rescinded for bribery or misrepresentation in its inception. The House of Lords held that it did, and that this did not depend upon fine distinctions about whether the contract required that the dispute arose ‘under’ or ‘in relation to’ or ‘in connection with’ the contract.

[40] A similar issue arose in relation to adjudication under a construction contract in *Hillcrest Homes Ltd v Beresford and Curbishley Ltd* [2014] EWHC 280 (TCC), (2014) 153 ConLR 179. At para [50] HHJ Raynor QC saw ‘considerable force’ in the submission that the reasoning in *Fiona Trust* was inapplicable to construction adjudication because the provision for adjudication was the consequence of statutory intervention. By contrast in *J Murphy & Sons Ltd v W Maher and Sons Ltd* [2016] EWHC 1148 (TCC), (2016) 166 ConLR 228, [2017] Bus LR 916 Sir Robert Akenhead reached the opposite conclusion, treating the learning about arbitration in *Fiona Trust* as a useful analogy at para [23]. The editors of Hudson’s Building and Engineering Contracts (14th edn, 2019) prefer Judge Raynor’s view, at para 11–022, while the editors of Keating on Construction Contracts (Supplement to 10th edn, 2019), para 18–077 appear to veer toward recognising the force of *Fiona Trust* by analogy.

[41] There is in my view little to be gained by an extensive analysis of the question how close is the analogy between arbitration and adjudication for the purpose of applying or not applying the learning in *Fiona Trust*. There are plainly points to be made on both sides. There are obvious differences between arbitration and adjudication, but they are both types of dispute resolution procedures for which provision is made by a contract between the parties, in which recourse to that procedure is conferred by way of contractual right. I am not persuaded that the statutory compulsion lying behind the conferral of the contractual right to adjudicate points at all towards giving the phrase ‘a dispute arising under the contract’ a narrow meaning, by comparison with a similar phrase in a contract freely negotiated. The fact that, after due consideration of the Latham Report, Parliament considered that construction adjudication was such a good thing that all parties to such contracts should have the right to go to adjudication points in the opposite direction. Indeed, the fact that the right to adjudicate is statutorily guaranteed is a powerful consideration favourable both to its recognition as a matter of construction, and to the caution which the court ought to employ before preventing its exercise by injunction”.

54. Turning to the leading textbook commentary, Ardmore drew my attention to *Coulson on Construction Adjudication* (4th edn), *Keating* (11th edn) and *Hudson’s Building and Engineering Contracts* (14th edn). In summary:

- a. The editor of *Coulson*, published after *Aspect* but before *Bresco*, comments at 7.129 on the conclusion in *Hillcrest* to the effect that “...on a strict interpretation of the words ‘arising under the contract’, such a conclusion may well be right”, but notes (as I have already alluded to) that the case does not fully explain the reasons for its conclusion or how it addresses the commercial

point relied upon in *Fiona Trust*. The editor goes on to say that the issue of whether there is an analogy with *Fiona Trust* in respect of adjudication provisions “therefore remains open for clarification. Its potential importance should not be underestimated”.

- b. The editors of *Keating*, published after the decision in *Bresco*, read the Supreme Court in that case to be saying that “while there are obvious differences between arbitration and adjudication, the fact that the right to adjudication was considered by Parliament to be such a good thing that it is statutorily guaranteed, was a powerful consideration in favour of applying the *Fiona Trust* principles to adjudication provisions” (at 18-089).
- c. The editors of *Hudson’s* (published before *Bresco*) examine the *Fiona Trust* principle at 11-022 and submit that “this reasoning is inapplicable to adjudication clauses”. The footnote reference clarifies that this submission relies upon the decision in *Hillcrest*. The editors go on to refer to the Statute Argument and point out that the purpose of the regime under HGCRA 1996 was to introduce a speedy mechanism for resolving disputes on an interim basis. They then opine that “[t]hat purpose does not require any dispute arising out of the relationship into which the parties have entered or purported to enter to be decided by the same tribunal. Indeed it encompasses the possibility of different disputes being decided by different tribunals: the parties are not bound to adjudication and a dispute can be submitted to arbitration or litigation following an Adjudicator’s decision”. Later in the same paragraph, the editors consider both *Aspect* and *Murphy* and observe that “[n]either of these decisions addressed the rationale behind the decision in the *Fiona Trust* case, which is specifically applicable to arbitration, or the fact that when the HGCRA 1996 was enacted, there was a long standing and well-recognised distinction (which the legislature must be taken to have appreciated) between disputes ‘arising under’ a contract and those ‘arising in connection with’ a contract”.
- d. The Supplement to the 14th edn of *Hudson’s* addresses the decision in *Bresco* at 11-020, observing that the reasoning of Lord Briggs in [41] of that decision did not form part of the *ratio* and that it also fails to account for the fact that “Parliament considered that the ‘good thing’ should be governed by the narrow meaning”. By way of explanation, the editors then point out that a proposed amendment to the Bill to insert the words ‘or in connection with’ in what became section 108 HGCRA 1996 was not proceeded with and that this background to the passing of the HGCRA 1996 “brings into play the rule in *Pepper v Hart* that the court may have regard to reports of the debates in Parliament on a Bill for the purpose of ascertaining the meaning of a provision of the resulting Act where: the provision is ambiguous or obscure, or leads to an absurdity; a statement as to the meaning of the provision is made by or on behalf of a minister or other promoter of the Bill, and the statement is clear”.

The editors conclude by saying that “[t]his would strongly support the argument that the phrase ‘a dispute arising under the contract’ should be given a narrow meaning in accordance with the law as understood at the time of the passing of the HGCRA 1996”.

55. Attempting to draw the strings of these various authorities and text book commentaries together, and having regard to the arguments of both parties, I reject Ardmore’s case that the *Fiona Trust* principle does not apply in respect of adjudication provisions. My reasons are as follows.
56. Although the *Fiona Trust* principle applies to arbitration clauses, I agree with Sir Robert Akenhead in *Murphy* (at [32]) that Lord Hoffmann’s speech in *Fiona Trust* confirms a “strongly signposted” departure from previous linguistic distinctions between disputes arising on the one hand “under” and, on the other hand, “arising out of” or “in connection with” the underlying contract between the parties. Such distinctions “reflect no credit upon English commercial law” (*Fiona Trust* at [12] and *Murphy* at [31](e)). Contrary to Mr Pliener’s submissions, I do not consider that the general nature of Lord Hoffmann’s observations on interpretation is undermined by the fact that a relevant factor in that case was his analysis of section 7 of the Arbitration Act 1996.
57. Against that background, while Lord Mance’s observations in *Aspect* as to the analogy between arbitration and adjudication are *obiter* and not binding on this court, it is perhaps not surprising that he expressed himself in the way that he did, i.e. that he was ‘very content’ to proceed on the basis that the *Fiona Trust* principle applies to statutory adjudications. He did not seek to make any countervailing points against the application of the *Fiona Trust* principle to adjudications, as Mr Pliener very fairly conceded during his submissions.
58. There is nothing in the argument that the *Fiona Trust* principle cannot apply by analogy to adjudication clauses simply because adjudication is a creature of statute (notwithstanding that the Statute Argument was considered in *Hillcrest* at [50] to have “considerable force”). On the contrary, that Parliament considered all parties to appropriate contracts should have a right to adjudicate “points if anything in the opposite direction” - see *Bresco* at [41]. In my judgment, the origin of the clause (whether it be by express agreement or Parliamentary provision) does not affect the principles of interpretation articulated in *Fiona Trust*. I agree with the observations on *Murphy* made by the editors of the Construction Law Reports to the effect that “Parliament should, when legislating for the construction industry, be considered to be as concerned with business common sense as contracting parties are taken to be”. Mr Pliener conceded during the course of the hearing that in light of the observations of Lord Briggs in *Bresco*, Ardmore could not sensibly place any weight on the Statute Argument. Importantly, those observations were expressly made having regard to *Hillcrest*, *Murphy* and the competing views of the editors of *Hudson’s* and *Keating* (see [40] of *Bresco*).

59. Absent the Statute Argument, *Hillcrest* is authority only for the proposition that the wording of other dispute resolution provisions may serve to narrow the scope of an adjudicator's jurisdiction (see [51]). This is of course an argument that will depend upon the terms of the contract in any given case.
60. In *Murphy*, Sir Robert Akenhead not only considered there to be analogies between arbitration clauses and adjudication provisions, he also took the view that the "commercial common sense" spoken of by Lord Hoffmann in *Fiona Trust* has a "particular resonance" in relation to adjudication and that courts dealing with adjudication cases should follow the direction of travel signposted in *Fiona Trust*. Sir Robert Akenhead provided a careful explanation as to why this was so at [31] of his judgment and Mr Pliener has provided me with no convincing basis on which I could determine that he was wrong.
61. Mr Pliener points out that Sir Robert Akenhead makes no reference to either *Hillcrest* or *Aspect* in his judgment, but I do not consider this to undermine its persuasive authority. Lord Mance's observations in *Aspect* are entirely consistent with Sir Robert Akenhead's views as expressed in *Murphy*. In *Hillcrest*, the only submission recorded in the judgment against the reasoning in *Fiona Trust* being applicable to adjudication clauses (a submission which the judge found to have "considerable force") was the Statute Argument. The judge in *Hillcrest* does not appear to have had submissions about the detailed analogies between adjudication and arbitration with which Sir Robert Akenhead was concerned, just as he did not address the detailed reasoning in *Fiona Trust*.
62. Mr Pliener also submits that it is clear from [32] of *Murphy* that Sir Robert Akenhead was approaching the *Fiona Trust* issue through the prism of the point that arose in that case as to a settlement agreement. He contends that the judge was not considering the reasons at [6] in *Fiona Trust* which he submits underpin the outcome at [7]. Accordingly, Mr Pliener contends that the ratio of *Murphy* is "of limited assistance" to BDW. I disagree.
63. Paragraph [31] of *Murphy* appears to me to involve a careful and detailed analysis of the ways in which adjudication and arbitration are similar. It is not specifically tied to the factual question that was before the court in that case (to which Sir Robert Akenhead turns only in [32] of the judgment). That analysis picks up:
- a. (at [31(a)]), the consensual nature of adjudication, albeit underpinned by statute. Paragraph [6] of *Fiona Trust* also focuses on the relationship and agreement between the parties in the context of arbitration. Once the Statute Argument is removed, there is no meaningful distinction to be made. As Lord Briggs pointed out in *Bresco*, although there are obvious differences between arbitration and adjudication "they are both types of resolution procedures for which provision is made by a contract between the parties, in which recourse to that procedure is conferred by way of contractual right".

- b. (at [31(b)]), the desire for a “quick and efficient adjudication” and the concern to avoid “the risks of delay” emphasised by Lord Hoffmann as part of his reasoning in paragraph [6] of *Fiona Trust*¹ in relation to arbitration. It is common ground that speed and efficiency are watchwords of the adjudication process.
- c. (at [31(c)]), that it is doubtful that Parliament and the parties “would want as a rational legislature and business people respectively ‘only some of the questions arising out of their relationship...to be submitted to [adjudication] and others to be decided by’ their chosen tribunal for the final dispute resolution”. This is the point Lord Hoffmann makes in *Fiona Trust* at [6], when he says that the parties to an arbitration clause “want those disputes decided by a tribunal which they have chosen”. I add that the parties to adjudication are equally free to choose the identity of their adjudicator, as is clear from clause 39A.2 of the Building Contract (referred to above at paragraph 7) which is in similar terms to those that apply to arbitration in clause 39B.1 (“an arbitrator shall be an individual agreed by the Parties or appointed by the person named in the Appendix...”). I accept of course, as Mr Pliener points out, that parties may refer a number of different disputes arising over the course of a lengthy building project to adjudication and that this may (over time) involve the use of different adjudicators. However, I do not consider this to detract from the general proposition that business people are likely to want their existing (live) disputes to be determined by an adjudicator of their choice, as the most commercially efficient and cost effective means of dispute resolution.

64. It is true that some of the points raised in *Fiona Trust* at [6] were not specifically addressed by Sir Robert Akenhead in *Murphy* at [31], but, dealing with these in turn, Lord Hoffmann focused on the reasons why parties are likely to want their disputes determined by a tribunal which they have chosen, namely:

- a. “on the grounds of such matters as its neutrality, expertise and privacy”. These are features which generally apply also to adjudication². As the court observed in *Beumer Group UK Limited v Vinco Construction UK Limited* [2016] EWHC 2283 (TCC) at [22]: “adjudication, which for all its time pressures and characteristics concerning enforceability, is still a formal dispute resolution forum with certain basic requirements of fairness. Although adjudication proceedings are confidential, decisions by adjudicators are enforced by the High

¹ The reference in 31(b) of *Murphy* to *Fiona Trust* at [7] appears to be a typo – it is clearly a reference to *Fiona Trust* at [6].

² See for example the obligation at 39A.5.5 of the Building Contract on the Adjudicator to act “impartially” together with his or her entitlement to use “his own knowledge and/or experience” (at 39A.5.5.1). Of course the majority of adjudicators will not be chosen for their expertise as lawyers, but because their skills in other disciplines are likely to assist them in finding an interim solution which meets the needs of the case (see *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, (2005) 104 ConLR 1, [2006] BLR 15 at [86]).

Court and there are certain rules and requirements for the conduct of such proceedings”.

- b. “the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law”. These are features which apply to international arbitration but which in any event are primarily focussed on the efficiency of the underlying process (also a key feature of adjudication). Furthermore, as Mr Choat rightly pointed out, the *Fiona Trust* principle applies equally to domestic arbitrations such that Mr Pliener’s argument (to the effect that in the international context there are particular reasons why the terms of an arbitration agreement should be given a broad scope which justify the conclusion in [7] of *Fiona Trust*) does not in fact advance his position.

- 65. I can see nothing in these features which renders Lord Hoffmann’s conclusion at [7] of *Fiona Trust* inappropriate or inapplicable to adjudication provisions. In so far as [6] describes the purpose of the arbitration clause, that purpose is, in a number of material respects identified by Sir Robert Akenhead in *Murphy*, mirrored in adjudication provisions. Accordingly I agree with [31(g)] of *Murphy* that there is “no logical reason” why the conclusion arrived at by Lord Hoffmann at [7], which is premised upon the accuracy of his description of the purpose of an arbitration clause, should not also apply to adjudication provisions whose purpose is similar. To use Mr Pliener’s terminology, I consider that the relevant “underpinnings” for adjudication are in many ways similar to those identified by Lord Hoffmann for arbitration and I agree with Mr Choat that this strongly supports the application of the *Fiona Trust* principle to adjudication provisions.
- 66. Mr Pliener raised two additional arguments in support of the proposition that the *Fiona Trust* principle does not apply to adjudication provisions. Both stem from observations made by the editors of *Hudson’s*. First, Mr Pliener submits that it is clear from the *Hudson’s* supplement that there is scope for Ardmore to rely upon the principles in *Pepper v Hart* and thus to persuade the court of Parliament’s intention that section 108(1) HGCRA 1996 should be interpreted narrowly. I do not, however, consider that this is an argument that is open to Ardmore on this application. Aside from the fact that the courts will generally resist the temptation to look at Hansard, this argument has neither been foreshadowed in Ardmore’s evidence nor (beyond the passing reference to the *Hudson’s* Supplement) has it been developed in any detail in its skeleton. Indeed in his reply submissions, Mr Pliener confirmed that it was not central to his case. Importantly, Ardmore has not sought to refer the court to any extracts from Hansard, just as it has not sought to explain in its evidence how the *Pepper v Hart* requirements are met in this case.
- 67. It is not enough on a summary judgment application of this type for a defendant to point to the suggestion in a text book that reference to Hansard would support the proposition it seeks to advance, without providing the court with any evidence whatever to that effect. I certainly do not consider that such reference is sufficient on

its own to enable the court to determine that Ardmore has a realistic (as opposed to a “fanciful”) prospect of success (see *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15(i)]). I note that in its skeleton argument, Ardmore put its case on this no higher than that “it is **suggested** that the editors of *Hudson’s* are correct” (**emphasis added**). But this does not appear to me to satisfy the evidential burden of establishing the existence of a realistic defence that carries some degree of conviction (*Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15(ii)]).

68. Second, Mr Pliener submits that the Building Contract was agreed long before the decision in *Fiona Trust* and thus the relevant factual matrix at the time of entry into the Building Contract must involve the “long standing and well-recognised distinction” identified by *Hudson’s* “between disputes ‘arising under’ a contract and those ‘arising in connection with’ a contract”. This distinction, which the parties and draftsman are to be taken to have been aware of, supports the proposition, says Mr Pliener, that the parties to the Building Contract made deliberate usage of different formulations in the adjudication and arbitration provisions and thus must have intended the adjudication provision to be narrower than the arbitration provision.
69. Once again the difficulty with this submission appears to me to be that it relies heavily upon the assertion by the editors of *Hudson’s* of the existence of “a long-standing and well-recognised distinction”, an assertion which suggests that the *status quo* prior to *Fiona Trust* was one of certainty as to the meaning of the different expressions “under the contract” and “in connection with the contract”. However, Mr Pliener made no attempt to justify this assertion by reference to the pre-*Fiona Trust* case law and, as Mr Choat points out, it is apparent from Lord Hoffmann’s speech in *Fiona Trust* itself at [11]-[12] that there was in fact no clarity or consistency prior to the date of that decision. Put at its highest, one could only really say that there was a live debate as to the true construction of these differing expressions. Accordingly I cannot see that Ardmore has any real prospect of establishing that the factual matrix on which it seeks to rely was known or reasonably available to both parties (including the draftsman) at the time that the Building Contract was finalised (see *Arnold v Britton* [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619 per Lord Neuberger PSC at [21]).
70. In all the circumstances, I consider that Ardmore has no real prospect of success in arguing that the *Fiona Trust* principles do not apply to adjudication provisions. Ardmore has not satisfied me that there is any other compelling reason why this matter should be disposed of at trial.
71. In arriving at this conclusion I have borne in mind the observation of the Privy Council in *Altimo Holdings v Kyrgyz Mobil Tel Limited* [2011] UKPC 7, [2012] 1 WLR 1804 per Lord Collins at [84] that “[t]he general rule is that it is not normally appropriate in a summary procedure...to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts”. However, Mr Pliener realistically accepted that there is no factual

dispute in this matter and that accordingly this warning has considerably less traction than might otherwise be the case. Indeed Mr Pliener was unable to provide me with any convincing reason why I should not determine the *Fiona Trust* question on this application.

72. Finally, I must turn to the issue which appears to have made all the difference in *Hillcrest*; the significance of the use by the draftsman of different wording in the adjudication and arbitration clauses. It was not suggested that this was an issue in respect of which Ardmore would wish to rely upon any factual evidence and accordingly I again see no reason (and none was suggested) why I should not “grasp the nettle and decide it” (*Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15(vii)]).
73. Applying the well-known principles of construction as summarised by Lord Hamblen in *Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2, [2023] 1 WLR 575 at [29], the court must objectively construe the relevant words of a contract in their documentary, factual and commercial context. Given my decision as to the applicability of the *Fiona Trust* principle, however, it seems to me that the words of Article 5 of the Building Contract must be given a wide meaning unless there is very clear language to indicate the contrary.
74. I start from the assumption that the parties to the Building Contract, as rational businesspeople, are likely to have intended any dispute arising out of the relationship into which they had entered to be decided by the same tribunal – whether that be arbitration or adjudication. The nature of the adjudication process and the purpose of the HGCRA 1996 appears to me amply to support this assumption.
75. As Lord Briggs observed at [10] and [13] in *Bresco*:

“10...Speaking generally, adjudication is one of a spectrum of dispute resolution mechanisms which range from party and party negotiation at one end, through mediation, early neutral evaluation (ENE) and arbitration to litigation at the other end, lying roughly between ENE and arbitration. ENE delivers a private non-binding opinion on the merits of the dispute from an independent, respected and often expert source. Arbitration delivers a (usually) private determination from a similar source which is binding subject to very limited scope for appeal. Adjudication shares with ENE the independent, often expert, respected source together with the speed and economy of ENE, with a provisional element of binding decision, unless and until the matter in dispute is later resolved by arbitration, by litigation or by agreement.

...

13...It was designed to be, and more importantly has proved to be, a mainstream dispute resolution mechanism in its own right, producing de facto final resolution of most of the disputes which are referred to an adjudicator”.

76. The purpose of the Act is thus not controversial: disputes are to be resolved quickly and effectively without delay and then put to one side to be revived in arbitration or litigation only if the parties have been unable to accept the decision of the adjudicator, or have been unable to reach a compromise having regard to the information provided by that decision as to the possible outcome before the ultimate tribunal.
77. Against that background it is difficult to see why it would make commercial sense for the parties to want to restrict the scope of the consideration by the Adjudicator to a narrower scope of dispute or difference than could ultimately be referred to arbitration or litigation. Furthermore, as Mr Choat points out, Ardmore accepts that BDW's claim under the DPA 1972 could be referred to arbitration under Article 6A of the Building Contract. I am inclined to agree with Mr Choat that, absent very clear words, it would make little commercial sense for the parties to have intended that their contractual claims could be referred to adjudication and/or arbitration but that any tortious claims (including tortious claims dealing with the same defects and seeking the same relief) could only be referred to arbitration.
78. I do not consider the fact that different wording was used for the arbitration clause at Article 6A to indicate a clear intention that the jurisdiction of the adjudicator would be narrower than that of the arbitrator (as opposed to, say, indicating merely that the draftsman was following the wording of section 108 HGCRA 1996 for the purposes of the adjudication provision) and I agree with BDW that, on a true interpretation, the contrast between the two provisions therefore has no material significance. The courts have made clear at the highest level that wording in dispute resolution provisions referring to disputes arising 'under' the contract should not be interpreted narrowly and in *Bresco* the Supreme Court took the view, albeit *obiter*, that the statutory underpinning of the (in this case express) contractual right to adjudicate is a factor which, if anything, weighs in favour of giving a broad interpretation to the phrase "a dispute arising under the contract".
79. In all the circumstances, I am not inclined to regard the decision in *Hillcrest* as persuasive. In that case, the Judge was convinced of the force of the Statute Argument and his subsequent decision on construction must be seen in that context. He was not operating on the basis that the *Fiona Trust* principle applied by analogy and, as I have already said, he did not carry out a detailed analysis of Lord Hoffmann's speech.
80. For all the reasons I have given, I find that there is no significance in the differing wording in the arbitration and adjudication provisions of this Building Contract and I consider that BDW has successfully established that Ardmore has no real prospect of success in establishing a lack of jurisdiction on the part of the Adjudicator in respect of the DPA 1972 claim for the purposes of the summary judgment application.
81. Finally, I must address two additional arguments.
82. First, BDW submits that, although its primary case on the true interpretation of Article 5 of the Building Contract is not dependent upon any reference to other provisions of

the Building Contract, if anything further is needed, then that case is reinforced by clauses 2.5.1 and 2.5.2 of the Building Contract, which provide as follows:

“2.5.1 Insofar as the design of the Works is comprised in the Contractor's Proposals and in what the Contractor is to complete under clause 2 and in accordance with the Employer's Requirements and the Conditions (including any further design which the Contractor is to carry out as a result of a Change in the Employer's Requirements), the Contractor shall have in respect of any defect or insufficiency in such design the like liability to the Employer, whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design who, acting independently under a separate contract with the Employer, had supplied such design for or in connection with works to be carried out and completed by a building contractor not being the supplier of the design.

2.5.2 Where and to the extent that this Contract involves the Contractor in taking on work for or in connection with the provision of a dwelling or dwellings the reference in clause 2.5.1 to the Contractor's liability includes liability under the Defective Premises Act 1972 and where the application of s.2(1) of the Act is included in the Employer's Requirements the Contractor and the Employer respectively shall do all such things as are necessary for a document or documents to be duly issued for the purpose of that section and the scheme approved thereunder which is referred to in Appendix 1”.

83. Given my decision on interpretation, which agrees with BDW's primary case, it is not essential to my reasoning that I address this argument in any detail. However, having heard argument on the point, I am inclined to agree with BDW that if reinforcement is required, then, on balance, clause 2.5.2 provides that reinforcement.
84. Clause 2.5.1 is a deeming provision. Regardless of what its obligations under the Building Contract would otherwise be, clause 2.5.1 provides that Ardmore will have the “like liability” to the Employer as would an architect or other professional designer – whether that liability be under statute or otherwise. Clause 2.5.2 goes on to explain that where the Building Contract involves work on a dwelling, the “like liability” includes liability under the DPA 1972. This does not actually render Ardmore liable under the DPA 1972 - rather Ardmore's liability under the Building Contract depends on whether an architect carrying out design work under a separate contract would have a liability under the DPA 1972; if so, then Ardmore will have “the like liability”.
85. Against that background I consider that it would be odd if the parties had intended such “like liability” (expressly provided for in the Building Contract) to be excluded from consideration by an adjudicator by reason of the wording used in Article 5. Much more likely, in my judgment, is that they intended a dispute over whether Ardmore had “like liability”, or indeed whether it was itself liable under the DPA 1972, to be determined under Article 5 as a “dispute or difference [arising] under this

Contract”. Thus, on balance, it appears to me that clause 2.5.2 is of assistance in confirming the construction for which BDW contends.

86. Second, Ardmore drew my attention in argument to *John Doyle Construction Limited v Erith Contractors Limited* [2020] EWHC 2451, a case decided on very different facts, in which Fraser J (as he then was) observed at [6] that:

“...the streamlined and fast-track procedure in the Technology and Construction Court for enforcement of adjudicator’s decisions was not designed to deal with the sort of issues that arise where decisions are (as this one is) years, not months old; nor that are made in respect of construction operations and disputes that are themselves (as this one is) eight years old. This is a procedural observation, but such older background matters may not be suited in all cases to the very rapid judicial enforcement currently available in the TCC for all adjudication business, a procedure that has been refined over the last two decades to mirror the ethos of the Housing Grants, Construction and Regeneration Act 1996 that intended adjudication to be a speedy remedy...”.

87. However, I do not consider Fraser J’s procedural observation to advance Ardmore’s defence of the application for summary judgment on this ground. Mr Pliener accepts that the stale nature of the adjudication is not enough in itself to thwart the grant of summary judgment on an enforcement application. As Lord Mance observed in *Aspect* at [14], although adjudication “was envisaged as a speedy provisional measure...there is nothing to prevent adjudication being requested long after a dispute has arisen and without the commencement of any proceedings”³. While I accept that the nature of this case, involving as it does claims made long after the relevant events took place, is very different from the majority of adjudication enforcement applications that come before the TCC, nonetheless this unusual feature is not sufficient on its own to establish a real prospect of a defence on Ground 2.

The Natural Justice Challenges (Grounds 3 and 4)

88. It is common ground that adjudication is inherently a rough and ready process and that the threshold for a valid natural justice challenge is high (see by way of example *Dorchester Hotel Ltd v Vivid Interiors Ltd* [2009] EWHC 70 (TCC), (2009) 122 ConLR 55, [2009] Bus LR 1026 (“*Dorchester Hotel*”) per Coulson J at [18]-[23]). As Chadwick LJ observed in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, (2005) 104 ConLR 1, [2006] BLR 15 at [86]:
- “...The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case...The need to have the ‘right’ answer has been subordinated to the need to have an answer quickly”.

³ See also Lord Briggs in *Bresco* at [13].

89. I need not set out the numerous authorities on this subject in any detail. However, I have extracted the following key principles, relevant to this case, from the authorities to which I was referred:

- a. Adjudication decisions must be enforced even if they contain errors of procedure, fact or law (see *Home Group Ltd v MPS Housing Ltd* [2023] EWHC 1946 (TCC), 209 ConLR 177 (“*Home Group*”) at [50(1)]). Arguments that merely involve a critique of the adjudicator’s reasoning will not succeed (see *AMD* at [26]).
- b. While the rules of natural justice do generally apply to adjudication there are obvious limits on the application of those rules owing to the nature of the process and the purpose of adjudication is not to be thwarted “by an overly sensitive concern for procedural niceties”. Accordingly, the court should examine any alleged breach of the rules of natural justice in an adjudication with scepticism (see *Dorchester Hotel* at [18]-[20] and *Home Group* at [50(2)]).

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- c. An adjudication decision will not be enforced if it is reached in breach of natural justice and the breach is material (see *Home Group* at [50(2)]). The burden of establishing a material breach rests with the party asserting breach of natural justice (see *AMD* at [23]). I shall return in a moment to the arguments in this case as to what is meant by the requirement for a “material” breach.
 - d. If the adjudicator has endeavoured generally to address the question referred to him (including any sub-issues) in order to answer the question then, “whether right or wrong, his decision is enforceable” (see *AMD* at [21] and *Pilon Ltd v Breyer Group Plc* [2010] EWHC 837 (TCC) (“*Pilon*”) at [22.1]).
 - e. If the adjudicator has failed to address the question referred to him, including a failure to consider the defence to the claim or some fundamental element of it, then his decision may be unenforceable on grounds of natural justice, but only if his failure was both deliberate and material. An inadvertent failure to consider one of a number of issues will not ordinarily render a decision unenforceable (see *AMD* at [21] and *Pilon* at [22.2]-[22.4])). The judge “will not put a fine tooth comb through the adjudicator’s decision seeking to ensure that every single point has somehow been addressed” (see *Coulson* at 13.55).
 - f. The mere fact that an adjudication is concerned with a large or complex dispute, that it is intrinsically complicated or ‘heavy’, is not a bar to adjudication enforcement (see *AMEC Group Ltd v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC), [2010] All ER (D) 267 (“*AMEC v Thames Water*”), per Coulson J, as he then was, at [60] and *Home Group* at [50(3)]). Merely

pointing to a large quantity of material, some of which is seen for the first time in the adjudication itself, is not sufficient (*Home Group* at [41(2)]).

- g. Arguments based on time constraints impacting the ability to respond fairly are unlikely to succeed. It is a fact of adjudication life that the process has to be carried out pursuant to a strict timetable. While this often causes pressure on the responding party, it is inherent in the process and complaints of unfairness are generally “given short shrift by the courts” (*Home Group* at [41] and [42]).
- h. “What matters is whether, notwithstanding the size or complexity of the dispute, the adjudicator...was satisfied that he could do broad justice between the parties” (*AMEC v Thames Water* at [60]).
- i. The question in almost all cases where the Adjudicator has considered the position but expressed the clear ability to render a fair decision, “will inevitably centre upon the timing of the provision of the material to the responding party, and its ability to fairly put its case, rather than the complexity of the material per se” (see *Home Group* at [39]).
- j. When considering the opportunities available to the defending party in an adjudication, “the court can and should look at the opportunities available to that party before the adjudication started to address the subject matter of the adjudication and at what that party was able to and did do in the time available in the adjudication to address the material provided to it and the adjudicator” (see *Home Group* at [41(5)], citing *HS Works* (2009) 124 ConLR 69, [2009] BLR 378, per Akenhead J at [49]).
- k. It has long been accepted that claims can be made by way of adjudication “at any time” (see *Dorchester Hotel* at [23], *Aspect* at [14] and *Bresco* at [13]).

90. Ardmore relies upon the Scottish case of *Whyte v Mackay Ltd v Blyth & Blyth Consulting Engineers Ltd* [2013] CSOH 54, 2013 SLT 556 (“*Whyte*”) in support of the proposition that there are rare cases in which the court will be persuaded to refuse enforcement owing to the size and/or nature and/or timing of the claim. Constable J considered *Whyte* in *Home Group* at [43]-[44] as follows:

“[43] Mr Neuberger also relied in his written submissions upon the Scottish case *Whyte and Mackay Ltd v Blyth & Blyth Consulting Engineers Ltd* [2013] CSOH 54, 2013 SLT 555, the only reported case in which a court unequivocally refused to enforce the adjudicator’s decision because of the size and nature of the claim. The pursuer had employed the defender to advise and prepare a design for construction works. An adjudication award was obtained for £3,000,000 of which £894,674.00 was the assessed cost of future loss in carrying out underpinning to the property. The pursuer applied to enforce the award and the defender sought the reduction of the award on several grounds. The decision was not enforced due to the failure of the adjudicator to deal with certain issues, and Lord Malcolm expressed the view (at [47]) that—

‘the adjudicator was presented with a next to impossible task. Even a judge would struggle to identify a procedure which would allow the complex issues of fact and law arising between the parties to be determined in any semisatisfactory manner within six weeks. In the circumstances of the present case, the well known problems, disadvantages and potential injustices of an adjudication are not counter-balanced, let alone outweighed, by any of the aims and purposes lying behind the 1996 Act. It is those public interest benefits which justify enforcement of an adjudicator’s award, even a sub-standard and obviously wrong award ... but they are more or less wholly absent in the present case. It follows that it would be disproportionate and wrong to enforce the award ...’

[44] In the commentary on this case in Coulson on Construction Contracts, the editor does not take issue with the determination of the Court in any way, describing the decision as careful and well-reasoned. It explains how, in that particular case, adjudication was an inappropriate process. ‘Finally’, the editor observes, ‘there is a case that concludes that, sometimes, a claim will be too large and/or too complicated and/or raised too long after completion to be suitable for adjudication’.

91. At [45] Constable J expressed the view, with which I agree, that:

“[t]he issue in *Whyte* did not turn on questions of volume of complex material and constraints of time to respond...The driving concerns of the Court when considering the proportionality of enforcement (which amounted to an interference with the defenders’ entitlement to peaceful enjoyment of their possessions) were the fact that the adjudication, relating to issues of professional negligence, had been brought more than six years after completion of the works, and that the pursuer would suffer no loss for many years into the future. Both of these fundamentally were at odds, it was held, with the rationale behind the statutory regime for speedy non-binding determinations”. **Ground 3**

92. In Ms Whiting’s statement she asserts that “[t]he fundamental reason BDW’s claims were not suitable for adjudication is because of the passage of time” and she suggests that “Parliament could not have envisaged adjudication being used to resolve disputes on projects up to 30 years after practical completion”. However, this was not the case advanced in argument.

93. Instead, Ardmore now makes a rather more nuanced argument. It contends that the unique combination of a 20 year old project and the pursuit of a £15m professional negligence claim by way of adjudication, a procedure which was primarily designed for the resolution of live or recent disputes, has created an inherently unfair situation in which it has “almost no relevant contemporaneous documentation” but must rely upon documents provided by BDW together with the searches made by BDW for documents. The problem it identifies is not the complexity of the issues or the amount of documentation involved, but rather the paucity and imbalance of documentation available to

Ardmore together with a process which is not capable of adequately addressing those problems. Ardmore points out that unlike arbitration or litigation, the adjudication process has very limited procedures to manage or police the disclosure process and that it is therefore impossible to address the unfairness of the position in which it finds itself by reason of its lack of access to relevant documents.

94. Mr Pliener accepts that the mere fact that this is an historic case is not, in itself, sufficient to give rise to a natural justice objection⁴. He also accepts that some element of unfairness, or at least the risk of unfairness, is probably ‘baked in’ to the retrospective extension of time to the limitation period for claims under the DPA 1972 effected by the BSA 2022. While he suggests that the passage of time militates against a rigorous application of the public policy requirement for a “pay now, argue later” approach, he also concedes that Ardmore must make good its natural justice objection by reference to its complaint of a lack of documentation and thus an inequality of arms. He submits that the key question for the court is the extent of the latitude to be given to the application of natural justice in the context of disputes with an extended 30 year limitation period.
95. Although Ardmore suggests in Ms Whiting’s statement that BDW’s disclosure in the adjudication was “selective by nature” and that BDW had therefore “exerted a

disproportionate level of control over the adjudication” leading to inherent unfairness (a suggestion which was strongly resisted by BDW), I did not understand this suggestion to be maintained in such strong terms in submissions. Mr Pliener very properly made clear that Ardmore does not criticise BDW for the approach that it took to disclosure, but rather contends that BDW’s initial collection of documents was inevitably selective and that thereafter the adjudication simply had “insufficient teeth” in the way of powers to order disclosure to redress the balance.

96. BDW resists the suggestion that this is a “special” case, whether owing to the passage of time or the position in relation to the disclosure of documents and it rejects any analogy with *Whyte*. It points out that it provided disclosure to Ardmore in response to a request made by the Adjudicator, that Ardmore made no complaint about that disclosure during the Adjudication and that Ardmore has provided no adequate explanation for its lack of project documentation. Further it submits that Ardmore has not satisfied the burden of establishing that any breach of natural justice was material (see *AMD* at [23]).

⁴ This is consistent with representations made to the Adjudicator by Ardmore in its letter of 5 April 2024 to the effect that the problem “is not, in and of itself, that the project is 20 years old (although that underlies the issue) ...”.

97. To address these arguments I must now return to look at the chronology of events leading to the Decision, with a specific focus on the production of documentation by

BDW.

98. As I have already said, the Letter of Claim attached what it described as “relevant Podium and Trifire reports” at Appendix 2. It is clear from the Letter of Claim that Podium LLP carried out intrusive surveys in May 2020 “for the purposes of obtaining EWS1 forms for the four buildings at the Development” and that “Podium identified the presence of a void between the insulation and internal block leaf and an absence of any horizontal fire barriers” (i.e. Podium identified the defect about which BDW was making complaint in the Letter of Claim). It is also clear that Trifire were instructed to advise on interim measures (including a waking watch and fire alarm system) necessary as a result of the missing fire barriers. In addition to these reports, the Letter of Claim also attached at Appendix 3 “relevant correspondence between Alumasc, Ardmore, SERS [the façade subcontractor] and others” which had been disclosed to BDW the previous year during investigations. This correspondence was summarised in detail in the Letter of Claim and was said to demonstrate that “cavity barriers were required by the manufacturer and that no alternative route to compliance was established at the time of construction”.
99. In its letter of 28 September 2022, Ardmore responded saying that it was continuing “to investigate the allegations” made in the Letter of Claim and that it would need more time to respond. On 19 October 2022, Ardmore invited BDW “to provide voluntary pre-action disclosure of all and any documents BDW has in its possession (or is able to possess upon request) relating to the project...”. Ardmore explained that it considered this to be a reasonable and proportionate request because it “will no longer possess records (which would have been disposed of in the ordinary course of business after the expiry of ordinary limitation)”. I pause to note the use of the conditional perfect tense here; there is no assertion at this stage that relevant documents had in fact been disposed of and there is nothing in the evidence for this hearing to suggest that this had in fact occurred. Ardmore went on to ask for documents relating to BDW’s standing to bring a claim together with details of the proposed remedial works considered necessary to remedy the alleged defects. It also requested that it be given an opportunity “to inspect any and all areas of the Development that are the subject to (sic) BDW’s claim prior to any remedial works being undertaken...”.
100. In its reply on 20 July 2023, BDW rejected the suggestion that Ardmore was entitled to wide-ranging pre-action disclosure. It noted, however, that in addition to the reports provided under cover of the Letter of Claim, it had also now provided Ardmore with “the Advice Note of Orla Fitzgerald, BDW’s expert architect”. BDW asserted that Ardmore now had “all that may be

required” to understand BDW’s case. However, BDW offered Ardmore the opportunity to inspect the defects at the Development in advance of commencement of the remedial works.

101. Ardmore responded on 25 August 2023 noting that BDW had not provided details of six matters which were said to be “essential for Ardmore to be able to consider BDW’s claim”. With the exception of a request for information as to what surveys had been completed and whether further investigations were planned, these all related to information about remedial works and loss suffered by BDW.

102. Against this background, BDW sent its letter of 8 March 2024 indicating an intention to proceed to adjudication absent confirmation from Ardmore of its liability in respect of the identified defects.

103. In a letter dated 20 March 2024, Ardmore raised its natural justice objections, including that:

“Ardmore’s records in relation to the project are negligible and it has only today learnt that of the relevant project team, only 6 are still employed by Ardmore. Ardmore is investigating the extent of their knowledge and recollection as they could be employees dealing with matters unrelated to the external wall system. In any event, to expect these employees to have any cogent recollection of the project after 21 years and with many other projects completed since is unrealistic. In terms of records located to date, Ardmore has only been able to retrieve just over 1GB of data in relation to the entire project and expects that data to be irrelevant to the external wall render system in any event. It is of course validating this assertion”.

104. Ardmore did not explain why its records were “negligible”, why it had only just discovered the position in relation to its employees and why it “expected” the data it held to be irrelevant, nor did it say whether it had made any efforts to obtain documents from third parties. Nevertheless, it went on to point out that for the purposes of the Adjudication it would be “heavily, if not almost entirely, reliant” on documents selected by BDW and that this would be “inherently unfair outside the normal unavoidable risk of adjudication unfairness”. In its subsequent letter of 28 March 2024, Ardmore expressly pointed to the lack of power on the part of the Adjudicator to order a referring party to comply with disclosure obligations or to require third parties to provide disclosure. BDW responded to these points in a detailed letter dated 2 April 2024.

105. In his decision on Jurisdiction of 4 April 2024 the Adjudicator rejected Ardmore’s arguments. He noted that “the largest part of the Referral” was a fire report from Mr Brown and that a large bundle of exhibits containing primarily technical data had been supplied to Ardmore in full. He recorded that there were in essence “three full lever arch files and two smaller files which comprise the whole of the claim and the back up to it” and he rejected

the suggestion that this involved a complex or “mammoth” task for Ardmore. He observed that the Response ought to be capable of being prepared in three weeks and he confirmed that: “[m]y examination of the case as presented in the Referral does not present an adjudication that could not comply with the rules of natural justice nor is the case as presented unreasonable or oppressive”.

106. On 5 April 2024, Ardmore wrote again to the Adjudicator to express its concern at his decision. It emphasised that the problem was not “in and of itself” that the project was 20 years old or that the issues are too complex or the documentation too extensive. Instead, it reiterated that Ardmore had “almost no project documents” and that, having now searched its electronic and hard copy archive it had identified only 5 documents of any potential relevance to the dispute. It was this evidential inequality on which Ardmore hung its case of unfairness. The letter went on to say this: “...should your Natural Justice Decision remain, in order to limit that unfairness to some degree at least, we invite you to exercise your powers under Clause 39A of the Construction Contract and direct BDW to search for and produce the narrow critical documents listed below to you and Ardmore”. In a table, Ardmore then made four targeted requests for documents which it said would not be onerous for BDW to disclose. It made clear that it was continuing to reserve its position on natural justice even in the event of provision of these documents but it confirmed that three weeks should be sufficient to provide its Response subject to time starting to run from the provision of the documents.
107. I pause to note that clause 39A.5.5.3 of the Building Contract provides that the Adjudicator may “[require] from the Parties further information than that contained in the notice of referral and its accompanying documentation or in any written statement provided by the Parties including the results of any tests that have been made or of any opening up”.
108. Also on 5 April 2024, BDW wrote to the adjudicator addressing the proposals in Ardmore’s letter of the same date. It pointed out that Ardmore’s letter was silent as to any efforts it had made over the last two years to investigate the claim but it indicated that it was content to agree an extended timetable.
109. In his Directions No 1, also issued on 5 April 2024, the Adjudicator directed that BDW provide the documents identified by Ardmore in its table “insofar as the documents requested are in the power and possession of BDW” and that (on the assumption these documents were readily available) they should be provided by midnight on 8 April 2024.
110. BDW provided additional disclosure in response to this direction under cover of a letter dated 8 April 2024. The disclosure provided was explained in an additional column added to Ardmore’s original table of requests, which BDW termed “Table 1”. BDW explained, however, that in the time available it had not been able to identify any (additional) documents falling within requests 2

and 4. BDW's solicitors updated this position by way of a further letter on 16 April 2024 in which they explained that, in addition to the manual searches that had been undertaken in advance of the adjudication, they had now "conducted further manual searches of the documents available to us". Specifically they confirmed that "we and our client have now completed a reasonable and proportionate search of all such documents and provide by way of disclosure limited additional documents as set out in the updated Table 1, enclosed". The updated Table 1 shows that documents were now being provided by BDW in response to each of the four original requests made by Ardmore.

111. Ardmore responded to BDW's further provision of documents in a letter dated 18 April 2024 by observing that it inferred that "BDW is not and will not be carrying out any further searches or providing any further disclosure". It neither suggested that the searches conducted or the disclosure provided by BDW were inadequate, nor did it identify any additional categories of document that it wanted to see. It did not seek to query what documents were, or were not, searched for and Mr Pritchard confirms in his second statement that no such query was ever raised by Ardmore. Furthermore at no time during the Adjudication was it suggested by Ardmore that BDW had failed to comply with the Adjudicator's direction of 5 April 2024. Instead, in the letter of 18 April 2024, Ardmore raised only two questions as to the external envelope works to the Development, inviting the Adjudicator to make urgent directions as to the provision of further information in response to those questions.
112. It is clear from the Decision [at 68.00] that the Adjudicator directed that he would like to see an answer to these two questions and that, on 19 April 2024, Howard Kennedy wrote two letters attaching further materials⁵. Thereafter a timetable for the adjudication was agreed and on 8 May 2024, Ardmore provided its detailed Response.
113. In its Response, Ardmore again asserted that BDW had been selective in the documents it had disclosed and it maintained its position that it was reliant upon BDW for documents. However, in section 5 it referred to its requests for disclosure and further information, acknowledging that disclosure had been produced on three separate dates and then arguing that this disclosure undermined BDW's case. There was no attempt to identify any further disclosure that was required. On the contrary, the focus appears to have shifted to the significance of the questions raised in the 18 April 2024 letter as to the external envelope works to the Development. I did not understand Ardmore's submissions on natural justice to focus, or rely, upon a breach of natural justice in connection with any perceived failure to respond to these questions. This is

⁵ I cannot see that these have been provided to me by either party, but the Response refers to a third tranche of disclosure from BDW on 19 April 2024.

unsurprising – in his Decision at 290.00-292.00 the Adjudicator explains that BDW provided a bundle of documents which satisfied the questions posed.

114. Ardmore's Response to the allegations of deliberate concealment and breach of duty under the DPA 1972 comments in detail on the available documents but does not suggest anywhere that further categories of document are sought or required in order properly to defend the claim. On the contrary, Ardmore seeks to rely upon a failure on

the part of BDW to discharge its evidential burden and prove on the balance of probabilities that Ardmore installed a façade system at the Development that did not comply with the Building Contract and/or the statutory requirements of the DPA 1972.

115. In its Rebutter served on 5 July 2024, Ardmore again raised an issue about disclosure, specifically in relation to a report into the structure of the Development that Ardmore understood had been prepared by AECOM. Ardmore asked in the Rebutter for directions that two categories of document relating to AECOM's review be provided. Ardmore pressed again for this disclosure in a letter of 19 July 2024 and on 25 July 2024, BDW agreed to provide (and did provide) various categories of document sought by Ardmore (albeit maintaining that they were "not material to the issues in this Adjudication").
116. Finally, I should mention that under cover of its Response, Ardmore provided a witness statement from Ms Whiting of 8 May 2024, in which she explains, amongst other things, that (i) the decision had been taken by Ardmore only to divert significant resources into investigations in connection with this claim on 8 March 2024; (ii) Ardmore's record keeping in relation to the project had not been robust; (iii) the archive had not been maintained "as well as we would now hope"; and (iv) that in 2017 there was a full physical relocation of Ardmore's head office at which time "a number of archive boxes were delivered by the relocation company and left outside in the rain", causing significant damage, albeit that it had proved impossible to identify whether any of these boxes had included hard copy records relating to the Development.

Analysis

117. Against that background and in the particular circumstances of this case, I take the view that there is nothing in the complaints raised by Ardmore and that it is not entitled to any additional degree of latitude by reason of the passage of time, essentially for the following reasons.
118. Ardmore accepts, as it must, that the Adjudicator was satisfied that he could do broad justice between the parties. The court should be slow to interfere with that conclusion (see *Home Group* at [38]).
119. Ardmore also accepts that the mere passage of time is not in itself enough to create unfairness and it is clear from the authorities to which I have referred

that adjudication provisions may be relied upon “at any time”. Nevertheless, in principle it must be the case that the longer the period since the works in respect of which complaint is made, the more careful the court will need to be in scrutinising any complaint of unfairness. I did not understand Mr Choat to dissent from the broad proposition that the passage of time will, in this sense, be a relevant factor.

120. The complaint here is not a complaint of complexity or volume of documents, just as it is not a complaint that the Adjudicator could not deal with the matter fairly within the relevant time constraints. Instead, it is that Ardmore does not have access to relevant documents but is reliant upon BDW’s disclosure, an issue which is said to have been exacerbated by the passage of time. This appears to me to raise two related questions relevant to the natural justice challenge: first, what is the reason for Ardmore’s inability to access relevant documents and/or information and second, given Ardmore’s stated lack of documents, were the broad requirements of natural justice satisfied during the adjudication process in relation to the provision of disclosure by BDW, even having regard to the passage of time?
121. As to the first question, it is quite clear that Ardmore’s record keeping over the relevant period has been deficient. This much is accepted by Ms Whiting in her statement of 8 May 2024 in which she says that “Ardmore’s record keeping in relation to recent projects is robust, but this is not the case for projects completed around the time of the Development”. One example of this that she gives is that documents relating to one project were sometimes stored in manuscript labelled boxes belonging to another. Although in her statement, Ms Whiting refers to the fact that, until recently, there has been no reason for those operating in the construction industry to retain documents for longer than required for usual limitation periods (i.e. 15 years), she does not say that Ardmore’s lack of documentation is the consequence of it having in fact operated on this basis. Instead the essence of her evidence is that Ardmore has been “unable to find” pertinent documents.
122. Against this background I can only infer that Ardmore’s lack of documentation is not down to disposing of documents after any relevant limitation period had expired. I note from Mr Pritchard’s second statement that there was in fact every reason for Ardmore to retain documents in relation to this project in circumstances where (i) by the time that this dispute was intimated in July 2022, there had already been two previous disputes about Ardmore’s works, the first in 2007 when Ardmore carried out remedial works to address water leaks and the second in 2015 when BDW arbitrated against Ardmore regarding balcony defects in Ardmore’s works, until a settlement concluded in February 2017 further to which Ardmore carried out remedial works to the balconies; (ii) the Grenfell Tower tragedy occurred on 14 June 2017, whilst Ardmore was carrying out these remedial works; and (iii) in 2019 BDW began asking

Ardmore for documents relating to the cladding materials installed at the Development. Even assuming that Ardmore was operating on the assumption that documents needed only to be retained for 15 years (which does not in fact appear to be the case), these supervening events should have alerted it to the importance of retaining its documents for longer.

123. I consider that where BDW had been asking for documents relating to cladding materials since 2019 and BDW had sent its Letter of Claim in 2022, Ardmore should have taken proper steps over a number of years to find, and gather together, the documentation it had relating to its works. It is not clear to me that such proper steps were in fact taken, notwithstanding Mr Pliener's submission that "in accordance with the usual narrative" Ardmore did "all that it could".
124. In addition, and given the difficulties Ardmore says that it encountered in trying to locate documents, one might have anticipated that it would be keen to inspect the Development before any remedial works commenced – certainly it suggested as much in its letter of 19 October 2022. However, as I have already said in connection with Ground 1, Ardmore did not take up the offer to carry out such inspection and has provided no explanation as to why it did not do so. It may be that the reason is to be found in Ms Whiting's candid statement that "[t]he need for Ardmore to divert significant resource into investigation only arose on 8 March 2024 when BDW provided the assignment of the contract and intimated an immediate adjudication".
125. In so far as Ardmore had a paucity of information going into the adjudication by reason of either its poor record keeping or its own decision not to carry out any detailed investigations into the issues raised in the Letter of Claim and subsequent correspondence, including its decision not to inspect the Development when it had the opportunity to do so, that seems to me significantly to colour its natural justice complaint. Neither of these things would appear to be the consequence of the 20 year passage of time since the works. Specifically, I consider that it is difficult for Ardmore credibly to complain that it was not in a position to know what had actually been installed at the Development when it chose not to carry out its own inspection.
126. Further, and in any event, the chronology I have referred to above simply does not support the proposition that there was a breach of natural justice in relation to the provision of documents to Ardmore (i.e. the second question).
127. In its correspondence pre-adjudication, Ardmore originally sought extensive disclosure from BDW. It was provided with various documents and reports by BDW in advance of the adjudication and it is of course unsurprising that these were selected by BDW. That some reports were only provided upon commencement of the Adjudication (a complaint made by Ms Whiting in her statement) is not a valid complaint and was not pursued by Mr Pliener in his submissions.

128. Once the adjudication got under way, Ardmore chose to identify only four categories of disclosure which it considered “critical” (see its letter of 5 April 2024). Far from being unable to do anything about this request, the Adjudicator directed that it should be complied with. BDW subsequently provided documents corresponding to each of the four categories requested.
129. Its requests for disclosure having been met, Ardmore did not complain of any omissions in the disclosure provided by BDW and nor did it choose to identify any additional disclosure that it needed (even though it was clear that its requests for disclosure would be taken seriously by the Adjudicator). Mr Pliener submitted that this reflected a recognition on the part of Ardmore that it was unlikely to achieve much more in the way of disclosure through the adjudication process, but he accepted that he had no evidence to that effect. Far from seeking additional disclosure, the correspondence shows that Ardmore concentrated on two questions about the building envelope which appear also to have been answered following a direction from the Adjudicator.
130. When Ardmore did identify an additional category of disclosure that it wanted to see in its Rebuttal, this was again provided by BDW. During his submissions, Mr Pliener specifically focused upon the fact that the documents provided by BDW did not contain any contemporaneous photographs and that Ardmore has no means of knowing what happened to those. However, as he also accepted, Ardmore made no request for any photographs during the Adjudication, as it could have done. Mr Pritchard confirms in his second statement that if Ardmore had had a reasoned concern about any missing documents during the adjudication that concern “would have been investigated”. I have no reason to conclude otherwise.
131. Accordingly, I reject the suggestion that the Adjudication had insufficient “teeth” to ensure that Ardmore had access to the documents it required. Clause 39A.5.5.3 of the Building Contract gave the Adjudicator the power to require the parties to provide further information and documentation, a power which he exercised upon the request of Ardmore. The fact that an arbitrator may have had the power (depending on the procedure he or she decides to adopt under the Construction Industry Model Arbitration Rules⁶) to make more extensive and comprehensive disclosure orders does not appear to me to take matters further in the circumstances of this case.
132. Furthermore, I reject the suggestion that the inevitable consequence of the adjudication process was that Ardmore would receive only “selected” documents from BDW. There is certainly no basis on which to criticise BDW for the approach it took to disclosure, as Ardmore now accepts. On the contrary, it is clear from its evidence that BDW took the entirely proper approach of carrying out reasonable and proportionate searches and disclosing

⁶ See clause 39B.6 of the Building Contract which provides that the arbitration is to be conducted in accordance with the JCT 1988 edition of CIMAR.

relevant documents to Ardmore. In his second statement, Mr Pritchard confirms again that his firm, Howard Kennedy LLP, and, to the best of his knowledge, BDW, “carried out a reasonable and proportionate search in order to provide documents responsive to Ardmore’s requests and the Adjudicator’s direction”. He explains his understanding that BDW’s document review had sought to capture BSC and BEL documents and he rejects the suggestion that the approach to disclosure was “selective”. He says that:

“My firm and I took very seriously the Adjudicator’s direction of 5 April 2024 and complying with the same. When complying with it we were not ‘selective’, rather, we sought to find and provide responsive documents, whether or not they might be helpful or unhelpful to either side’s cases”.

133. Ardmore does not appear to dispute this evidence. Instead, it complains that it does not know the scope or extent of the searches undertaken by BDW, an issue described by Ms Whiting in her statement as “critical”. However, this was not a complaint raised by Ardmore during the Adjudication and it also made no attempt to ask for further information about the scope of the searches, as it could have done had it genuinely considered there to be a need to understand their scope. In his oral submissions, Mr Pliener clarified that Ardmore’s real point was that the process of adjudication does not oblige either party to search for documents, but I cannot see that this advances his position where this will always be the case in any adjudication. Does the historic nature of the dispute exacerbate the situation, bringing the absence of searches into sharper relief on the facts of this case? I think not, given Ardmore’s failure even to refer to the point during the adjudication, a failure which undermines its credibility at this stage. The complaint at the time of the adjudication concerned only

the absence of disclosure, but, for the reasons I have given, I do not consider that complaint to be well-founded.

134. Further and in any event, it is common ground that Ardmore carries the burden of establishing the materiality of any breach of natural justice. At the hearing there was a debate between the parties as to whether it is necessary for Ardmore to show that the breach “was” in fact material to the outcome of the Adjudication, as BDW contends, or whether it is sufficient for Ardmore to show that it was “potentially” material, as Ardmore contends. Having considered the authorities with care, I am inclined to agree with Mr Pliener that the breach must be shown to have had “a potentially significant effect” on the overall result of the adjudication in that it is either “decisive or of considerable potential importance to the outcome...and is not peripheral or irrelevant” (see *Pilon* at [22.4] and *Cantillon* at [57(c) and (d)]). Mr Choat

relied upon Constable J's distillation of the relevant legal principles in *Home Group* at [50(2)] for his proposition that the breach must be shown to be material "in that it has led to a material difference in outcome", but I can find nothing in Constable J's earlier analysis of the authorities to support this proposition.

135. In any event, however, whichever test is to be applied, Ardmore has failed to satisfy it. The highest it has been able to put its case on materiality is apparent from Ms Whiting's statement in which she says that "it is probable" that records from BSC or BEL "would be materially relevant to Ardmore's defence to BDW's deliberate concealment claims" and that evidence from these companies "more than likely exists, and...could have provided Ardmore with a compelling defence". To my mind this rather speculative evidence is very far from establishing that any disclosure that might have been available from these companies⁷ would have had a potentially significant effect on the outcome of the adjudication, much less that it would in fact have been decisive.
136. I also reject Ms Whiting's suggestion in her evidence that the Adjudicator "seems to recognise that the absence of documents caused material harm to Ardmore's defence". I do not read the Adjudicator's statement that he could only find documents confirming the necessity of fire barriers but could not find anything to suggest that fire barriers were not being provided as being intended to indicate that further disclosure was likely to have made a material difference to Ardmore's defence. On the contrary, it is purely a comment on the weight of the evidence. Ms Whiting's assertion that "if a robust process of disclosure had taken place...it is arguable that BDW would have produced documents that provided Ardmore with a compelling defence" appears to me to be nothing more than wishful thinking.
137. During his oral submissions, Mr Pliener pointed to paragraph 272.00 of the Decision where the Adjudicator explains that, on the evidence, there is "no certainty at all" as to what was installed on the external walls of the Development. He submitted that this was an issue that could have been resolved with additional disclosure.

However, even assuming that he is right about that, the Adjudicator concluded a few

paragraphs later in his decision (at 276.00) that this was not even an issue that he needed to resolve because "[t]he thrust of any argument on defects does not go to the cladding system but goes to the lack of fire stopping. Both [potential external cladding] systems require fire stops". At 280.00, the Adjudicator observes that "[i]t is a bad point to even think that this can go to jurisdiction".

138. Mr Pliener then pointed to paragraphs 381.00-394.00 of the Decision, in which the Adjudicator deals with the issue of whether there had been deliberate

⁷ This of course assumes a lack of disclosure of relevant documents from these companies – an assumption which Mr Pritchard's evidence establishes is in any event incorrect.

concealment of the lack of fire barriers. He submits that the Adjudicator's decision on this point was made in the absence of all relevant documents. However, looking at the reasoning of the Adjudicator in this section of the Decision, I note that he does not say that he has not seen all relevant documents (as Ardmore suggests). He observes at 386.00 that he has examined in excess of 2500 documents and, although he accepts that he has "not seen every document generated in connection with this project" (an entirely unsurprising statement), nevertheless he says "the parties have made it clear given the date of the contract in 2002 they have done their best in finding those documents that exist readily in order to provide as much as they can to assist this Adjudication". At no time did Ardmore identify any additional documents it wanted to see, or seek a further direction from the Adjudicator for the provision by BDW of additional documents or information, in connection with this allegation. Further, there is, in any event, no credible evidence whatever to support the suggestion that any additional disclosure would potentially have made a material difference to the outcome.

139. Finally, Mr Pliener pointed to various paragraphs in Ardmore's Response and in its Rejoinder to Reply in which it made clear that BDW and/or its agents, BSC and BEL, would have been present on site during the construction of the Development – the inference being that they would have had access to numerous project documents. However, none of these paragraphs identifies the absence of relevant documents as a material factor in Ardmore's defence. On the contrary, they make submissions as to what the available documents (including progress reports disclosed by BDW) show, together with seeking to make a virtue of a lack of evidence from BDW. Once again, I consider these submissions on close analysis to be very far from establishing a potentially material effect on the outcome of the Adjudication by reason of a lack of disclosure.
140. Indeed, Ardmore's chosen approach at various junctures in its Response and Rejoinder to Reply (to the effect that there was an absence of substantiation by BDW of its case) does not appear to me to sit well with the submission that Ardmore was potentially materially prejudiced in its conduct of the adjudication. Parties who consider their opponents not to have produced sufficient by way of evidence to satisfy the burden of proof may choose not to seek further disclosure for fear of inadvertently improving the evidence against them. While it is impossible to know whether a strategic decision of that sort occurred here, there can be no doubt that Ardmore chose not to make any additional requests for disclosure beyond those to which I have referred in the chronology above. Equally, it has not chosen to address the reasons for this decision in its evidence. Each of the requests it did make was satisfied.
141. In all the circumstances, I do not consider that there is any real analogy to be drawn between the facts of this case and those in *Whyte*. That case was, in

any event, decided on its own facts. It did not involve arguments of the sort that have been raised here as to a lack of documentation. While it is true that both cases involved the passage of time, that is really where any similarity ends.

142. In my judgment the natural justice challenge under Ground 3 fails; Ardmore has no real prospect of successfully defending enforcement of the Adjudicator's decision on that ground.

Ground 4

143. Given my findings on Grounds 1-3 together with Ardmore's acknowledgement that it cannot escape enforcement with a win on Ground 4 alone (which would undermine the Adjudicator's decision only on breach of the Building Contract and not on liability under the DPA 1972), there is now no real need for me to address this Ground in any detail. However, as it has been argued, I shall deal with it briefly.

144. In short, Ardmore contends that the Adjudicator deliberately ignored a material defence in the context of the claim of deliberate concealment. Specifically (as identified in Ms Whiting's statement) the defence that BPCL or its agent "would have known the position on cavity barriers and that BDW is fixed with that knowledge as assignee". Ardmore's case is that the Adjudicator "clearly decided not to consider that point when resolving the question of what BDW would have known" about the presence of fire barriers.

145. BDW submits that there is no proper basis for a natural justice challenge on this ground because (i) Ardmore's submissions amount in reality to no more than "a critique of the adjudicator's reasoning"; (ii) the material defence on which Ardmore now seeks to rely was not in fact expressly raised by Ardmore in the adjudication; (iii) the Adjudicator did in fact deal with the issue which Ardmore claims was not considered; and (iv) that Ardmore has failed to satisfy its burden of establishing materiality. [Analysis](#)

146. Once again, I consider there to be nothing in this complaint and I need focus only on one or two of the points raised by BDW.

147. Having considered the various documents submitted to the Adjudicator by Ardmore, I agree with BDW that this "material defence" was not in fact squarely raised by Ardmore in the Adjudication. There are references in its documents to BSC and BEL, but its Response⁸ focuses on what BDW itself knew, as does its Rejoinder to Reply⁹. BPCL is not even mentioned in the relevant sections of either the Response or the Rejoinder to Reply.

⁸ For example at 6.13: "BDW would have had knowledge of this omission prior to/during construction" and at 6.16(a): "unless BDW can show the external envelope was constructed over a weekend, there is no prospect of BDW denying it would have seen the lack of cavity barriers if this was the case". ⁹ For example at 4.4(a) and 4.26.

-
148. BDW's Reply at 15-17 shows that BDW understood Ardmore to be advancing a case based on BDW's actual knowledge (as opposed to any knowledge that might be imputed to it by reason of the knowledge of BPCL or its agents).
149. Whilst frankly acknowledging that Ardmore did not plead out the 'material defence' on which it now seeks to rely, Mr Pliener nevertheless contends that its submissions could only have been understood on that basis. I disagree. Nowhere is there an express submission by Ardmore that BDW is to be fixed with the knowledge of BPCL, or of BPCL's agents, as assignee, and I can see no reason to suppose that the Adjudicator would therefore have understood the case to be advanced on that basis.
150. Tellingly in my judgment, Ardmore proposed a series of issues for resolution by the Adjudicator. BDW accepted these issues in a letter of 16 August 2024 and the Adjudicator duly dealt with each of Ardmore's identified issues in the Decision. These issues did not include the "material defence" now identified by Ardmore. On page 107 of the Decision, the Adjudicator sets out the issues and sub-issues arising in respect of the claim of deliberate concealment. As Mr Pliener accepts, there is no issue concerned with the knowledge of BPCL or its agents. The only issue concerned with knowledge is sub-sub issue 5: "[w]hat is the earliest date on which BDW with reasonable diligence could have discovered the omission of fire barriers".
151. In the circumstances, I am bound to say that I agree with Mr Choat that the failure to identify what is now said to be a material defence as one of the issues for determination by the Adjudicator, together with the failure to raise that defence in any of its submissions to the Adjudicator, is a fatal impediment to this natural justice challenge. I also agree that, accordingly, this challenge is no more than an attempt to contend that the Adjudicator made an error of law and/or of fact or that his reasoning was flawed.
152. Ground 4 fails. There is no real prospect of Ardmore establishing a breach of natural justice on this ground.

Conclusion

153. Given the conclusions I have arrived at on each of Grounds 1-4, I am satisfied that there is no real prospect of Ardmore successfully defending the claim on any of the Grounds identified. There is no other compelling reason why the case should be disposed of at trial.
154. Accordingly, the Decision falls to be enforced by way of summary judgment and I grant judgment in favour of BDW in the sum of **£14,539,243.45**, together with interest and costs.

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Neutral Citation Number: [2024] EWHC 3569 (TCC)

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 19 December 2024

BEFORE:

MRS JUSTICE JEFFORD DBE

BETWEEN:

- (1) 381 SOUTHWARK PARK ROAD RTM COMPANY LIMITED
(2) SOPHIA ELIZABETH SMITH
(3) ARMAND JUNIOR HOLDINGS LIMITED
(4) PIZARRA Y BALDOSAS SA
(5) LAURA JANE MACKIE
(6) CHARLES WILLIAM GEORGE FRY and EDWARD CHRISTOPHER
MURRAY FRY
(7) GLORIA NOK TUNG CHAN
(8) PROPERTIES (RESIDENTIAL 2) LIMITED
(9) SALIM LALANI and ROZIM LALANI
(10) KAMALA NADIR KYZY BUCHHOLZ
(11) LUKE EDWARD PRICE

Claimants

- and -

- (1) CLICK ST ANDREWS LIMITED
(IN LIQUIDATION)
(2) CLICK GROUP HOLDINGS LIMITED

Defendants

MR M LEVENSTEIN appeared on behalf of the Claimants
The Defendants did not appear and were not represented

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

MRS JUSTICE JEFFORD:

The application

1. The leaseholder claimants, that is the second to eleventh claimants, make an application for a Building Liability Order under section 130 of the Building Safety Act 2022 against a background which is already set out in my judgment ([2024] EWHC 3179 (TCC)). In anticipation of that application being made, I made two relevant findings as to relevant liability in that judgment.

2. Section 130 of the Building Safety Act 2022 provides as follows:

"(1) The High Court may make a building liability order if it considers it just and equitable to do so.

(2) A “building liability order” is an order providing that any relevant liability ... of a body corporate (“the original body”) relating to a specified building, is also -

(a) a liability of a specified body corporate ...

(3) In this section, “relevant liability” means a liability (whether arising before or after commencement) that is incurred --

(a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or

(b) as a result of a building safety risk."

A building safety risk is defined as:

"... a risk to the safety of people in or about the building arising from the spread of fire or structural failure."

Subsection (4) provides that:

"A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body."

3. In my judgment I found that there was a relevant liability within the meaning of section 130(3)(b) in two respects. Firstly, at paragraph 198, I said that in the light of the evidence of Mr Ferguson, the architectural expert, I was satisfied that there was a breach of certain clauses of the Freehold Purchase Agreement in the respects set out above in that judgment and that those breaches gave rise to a relevant liability for the purposes of section 130(3)(b). The relevant paragraphs immediately were the paragraphs of my judgment concerned with the evidence in relation to fire safety and I set out Mr Ferguson's conclusions at paragraph 194 which drew together the respects in which his expert evidence, which I accepted, was that there was inadequate fire protection within the building. The second respect in which I found that there was a relevant liability within the meaning of section 130(3)(b) was in respect of the structural adequacy of certain beams which, in effect, support the upper storey of the property. That finding is set out at paragraph 219 of my judgment. Those were my findings as to relevant liability.
4. The order - and I will return to this point – is, therefore, necessarily sought in respect of that liability and, if made, the order will provide, as set out in section 130(2), that the relevant liability of Click St Andrews is the liability of another body corporate. The order is sought against the second defendant, Click Group Holdings, on the basis that Click Group Holdings is an associated company of Click St Andrews within the meaning of the Act. Further, as section 130(1) provides, the order will be made if I consider it just and equitable to do so.
5. Before I turn to those issues, I should say that there was always a claim for a Building Liability Order in the Particulars of Claim but, originally, that was made only on the basis of a breach of section 2A of the Defective Premises Act 1972. I did not find there to be any basis for finding such a breach in this case. That is explained in my judgment and I say no more about it. However, a late amendment was made to add a claim based on a relevant liability in the sense of a liability incurred as a result of a building safety risk and that is what I found there to be in the respects that I have already set out.

Associated body corporate

6. Turning then to the provisions of the Act, it seems to me, firstly, that there is no real issue that Click Group Holdings is an associated company of Click St Andrews for these purposes. Section 131 of the Act provides at subsection (1) that:

"(1) For the purposes of section 130, a body corporate (A) is associated with another body corporate (B), if -

(a) one of them controls the other, or

(b) a third body corporate controls both of them."

The subsection then provides that the following subsections (2) to (4) set out the cases in which a body corporate is regarded as controlling another body corporate. One of those subsections, subsection (4), provides that:

"A body corporate (X) controls another body corporate (Y) if X has the power, directly or indirectly, to secure that the affairs of Y are conducted in accordance with X's wishes."

7. The position in relation to these two companies, Click St Andrews and Click Group Holdings, is that Click Group Holdings, in my judgment, does control or did control Click St Andrews. That is because Click Group Holdings holds all the shares of Click Above Limited and Click St Andrews is a wholly owned subsidiary of Click Above Limited. Therefore, Holdings controlled Click St Andrews indirectly in the sense that it was able, through that corporate structure, to secure that the affairs of Click St Andrews were conducted in accordance with its wishes. Indeed, on the facts, as Mr Levenstein has submitted, the controlling or directing mind of both of these companies was the same person, that is, Mr Emmett who appeared at trial on behalf of Click Group Holdings .
8. There are therefore, in my judgment, two factors in the Act which are satisfied, namely, that there is a relevant liability and that this claim is made against a body corporate which is associated with Click St Andrews within the meaning of the Act. That, therefore, means that the principal issue I have to consider is whether it is just and equitable to make this order.

Just and equitable

9. The only case to date in which that short phrase has been considered is the decision of the First Tier Tribunal, albeit an FTT constituted by the President of the Upper Tribunal, Lands Chamber, and the Deputy President of the Upper Tribunal, Lands Chamber, in *Triathlon Homes LLP and Stratford Village Development Partnership* [2024] UKFTT 26 (PC). The application before the FTT was for a remediation contribution order under section 124 of the Building Safety Act 2022. That provides a somewhat different jurisdiction from the jurisdiction of the High Court to make a Building Liability Order but it is also a necessary element of the making of that order that it should be just and equitable to do so. The FTT was therefore concerned with the words that also appear section 130.

10. In paragraph 237, the tribunal said this:

"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."

There is however, to my mind a steer, in that paragraph to have regard to the purposes of the Act and to all relevant factors.

11. In terms of the purposes of the Act, at paragraph 266 the First Tier Tribunal said this:

"The obvious purpose behind the association provisions is to ensure that where a development has been carried out by a thinly capitalized or insolvent development company, a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedy in the relevant defects by hiding behind the separate personality of the development company. It seems to us that the situation of SVDP with its relatively precarious financial position and its dependence for financial support upon Get Living, its wealthy parent company, constitutes precisely the sort of circumstances at which these provisions are targeted."

12. This case seems to me to have similarities to that scenario in that Click St Andrews, to whom the relevant liability attaches, was a special purpose vehicle whose sole existence was to acquire the freehold of the property, in due course to develop the top floor of the property, and then to divest itself of the freehold as it sought to do through the Freehold Purchase Agreement. It was inevitably thinly capitalised and dependent on inter-company or inter-group loans for its financial wellbeing. Those are matters that were considered in the course of the applications for a freezing injunction and the evidence that was adduced at those hearings supports that position.
13. The difference, if there is a relevant difference, here is that the description of Click Group Holdings as a wealthy parent may well be misplaced. Indeed, one of the reasons why the freezing injunction was not continued against Click Group Holdings was the perception that, in truth, it had no real assets. There remains considerable doubt as to the financial standing of Click Group Holdings.
14. Mr Levenstein, nonetheless, submits that it would still be just and equitable to make a Building Liability Order in respect of Click Group Holdings because the emphasis, as he put it, should be on the financial position of the first defendant rather than on the parent company. He relied in part on paragraph 255 in the decision in *Triathlon* in which the tribunal said this:

"The increase in value of Get Living's investment in East Village is not a matter to which we give great weight, although to the extent that it is relevant at all it is obviously a point in favour of making an order. It is common ground that Get Living has the resources to enable it to comply with any order the tribunal may make, but even if there had been doubt about that we think it would be an unusual case in which the source or extent of a respondent's assets or liabilities will carry much weight when deciding whether it is just and equitable to order it to bear the cost of remediation."

15. I respectfully agree with that approach. In the circumstances of this case, it seems to me that the indicators, at least prima facie, are very much in favour of the making of an order in respect of Click Group Holdings because it is the holding company of Click St Andrews, albeit by one step removed, and because the directing mind of the companies is common.

The arguments of Click Group Holdings

16. It is fair that I should address a number of further points on which I did not ask Mr Levenstein to address me at this hearing, not least because he did so in the course of the trial, and particularly in the context of the application to amend the Particulars of Claim. As I have mentioned that application was made in the course of the trial to seek a building liability order against an unspecified corporate entity on the basis of a relevant liability rather than a liability under the Defective Premises Act. It was the subject matter of argument and objection from the second defendant then represented in person. The same arguments were capable of being deployed in objection to the making of the Building Liability Order. I dealt with them at the time but I deal with them again now briefly and will be forgiven for some degree of repetition.
17. Firstly, it was argued on behalf of Click Group Holdings that the amendment ought not to be allowed because there was no expert evidence in relation to the fire safety and structural matters relied upon. That was particularly so in relation to fire safety where the argument was advanced that no fire safety expert had been called. That was a point I addressed in my judgment. It was a thoroughly bad point. Mr Ferguson, the architectural expert, had been called to give that evidence. He did give that evidence and it is recited in my judgment. There were specific points on which it was suggested he had not been fully informed - for example, that sprinklers had been installed - but that was simply wrong. He had been asked about them and given his opinion.
18. It was also suggested that the second defendant had been deprived of the opportunity to cross-examine specifically on the requirements of the Building Safety Act and whether there was a building safety risk. That was again, in my view, a misconceived argument. There may be cases where there is a live issue as to whether a risk is a building safety risk but, in this case, the nature of the risks was straight forward. The risks were those posed by inadequate fire protection and an insufficient load bearing capacity of beams. Nothing was identified that could have been put, or would have been put, with the benefit of distinct expert evidence, to suggest that those did not pose a risk to safety of people from spread of fire or structural failure, reflecting the definition of a building safety risk.

19. That point is of some importance because it has been submitted to me in the course of this application that one of the few reasons that might militate against it being just and equitable to make the order would be if the body against whom that order was sought had not had the opportunity to have a fair trial in respect of the making of the order.
20. In this case, that potential argument does not run because Click Group Holdings participated in the trial and not only had the opportunity to have fair trial but did have a fair trial, and the arguments that were advanced in opposition to the application to amend had no merit for the reasons I have just given.
21. The second argument advanced in relation to the application for leave to amend, which is also relevant to the application now made, is that it would not be just and equitable to make any order because of the terms in which it was claimed. The submission made was that no party was identified on the face of the pleading against whom that order would be sought. That point had no merit in the circumstances of this case. It was very clear from submissions, and is again recorded in my judgment, that, despite the absence of the naming of any party in the pleadings, a claim would be made against Click Group Holdings.
22. In any event, the Act does not require a party to be identified in pleadings or joined into proceedings before such an order is made. That is because it may not be apparent that a particular company will be pursued, and which company may be pursued may turn on changeable financial arrangements, or the company against whom the order is sought may not even exist at the time of the original proceedings. Before the order is made, the relevant body corporate must be specified but it does not follow that the associated company must be named or specified in the substantive proceedings. It is fair to say that I have observed in another context that where it is known that an application will be made against a particular party, it is sensible to join them into the ongoing proceedings to ensure that all issues are dealt with, but that does not preclude the seeking of a Building Liability Order against a party not joined.
23. In this case, none of this arises because Click Group Holdings was a party to the proceedings.

24. The only other argument advanced was that the claimants have a contractual arrangement with the defendants and a Building Liability Order would allow them to "correct their own failure" - presumably meaning their failure to ensure that any claims could potentially be enforced against both defendants. The individual leaseholders, however, do not have a contractual arrangement with Click Group Holdings but only with Click St Andrews. However, Click Group Holdings guaranteed the performance of Click St Andrews Limited under the Freehold Purchase Agreement and it seems to me that that guarantee militates in favour of Click Group Holdings Limited being liable to the leaseholders for the losses that flowed from the breaches of the Freehold Purchase Agreement which give rise to the relevant liability. The making of that Building Liability Order, albeit it may be of limited value given the financial position of Click Group Holdings, provides the leaseholders with a direct route to claim against Click Group Holdings which they otherwise do not have.

Conclusions

25. For all those reasons, I consider that it is just and equitable to make the Building Liability Order.
26. I said at the outset that, if made, the terms of that order would be that the relevant liability of Click St Andrews is also the liability of Click Group Holdings. In that context, the liability must, in my judgment, be the relevant liability only because that is the only matter in respect of which the Act gives me the jurisdiction to make such an order.
27. However, in the course of argument, Mr Levenstein submitted that the Building Liability Order would or should extend to liability in respect of all of the leaseholders' losses whatever the breach from which they arose. He argued, but did not develop the argument, that section 130 acted as a gateway to a broader order as to the liability of an associated body corporate.
28. I simply do not see how that argument can be made out. The leaseholders' individual losses largely, if not entirely, flowed from the water ingress that occurred in July 2021. The water ingress, and the carrying out of the works which gave rise to it, did not give

rise to a relevant liability within the meaning of the Act. They had nothing to do with a risk to the safety of people in or about the building arising from the spread of fire or structural failure. It makes no sense to treat the “relevant liability” as a gateway to recovery of all losses arising from any liability that might have been found on the part of Click St Andrews. That is not what the Act provides for.

29. I cannot, however, see anything that requires me to quantify the liability in respect of the relevant liabilities as set out in my judgment at the point of making the Building Liability Order. That is particularly relevant here because of the potential issues in identifying what losses, beyond the cost of remedial works, flow from the relevant liability and not the water ingress. It may in future often be the case that such a Building Liability Order will be made in terms of liability for an amount, particularly if, as here, the order is being made following a trial which has identified the extent of the liability in monetary terms. But it does not seem to me that I am required to do that and to make an order in an amount. At present, there are no figures before me which would enable me to do so, or at least to do so without considerable further interrogation of the spreadsheets that have been produced for the purposes of this hearing. That is not a reason not to make the order in terms that reflect the wording of section 130.
30. Therefore, the order that I will make, subject to any further refinement of the language, is a Building Liability Order providing that the relevant liability of Click St Andrews Limited to the leaseholders, as set out in my judgment, is also the liability of Click Group Holdings to the same leaseholders.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge



Neutral Citation Number: [2025] UKUT 39 (LC)

Case Nos: LC-2024-490
and LC-2024-685

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
APPEALS AGAINST DECISIONS OF THE FIRST-TIER TRIBUNAL PROPERTY
CHAMBER

FTT Refs: MAN/00BY/LRM/2022/0007 and LON/00BK/LRM/2023/0022

Royal Court of Justice,
Strand, London WC2A 2LL
7 February 2025

*LANDLORD AND TENANT – RIGHT TO MANAGE – qualifying rules – self-contained
part of a building – vertical division – capable of independent redevelopment – independent
services – s.72(3)-(4), Commonhold and Leasehold Reform Act 2002*

BETWEEN (LC-2024-490):

THE COURTYARD RTM CO LIMITED (1)
THE STUDIOS RTM CO LIMITED (2)
X1 THE TERRACE RTM CO LIMITED (3)

Appellants

-and-

ROCKWELL (FC103) LIMITED (1)
GREY GR LP (2)

Respondent

AND BETWEEN (LC-2024-685):

14 PARK CRESCENT LIMITED (1)
PC INVESTMENTS LIMITED (2)

Appellants

-and-

14 PARK CRESCENT RTM CO LIMITED

Respondent

Martin Rodger KC, Deputy Chamber President

14-15 January 2025

Plaza Boulevard, Liverpool L8 (LC-2024-490) and
14 Park Crescent and 8 Park Crescent Mews, London W1 (LC-2024-685)

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Winston Jacob, instructed by public access, for the appellants in LC-2024-490
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Justin Bates KC, instructed by Northover LLP, for the appellants in LC-2024-685
James Fieldsend, instructed by Wallace LLP, for the respondent in LC-2024-685

The following cases are referred to in this decision:

Assethold Ltd v Eveline Road RTM Company Ltd [2024] EWCA Civ 187, [2024] Ch 204
Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101
Crafrule Ltd v 41-60 Albert Palace Mansions (Freehold) Ltd [2011] EWCA Civ 185, [2011] 1 WLR 2425
FirstPort Property Services Ltd v Settlers Court RTM Co Ltd [2022] UKSC 1, [2022] 1 WLR 519
L M Homes Ltd v Queen Court Freehold Co Ltd [2020] EWCA Civ 371, [2020] QB 890
Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd [2015] EWCA Civ 282; [2016] 1 WLR 275
Oakwood Court (Holland Park) Ltd v Daejan Properties Ltd [2007] 1 EGLR 121
Re Holding and Management (Solitaire) Ltd [2008] L & TR 16
St Stephens Mansions RTM Co Ltd v Fairhold NW Ltd [2014] UKUT 541 (LC)

Introduction

1. Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 provides a statutory right for a leaseholder-owned RTM company to manage premises to which the Chapter applies. These appeals are concerned with the qualifying rule that the statutory right is available only in respect of premises which consist of a “self-contained building or part of a building”.
2. The two appeals are from separate decisions of the First-tier Tribunal, Property Chamber, (the FTT) and they are concerned with four quite different premises. One appeal is about a group of modern, purpose built residential blocks in a new development in Liverpool. The other is about part of a Regency terrace and its associated mews in central London, recently restored to residential use following a major redevelopment. The timing of the two appeals is coincidental, but as they raise similar issues they have been heard together.
3. The first appeal concerns “The Courtyard”, “The Studios”, and “The Terrace”, three separate blocks forming part of the Plaza Boulevard development on the southern fringe of Liverpool city centre. It is no longer suggested that any of the blocks is a self-contained building in its own right, but each is said by the RTM company which bears its name to be a self-contained part of a building. By a decision published on 2 May 2024 the FTT disagreed and ruled that none of the blocks is eligible to acquire the right to manage because none is self-contained in the sense required by section 72(3) of the 2002 Act. The RTM companies are the appellants in the first appeal.
4. The second appeal concerns 14 Park Crescent and 8 Park Crescent Mews East in central London, which formerly housed the Bloomsbury and Marylebone County Court. For convenience I will refer to it simply as “No.14”. In 2023 14 Park Crescent RTM Co Ltd claimed the right to manage No. 14 (including the mews) on the basis that it comprises a self-contained part of a building. In a decision handed down on 18 July 2024, the FTT agreed and dismissed the objections of the immediate landlord and its superior, who are now the appellants in the second appeal.
5. In the first appeal the RTM companies were represented by Mr Winston Jacob, the first respondent (landlord of The Courtyard and The Studios) was represented by Ms Sonia Rai, and the second respondent (landlord of The Terrace) was represented by Mr Simon Allison. In the second appeal Mr Justin Bates KC represented both landlords and Mr James Fieldsend represented all three RTM companies. I am grateful to them all.

The statutory provisions

6. Sections 72 to 77 of the 2002 Act explain the circumstances in which the right to manage can be acquired and exercised. These qualifying rules, as they are described in the cross heading to that group of sections, begin by identifying the premises to which the right applies in section 72. The whole section provides:

"Premises to which this Chapter applies

- (1) This Chapter applies to premises if—

- (a) they consist of a self-contained building or part of a building, with or without appurtenant property,
 - (b) they contain two or more flats held by qualifying tenants, and
 - (c) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.
 - (2) A building is a self-contained building if it is structurally detached.
 - (3) A part of a building is a self-contained part of the building if—
 - (a) it constitutes a vertical division of the building,
 - (b) the structure of the building is such that it could be redeveloped independently of the rest of the building, and
 - (c) subsection (4) applies in relation to it.
 - (4) This subsection applies in relation to a part of a building if the relevant services provided for occupiers of it—
 - (a) are provided independently of the relevant services provided for occupiers of the rest of the building, or
 - (b) could be so provided without involving the carrying out of works likely to result in a significant interruption in the provision of any relevant services for occupiers of the rest of the building.
 - (5) Relevant services are services provided by means of pipes, cables or other fixed installations.
 - (6) Schedule 6 (premises excepted from this Chapter) has effect.”
7. Section 72(1)-(5) closely mirror section 3(1)-(2), of the Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act), which identify the premises to which the right of collective enfranchisement applies. Substantially the same language is also found in section 117(5), Building Safety Act 2022 (but with the clarification that “it” in section 72(3)(b) is a reference to “the part”). Each statutory regime therefore applies to a self-contained building, meaning one which is structurally detached, and to a self-contained part of a building, meaning one which satisfies the conditions in section 72(3) and (4).
8. The right to manage provisions in the 2002 Act have been considered in two important decision of the Court of Appeal and the Supreme Court. In *Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd* [2015] EWCA Civ 282 the Court of Appeal determined that an RTM company may only manage one building. In *FirstPort Property Services Ltd v Settlers Court RTM Co Ltd* [2022] UKSC 1 the Supreme Court concluded that the right to manage does not extend to shared estate facilities used in common by the members of the RTM company and tenants of other blocks on the same estate but is confined to premises which the RTM company can manage on its own. To permit management of shared facilities would be counter to a fundamental purpose of the 2002 Act, namely, “to confer management rights and responsibilities on a body (the RTM company) which is accountable to and controlled by the very tenants who will be affected by the conduct of that management, through their right to be members of the RTM company, rather than by

either the landlord or a third party manager which will have its own agenda.” I will return to *Settlers Court* later in this decision.

Previous cases on self-containment

9. A useful general statement of principle which should be kept in mind when considering the issue of self-containment can be found in *Assethold v Eveline Road RTM Co Ltd*, [2024] EWCA Civ 187, a case under section 72 of the 2002 Act in which the issue was whether premises could qualify as a self-contained part of a building even if they were capable of being subdivided into smaller parts. Lewison LJ explained, at [36], that:

“Whether premises satisfy the definition of ‘self-contained building or part of a building’ is a purely physical test. The definition is concerned only with the structure of the built envelope, its internal structure, and the separability of services.”

In emphasising that this is a “purely physical test” Lewison LJ was ruling out any need to consider the entitlement of any person to carry out works to redevelop the building, in whole or in part, or separate the services provided to it. The same point had previously been made in *Oakwood Court (Holland Park) Ltd v Daejan Properties Ltd* [2007] 1 EGLR 121 (a 1993 Act case) and in *St Stephens Mansions RTM Co Ltd v Fairhold NW Ltd* [2014] UKUT 0541 (LC), at [88], but on each occasion in relation to the third condition alone. It can now be seen that the same focus on what is physically achievable, whether or not it is legally or contractually permissible, should be applied generally to each limb of the test of self-containment.

10. The requirement that, to be a self-contained part of a building, premises must constitute “a vertical division of the building” (section 72(3)(a)), has been considered only once at this level, by the Lands Tribunal in *Re Holding and Management (Solitaire) Ltd* [2008] L & TR 16. The premises in that case comprised a block of flats which formed part of a terrace, beneath which was an underground carpark. Access to the car park from the premises passed under the neighbouring building in the terrace, and two of the parking spaces allocated to the premises were also under the neighbour. The proportion of the premises which lay below the adjoining premises was only 2% of the whole by area. The leasehold valuation tribunal had decided that this layout did not prevent the premises from being a vertical division of the terrace as a whole, but the Lands Tribunal (George Bartlett QC, President) disagreed and held that while a *de minimis* departure from a vertical plane through the building could no doubt be ignored, the requirement of vertical division was otherwise unqualified. In particular, section 72(3)(a) did not invite consideration of the materiality of any overlapping parts of the building (unlike the corresponding provision of the Leasehold Reform Act 1967) and none should be imported.
11. The only other consideration of vertical division to which I was referred was an aside by Smith LJ in a case under the 1993 Act, *Crafrule Ltd v 41-60 Albert Palace Mansions (Freehold) Ltd* [2011] EWCA Civ 185, in which the Court of Appeal determined that premises can qualify as a self-contained part of a building even if capable of being subdivided into smaller parts, each of which also satisfied the test of being self-contained in section 3, 1993 Act. In the course of her judgment in *Crafrule*, Smith LJ observed:

“... I interpose to say that, in my view, the expression ‘vertical division’ is rather odd. A division is a line of no thickness. It seems to me that what section 3(2)(a) means is that the premises must be a vertical slice of the building.”

12. The second aspect of self-containment, in section 72(3)(b), is that the structure of the building must be such that the part of the building which is said to be self-contained could be redeveloped independently of the rest of the building. This requirement has not previously been the subject of consideration on an appeal. In the only case at first instance to which I was referred (*Stamford Hill Mansions RTM Co Ltd v Daejan Properties Ltd*, a 2007 decision of a leasehold valuation tribunal) it was suggested that the concept of redevelopment as used in the 1993 Act need not mean total redevelopment but could also include the demolition or reconstruction of, or carrying out substantial works of construction to, the whole or a substantial part of the premises (each of which is an operation identified in section 23(2), 1993 Act, as sufficient to defeat a tenants’ claim to enfranchise). The LVT adopted the same approach and determined that a building which could be redeveloped internally, without disturbing the exterior structure, satisfied the requirement of section 72(3)(b).
13. The third requirement of self-containment, namely the ability to provide services to the relevant part of the building independently, without significant interruption to the services provided to the remainder of the building, has been considered more often. Each case has turned on its own facts, and only general guidance on how the issues should be approached has been suggested.
14. The *St Stephens Mansions* appeal in this Tribunal concerned separate RTM claims in respect of connected blocks of flats. These were served by a single metered mains water supply pipe which ran underground to a pump house housing shared water tanks and pumps from which water was distributed through separate outflow pipes. In agreement with the leasehold valuation tribunal, it was held that the storage of water in shared tanks and its distribution through shared pumps meant that the water provided to one part of the building was not provided independently of the water provided to the remainder of the building. The availability of the right to manage therefore turned on the separation of the relevant services and whether water could be supplied independently to the subject premises “without involving the carrying out of works likely to result in a significant interruption in the provision of any relevant services for occupiers of the rest of the building” (section 72(4)(b)).
15. In addressing that issue I adopted, with slight adaptation, the five step approach suggested by HHJ Hazel Marshall QC in the *Oakwood Court* case (a decision of the County Court under the 1993 Act). Those steps are:
 - (1) First, to identify the services provided to occupiers of the part of the building of which RTM is claimed (“the RTM part”) which are in issue because they are not provided independently.
 - (2) Consider whether those services can be provided independently to the RTM part independently of their provision to the remainder of the building.

- (3) Ascertain the works required to separate the respective parts of the services supplying the RTM part and the remainder of the building, so that such services would thereafter be supplied to each part independently of the other.
- (4) Assess the interruption to the services provided to the remainder of the building which would be caused by carrying out the works.
- (5) Decide whether that interruption would be “significant”.

Plaza Boulevard

16. The Courtyard, The Studios and The Terrace are parts of the Plaza Boulevard complex of five blocks which I will refer to as “the Estate”. The Estate was developed in phases, and although the individual blocks are separated from each other, each successive phase is structurally attached to a central podium which spans the area between them and to an underground car park beneath the podium which serves them all. It was originally suggested that each block is a self-contained building, but that argument was not pursued before the FTT.
17. The Estate stands on rising ground, so that the ground level at one end is approximately two floors above ground level at the other end. A single large underground car park lies beneath the Estate and is overlapped by each of the three blocks. The area of the car park beneath each block is not reserved for the exclusive use of the occupants of the block which sits on top of it. Parking spaces are let to tenants of different blocks, and to the public, and tenants of flats in the building have rights of access over the whole car park. It is not clear from the leases of each building how much, if any, of the basement level is demised to the respondents and whether it includes any part of the car park, but I was told that at least some of the leases of spaces in the car park have been registered against the freehold title to the Estate, rather than against the head-leasehold titles of the respondents.
18. Before the FTT it was common ground that the three blocks were not self-contained buildings and did not satisfy the first limb of section 72(1)(a). They were said to be self-contained parts of a building within the second limb. The unstated assumption is that “the building” of which each block is part comprises either the whole of the Estate or at least those built elements adjacent to each building including the underground car park and the podium deck which connects the buildings at ground floor level.
19. The extent of the premises over which the right to manage is claimed was not clearly defined in the claim notices which refer to the blocks simply by their postal addresses. The argument before the FTT therefore took an unusual course. Rather than the RTM company identifying the premises over which it claimed rights, the premises to which each claim related was treated as an open question which was to be answered by considering which, if any, premises could be identified which both included the individual blocks and satisfied the requirements of section 72(3) and (4).
20. Three alternative configurations were considered by the FTT. The first treated the premises as comprising only the building above ground level. There appears to have been very little argument about that possibility which was dismissed by the FTT and has not been revived on appeal. Another option assumed that the premises comprise the whole of

each block, both above ground and down to basement level, and that at basement level they extend beyond the footprint of the block to take in an undefined area of the car park. This was rejected by the FTT because it was not a vertical division and included common areas the use of which was shared between different blocks, contrary to the decision of the Supreme Court in *Settlers Court*.

21. The FTT therefore considered a third option, namely that in each case the premises comprised the area enclosed within the block's steel frame which runs from the basement to the top floor. At ground level and above each block cladding panels are fixed to the front face of the columns and beams of the steel frame. But at basement level only part of the area within the steel frame is enclosed by block walls while the rest is open and forms part of the shared car park. The extent of the open areas within the steel frame at basement level is different for each building. The FTT said the area was "relatively small", which is a fair comment if the comparison is with the car park as a whole. By my own very rough estimate, at basement level, only about 5% of the area defined by the steel frame of The Courtyard is included within the car park, but about a quarter or a third of the corresponding area beneath The Terrace and The Studios is within the car park.
22. At basement level a largely continuous concrete floor slab extends well beyond the footprint of the individual buildings. But in one place (beneath The Studios) an expansion joint in the concrete slab follows the line of steel columns which support the building. There are similar columns throughout the car park, which support the buildings above as well as the podium deck and road at ground level between them.
23. The FTT noted that "the drawing of a vertical line from the outmost edge of the steel structure of each of the Premises to basement level must at some point(s) bisect the basement slab where there is no division in reality". It regarded that absence of a physical division through the basement slab as fatal to the requirement that the claimed premises must constitute a vertical division of the building.
24. No other part of the structure of The Studios or The Courtyard gave rise to any difficulty in relation to the requirement of vertical division, but in the case of The Terrace the FTT considered whether the test was failed for a further reason. One side of The Terrace fronts Sefton Street. That facade features what the FTT referred to as "balconies". These are continuous bays which project from first to fifth floor level, extending beyond the steel frame of the building and overhanging the public highway. The RTM companies argued that the requirement of vertical division has no application to any part of the block which is not structurally connected to the remainder of the Estate, but the FTT rejected that argument. It nevertheless considered that although these balconies are "a deviation from the vertical line that runs down the steel frame wall" this deviation was *de minimis* (too trivial to matter). It justified that conclusion by saying that the projections featured on part only of one wall of the building and that it would be capricious or absurd to distinguish between The Terrace, which had such features, and the other buildings which did not.
25. Because of the importance the FTT attributed to the undivided floor slab, it did not have to consider two other features of The Terrace which are relied on by the landlords. These are a large parapet on the flank wall which overhangs the podium, and an entrance porch which projects beyond the face of the block on the podium side.

26. The FTT received evidence from two witnesses who had been involved in the design and construction of the Estate. It found that each of the blocks had been erected separately and that each could be redeveloped independently of the remainder of the Estate. It acknowledged that the podium deck which sits above the car park and spans the space between the individual blocks is supported on beams attached to the steel building frames. If the steel frames were removed in their entirety the podium deck would collapse unless it was supported. Similarly, a staircase between Sefton Street and the podium deck, which is supported on one side by the flank wall of The Terrace, would require alternative support if The Terrace was to be entirely redeveloped.
27. For the most part, each of the blocks on the Estate has its own independent services. Each was originally provided with its own independent fire alarm system including a separate control panel. After the Grenfell Tower fire, these fire alarm systems were linked but by the FTT hearing The Courtyard and The Terrace were no longer linked. The only continuing connection was between the fire alarm systems serving The Tower and The Studios.. The evidence on this was sparse, but the FTT concluded that any connection could be decommissioned and independent service to each of the two blocks could be reinstated without significant interruption.

Park Crescent

28. Park Crescent was designed by John Nash and completed in 1820 as a terrace of grand houses, each sharing a solid party wall with its neighbours on either side. It suffered substantial bomb damage during the second world war and in the 1960s it was redeveloped as offices with a restored façade after the original design supported by new steel and concrete frames. The County Court was at the western end, incorporating No. 14 and its mews, and it was closed eleven years ago as Park Crescent was redeveloped and restored to residential use.
29. The freehold of Park Crescent is held by the Crown, which does not object to the acquisition of the right to manage. The freehold is subject to two separate headleases, one of which is held by the second appellant, PC Investments Ltd. Part of that title, comprising No.14 and the mews behind it, is subject to an underlease held by the first appellant, 14 Park Crescent Ltd.
30. The redevelopment of No.14 created six new apartments in the main building and a further three in the mews. Each of these apartments has been let on a new long lease. The mews and the main building are connected by internal corridors and staircases and jointly comprise the premises for which the right to manage is claimed.
31. No.14 lies between 12 Park Crescent on one side and 98 Portland Place on the other. The whole Crescent was redeveloped between 2012 and 2018 as one project, but in stages, so that No.12 was completed and occupied before work began on No.14. No.14 underwent almost total demolition except for the front façade and its 1960s steel and concrete frame which were retained. In the course of the work the original foundations of the party walls were excavated, and new deeper and more substantial foundations were inserted below them, in effect underpinning the party walls. A new basement level was added, and a new residential mews building was created in place of former mews offices.

32. A number of features of the building are relied on by the appellants in support of their case that No.14 is not a self-contained part of a building, either because it does not constitute a vertical division of the building or because it could not be redeveloped independently of the rest of the Crescent.
33. There are movement joints on the façade of No.14 which do not align with the party wall behind. The movement joints are located in the gaps between the steel frame which supports the façade of No.14 and the frames supporting the facades of the adjoining buildings. In that location the façade is supported by the party wall. It was the view of the appellant's expert witness, Mr Ilsley, that if No.14 was to be removed in its entirety along the inside face of the party wall, the section of the front elevation in front of the party wall, up to the movement joint, would be unsupported and would collapse. There are similar movement joints in the vicinity of the party wall with 98 Portland Place and at the rear of the building.
34. Because the movement joints and the party wall do not align, Mr Bates KC also submitted that it is not possible to divide the Crescent vertically down the line of the movement joint and that any division which follows the party wall would leave an unsupported portion of the façade.
35. A vertical division along the line of the party wall would also encounter the new foundations, the whole of which are said by the appellants to "belong" to No.14 and to be part of the premises over which the right to manage is claimed. A vertical division of No.14 would therefore have to deviate around the foundations in order to include them in the managed premises. Additionally, the new foundations could not be removed as part of a redevelopment of No.14 without destabilising the party wall and causing it to collapse. The same is said to be true of the mews.
36. Despite the various points made about the structure of the building and the support which No.14 provides to and receives from its neighbours on either side, it was agreed by Mr Ilsley that, by using temporary supports and restraints it would be possible to redevelop No.14 without redeveloping its neighbours.
37. At the rear of No.14, where it abuts the rear of 98 Portland Place, a balcony on the neighbouring premises projects across a straight line drawn through the centre of the party wall separating the two buildings. This was said to prevent a vertical division of No.14 from its neighbour because it would create a "dog leg" rather than a perfectly straight line. At the front of the mews, a step, which is said to be part of the claim premises, projects beyond a vertical line drawn down the face of the building. This was said by the appellants to be critical to satisfying the vertical division requirement as a vertical line drawn through the step would leave part of the premises on the wrong side, while a line which followed the surface of the step would not be completely vertical.

Vertical division – the issues

38. The requirement of vertical division gives rise to a number of distinct grounds of appeal and cross appeal in both proceedings.

39. It is convenient to identify the issues of principle and to consider the facts of the individual appeals as illustrations of points of general application. The issues are all related to the question whether to satisfy the requirement of section 72(3)(a) it is necessary for there to be a physical division through the building, “from the earth to the sky”, as Mr Bates put it, and what any such division must comprise. This gives rise to the following sub issues:
1. Is it necessary to consider each face of the building, or is the test of vertical division concerned only with the connection between the premises and the rest of the building?
 2. If the focus is only on the area where the premises abut the remainder of the building, does it matter if part of the premises overhangs airspace above the rest of the building?
 3. Does it matter if a notional line dividing the premises from its neighbour intersects with a solid building component, such as a basement slab or foundation?
 4. Is it necessary that the division of the premises from the rest of the building be a perfectly straight line passing laterally from the front of the building to the back?
 5. Can the premises constitute a “vertical division of the building” if part of the premises is undivided from the remainder of the building?
42. Other issues may arise in the Plaza Boulevard appeal, depending on how these issues of principle are resolved. They include: the extent to which a deviation from the requirement of a vertical division can be regarded as *de minimis* and of no consequence; the significance of the movement joint in the basement slab beneath The Studio; and the consequences of treating the outer face of the steel frame as the limit of the premises, leaving the cladding affixed to the steel frame on the wrong side of the boundary line.

Vertical division – discussion

43. I begin with two preliminary points.
44. First, each of the conditions in section 72(3) describes a different aspect of the self-containment required for premises to be a self-contained part of a building. The few cases in which the definition has been considered have tended to focus on one or other of the conditions, but in interpreting each of them it is relevant to keep in mind that they are collectively intended to describe a single thing, “a self-contained part of a building”. The label which the statute applies to that thing is an important point of reference when trying to understand what the individual conditions mean. As Lord Hoffmann explained in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 (although there speaking of a contractual rather than a statutory label):

“The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition. In such cases the language of the defined

expression may help to elucidate ambiguities in the definition or other parts of the agreement.”

45. Secondly, in *Crafrule*, Smith LJ commented on the ‘rather odd’ expression ‘vertical division’ and implied that the natural meaning of ‘division’ was ‘a line of no thickness’. While that is one meaning of ‘division’, the word has a number of related meanings. A division is also one of the parts into which an object can be divided; a portion, or section. It can therefore refer both to the plane through which something is divided, and to the segments produced by the act of dividing it. Smith LJ explained that in this context the expression means that “the premises must be a vertical slice of the building”. But “slice” has the same dual meaning as “division”; it can be either a cut, or, the piece which is cut from something larger. In section 72(3)(a) the sentence as a whole indicates that the word “division” is there being used to refer to a part of a building, with substance and dimensions, rather than to a line of no thickness drawn through a building: it is the whole slice of cake, not just the line along which the cake is cut.
46. Although section 72(3)(a) might appear rather odd, its purpose and effect are clear. A self-contained part of a building must be a part of the building divided vertically, not horizontally. The effect is to limit the acquisition of the right to manage (or collective enfranchisement in the case of the 1993 Act) to premises which do not overlap or underlap the remainder of the building of which they form part.
47. In the case of the 1993 Act the requirement of vertical division has been said by the Law Commission to be important to prevent the creation of flying freeholds (Law Commission, Leasehold home ownership: exercising the right to manage, No 243, January 2019 at paragraph 2.74). The particular vice of flying freeholds is that they give rise to practical problems in relation to maintenance and support, which cannot be dealt with by covenant since the burden of a positive covenant does not run with freehold land. Under the right to manage, no ownership passes so the specific issues which may have been a concern to the drafters of the 1993 Act do not arise directly. Nevertheless, the statutory context and language are so closely aligned that it seems unlikely, though not impossible, that the test of self-containment should be different as between the 1993 and 2002 Acts. For the purpose of the 2002 Act it must have been considered important to avoid the creation of separate management responsibilities for overlapping parts of the same building.
48. Taken together, these preliminary points lead to a general observation about how the issue of vertical division might usefully be approached. In the course of argument in the appeals, and in the decisions of the FTT, attention was focussed exclusively on the location and features of one or more notional lines drawn through the relevant building either where it abutted its neighbour or on each of its sides. In Mr Bates KC’s submission these lines had to be straight and had to be capable of being drawn ‘from the earth to the sky’. I do not disagree that the boundaries between the premises and the rest of the building must be considered carefully, but the statutory language identifies a single wider question. That is, whether the premises as a whole are a vertical division of the larger building of which they are part, which I take to mean a vertical division rather than a horizontal division or any other configuration. That is the question to be determined, not whether a particular boundary line deviates from the vertical plane.
49. I can now address the issues concerning vertical division in both appeals.

Parts of the premises unconnected to the rest of the building

50. First, in the Plaza Boulevard case the FTT accepted that it was necessary that no part of the premises should overlap any other land (unless the extent of the overlap was *de minimis*). It was “not persuaded ... that it is sufficient for the test in s.72(3)(a) to be satisfied that there is established a vertical division in respect of one face only of the building in question”. It therefore had to address the four bays, or blocks of balconies, which projected over the public highway from the Sefton Street elevation of the Terrace and constituted a “deviation from the vertical line which runs down the steel frame wall”. These features are unconnected to any part of the Estate which is not itself included in the claim and they do not project over the podium or the car park.
51. Mr Allison, for the second respondent, did not seek to uphold the FTT’s reasoning on this point, and he was clearly right not to do so. There is no requirement that, to constitute a self-contained part of a building, premises must not overhang land which is not part of the larger building of which the premises form part. There is no requirement that the facades of the premises be free of projections, or bays or overhangs; what is required is that the part of the building over which the right to manage is claimed must “constitute a vertical division *of the building*”. The only boundaries of the premises which are relevant to this requirement are those which are connected to the rest of the building.
52. That much is obvious, and no contrary argument has been presented. It disposes of one of the FTT’s reasons for rejecting the claim in relation to The Terrace and makes it unnecessary to consider whether it was entitled to treat the projecting balconies as a *de minimis* deviation from the vertical face of the building. It also disposes of the step projecting from the vertical plane of the mews building at Park Crescent, which is not connected to the remainder of the building.

Balconies and projections into airspace over the rest of the building

53. The second and trickier issue is whether the requirement of vertical division applies not only to those building elements which are physically connected to the rest of the building, but also to parts of the premises which are unconnected to the rest of the building but which project into airspace lying above it. The Terrace is structurally attached to the rest of the Estate (i.e. to the podium and the car park) at ground floor and basement levels only. Above the podium there is only airspace. The flank walls and the rear wall of the Terrace abut that airspace, with no further connection of any kind to the rest of the Estate. But at the very top of the flank walls and the rear façade, a parapet projects out into the airspace. The parapet is eight storeys above the podium, but Mr Allison submitted that it prevents the Terrace from constituting a vertical division of the Estate as a whole.
54. I do not accept that submission. It is not supported by the language of section 72(3)(a), which requires only that the premises constitute a vertical division “of the building”. There is no division between The Terrace and the remainder of the building at the level of the parapet, and The Terrace is not prevented from being self-contained, as that expression would ordinarily be understood, by the projection of the parapet. Nor is Mr Allison’s submission supported by consideration of the assumed purpose of restricting the right to manage to premises which comprise a vertical division of a building. No difficulty arises

in relation to the enforcement of rights of support or maintenance part of the premises is not connected to the remainder of the building. The parapet derives no support from the podium or car park and will not be prejudiced by their general state of repair.

55. It is true that, as a general principle of law, ownership of the freehold or leasehold of a building carries with it the airspace above the built structure. That principle led the Court of Appeal in *L M Homes Ltd v Queen Court Freehold Company Ltd* [2020] EWCA Civ 371 to conclude that, in a collective enfranchisement claim under the 1993 Act, the nominee purchaser was entitled to acquire not only the freehold of the building itself, but also the airspace above it. Under section 1(1), 1993 Act, the qualifying tenants were entitled to acquire the “premises” which comprised “the building”. As Lewison LJ explained, although the primary meaning of a “building” may well be a built structure, the context may require a broader meaning. A “building” is not necessarily confined to bricks and mortar and in the 1993 Act its meaning can extend to the airspace immediately above the building necessary to enable maintenance to be carried out. But for the purpose of the 2002 Act, when the issue is whether part of a building constitutes a vertical division of the building as a whole, I do not consider that anything said in *L M Homes* compels a negative answer simply because part of the premises extends a short distance into the airspace eight storeys above the remainder of the building.
56. If I am wrong in that conclusion, and the presence of the parapet in the airspace over the podium is a relevant consideration, it would be necessary to consider whether the degree to which the premises did not constitute a vertical division of the building was *de minimis*. The extent of the projection, the practical consequences of its presence in the airspace, the rights and responsibilities which the RTM company would have in relation to it would all need to be considered before a judgment could be formed on that question. On the other hand, the entrance porch which projects beyond the face of the block on the podium side and which is presumably connected to the podium itself, is an example of a feature which if necessary I would have no hesitation in treating as *de minimis*.
57. I am therefore satisfied that neither The Terrace’s projecting bays or balconies, nor its projecting parapet, prevent it from being a self-contained part of a building.

Obstructions perpendicular to the line of division

58. Thirdly, the FTT also decided that each of the Plaza Boulevard blocks failed the test of self-containment because a vertical line drawn down the face of the building to reach basement level would hit the concrete basement floor slab (it would also pass through the podium, unless the line was drawn tightly to the steel frame which would leave the cladding attached to it outside the premises). In contrast, the FTT which determined the Park Crescent application was untroubled by the fact that a vertical line drawn down the internal face of the party wall of No.14 would pass through the solid foundation supporting the wall. It dismissed the landlord’s objection saying: “there is nothing objectionable about running the dividing line through a shared part of the building”. So the question is, does it matter if a notional line dividing the premises from its neighbour intersects a solid building component running perpendicular to the line?

59. For the Plaza Boulevard RTM companies, Mr Jacob argued that for the purpose of the test of self-containment the division of the building is notional rather than physical and that it did not matter if the notional division passed through the basement floor slab. The contrary case was argued in different ways by each of the three counsel for the landlords.
60. In the Plaza Boulevard case Ms Rai, who was concerned only with The Courtyard and the Studios, conceded that it was not necessary for there to be “an identifiable physical division through the entire building in a vertical line” but nevertheless supported the FTT’s approach on the basis that “due to the nature of the continuous slab, the building cannot be divided”. Mr Allison could find relatively little to say in support of the FTT’s approach. He too accepted that there was no need for physical separation along the line of a vertical division, but he stressed the importance of certainty over where the management responsibilities of the RTM company were to begin and end. He assembled a collection of building components which he said had not been properly considered by the FTT and where the location of the notional dividing line was unclear. He also relied on the fact that the basement slab served the whole of the development, and many parties who were not leaseholders in The Terrace had rights over it. As the Supreme Court’s decision in *Settler’s Court* demonstrated, it was not part of the policy of the Act for an RTM company to have management of areas which were used in common with third parties. I will come to that point later.
61. In the case of a conventional terrace the boundary between one building and the next is likely to be a notional one running down the midline of the party wall, which will usually, or often, be a solid structure. The self-contained part of the terrace which the Court of Appeal considered in *Eveline Road* shared a party wall with the remainder of the terrace (paragraph [13]) but it was not suggested that that was a problem. It is difficult to see why it should be thought to create a problem, whether the building is a conventional terrace or a more elaborate structure. The law has no difficulty in coping with the repair of party structures, or protecting the rights of owners on one side or the other when work has to be done to in the vicinity of a party wall. There is no practical problem between adjoining owners and no reason why there should be between an owner and an RTM company.
62. Standing back and considering whether the premises as a whole constitute a vertical division of the building as a whole, the precise route of the notional dividing line between the premises and the rest of the building risks becoming a distraction and should not be taken to the extremes that have featured in these cases. In my judgment the FTT which decided the Park Crescent case was correct on this issue and the fact that a notional dividing line between the premises and the remainder of the building (wherever precisely it may be drawn) would have to pass through a solid structure running perpendicular to that line is no obstacle to the premises constituting a vertical division of the building. That is because the line is a notional one.
63. The FTT was therefore wrong to conclude that none of the Plaza Boulevard blocks could pass the test of self-containment because they shared an undivided basement slab. It follows that the issue raised in the cross appeal concerning the significance of the movement joint in the basement slab beneath The Studio does not arise.
64. The point was argued differently by Mr Bates KC in the Park Crescent appeal. He referred to the evidence about the way in which the foundations of the party walls between

No.14 and its neighbours had been created: Mr Ilsley had explained that “the new foundations of No.14 now span under and in the voided areas of the neighbouring properties”. The whole of these new foundations served and belonged to No.14 and, Mr Bates KC suggested, they were all part of the premises over which the right to manage was claimed. There was no difficulty in drawing a notional line through the solid foundations, but that would leave part of No.14’s foundations on the wrong side of that line.

65. I do not accept that submission. There is no relevant sense in which the foundations on one side of a party wall “belong to” the building on the other side. Each building has rights of support from the foundations, but the foundations themselves are not jointly owned, let alone owned by one owner to the exclusion of the other. Each owner owns up to the midpoint of the party wall and the foundations beneath it. To put it another way, the foundations on the No.12 side of the party wall are not part of the premises over which the right to manage is claimed and it is therefore unnecessary to consider whether they prevent No.14 from constituting a vertical division of the Crescent.
66. Although Mr Bates KC did not have difficulty with the notion that a building might notionally be divided through a solid wall or foundation, he still relied on the off centre movements joints on the front and rear elevations as creating a problem for the RTM company. I do not see why. The movement joints do not define the boundaries of the premises, which conventionally run through the midpoint of the party walls. They are therefore of no more relevance to the vertical division requirement than the common foundations.

Undivided spaces

67. The next issue arises only in the Plaza Boulevard cases. It is related to the debate over whether it is necessary for there to be a physical division through the building. The FTT had focussed on the absence of a division through the undivided floor slab, but the respondents also argue that the undivided basement car park extending beneath each of the blocks in the complex means that none of those blocks is a self-contained part of a larger building.
68. At basement level there is no real difficulty in identifying the area over which the right to manage is claimed for The Terrace, The Studios and The Courtyard. In most locations it is marked by solid walls enclosing the basement storerooms or service areas beneath the individual blocks. In other areas it is delineated by the lines of steel columns which support the blocks. But in those locations one can easily step or drive between the columns and across the expansion joint, where it is present, and so pass unimpeded from the area of the basement for which the right to manage is claimed to the remainder of the Estate over which it is not claimed.
69. Third parties, without any interest in any of the blocks, have rights to park in the parking spaces immediately under the blocks; in some instances tenants of flats in one block may also be leased parking spaces under a different block.

70. These features of Plaza Boulevard, which are typical of many substantial modern developments, pose the question whether the requirement that the premises must constitute a “vertical division of the building” can be satisfied where part of the premises over which the right to manage is claimed is undivided from the remainder of the building.
71. Mr Jacob submitted that the purpose of requiring that the premises be a vertical division of the building was to enable the right to manage premises to be clearly identified and to prevent horizontal layers of management. Neither of these considerations was undermined by permitting the premises to contain an area undivided from the rest of the building. A notional dividing line could be drawn in an obvious location leaving the area beneath each block lying within the RTM premises and leaving management of the remainder of the car park with the landlords.
72. Mr Jacob acknowledged that the consequence of extending the right to manage to only part of the car park would be that responsibility for practical matters such as cleaning, lighting, signage and road markings would be divided between the landlords who would manage most of the car park and the three RTM companies which would each manage the portion of the car park lying immediately beneath their own block.
73. I do not accept Mr Jacob’s submission. At basement level the car park beneath the individual blocks is not part of self-contained premises in the ordinary sense; it is open-plan and undivided. It is only by drawing a notional line on a plan that a division is achieved, but this is an instance where focussing on a notional dividing line is liable to distract from the real question. To achieve a vertical division the premises must incorporate part of the car park because otherwise the footprint of the buildings at basement level would be smaller than at higher levels, creating an impermissible overhang. But by bringing in part of the car park the premises cease to be a division of the building. There is no division at that point. It does not seem to me to be an apt description of the part of the car park beneath the individual blocks to say that they each form part of a vertical division of the building otherwise consisting of the block above them.
74. Additionally, it seems to me to be unlikely to have been intended that the management of what in practice is an undivided space would be divided between the building owner and an RTM company. Such a division of responsibility is impractical, and is not contemplated by the RTM regime, as Lord Briggs JSC explained in *Settlers Court*, at [35]:
- “[...] the RTM company has the right to perform its allotted functions itself, to the exclusion of any participation by the landlord, third party manager or even a manager appointed under the 1987 Act, save to the extent that the RTM company agrees otherwise. That is a very powerful pointer to a construction which confines the right to manage to that which the RTM company can manage on its own, namely the structure and facilities within the building or part of it constituting the relevant premises and, where they exist, those facilities outside it which are exclusively used by the occupants of the relevant premises.”
75. One difficulty which the RTM company would face is that others who are not tenants of the block have been granted rights, including in some cases leases, of parking spaces

within the area over which it claims the exclusive right to manage. Lord Briggs anticipated the sort of problems that might arise, at [36]:

“The apparently unconstrained right of the RTM company to perform its management functions on its own runs into insuperable problems if those functions are construed to include management of shared estate facilities. This is because the landlord or third party manager will have the right and obligation to manage those facilities under the potentially very large number of leases of flats outside the RTM company’s allotted single block. All those tenants will have the right under their leases to insist that the landlord or third party manager (and no-one else) performs those functions, and it would be a very strong thing to read section 97(2) as taking that right away from them.”

76. I appreciate that the issue determined by the Supreme Court in *Settlers Court* was not concerned with the definition of “the premises” in the 2002 Act, but rather with the extent to which an RTM company was entitled to manage “appurtenant property”, as defined in section 112(1), where that appurtenant property was used in common by the tenants of all blocks on an estate. But the problems of managing appurtenant property used in common cannot be overcome simply by designating it as part of the premises, which is effectively what the RTM companies at Plaza Boulevard are forced to propose in order to bring their blocks within section 72(3)(a). Parts of a complex estate which have been left physically undivided from the remainder despite occupying the same footprint are often designed for joint use and call for common management of the sort which the RTM regime is not intended to provide. That consideration points strongly away from construing section 72(3)(a) as including such undivided spaces within the vertical division of the building to which the right is confined.
77. Although this was not the basis on which the FTT found against the RTM companies, it did consider that, because of *Settlers Court*, the premises could not extend beyond the footprint of each block because it would incorporate part of the basement car park. It did not apply the same logic to the area of car park within the footprint of each block, but, in agreement with Mr Allison and Ms Rai, I am satisfied that the presence of the undivided car park beneath each of the three blocks, means that individually the blocks do not constitute a vertical division of the Estate as a whole. That is fatal to the RTM claims at Plaza Boulevard.

Boundaries deviating from a straight line

78. The remaining vertical division issue in the Park Crescent appeal arises out of the configuration of the boundaries of No.14. A notional vertical division between No.14 and its neighbours would not be a completely straight line but would deviate in places, particularly at the rear, turning 90° to the left or the right, to go round the projecting balcony of No.98. These dog-legs were said by Mr Bates KC to be fatal to the vertical division of the premises. He advanced a number of reasons why that was so, none of which I found convincing.
79. First, he submitted that the requirement is for “a” vertical division between the premises and its neighbour, and that there is no reference to “dog legs” in the Act. But that is not

what section 72(3)(a) requires; what it requires is that the premises constitute a vertical division of the building. That division will usually have four walls, with those at the front and back usually being at right angles to the party walls separating the premises from its immediate neighbours. Nothing in that configuration prevents the premises from constituting a vertical division of the building and I can see no reason why twists and turns in the party walls themselves should do so.

80. Secondly, Mr Bates KC suggested that “multiple vertical divisions” would create uncertainty about the extent of the RTM company’s repairing responsibilities. I do not see why that should be, as those multiple vertical divisions do not create any uncertainty about where No.14 ends and its neighbours begin.
81. Thirdly, Mr Bates KC argued that the vertical division test must have been intended to exclude some properties from the right to manage and he asked rhetorically, if multiple vertical lines, dog legs etc are permissible, then what properties are excluded? The answer is simply that premises which do not constitute a vertical division of the building because they lie immediately above or below a part of the building which is not included in the claim are excluded.
82. In summary, section 72(3)(a) says nothing about the need for a perfectly straight boundary between the premises and its neighbour and no such requirement can be read into it.

Independent redevelopment

83. In the Park Crescent appeal the landlords contend that the FTT misinterpreted section 72(3)(b), 2002 Act and that had it directed itself properly it would have concluded that the structure of No.14 could not be redeveloped independently of the remainder of the building. By cross appeal, the respondents in the Plaza Boulevard appeal challenge the FTT’s determination that each of the three blocks could be redeveloped independently.

Park Crescent

84. Mr Bates KC introduced his submissions on this part of the appeal by referring to the decision of the Supreme Court in *Settlers Court* and drawing attention to the importance placed by the Supreme Court on limiting the right to manage to property which the RTM company would be able to manage on its own. Lord Briggs JSC had found support for that limitation in section 72 itself, as he described at [40]:

“The starting point lies in section 72, which imposes a much tighter qualification requirement in relation to premises than the equivalent provision in the 1987 Act. The premises must be self-contained. If they constitute a whole building it must be structurally detached. If part of a building that part must be divided vertically from the rest of the building, be capable of being independently redeveloped and have services which either are or could without interruption to the rest of the building be made independent. All these requirements point strongly towards confining the right to manage to separate premises within which the quality of the management provided by the RTM company affects only the occupants of that building or part of it.”

85. This passage provided the foundation for Mr Bates' submission that, when section 72(3)(b) refers to the structure of the building being such that the part of the building "could be redeveloped independently of the rest of the building", it meant that it must be possible to redevelop the RTM premises without needing the consent, agreement or support of the owners of any neighbouring premises and without impacting on their property.
86. The whole Crescent was redeveloped behind its original façade between 2012 and 2018, with the work to No.14 coming towards the end of that period after the adjoining No.12 had been completed and occupied. Before the FTT the expert witnesses on both sides also agreed that by the use of appropriate temporary restraints and supports it would be possible to demolish and redevelop the whole of No.14, including its façade, without causing the collapse of the neighbouring buildings. In the Park Crescent appeal the issue is whether the degree of cooperation or consent which would be required for such a redevelopment would be such that it could be described as having been undertaken "independently".
87. Mr Bates KC stressed the structural dependence of No.14 on its neighbours, with which it shared party walls and foundations. The degree of support for No.12 which had been required during the redevelopment of No.14 demonstrated that the structure of the Crescent was not such that No.14 could be redeveloped independently of the remainder of the Crescent. He suggested that the independence requirement in section 72(3)(b) must mean something more than simply that redevelopment was possible, no matter what resources or elaborate engineering solutions were required.
88. The FTT did not accept Mr Bates submission. It was satisfied that "redeveloped independently" simply meant that the RTM premises must be capable of being redeveloped while the remainder of the building was not.
89. In my judgment the FTT was right. The starting point is that the conditions in section 72(3) and (4) are purely physical tests, as the Court of Appeal has confirmed in *Eveline Road*. They do not invite consideration of the legal obstacles which may stand in the way of a redevelopment or of the entitlement of the RTM company to embark on the sort of project the conditions describe. The RTM company will have no right to redevelop the premises, but section 72(3)(b) is not about the RTM company's rights or intentions. It is one part of a description of the physical characteristics, amounting to self-containment, which part of a building must possess before the right to manage provisions will apply to it.
90. There is a substantial overlap between the three aspects of self-containment identified in section 72(3) and (4). Part of a building which is not a vertical division is likely to be more difficult or perhaps impossible to redevelop independently as may premises where services shared with a neighbour cannot be separated without significant interruption. These conditions overlap and interrelate, and I see no need to identify rigid boundaries between them in order to find a distinct meaning for "redeveloped independently".
91. Mr Bates KC attributed to the word "independently" connotations of exclusivity, freedom of action and absence of cooperation but resisted any consideration of the opportunity a building owner has, through the Party Wall Act 1996 or the Access to Neighbouring Land

Act 1992, to obtain consent to works through a judicial or arbitral procedure where the necessary consent of a neighbouring owner is being refused. His preferred meaning would be liable to exclude most, or perhaps all, terraced buildings from access to the right to manage. That extreme interpretation would limit the statutory regime to an extent which cannot have been intended and which has certainly not previously been recognised (including by the Court of Appeal in *Eveline Road*).

92. I am satisfied that the FTT came to the right conclusion on this issue, and that the agreed expert evidence was conclusive. What matters for the purpose of section 72(3)(b) is the structure of the building and whether it lends itself to redevelopment at a time when the remainder of the building is not being redeveloped. On that understanding this ground of appeal must be dismissed.

Plaza Boulevard

93. In the Plaza Boulevard case the FTT directed itself that the sort of redevelopment with which section 72(3)(b) was concerned was not limited to a redevelopment of the interior of the premises, such as had taken place in the recent past. On the other hand, it did not accept that a need to provide support for other parts of the building meant that the condition could not be met. The experts had described each block on the Estate as an independent, self-supporting structure on its own piled foundations and the FTT was satisfied that the structure of the Estate as a whole was such that each block could be redeveloped comprehensively but independently of the rest.
94. For the respondents, Ms Rai and Mr Allison supported the FTT's approach to redevelopment, understanding it as referring to a comprehensive or complete redevelopment which removed every component of the original structure, including the steel frames which performed the dual function of forming the skeleton of the individual blocks while supporting the podium and estate roads. If the steel frame was removed in its entirety, as would be necessary for a complete redevelopment, the podium would collapse unless it was supported. Neither counsel was prepared to accept that some form of support could be provided during redevelopment to avoid the catastrophe which they described. Mr Allison emphasised that the redevelopment had to be independent, and so could not depend on arrangements with the owner of the rest of the building.
95. I do not see any reason to interpret "redeveloped" as referring to building operations so comprehensive that nothing of the original premises remains. No sensible person would dispute that No.14 had been redeveloped in the years before the RTM claim, although the front and rear facades, and the party walls, had remained in place. In the *Stamford Hill* case the LVT had drawn support from section 23(2)(b) of the 1993 Act, which refers to redevelopment involving demolition or reconstruction of the premises or carrying out substantial works of construction on the premises and is reminiscent of section 30(1)(f) of the Landlord and Tenant Act 1954. The actions described in these different statutory provisions would be recognised as examples of redevelopment, notwithstanding that they may result in parts of the original structure surviving and being incorporated into the new. Whether sufficient work is involved in a particular scheme to merit the description redevelopment would obviously be a matter of degree, but something well short of complete demolition is likely to suffice.

96. I also reject the suggestion that a scheme of redevelopment which depends on support being provided to adjoining structures is not capable of satisfying section 72(3)(b). That was effectively Mr Bates KC's argument which I have already dismissed.
97. I am therefore satisfied that the FTT was entitled to conclude that the three Plaza Boulevard blocks could each be redeveloped independently of the remainder of the Estate.

Independent services

98. The last issue concerns section 73(3)(c) and (4). By cross appeal, the first respondent in the Plaza Boulevard appeal contends that there was insufficient evidence to support the FTT's conclusion that the fire alarm service shared between The Studios and The Tower could be provided independently without a significant interruption.
99. It was common ground between the parties that it had been for the RTM company to prove that the final condition was satisfied. Ms Rai submitted that the company had led no evidence before the FTT on that issue and had failed to show that the fire alarm system could be "de-linked", as she put it. It should therefore have dismissed the application on that additional ground as well.
100. There was very little evidence before the FTT of exactly what the fire alarm system comprised, but it was satisfied that a fire alarm was a "relevant service" within the meaning of section 72(5). There has been no challenge to that starting point, which is clearly correct; warning residents of a fire by means of a fire alarm, however it is connected or powered, is a service provided by means of a fixed installation.
101. The evidence which the FTT had comprised a very brief statement from the specialist maintenance engineers who had been maintaining the fire alarm systems at Plaza Boulevard since 2018. It also had some correspondence and a fire risk assessment prepared in 2021 when work was being carried out to replace cladding on the exterior of The Terrace. The engineer explained that independent fire alarms with their own autonomous fire control panels had originally been installed and commissioned for each of the five blocks, but these had later been networked together for monitoring. The network arrangement could easily be removed if required so that the system for each building operated independently again. The fire risk assessment suggested that the fire alarm system for The Terrace might not be required once the cladding issues had been resolved.
102. The engineer's statement did not describe the extent of the works which might be required to make the systems independent, nor did it consider the extent of any interruption to the service which might be caused by those works. I assume it was for that reason that the FTT was not prepared to accept the statement as conclusive of the issue under section 72(4). But there was no evidence that the separation which had already occurred at three of the blocks had caused any interruption in the service. Having regard to the original design of the systems and the retention of the independent fire control panels, the temporary nature of the linkage, the absence of any evidence of disruption, and the engineer's evidence that the interlinking could be "easily removed", the FTT nevertheless concluded that the section 72(4) condition was satisfied in respect of The Studios.

103. The landlords tendered no evidence of their own on this issue and I have no doubt that the FTT was entitled to reach the conclusion it did on the basis of the evidence before it. I therefore dismiss the cross appeal on this issue.

Conclusion

104. For the reasons I have given:

- (a) The FTT was correct to find that the three Plaza Boulevard blocks are not self-contained parts of the Estate and that the right to manage provisions do not apply to them. Although I have allowed the RTM companies' challenge to the FTT's reasoning on the issue of vertical division, I am nevertheless satisfied that the blocks do not constitute vertical divisions of the building because they each include parts of the undivided basement car park. The RTM companies' appeals are therefore dismissed.
- (b) The FTT was correct to find that No.14 is a self-contained part of a building and that 14 Park Crescent RTM Co Ltd is entitled to acquire the right to manage it. The landlords' appeal is dismissed.

Martin Rodger KC,
Deputy Chamber President
7 February 2025

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.



Neutral Citation Number: [2025] EWHC 434 (TCC)

Case No: HT-2024-000316

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 February 2025

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

Between:

BDW TRADING LIMITED

Applicant

- and -

(1) ARDMORE CONSTRUCTION LIMITED

**(2) ARDMORE CONSTRUCTION GROUP
LIMITED**

(3) ARDMORE GROUP LIMITED

(4) ARDMORE GROUP HOLDINGS LIMITED

Respondents

Rupert Choat KC and Max Twivy (instructed by Howard Kennedy LLP) for the Applicant
Sean Brannigan KC and Thomas Crangle (instructed by Mantle Law (UK) LLP) for the
Respondents

Hearing date: 17 February 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 27 February 2025 by circulation to the parties or their representatives by email and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Background

1. The applicant (“BDW”) has made two applications for an order for information and documents (“information order”) pursuant to section 132 of the Building Safety Act 2022 (“the 2022 Act”) or alternatively section 37(1) of the Senior Courts Act or the inherent jurisdiction of the court. The first application, dated 13 December 2024, is against the first respondent (“ACL”). The second application, dated 3 February 2025, is against the second, third and fourth respondents (respectively, “R2”, “R3” and “R4”; collectively, “R2-4”).
2. The matter arises in this way. BDW, which is a subsidiary company of Barratt Developments PLC, was the developer of five relevant building projects that completed at various times between 1999 and 2005; these are known as (1) Crown Heights, (2) Explorers Court, (3) Pierhead Lock, (4) Galleria, and (5) Citiscape.¹ On each of these projects BDW engaged ACL as the design and build contractor. Following the Grenfell Tower tragedy in 2017, fire safety defects and/or structural defects have been discovered in those five developments. BDW has accepted responsibility to the building owners and apartment owners and has agreed to meet the cost of necessary remedial works. BDW has notified ACL of claims in respect of the fire safety and structural defects at the five developments, on the basis that (i) the defects were caused by ACL’s breach of its duties under the Defective Premises Act 1972, in circumstances where the defects rendered the dwellings unfit for habitation when completed, and/or (ii) pursuant to the Civil Liability Contribution Act 1978 ACL is liable to make a contribution and/or to indemnify BDW in respect of the cost of remedial works. In one case, ACL’s liability was established in an adjudication award that has been paid and is not disputed (though ACL does dispute one of the bases of the award—see below). ACL disputes its liability in respect of the other four developments. In two cases, there are pending arbitration proceedings. In two cases, litigation in this court is at an early stage.
3. BDW has concluded, on the basis of ACL’s latest publicly available accounts, for the year ending September 2023, that ACL does not have the financial reserves to satisfy its alleged liabilities, which are estimated to be of the order of £85m in respect of the five developments. It therefore intends to apply for a building liability order under section 130 of the 2022 Act against entities “associated” with ACL within the meaning of section 131. By these applications it seeks the provision of information and documents to enable it to make, or consider making, an application under section 130.
4. ACL is a wholly owned subsidiary of R2. R2 is a wholly owned subsidiary of R3. R3 is a wholly owned subsidiary of R4, which is the ultimate parent company. R2 and R3 admit that they are associates of ACL for the purposes of sections 130 to 132 of the 2022 Act. R4, which was incorporated in June 2024, after BDW had informed the other respondents of its intention to apply for a building liability order, has not admitted that it is an associate of ACL, though BDW contends that it is.

¹ In these applications, BDW originally relied on a further two developments, known as Centrium and Becket House, but it no longer does so.

5. In broad terms, the information sought by BDW relates to whether R4 is an associate of ACL, whether any other entities (including entities incorporated in the British Virgin Islands or in the Republic of Ireland) are associated with ACL, and up-to-date information on the financial positions of the respondents.
6. The applications are supported by the third, fourth and fifth witness statements of Mr Mark Pritchard, the solicitor with conduct of the application for BDW. In response the respondents rely on the witness statement of Mr Robert Goodship, the Head of Risk, Insurance & Compliance for Ardmore Group and a qualified solicitor. I have read those statements but do not think it necessary to recite their detailed contents in this judgment.
7. I am grateful for the written and oral submissions of Mr Rupert Choat KC and Mr Max Twivy for BDW, and for those of Mr Sean Brannigan KC and Mr Thomas Crangle for the respondents.

Building Safety Act 2022

8. The Preamble to the 2022 Act describes it as follows:

“An Act to make provision about the safety of people in or about buildings and the standard of buildings, to amend the Architects Act 1997, and to amend provisions about complaints made to a housing ombudsman.”

9. Section 1 of the 2022 Act provides in part:

“(1) This Act has 6 Parts, and contains provisions intended to secure the safety of people in or about buildings and to improve the standards of buildings.

...

(6) Part 5 contains further provisions, including—

(a) provisions about remediation and redress; ...”

10. Part 5 of the 2022 Act comprises sections 116 to 160. The provisions about remediation and redress are in sections 116 to 135. There are specific provisions about remediation in sections 116 to 125. I have been referred in particular to sections 123 and 124, which confer on the First-tier Tribunal power to make remediation orders and remediation contribution orders respectively, but I do not think it necessary to make further reference to those provisions or to dicta of the First-tier Tribunal concerning their breadth and operation². The present case concerns the provisions dealing with building liability orders, which are sections 130 to 132. They provide in relevant part as follows.

² See *Waite v Kedia Ltd* (2023) 210 ConLR 166; *Triathlon Homes LLP v Stratford Village Development Partnership & ors* [2024] UKFTT 26 (PC), 212 ConLR 1; and *Grey GR Ltd Partnership v Edgewater (Stevenage) Ltd & ors* (2025) CAM/26UH/HYI/2023/0003.

“130. *Building liability orders*

(1) The High Court may make a building liability order if it considers it just and equitable to do so.

(2) A ‘building liability order’ is an order providing that any relevant liability (or any relevant liability of a specified description) of a body corporate (‘the original body’) relating to a specified building is also—

- (a) a liability of a specified body corporate, or
- (b) a joint and several liability of two or more specified bodies corporate.

(3) In this section ‘relevant liability’ means a liability (whether arising before or after commencement) that is incurred—

- (a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or
- (b) as a result of a building safety risk.

(4) A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body.

(5) A building liability order—

- (a) may be made in respect of a liability of a body corporate that has been dissolved (including where dissolution occurred before commencement);
- (b) continues to have effect even if the body corporate is dissolved after the making of the order.

(6) In this section—

‘associate’: see section 131;

‘building safety risk’, in relation to a building, means a risk to the safety of people in or about the building arising from the spread of fire or structural failure;

‘commencement’ means the time this section comes into force [28 June 2022];

‘the relevant period’ means the period—

- (a) beginning with the beginning of the carrying out of the works in relation to which the relevant liability was incurred, and
- (b) ending with the making of the order;

‘specified’ means specified in the building liability order.

131. *Building liability orders: associates*

(1) For the purposes of section 130, a body corporate (A) is associated with another body corporate (B) if—

- (a) one of them controls the other, or
- (b) a third body corporate controls both of them.

Subsections (2) to (4) set out the cases in which a body corporate is regarded as controlling another body corporate.

(2) A body corporate (X) controls a company (Y) if X possesses or is entitled to acquire—

- (a) at least half of the issued share capital of Y,
- (b) such rights as would entitle X to exercise at least half of the votes exercisable in general meetings of Y,
- (c) such part of the issued share capital of Y as would entitle X to at least half of the amount distributed, if the whole of the income of Y were in fact distributed among the shareholders, or
- (d) such rights as would, in the event of the winding up of Y or in any other circumstances, entitle it to receive at least half of the assets of Y which would then be available for distribution among the shareholders.

...

(4) A body corporate (X) controls another body corporate (Y) if X has the power, directly or indirectly, to secure that the affairs of Y are conducted in accordance with X’s wishes.

...

(6) In determining under any of subsections (2) to (4) whether one body corporate (X) controls another, X is treated as possessing—

- (a) any rights and powers possessed by a person as nominee for it, and
- (b) any rights and powers possessed by a body corporate which it controls (including rights and powers which such a body corporate would be taken to possess by virtue of this paragraph). ...

132. Order for information in connection with building liability order

(1) A person of a prescribed description may apply to the High Court for an information order.

(2) An ‘information order’ is an order requiring a specified body corporate to give, by a specified time, specified information or documents relating to persons who are, or have at any time in a specified period been, associated with the body corporate.

(3) An information order may be made only if it appears to the court—

- (a) that the body corporate is subject to a relevant liability (within the meaning of section 130), and
- (b) that it is appropriate to require the information or documents to be provided for the purpose of enabling the applicant (or the applicant and others) to make, or consider whether to make, an application for a building liability order.

(4) In this section—

‘associate’: section 131 applies for the purposes of this section as it applies for the purposes of section 130;

‘building liability order’: see section 130;

‘prescribed’ means prescribed by regulations made by the Secretary of State;

‘specified’ means specified in the information order.”

11. It is convenient at this point to refer to two examples of the operation of these provisions given in the Explanatory Notes to the 2022 Act. First, the example given for building liability orders:

“A 14 storey residential building is developed by a body corporate A. A few years after it is completed later, it is discovered that there are serious fire compartmentation issues within the building and the local fire and rescue authority order the building to be evacuated until the risk from fire is reduced. To seek recompense for the remediation costs, the freeholder speaks to lawyers about whether they can make a civil claim. The lawyers advise the freeholder that they can make a claim under the Defective Premises Act as the building is unfit for habitation.

The freeholder discovers the development company was dissolved once the building was completed and the freehold sold off. The freeholder’s lawyers advise that they can establish that the development company’s parent company is associated, as the parent company directly controlled the actions of the development company.

The freeholder applies to the High Court for a building liability order to be applied to the parent company. The freeholder must show that the parent company is associated with the development company. The High Court must consider whether it is just and equitable to grant the building liability order, for example whether the parent company can receive a fair trial.

In this example, the request for a building liability order is granted. The freeholder can now make a claim under the Defective Premises Act against the parent company. The court proceedings would then proceed as normal.”

Then, the example given for information orders:

“A 14 storey residential building is developed by body corporate A. A few years after it is completed, it is discovered that there are serious fire compartmentation issues within the building and the local fire and rescue authority orders the building to be evacuated until the risk from fire is reduced. To seek recompense for the remediation costs, a leaseholder within the building speaks to lawyers about whether they can make a civil claim. The lawyers advise the leaseholder that they can make a claim under the Defective Premises Act as the building is unfit for habitation.

The leaseholder discovers the development company was dissolved once the building was completed and the freehold

sold off. The leaseholder suspects that the development company's parent company is associated, therefore, they wish to be able to apply for a building liability order in order to seek damages from the parent company. However, the leaseholder is unable to show that the parent company is associated to the degree needed to be granted a building liability order.

The leaseholder applies to the High Court for an information order to be applied to the parent company. The leaseholder must show that they intend to seek damages under a relevant liability (in this instance the Defective Premises Act) and that the information order could support them in applying for a building liability order.

In this example, the request for an information order is granted. The High Court places an information order on the parent company, and they are then required to share with the leaseholder details of all companies which were associated with them during a time period specified by the courts. The leaseholder now has the information required to show that the parent company is associated with the development company, as the parent company directly controlled the actions of the development company.

The leaseholder is then able to apply for a building liability order, to support them in making a claim under the Defective Premises Act against the parent company.”

Building liability orders

12. The present applications are not for building liability orders under section 130 but for information orders under section 132. The construction and operation of section 130 are, therefore, not themselves matters that fall for determination. However, they are relevant, because section 132 is ancillary to section 130: it is not freestanding but exists to provide a means by which a prospective applicant for a building liability order can obtain information or documents to enable it to make, or consider whether to make, such an application.
13. Certain features of a building liability order may be noted. First, it concerns a relevant liability “relating to a specified building”: section 130(2). A building liability order cannot make associated companies liable for the entire liability of the original body to the applicant across a number of developments. The court can, of course, make any number of individual building liability orders in respect of the relevant liabilities of one original body, but each such order will be discrete. Second, the precise and in that sense carefully confined definition of “associate” is nevertheless relatively extensive on account of the definition of “the relevant period”.
14. Third, I can see nothing in section 130 that makes it a precondition to the making of a building liability order that the relevant liability of the original body shall already have been established. Recent decisions of Jefford J illustrate that applications for

such orders may be made before the trial of the original body's liability, that such applications may proceed in tandem with the litigation against the original body, and that it may in a given case be convenient to defer consideration of an application for a building liability order until after the trial against the original body; see *Willmott Dixon Construction Ltd v Prater* [2024] EWHC 1190 (TCC), 214 ConLR 164; 381 *Southwark Park Road RTM Company Limited v Click St. Andrews Limited* [2024] EWHC 3179 (TCC). However, I do not read any of the Judge's observations in those cases, made in specific factual contexts, as meaning that a building liability order cannot be made before the existence of a liability of the original body is established. If they did have such a meaning, I would respectfully be of a different opinion, for the following reasons. (1) There are many simple and obvious ways in which such a condition could have been expressed, but it was not. (2) It is unnecessary to imply such a condition. (3) It makes perfectly good sense to allow a building liability order to function as what might be termed an indemnity ("If this original body has any relevant liability in respect of this specified building, this associate shall also have that liability"). In a given case, it may be very convenient to know in advance that an associate will be liable, if the original body's liability is subsequently established, so that the associate knows where it stands when it seeks to defend the substantive allegations. (4) The use of the word "any" in section 130(2), rather than merely "a", suggests that an indemnity is permissible. Especially in view of the definition of "relevant liability", "a" would have done very well to refer to an established liability. (5) The use of the word "is" ("... specified building is also ..."), rather than "shall also be", is not a significant contraindication, in view of (a) the use of "any", (b) the fact that a liability may be said to be extant though it is (falsely) disputed and not yet established by judicial determination, and (c) the next reason. (6) Subsection (5) makes clear that a building liability order can be made even if the original body has been dissolved. This clearly envisages that the original body does not have to be restored to the register—if it were restored, mention of its dissolution would be pointless. There is nothing to suggest that the original body must have had liability established against it before its dissolution, and in view of the circumstances in which the Act was passed (the appreciation, after Grenfell, that many buildings had serious but hitherto latent safety issues) and the extended limitation periods provided for in section 135 of the Act (15 or 30 years), section 130 is clearly designed to catch the situation where the original body has passed into history and either could not be restored to the register or, if it were restored, would be a mere empty shell. (7) The example of a building liability order in the Explanatory Notes supports this construction. For reasons mentioned below, any reliance on such an example can only be cautious, because the example of an information order is badly flawed. But in this case the example is consistent both with the wording of section 130 and with good sense. Of course, the construction here advanced does not at all mean that a building liability order cannot be made after liability has been established against the original body, only that it is not available only in such circumstances.

15. In this context, and with reference to the particular facts of this case, I turn to consider the present applications for orders for information.

Who can apply for an order for information?

16. Regulation 12 of the Building Safety (Leaseholder Protections) (England) Regulations 2022 provides:

“12. For the purposes of section 132 of the Act, any person making, or intending to make, an application for a building liability order under section 130 of the Act may apply to the High Court for an information order.”

It is common ground that BDW is a “person of a prescribed description” for the purposes of section 132(1) and regulation 12.

Against whom can an order for information be made?

17. The body corporate mentioned in section 132(3)(a) can only be the body corporate mentioned in section 132(2). It follows that an order for information can only be made against a corporate body that “is subject to a relevant liability”: section 132(3)(a). I accept the submission on behalf of R2-4 that no order for information can be made against them, because there is no basis for supposing that they have any relevant liability within the meaning of section 130. ACL alone was party to the underlying building contracts and ACL alone could have a relevant liability. R2-4 are, at most, associates of a company with a relevant liability. Therefore the application under the 2022 Act against R2-4 must fail.
18. This conclusion is contrary to the example of information orders given in the Explanatory Notes to the 2022 Act. The example shows an information order being made not against the “original body” (here, putatively, ACL) but against the company believed to be an associate (here, each of R2-4). That is, in my judgment, impossible to square with the wording of section 132. The corporate body required to give the information (section 132(2)) is the corporate body subject to the relevant liability (section 132(3)(a)), not an associate of that corporate body. The use to which Explanatory Notes to a statute may be put was discussed in *Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103, [2007] 1 WLR 482, where Brooke LJ said:

“15. The use that courts may make of Explanatory Notes as an aid to construction was explained by Lord Steyn in *R (Westminster City Council) v NASS* [2002] UKHL 38 at [2]-[6]; [2002] 1 WLR 2956; see also *R (S) v Chief Constable of South Yorkshire Police* [2004] UKHL 39 at [4], [2004] 1 WLR 2196. As Lord Steyn says in the *NASS* case, Explanatory Notes accompany a Bill on introduction and are updated in the light of changes to the Bill made in the parliamentary process. They are prepared by the Government department responsible for the legislation. They do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. They are intended to be neutral in political tone: they aim to explain the effect of the text and not to justify it.

16. The text of an Act does not have to be ambiguous before a court may be permitted to take into account an Explanatory Note in order to understand the contextual scene in which the act is set (*NASS*, para 5). In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction. Lord Steyn, however, ended his exposition of the

value of Explanatory Notes as an aid to construction by saying (at para 6):

‘What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.’

Accordingly, although the Explanatory Notes are an admissible guide to the interpretation of a statute, what matters is the interpretation of the statute, not that of the Explanatory Notes. The Explanatory Notes cannot override the statute. See, for example, *Aspinalls Club Ltd v HM Revenue and Customs* [2013] EWCA Civ 1464, [2015] Ch 79, *per* Moses LJ at [22]; and *R (on the application of McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559, *per* the Court at [37]. It cannot be assumed that the Explanatory Notes correctly state the effect of the statute. In this instance, in my view, they do not.

19. In oral submissions, Mr Choat candidly accepted that the example in the Explanatory Notes was inconsistent with section 132. Insofar as BDW’s application against R2-4 rests on the jurisdiction to make an information order against them, it must fail.

Section 132(3)(a): general considerations

20. Section 132(3) stipulates two conditions that must be satisfied before the court has power to make an information order. The first is that “it appears to the court ... that the body corporate [here, ACL] is subject to a relevant liability”. ACL disputes that this condition is satisfied. The first question that falls to be considered is the construction of section 132(3)(a) and what is required to satisfy the condition. On this question there appears to be no existing authority.
21. For BDW, Mr Choat submitted that the condition was satisfied in circumstances where (as is established by the evidence in the present case): (i) the applicant (here, BDW) has received advice from competent and qualified experts that in respect of each of the developments there are serious fire safety and/or structural failures that give rise to serious risks to the safety of people in or about the buildings and that require remedial works; (ii) in respect of each development the applicant has been advised by lawyers that a claim can be made against the original body (here, ACL) under the Defective Premises Act 1972; and (iii) the applicant intends to seek damages from the original body. In support of this interpretation of section 132(3)(a), Mr Choat relied on the example of an information order given in the Explanatory Notes. Although he accepted that the example was inconsistent with section 132(2) in respect of the body corporate against whom an information order could be made, he submitted that it was consistent with a construction of section 132(3)(a) that was both possible and practically sensible.
22. If that primary submission were wrong, Mr Choat submitted that the court could nevertheless be satisfied that ACL had a relevant liability, for either of two reasons.

- 1) The court ought to consider it implausible that ACL could defeat the case against it in respect of every single one of the five developments. Although a single building liability order can relate to liability only in respect of a single building, it only takes one such instance of liability to satisfy the condition in section 132(3)(a). ACL's latest company accounts, those for the year ended September 2023, include substantial provision for liabilities for remedial works on previous projects (as, indeed, do those of R2 and R3). BDW's requests for information as to the particular projects to which this provision relates have been refused.
 - 2) If section 132(3)(a) requires that a relevant liability shall actually have been established before an information order can be made, the condition is satisfied in respect of the Crown Heights development. That dispute went to adjudication, in which BDW was awarded its entire claim of about £14.5m on two bases: (i) breach of the building contract, in respect of which a limitation defence was rejected on the grounds of deliberate concealment; (ii) the Defective Premises Act 1972. Joanna Smith J subsequently gave summary judgment enforcing that award: *BDW Trading Ltd v Ardmore Construction Ltd* [2024] EWHC 3235 (TCC). The liability has been discharged and is not disputed. ACL has obtained permission to appeal in respect of the second basis of the award (liability under the Defective Premises Act 1972) but as it does not dispute the alternative basis of the award (breach of contract) and does not seek repayment of the moneys paid, permission to appeal was granted on condition that ACL pay the costs of the appeal in any event. Mr Choat accordingly submitted that there were relevant liabilities in respect of the Crown Heights development, namely, first, the liability found by the adjudicator and, second, the liability in respect of the costs of the appeal, which were likely to be of the order of £120,000.
23. For ACL, Mr Brannigan submitted that, for the condition to be satisfied, it must appear to the court that ACL is, not that it might be or has previously been, subject to a relevant liability: that is, that it actually is liable in respect of such a liability, not merely that it might be liable or that it has a potential liability. The main points in his argument may, I think, be summarised as follows.
- 1) The wording of section 132(3) is clear. The words "it appears to the court that" naturally indicate the requirement for a judicial determination or conclusion; that is how they are repeatedly used in the Civil Procedure Rules 1998 (among other examples, r. 3.4(2), r. 6.15(1), r. 44.11(1)). The words cannot properly be construed to mean "the applicant, on advice, considers that", or any such thing.
 - 2) What must appear to the court is that the body corporate against which the information order is to be made "is subject to a relevant liability", not that it might be, nor that it has previously been. Further, there is no arguable distinction between having a liability and being subject to one.
 - 3) Parliament could easily have framed the condition by reference to a possible or potential liability but did not do so. By way of contrast, Schedule 8 to the 2022 Act (which concerns remediation costs and section 122) refers, in

paragraph 9, to service charges in respect of certain services “relating to the liability (or potential liability) of ...”.

- 4) Section 132 is only ancillary to section 130. As a relevant liability is required for the making of a building liability order, it would be strange if one were not required for the making of an information order. (I should say that Mr Brannigan did not place much weight on this particular argument, partly because he accepted that an application for a building liability order could be made before any relevant liability was established—see above—and partly in the face of my scepticism of the suggested construction of section 130.)
- 5) The requirement for the court to be satisfied as to the existence of a relevant liability is entirely appropriate, because an information order is capable of requiring the provision of information and documentation that not only relates to non-parties to the application but also may be confidential or commercially sensitive; the provision of such information or documentation might even constitute an interference, requiring justification, with the non-parties’ rights under Article 8 of ECHR.
- 6) The primary case for BDW on the construction of section 132(3)(a) rests entirely on the example in the Explanatory Notes. However, the example is seriously flawed. First, as already mentioned, it misunderstands the way that section 132 operates, in that it supposes that an information order can be made against an associate, whereas in fact it can only be made against the original body with the relevant liability. Second, it entirely ignores the requirement in section 132(3)(a), moving without explanation from the assertion of the applicant’s case to the conclusion that an information order will be made. (Mr Brannigan made other critical observations on the example, but they seemed to me to be, arguably, indicative merely of rather loose drafting and not to go to the heart of this issue.)
- 7) Thus for the condition in section 132(3)(a) to be satisfied, the court had to be satisfied of the existence of a relevant liability. This could be achieved in either of two ways. First, the liability could already have been established, most obviously by judicial or arbitral determination or by admission. Second, the applicant could persuade the court by adducing evidence at the application and seeking to prove the existence of the specific relevant liability. This latter course would not be available at all in respect of any development pursuant to a contract containing an arbitration clause: section 9 of the Arbitration Act 1996. In other cases, it could conceivably be available but would require disclosure of documents and examination of factual and expert evidence in a manner akin to a trial (skeleton argument, paragraph 43(c)(iii)).
- 8) In the case of not a single one of the five developments could the court, on this application, be satisfied as to the existence of a relevant liability:
 - a) *Crown Heights*: The liability established in the adjudication has been discharged; therefore it is not an existing liability: ACL did have a relevant liability, but it does not now do so. As for the liability to pay BDW’s costs of the appeal: first, that is no more than a potential liability, because the appeal might not be pursued; second, in any

event, such liability is neither a liability “incurred under the Defective Premises Act 1972” nor a liability “incurred as a result of a building safety risk”. It is therefore not a relevant liability.

- b) *Explorers Court, Pierhead Lock*: These two developments are subject of ongoing and confidential arbitration proceedings, in respect of which no award has been issued. Therefore no relevant liability has been established. Further, in view of the existence of the arbitration agreement it would not be open to the court to make any determinations as to the existence of such a liability.
- c) *Galleria*: BDW has commenced proceedings against ACL under claim no. HT-2023-000370. In December 2024 ACL served an Amended Defence disputing both liability and quantum. No relevant liability has yet been established.
- d) *Citiscap*: BDW has issued proceedings against ACL, but these have been stayed pursuant to a consent order dated 3 November 2023 to enable compliance with the Pre-action Protocol, and there has been no exchange of statements of case. Again, therefore, no relevant liability has been established.

- 9) In these circumstances, with the exception of Crown Heights, where there was but is not now a relevant liability, each of the projects involves only contested and unresolved claims in which no relevant liability has been established. As BDW does not seek to establish the existence of such liability on this application—for example, by factual and expert evidence on the substantive issues of liability—the condition in section 132(3)(a) is not satisfied.

24. Those are the competing submissions. I turn to my consideration of the matter.

25. First, I do not consider that the primary interpretation of section 132(3)(a) contended for by BDW does sufficient justice to the wording of the statute. However one may precisely put the matter, it would come to saying that the condition is satisfied if the court considers that a relevant liability is asserted on reasonable, or plausible, or credible grounds; that (to put the matter colloquially) the party against whom the information order is sought is, or is potentially, in the frame for a relevant liability. I have not found such an interpretation of the provision to be without attraction: it would accord with the example in the Explanatory Notes; it would be consistent with the fact that the provision does not require there to have been any prior adjudication or admission of relevant liability and would address what I think is a very real practical problem where such liability has not previously been established; and it would fit well with the fact (as I think it to be) that a building liability order can be made when the original body’s relevant liability remains in dispute. These are not, however, sufficient reasons in my view to adopt this interpretation.

- 1) The example in the Explanatory Notes is of very limited assistance, both because it is clearly wrong in another respect—see above—and because it entirely fails to address this particular issue.

- 2) It is very difficult to see how “it appears to the court” can indicate anything other than a view arrived at by the court. That is what it naturally suggests. That is how it is used in the CPR. I have not been referred to any uses of the expression in primary legislation, but it is how it is used in the only such instance of which, without proper research, I am aware.³ If what was required was only that the court was satisfied of the possibility of the existence of a state of affairs, rather than of the actual existence of the state of affairs, this would easily be achieved; for example, by providing “if it appears to the court that there are grounds for believing that ...”, or some such wording.
 - 3) Similarly, I find it hard to see how “is subject to a relevant liability” can be construed to mean anything like “might have a relevant liability” or “is a person against whom a relevant liability might be established”.
 - 4) The fact that one can apply for a building liability order before the relevant liability of the original entity has been established neither entails nor, in my view, suggests any particular construction of the requirement in section 132(3)(a), because one can certainly apply for a building liability order after the relevant liability has been established.
26. Second, however, section 132(3)(a) does not require that a relevant liability shall already have been established against the corporate entity. Again, it would have been easy to stipulate some such condition.
27. Third, in a measure of disagreement with Mr Brannigan’s submissions, I do not think that section 132(3)(a) requires the court to make any determination of liability as such in a case where liability has not already been established. In my view, the actual wording—“it appears to the court (a) that the body corporate is subject to a relevant liability”—deliberately reflects two things, each of which is important: first, that it is not necessary that the existence of a relevant liability should already have been established; second, that the court, upon an application under section 132, is not determining the question of liability but is simply forming a view on the question for the purpose of considering the application for an information order. I do not regard this latter point as a distinction without a difference.
28. Fourth, for this reason, I should not consider that section 9 of the Arbitration Act 1996 had any bearing on the matter. Section 9(1) provides:
- “(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.”

³ Section 2(1) of the (now repealed) Protection of Animals (Amendment) Act 2000 provided: “If, on the application of the prosecutor, it appears to the court from evidence given by a veterinary surgeon that it is necessary in the interests of the welfare of the animals in question for the prosecutor to do one or more of the things mentioned in subsection (2), the court may make an order authorising him to do so.”

Legal proceedings to determine matters of liability that are covered by an arbitration agreement would fall within section 9(1). But an application for an information order would not, in my view, fall within section 9(1), because it would not be an application “in respect of a matter which under the [arbitration] agreement is to be referred to arbitration”. And I do not think that it would fall within section 9(1) just because of the condition in section 132(3)(a) of the 2022 Act, as the court dealing with such an application would not be determining questions of liability at all but would simply be forming its own view for the purpose of deciding whether to make an information order.

29. Fifth, there is no difficulty if the relevant liability has been established by judgment, arbitration award, adjudication decision or admission. But both the applicant and the respondents are agreed—rightly, in my view—that the power to make an information order exists even where there has been no such prior determination of liability. This does, I think, give rise to a practical question. What is to be expected on the hearing of an application in such circumstances? In this regard, I think it important to have firmly in mind that section 132 is merely ancillary to section 130. It is not a vehicle for trying or resolving building disputes and it is not a method of early neutral evaluation; its only purpose is to provide a means of enabling persons to apply for building liability orders or consider whether to apply for them. In my view there should be no question at all of having anything like trial procedures; the suggestion in the written arguments that there might be examination of lay and expert witnesses appears to me (with respect) one that ought not to be entertained. But I am little more enamoured of the idea that, when there is an active building dispute (as there is in four of the cases relied on by BDW), the applicant should be putting its evidence before the court and inviting an assessment (albeit non-binding) on the merits. Applications under section 132 ought (in my view) to be short and uncomplicated, and I do not consider that they impose on the court any obligation to become embroiled in assessments of the merits of disputed matters. If this means that applications for information orders will be made sparingly in cases where liability is in issue, I cannot see why that is a bad thing. Further, as a judge dealing with such an application is not making any determination of liability but merely saying how things appear to him, he ought not to be required to do more than say how things appear to him; detailed reasons for why one view is to be preferred to another do not seem to me to be appropriately required.
30. Sixth, I do not regard objections concerning privacy, confidentiality or commercial sensitivity as being of great importance as regards the question of statutory construction. The effect of section 132(2) is that the body corporate can only be required to provide information or documents relating to associates, as these are defined in section 130 in terms of “control”. More importantly, perhaps, section 132(3) imports a condition of appropriateness, which gives the court ample power to control inappropriate disclosures. There is also, of course, the court’s power to impose restrictions and conditions on the use that can be made of information and documents. The whole matter needs also to be considered in the context that Parliament has decided that extensive impositions of liability upon companies that otherwise could have no relevant liability are justified in the public interest.

Section 132(3)(a): the present case

31. For reasons given above, BDW's primary contention, which rests on the example in the Explanatory Notes, fails.
32. As for Crown Heights, the liability in the adjudication award and the subsequent judgment has been discharged by payment in full; I do not see how ACL can be said to be subject to that liability now.
33. The alternative argument concerning Crown Heights rests on the order of Coulson LJ dated 11 February 2025: "Permission to appeal is granted on condition that Ardmore pay the costs of the appeal, including the costs incurred by BDW, such costs to be assessed on the standard basis if they cannot be agreed." A question might arise as to whether that creates an existing liability, especially if ACL has not decided to pursue an appeal on the stipulated condition. However, I shall assume that there is an existing costs liability. Even so, I would not consider it as providing any basis on which to make an information order. First, I doubt whether the liability is a "relevant liability" as defined in section 130(3) of the 2022 Act. It is a costs liability in respect of Joanna Smith J's conclusion that the adjudicator, who had jurisdiction to deal with disputes arising "under the contract", thereby had jurisdiction to deal with the claim under the Defective Premises Act 1972. It is not clear to me that this costs liability can be said to be "incurred under the Defective Premises Act 1972 ... or as a result of a building safety risk." Second, even if the costs liability would suffice to ground the court's jurisdiction to make an information order, I should not consider it sufficient to justify making such an order. Sections 130 to 132 are concerned with enabling the identification of bodies corporate to whom liability for serious building defects can be passed, not with costs protection. (The Court of Appeal has the power to order an appellant to give security for costs in an appropriate case: CPR r. 25.15.)
34. As regards the other four developments, BDW's argument was that it was likely that ACL had a relevant liability in respect of at least one development if not more, in the light of several pieces of evidence. First, a relevant liability was established in respect of the Crown Heights development. Second, the claim in respect of each of the other four developments is supported by expert technical and legal opinion. Third, the latest company accounts for each of ACL, R2 and R3 include very substantial provision for liabilities for remedial works on previous projects. The respondents have refused to specify which projects this provision relates to; they have not asserted that it does not relate to any of the four developments in question. Fourth, in the Crown Heights adjudication proceedings ACL denied that it was seeking to evade responsibility for issues for which it was culpable and stated that it "ha[d] spent or [was] spending over £80m of its own funding to remediate buildings with fire safety defects." Fifth, ACL has refused BDW's request to agree to putting before the court the technical experts' joint statements in the Explorers Court arbitration; it is said that an adverse inference ought to be drawn from that refusal.
35. Mr Brannigan submitted that this argument of BDW could not succeed, because the building liability order must relate to a relevant liability relating to a *specific building*; thus the attempt to satisfy section 132(3)(a) by contending that it was likely that at least one indeterminate claim would succeed did not reflect the statutory provisions. In my judgment, there is force in this submission, at least in a modified form. The requirement to identify a relevant liability "relating to a specified building" concerns the definition and therefore the nature and scope of a building liability order. But "relevant liability" is itself not defined by reference to a specified building but by

reference to the nature of the thing that gives rise to the liability. Therefore one could, strictly, conclude that a respondent was probably subject to a relevant liability even if one could not actually say which of several buildings such a liability, or liabilities, related to. However, the very purpose of the information order is to facilitate an application for (or consideration whether to make an application for) a building liability order, and such an order would have to do with a relevant liability “relating to a specified building”. I conclude that either as a matter of construction or, at least, as a matter of appropriateness, the applicant for an information order must satisfy the condition in section 132(3)(a) in respect of a relevant liability relating to the specified building in respect of which it is considering making an application for a building liability order. This would dispose of the present applications.

36. Anyway, the most I am prepared to say on the basis of the information before me is that it appears to me that ACL may well have a relevant liability to BDW. But it does not appear to me that it actually has such a liability. I specifically reject the submission that an adverse inference ought to be drawn against ACL because of its refusal to have selected arbitration documents introduced in evidence, because I think that a party to arbitration proceedings is entitled to stand on the confidentiality of the arbitration process.
37. For these reasons, the condition in section 132(3)(a) is not satisfied. This means that I cannot make an information order.

Appropriateness and the scope of section 132

38. It follows that the condition in section 132(3)(b) does not strictly fall for consideration. However, I shall say something about it fairly briefly.
39. Section 132 says two things about the permissible scope and purpose of an information order: first, that the information or documents must “relat[e] to persons who are, or have at any time in a specified period been, associated with the body corporate”; second, that it is appropriate to require the information or documents to be provided for the purpose of enabling the applicant to make, or consider whether to make, an application for a building liability order. Paragraph 1095 of the Explanatory Notes to the 2022 Act relates to section 132:

“1095. This section has been created to prevent companies using more complex and opaque structures to prevent a building owner, landlord or leaseholder from being able to prove how companies are associated and therefore undermine the intended outcome of building liability orders as defined in section 130. Information orders provide a route for persons to obtain information in order to support them applying for a building liability order and to support them in receiving adequate recompense to correct building safety defects.”

40. Section 132 does not stipulate the kinds or categories of information or documents that may be specified in an information order. These will clearly include information and documents that enable the applicant to identify associates of the respondent. In an appropriate case, they will, in my view, also include matters concerning the financial position of the associate; such matters may, in a given case, be highly

material to the decision whether or not to apply for a building liability order. If the information and documents are publicly available (for example, from Companies House), or if an applicant does not need the provision of information or documents in order to make an application under section 130 or to decide whether to make such an application, it is hard to see why it should be appropriate to make an information order. However, it is probably not very fruitful to try to decide in the abstract what sort of information or documents might be the subject of an information order; it is better to look at the terms of the particular application and consider whether it is appropriate to require the information and documents to be provided for the specified purpose, as required by section 132(3)(b).

41. The information and documents sought by BDW at the hearing were set out in the Schedule to its skeleton argument, though very little was said about them in oral argument. The text at the head of the Schedule explained the detailed requests:

“Information and documents regarding (a) all bodies corporate which since 2006 have or have arguably been associated with ACL for the purposes of s. 131 of the Building Safety Act 2022 (‘Associates’) and thus including, per s. 131(4), if any of the Associates have or have had (or arguably have or have had) the power, directly or indirectly, to secure that ACL’s affairs are conducted in accordance with the Associate’s wishes; and (b) the financial standing of ACL and Associates.”

42. The specific requests and my brief comments on them are as follows.
43. *A.1 Details of the corporate structure in which ACL and the Associates sit, including the identities of all Associates. Includes information and documents related to all Associates (including, but not limited to, whether AGHL is associated with ACL)*

I would not have ordered the provision of this information and documentation in respect of R2-4. The corporate structure is clear and simple and R2 and R3 acknowledge that they are associates of ACL. R4 has not made a similar admission, but its structural relationship with the other respondents is clear. BDW has contended that, as R4 is not admitting that it is an associate, BDW requires and is entitled to further documentation that is not within the public domain. I do not think that this is so. The test for whether R4 is an associate of ACL is in section 131(1): first, does R4 control ACL? second, does a third body corporate control both of them? The first part of the test turns on the application of subsections (2), (4) and (6) to the facts. The second part of the test requires knowledge of whether there is an even more ultimate corporate body. But Companies House shows that Mr Cormac James Byrne has 75% or more of the shares and of the voting rights in R4. The argument relating to R4 concerns not factual uncertainty but the application of section 131(1) to known facts. I understood Mr Choat to have acknowledged this in the course of argument. I would, however, have been willing to make a limited order to elicit information concerning two Irish companies that are said in ACL’s latest accounts to be “related” to ACL, and concerning two companies incorporated in the British Virgin Islands and in which ACL has subscribed for shares (see *Ardmore Construction Ltd v Revenue and Customs Commissioners* [2018] EWCA Civ 1438, [2018] 1 WLR 5571, at [4]).

44. *A.2 In relation to the incorporation of AGHL [i.e. R4]: (1) the intended purpose and/or primary function of AGHL; (2) board resolutions and/or minutes which relate to the incorporation of AGHL and the allocation of AGL shares in AGHL; (3) advice prepared for the ex-directors of AGL in relation to the transfer of assets to AGHL; (4) whether the directors of AGHL intend to make a financial provision in the next set of accounts to be filed by AGHL for the cost of remedial works to the seven BDW Developments built by ACL; and (5) if such a financial provision will be made (a) whether the provision for liabilities will include allowances for remedial works at the seven BDW Developments built by ACL; and (b) the amount of financial provision made in respect of each of those Developments.*

I would have disallowed this request, on the basis that, having regard to the information that is publicly available and that BDW already has, the information was not required to enable BDW to identify R4 as an associate of ACL or to assess whether it was worthwhile applying for a building liability order against it. In that context, I regard the request as commercially intrusive without sufficient justification. I also accept that ACL itself is unlikely to have much of this information; it is not enough to say that other parties in the group can provide it.

45. *A.3 Details of the group security structure in which ACL and the Associates sit, including any cross-guarantees/cross guarantor structures - with details and copies of any current letters of credit, parent company letters of support, performance bonds*

I would have refused this request. This, again, is commercially sensitive information to the extent that it goes beyond information at Companies House. It does not seem to me to be required either for the purpose of identifying associates of ACL or to enable BDW to form a view as to the financial viability of associates. I bear in mind that the information is being sought before liability has been established and before it is even known whether ACL will discharge any liability. That does not preclude an order being made, but it does seem to me to be relevant when considering whether an intrusive order ought to be made now. I would not, however, have refused the request simply on the ground that the information related to ACL rather than, as is required, to the associates, as it seems to me to relate to both.

46. *B.1 Management accounts and reports for ACL and each of the Associates for: the year ending 30 September 2023; the year ending 30 September 2024; the quarter ending 31 December 2024. To include profit and loss; balance sheet and cash flow statements (standalone and consolidated where applicable); total assets less current liabilities; claims received (with the total liabilities faced and reasonably anticipated sums falling due); cash in hand; and historical performance on a monthly basis.*

I would have refused this request. Insofar as it relates to ACL's management and accounts and reports, it does not fall within the permitted scope of an information order: section 132(2). Insofar as it relates to the associates' management accounts and reports, there is no good reason for supposing that ACL is entitled to those documents. More generally, I am not satisfied that the documents are required for BDW to decide whether to apply for a building liability order.

47. *C.1 In relation to the provision for liabilities for remedial works on previous projects made in the accounts of ACL, ACGL and AGL for the years ending 2022 and 2023: (1) whether the provision for liabilities in the filed accounts record that ACGL and*

AGL have made financial provision for the cost of remedial works to seven BDW Developments built by ACL; (2) whether the provision for liabilities in the filed accounts include allowances for remedial works at those seven Developments; (3) the amount of financial provision made in respect of each of the seven Developments; (4) management reports and management accounts prepared for the directors of ACL, ACGL and AGL in relation to the provisions; (5) board resolutions and/or minutes which relate to these provisions and the payment of dividends from ACL, ACGL and AGL; and (6) board communication with shareholders and investors regarding these provisions.

I would have refused this request. First, insofar as it relates to ACL, it is not within the proper scope of an information order. Second, I have not been persuaded that the information in respect of the associates is actually required for the purpose of assessing their ability to meet any liability under a building liability order; it seems to me to have more to do with assessing the group's (confidential) view as to the likely extent of liabilities to BDW. This is the sort of information that, if I were to order it at all, I should be reluctant to order before liability had been established. Third, the information relating to the associates appears to be within the control of the associates, not of ACL.

48. *C.7 Detail for ACL and each Associate of all existing banking and lending arrangements (including overdraft facilities), associated covenant details, and the most recent schedules of covenant compliance*

I would have refused this, for largely similar reasons. Even if ACL has the right and power to provide this information in respect of its associates, I am not persuaded that BDW reasonably needs it for the purpose of considering an application for a building liability order, and I should see no good reason for ordering such information relating to associates when ACL's liability had not been established.

49. *C.8 Details for ACL and each Associate of all ongoing contracts, including value, delivery status, completion timing and payment terms of each contract as well as any intentions to novate any contracts*

I would have refused this for similar reasons.

50. *D.2 Medium-term forecasts (on a monthly basis) to 31 December 2025 including projected profit and loss, cash flow and balance sheet for ACL and each Associate. Include associated workings and assumptions as well as forecast contract schedule cashflows per project and any cost saving plans.*

Again, insofar as it relates to ACL the information is not within the scope of section 132(2), and insofar it relates to the associates the information is not ACL's to give. Further, although it is said that this information is relevant to BDW's consideration of whether to make an application for a building liability order, I am not persuaded that it is likely to play a sufficiently significant role in making any such decision to justify the requirement to provide such highly intrusive and commercially sensitive material.

Alternative bases: section 37(1), Senior Courts Act 1981, and inherent jurisdiction

51. If and to the extent that, contrary to BDW's primary case, section 132 does not permit an information order to be made against R2-4 and any of the requested information or documents do not fall within the scope of an information order that can be made against ACL (because they are not within ACL's possession or control), BDW seeks the same information and documents on either or both of the following grounds: (a) section 37(1) of the Senior Courts Act 1981; (b) the inherent jurisdiction of the court to make ancillary orders, including orders for the provision of documents and information, to ensure the effectiveness of its orders.
52. Section 37(1) of the Senior Courts Act 1981 provides:
- “(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.”
53. As for the inherent jurisdiction of the court, in *Quay House Admirals Way Land Ltd v Rockwell Properties Ltd* [2022] EWHC 545 (Ch), Mr Simon Gleeson, sitting as a Deputy High Court Judge, considered the submission that the court's inherent power to cancel or discharge inhibitions had been supplanted by section 57 of the Land Registration Act 1925, which conferred a similar statutory power, and that when the Land Registration Act 2002 did not continue the statutory power, the inherent power did not revive. The deputy judge said:
- “84. I do not think that this is correct. I think the position is correctly stated in the commentary to s.19(1) [of the Senior Courts Act 1981] in the White Book (at para 9A-67), which observes that ‘The court may execute its inherent jurisdiction even in respect of matters which are regulated by statute’, citing *Willis v Earl Beauchamp* (1886) 11 PD 59 at 63 per Bowen L.J. It is therefore entirely clear that the court's inherent jurisdiction can exist alongside a statutory jurisdiction, and that the creation of a statutory jurisdiction does not necessarily exclude the court's inherent jurisdiction.
85. Applying this approach to the 2002 Act, I cannot see any provision of it which conveys with the necessary clarity the idea that the inherent jurisdiction of the court is somehow displaced by the creation of an extrajudicial mechanism for application to the registrar directly for the amendment of the register. Consequently, I am satisfied that the inherent jurisdiction of the court to order the register to be amended in the way that the claimants seek remains intact, and has not been extinguished by the 2002 Act.”
54. There is a fair amount of learning and authority on both section 37(1) and the inherent power of the court. I was not referred to very much of it. Perhaps that does not matter greatly. Even if (which I doubt) the court has power to make the suggested orders against R2-4 under either section 37(1) or the inherent jurisdiction, I can see no good reason for exercising the power. The entire exercise in the present case relates solely to the remedy provided in section 130 of the 2022 Act; there is no general

power to impose on one person the liabilities of another person just because it seems desirable or convenient to do so. Section 132 represents Parliament's ancillary provision to secure the efficacy of section 130. Even if technically it could, I do not think that the court should disregard the limits placed on the power to make information orders because it thinks that some wider power than that actually provided for would be more convenient.

Conclusion

55. The applications are refused.



FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference : HAV/00HN/BSA/2024/0001 and 0002

Property : Blocks A and B Purbeck House, 3 Oxford Road,
Bournemouth BH8 8ES

Applicant : Barclays Nominees (George Yard) Limited

Representative : Mr Bowker, counsel, instructed by CMS
Cameron McKenna Nabarro Olswang LLP

Respondent : LDC (Oxford Road Bournemouth) Limited

Representative : Mr Nissen KC, counsel, instructed by Walker
Morris LLP

Type of Application : Application for a Remediation Order pursuant
to the Building Safety Act 2022

Tribunal
Member(s) : Regional Judge Whitney
Regional Surveyor A Clist MRICS
Mr A Thomas RBI FRICS MBA MIFireE

Date of Hearing : 21-24 January and 3 March 2025

Date of Decision : 8th May 2025
[CORRECTED IN BLUE 16TH May 2025](#)
[pursuant to Rule 50](#)

[CORRECTED](#) DECISION

Background

1. The Applicant seeks a [Remediation Order](#) pursuant to the Building Safety Act 2022 in respect of Block A and Block B. Separate applications were made but these were consolidated.
2. Block A has 39 flats and Block B 64 flats. In total there are 519 bedrooms. The Applicant is the owner of the freehold interest. The Respondent is a company which is part of the Unite Group. It holds a leasehold interest in the building. The building is used to provide student accommodation to students principally at Bournemouth University.
3. The parties agree that the Applicant is an “interested person” as the owner of the freehold interest and that the Respondent is a “relevant landlord” as it lets the accommodation at the blocks to students. Further it is accepted both blocks are “relevant buildings”.
4. Certain “relevant defects” were admitted by the Respondent but not all contended for by the Applicant. Further the Respondent contends that notwithstanding the admitted defects a Remediation Order should not be made.
5. The Tribunal has issued various sets of directions. The parties have substantially complied with the same and we were provided with the following:
 - A bundle of 6355 pdf pages with page numbers throughout this decision shown as [];
 - A supplementary bundle of 1175 pdf pages shown as S[];
 - Skeleton argument from each party;
 - Bundle of authorities

Inspection

6. The Tribunal inspected the premises on the afternoon of 20th January 2025. Each side's counsel and solicitors were in attendance. The inspection was led by the parties' experts, Ms Sheehan for the Applicant and Mr Brown for the Respondent.
7. Block A fronts on to Oxford Road, Bournemouth with Block B behind separated by a modest paved courtyard area. On the opposite side of the road was another high rise block and on either side of the blocks were tall buildings. To the Tribunal it felt that the development in question was surrounded on all sides by high rise buildings.
8. We initially viewed the two buildings externally including seeing the vents at the side and the terracotta tiles. We observed some of the

terracotta tiles were damaged. It was also apparent where works had been undertaken to open up the cladding for the purpose of investigations.

9. We noted that the courtyard between the two blocks housed a bike store and bin storage area. There was also an electricity sub station in this area. Adjacent to the blocks to the right hand side (if looking from the front on Oxford Road) was a car parking area which we are told is not part of the development save that there is an undercroft parking area below part of Block B which we are told is separately [owned](#). This appeared to have a relatively low roof height.
10. Plans were provided to the panel which included descriptions of the various external wall systems. Both experts walked the Tribunal around the buildings identifying the same.
11. The Tribunal commenced the internal inspection of Block B. We were shown a fire door to the stairway which had a regular mastic silicone sealant around the Georgian wired glass pane. To the eighth floor, we viewed a ceiling in the corridor to which the penetration had been sealed with an intumescent mastic sealant. We are directed to areas throughout various services, riser and cleaner's cupboards whereby there were gaps surrounding penetrations. Also on the eighth floor, a threshold gap of a fire door was measured at 28mm to which both experts agreed.
12. The Tribunal were taken to other fire doors throughout the building, including to the fifth floor [w](#)here threshold gaps of between 20 – 24mm were recorded. We were shown an example of a fire door with a timber frame whereby most had a steel frame.
13. We were shown similar elements within Block A. We were directed to some graduating gaps to the header jambs, for example to a riser cupboard whereby the range was 2-4mm. The automatic operation of a smoke vent to the top floor was observed. Finally, we were directed to the threshold gap to the wash room on the ground floor which was measured at 23mm. We were directed to the floor coverings to the laundry room and the corridor whereby it appeared that some had been replaced since the building was constructed, evidenced by a gap between the floor and the skirting boards.

The Law

14. The Application is made pursuant to Section 123 of the Building Safety Act 2022 ("the Act") which provides that:

"Section 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”

15. The parties also provided a bundle of authorities which included Sections 84, 85 & 86 and the whole of Part 5 of the Act. We do not set all of these sections out within this decision but have had regard to the Act and these sections in particular in reaching our determination.

Hearing

16. The hearing took place at Havant Justice Centre. Initially the hearing was listed for 4 days commencing upon Tuesday 21st January 2025. It became apparent that a further day would be required for submissions. Unfortunately this could not take place until 3rd March 2025.
17. All parties attended in person for the hearing. The below is a summary only of what took place during the same.
18. As an aside the Tribunal believed the proceedings were being recorded however the recording obtained for the first four days was not of sufficient quality to enable a transcript which was requested by the [Respondent](#) to be prepared.
19. Counsel for the parties had agreed a timetable and the Tribunal was happy to adopt the same.
20. At the start of the proceedings Mr Bowker confirmed that certain items were no longer being sought by the Applicant. He identified these as the following items contained in the draft updated [Remediation Order](#) prepared by the Applicant [81] being:
- 7(b) The electrical installations which require enclosure in a fire resistant construction.
 - 7(c) The unstopped penetrations in ceilings.
 - 7(d) The unstopped penetrations in compartment walls and floors.
21. Mr Bowker confirmed in opening that his client was seeking a [Remediation Order](#) for all of what he termed the live issues within the draft updated [Remediation Order](#) save for those withdrawn as set out above. He contends it is reasonable for a Remediation Order to be made. He suggests even if we do not agree with him, that all the cladding on the building including what is known as EWT2 and EWT5 is a defect, a [Remediation Order](#) is still required.
22. Mr Nissen KC suggested this case was different from Waite v Kedai Limited LON/00AY/HYI/2022/0005 & 0016 . That case placed emphasis on leaseholders which was different from this case. Mr Nissen KC accepted the Tribunal had a discretion as to whether or not to make a Remediation Order however he disputed Mr Bowker's submission that an order should be made in all circumstances unless there was an exceptional reason why it should not do so. He did not accept there was any reference to "exceptionality".

23. Mr Nissen KC suggests that the question to be answered is whether in exercising the discretion it is appropriate to make an order considering the situation of the parties. It is for the Tribunal to take account of the facts of the case and of the material to take account of the same. He submits that the Applicant is seeking an order for its commercial benefit and not to provide leaseholder protection.
24. Mr Nissen KC submits that any defect must cause a building safety risk. He submits that we can take account of PAS9980 in determining any risk. He suggests that if there is charring of insulation this is not a spread of fire as required under section 120(5) of the Act. Further Section 120(3) of the Act is critical to determining the questions in relation to the alleged internal defects. He suggests that what we need to consider [now](#) is the condition as it was constructed. If wear and tear he suggests we cannot be so satisfied that this is a building safety defect.
25. Mr Bowker called Mr Buckley-Sharp. He confirmed his statement [588-594] was true. Mr Buckley-Sharp is a fund manager employed by abrdn plc. abrdn plc [provide asset management services in relation to](#) the Property on behalf of the Applicant.
26. Mr Bowker asked certain agreed supplemental questions in respect of recent disclosure. Mr Buckley-Sharp confirmed he had seen these documents. He concluded that it was a large volume of information which he believed should have been shared earlier in the proceedings.
27. Mr Nissen KC then cross examined him.
28. He confirmed the specific asset manager for the blocks is a Mr Peter Tomley. Mr Buckley-Sharp manages two portfolios with in excess of 50 developments. 24 of these relate to Barclays.
29. He agreed that the asset value is part of his role however he suggests every mandate has investment guidelines being principles not just including financial return. He suggests the investment principles for the Applicant are matters of public record although he accepts not exhibited. The Health and Safety of the occupants is of paramount importance.
30. He explained generally the building would be inspected once a year on behalf of the Applicant. He had not corresponded with any of the actual occupants of the two buildings. Safety is the responsibility of the Respondent. His responsibility is to have the fire risks addressed for the long term. The current lease will end in about 6 years. He suggested that he was being pro-active in looking to make the Property safe.
31. Mr Buckley-Sharp explained he had personally visited the Property on three occasions. Firstly in 2015 and subsequently in a visit with BCP Council in February 2023 and later in 2023. He stated he was keen to see if works had begun to make the Property safe.

32. Mr Buckley-Sharp did not believe works were being done in a timely manner. He stated that his client wanted the works done as soon as possible. He confirmed he was aware that BCP and the Fire Service were keeping matters under review. He considered that the Applicant and Respondent had been corresponding over the works required for about five years and this was too long.
33. He confirmed that any consents should be in the form adopted by the Applicant's solicitors. He stated that no movement had been made on the granting of consent for the works (which was required under the lease) as there was no agreement as to what works were required to be done. He stated he thought it was unlikely that the Applicant would stand in the way of works being undertaken.
34. Mr Bowker did not re-examine.
35. The Tribunal then heard from the Respondent's witnesses of fact.
36. The first witness was Mr Pyrah. He confirmed his statement [614-623] was true. Mr Pyrah is the Group Fire Safety Manager at Unite [Group PLC](#). He joined Unite in 2022 and took up his current role in October 2023.
37. He was cross examined by Mr Bowker.
38. He was referred to the Fire Impairment Records [3267-3282]. He stated that they aim to review these measures every six months. He confirmed once works were completed then items are deleted including works identified by Global previously.
39. He confirmed ultimate responsibility for the fire safety of the Property rests with him although day to day Mr Parmar oversees the work. He confirmed that Mr Chris Sorrenti was the Head of Special Projects.
40. He understood the student occupiers had been told about the issues with the Property. He did not know what exactly as he was not involved in the resident's engagement strategy.
41. He stated that [Unite's cladding remediation strategy](#) was introduced before he joined Unite. It was introduced following the Grenfell fire when Unite looked to assess the risk on all buildings and prioritise the work to be undertaken. He presumed Mr Sorrenti was responsible for writing all strategy notes.
42. Mr Pyrah stated that resources are stretched. He was aware of the BB7 and Hydrock reports but had not read all. He stated Mr Parmar would have done so. He understood originally Unite had about 160 buildings potentially affected by fire safety risks. He believed now there were about 65 buildings.

43. He assumed the local authority and fire service will not have been provided with the experts reports within these proceedings. He understood Avon Fire Service (being the principle fire authority for Unite) had no concerns given the enhanced measures in place. He was not aware of matters relating to the Improvement Notice previously served by the local authority or the Fire Safety Matters Notice as these pre dated his appointment.
44. He suggested that four evacuation tests per year are undertaken. The Property general manager organises the same and both blocks are tested at the same time. Generally one would be undertaken to simulate a night time evacuation. He explained that typically there are about 500 students across the two blocks. Some would not evacuate, he stated no head count as such was undertaken but information would be stored in the fire folder on site.
45. He confirmed that contractors were ready to begin work on replacing doors subject to the Building Safety Regulators approval. This was expected in the next day or so.
46. On questioning as to why it had taken so long to obtain a FRAEW he felt he would have to defer to others.
47. He confirmed that he covered a large portfolio of properties. He would review any identified risk and then apply internally for any required funding. He confirmed currently they were working on replacing about 1200 doors at a cost of about £1million.
48. Mr Nissen re-examined and then the Tribunal questioned.
49. In answer to questions from the Tribunal he confirmed that no search would be undertaken to ascertain how many people had not evacuated.
50. Mr Nissen then called Mr Parmar. He confirmed his statement was true subject to being updated [596-611]. Mr Parmar is the fire safety manager at Unite group plc, having joined in June 2022.
51. He confirmed he had scanned through the Global report [3163]. Further he had read the Cladding Remediation Strategy at [5966] and [5983].
52. He confirmed he was aware through internal discussion of the application to appeal an Improvement Notice served by the local authority S[369]. He was not aware of the legal process involved.
53. In reference to paragraph 50 of his statement [609] there was a clear journey and it had taken time to get to the point of works commencing but processes had been followed and matters had not been stationary.
54. He would oversee 12-16 cladding projects in each year. The wider remit for works is now covered by the Capital Projects Team of which Mr

Sorrenti is in charge. It is Mr Sorrenti who would set the objectives for reports.

55. He explained internal approvals for all design and works would be required. A report would be prepared by Mr Sorrenti who would submit this to the Board. Typically the Board would approve all schemes in the Summer. Without Board approval works do not proceed.
56. Despite being high risk a building would then revert to deferred status. He confirmed the strategy as to works and when undertaken is led and informed by Chris Sorrenti.
57. He explained typically there is a list of projects which have a risk rating. Generally the highest risk are to be undertaken first. In respect of these blocks the PAS9980 was seen later and so fell outside the cycle for projects. If it gets the green light from the investment committee, they generally tell contractors so ready to mobilise in the January. January to June is the design phase with works after.
58. At this point day one concluded. Mr Parmer was reminded he was a witness and so was unable to discuss the case with anyone.
59. At the beginning of Day 2 Mr Bowker also indicated he was not pursuing 7(a)(ii).
60. Mr Nissen KC confirmed that his client had received approval from the Building Safety Regulator to undertake door remediation works.
61. The cross examination of Mr Parmar continued.
62. He believes the improvement notice was brought to his attention in Summer 2023. He did not provide information to the local authority, this was provided by Mr Pyrah's predecessor. He was not aware of the grounds of appeal.
63. He confirmed he visited the Property jointly with the fire service in February 2023.
64. He confirmed he instructed a FRAEW to be undertaken. It was required to produce a remedial scheme to move forward.
65. He confirmed a corporate body is the Principal Accountable Person for the purpose of Registration with the Building Safety Regulator. He had not dealt with the Registration, this was undertaken by the Estates Team. He stated it was coincidence this happened at the same time as he instructed the FRAEW. If the process had allowed him to, he would have instructed this sooner. He was referred to the Strategy Notes at [5966] and [5983]. He agreed that reference to "substantial" [5969] refer to the risk and he confirmed that Purbeck House is programmed for works to be undertaken during 2025.

66. Mr Parmar confirmed he would allocate the risk. He fed this in to the decision making although it is Mr Chris Sorrenti who prepares the programme and makes the decisions in conjunction with the Board.
67. On questioning by the Tribunal Mr Parmar confirmed that Purbeck House was approved last Summer but dependant on the outcome of this case would likely require further approval.
68. Mr Parmar confirmed works were originally programmed pre 2023 on basis of removal and replacement of all cladding. This was changed as the Board did not approve the scheme which was felt not to be proportionate.
69. On questioning on [5988] Mr Parmar explained that he did not know why Park Way Gate had been remediated in 2021/2022 save it was a building with a substantial risk. Dorset House had been expedited as there were health and safety concerns due to cladding falling off the building.
70. On questioning by the Tribunal in respect of [5989] Mr Parmar could not remember how many projects are currently live, he thought there were eight. Two projects had begun in January 2025. He agreed cost is always a consideration but is not the primary outcome.
71. Mr Parmar explained that he is governed by the business' internal processes. He explained in 2025 a number of moderate risk buildings are being remediated due to lender requirements. He accepted funding requirements were coming ahead of risk.
72. Mr Parmar confirmed having considered the reports he felt it was disproportionate to the risk to remove the Kingspan panels behind the terracotta tiles.
73. Mr Nissen KC re-examined.
74. Mr Parmar confirmed the projects selected for each year would be selected after the board [approval](#). The investigations start in the January and he then reports to Chris Sorrenti. Budgets had been allocated and so Purbeck House had been left behind.
75. Next Mr Nissen KC called Mr Walker. He confirmed his statement [628] was true. Mr Walker is the Defects Manager at Unite group plc.
76. Mr Walker confirmed that on 21st January 2025 approval had been given by the Building Safety [Regulator](#) for works to the doors to be undertaken. This was in accordance with the Checkmate report contained within the bundle.
77. He confirmed he was familiar with the FRAEW. It was held on a central database for all sites to which he had access.

78. In answer to questions from the Tribunal he stated that 1190 doors are to be replaced at the Property. He confirmed that certain doors would have been replaced in the past following quarterly door inspections undertaken by the local team. He stated that all will be replaced.
79. Mr Nissen then called Mr Joel. He confirmed his statement [635-640] was true. Mr Joel is the Head of Pre-Construction at Topeak Southern Ltd who are described as the principal contractor who will be appointed to undertake remediation works at the Property.
80. On cross examination he agreed that [957] was the proposed programme of works. A colleague had written it on 8/1/25. He had also written the proposed scheme (see [965]). He confirmed that Unite will appoint a Fire Engineer although he does not believe they have appointed one yet. The estimated cost of the works in the scheme is about £1.5million but if full remediation of all wall claddings this would rise to about £7million.
81. He confirmed he had allowed 23.6 weeks for design but he accepted could be less. In his opinion the key timing issue will be the Building Safety Regulator approval. In his view the current scheme will take about one year on site and if the full cladding likely to take 2 years.
82. Upon completion of the witness evidence of fact Mr Bowker confirmed the items not being pursued were on page [81] items 7 (b), (c), (d) and (e). Item (e) being in addition to those set out above:
- “In respect of the electric water heater cupboard, the incomplete construction within cluster corridors, namely, where there is no separation between the cupboard and the bedroom.”*
83. Mr Bowker then called Ms Sheehan.
84. The joint statements were at [118-138] & [139-161]. Her report was at [162-299]. She was a director of Jensen Hughes ([fire engineering and litigation](#)). She has specialised in fire safety work since 2005.
85. She confirmed she understood her duties to the Tribunal under Rule 19 of the Tribunal Procedure Rules. She went through various minor corrections to her report.
86. Initially Mr Seow in her London office was instructed to provide reports for the Applicant's asset manager. Subsequently she was asked to become involved given the litigious nature.
87. Mr Nissen KC cross examined Ms Sheehan.
88. As to EWT2 & 5 it is agreed that the panels are Kingspan KS 900 & 1000 MR. The difference relating only to the dimensions of the panels [193]. She was satisfied with the safety of the panels themselves. However in her opinion it was not sufficient to just look at the testing of the panels but also as to the method of installation.

89. Ms Sheehan stated that in her opinion the parties were better informed now although she accepted the previous schemes proposed by Hydrock and BB7 would remediate any risk but other routes also existed. She was no longer contending that the EWT2 & 5 panels all needed to be removed.
90. She agreed the LPS1181 is designed for commercial buildings. LPS is an insurance industry body primarily looking at property protection. It does give information which should not be read in isolation. In her opinion it is better to consider tests that are available as it is better than no test data.
91. Ms Sheehan explained that the site construction needed to match the test construction. Here we have 2 steel panels with a PIR core which is not fully encapsulated, an issue arises where the edges are open.
92. She explained that she and Mr Brown had been provided with literature by Kingspan. The panels on Purbeck House are not fire rated. Kingspan confirmed all panels supplied had a PIR core.
93. Ms Sheehan stated she reported on what was on the buildings. She now knows of the test and the new FRAEW can take account of the information found including that provided by Kingspan and how the panels were installed on the buildings.
94. In her opinion the Building Safety Act defines what is a building defect. Any PAS or FRAEW already knows of the risk or perceived risk. Under PAS [you then](#) work out a scale of risk. It is tool for determining a cost and risk proportionate scheme. In her opinion if you assume a risk is appropriately reviewed then it may not be a defect if the risk is low. Risks are all a question of proportionality.
95. PAS is a guidance document and not an in depth risk assessment.
96. At [4069] were the list of Kingspan drawings. Ms Sheehan was referred to [4095 & 4096]. These were examples of the EWT5 scenario. In her opinion this required encapsulation to make the same safe. In her opinion whilst it will char from fire any fire may also leapfrog if not encapsulated. She was concerned that the test did not show the barrier and so not clear what was tested and so a risk still exists.
97. Ms Sheehan stated that some drawings (see [4102]) show encapsulation. It is a question of considering what is on the building to assess if it causes a risk.
98. At this point we reached the conclusion of day 2. Ms Sheehan was warned she must not discuss her evidence overnight.
99. The following morning the Tribunal met initially just with counsel. The Tribunal drew to counsel's attention that it had seen and considered a

report from BRE Group Limited titled Fire Performance of Cladding Materials Research-Appendix A Literature review which appeared to consider the testing regimes and may be relevant. In particular it referenced that the use of the LPS 1181 test in respect of residential premises may not be appropriate.

100. Further the Tribunal advised counsel that it did take judicial notice of the findings made in respect of Kingspan as part of the Grenfell Tower Inquiry.

101. The Tribunal agreed with counsel the experts could meet to discuss the BRE report and we would adjourn until 11am for the parties to consider. It was agreed Mr Bowker could discuss this new report with Ms Sheehan.

102. Counsel returned shortly after 11am. It was agreed that questioning in respect for the BRE report would be conducted by way of "hot tubbing" the two experts separate to their current reports once both had given their evidence upon their substantive reports. We were also supplied with a supplementary report on behalf of Mr Brown the Respondent's expert.

103. It was confirmed by Mr Nissen that Mr Brown was placing no reliance on pages [3721 and 3722] which referred to coffins. The inclusion of these pages appears to be in error.

104. The cross examination of Ms Sheehan then continued.

105. Ms Sheehan agreed that the certification ([3788-3790]) was not affected by the orientation of the panels. Ms Sheehan stated she had not observed any taping and jointing of panels and there are no cavity barriers. In her opinion there is nothing that provides fire protections [3451] and the glass fibre is not sufficient. She has no information that it has fire resistance. It is necessary to look at everything with a critical eye. The panels themselves are not a problem but the lack of encapsulation is the problem.

106. Ms Sheehan was referred to paragraphs 196 and 197 of her report [197]. She stated she could not see how the spread of fire would stop. Whilst the heat may be minimal volatile gases would be given off. She considered the mechanisms of fire and acknowledged charring could occur.

107. In her opinion the BS test has full encapsulation. This is different from the LPS test which she was not sure covered gases. The volatile gases may be given off by charring.

108. She accepted that paragraph 22 of her supplementary report [216] could be said to be speculation but in her opinion the question of encapsulation was key to the test results.

109. She was referred to Mr Brown's supplemental report and the hand written drawing at page 13 in connection with her findings which were set out at page 14 paragraph 4.1.13 of Mr Brown's supplemental report. Ms Sheehan suggested she had used the panels on the elevation based on the test. She accepts she could have looked back at this but doesn't think it undermines her conclusions.
110. Ms Sheehan was referred to the [BRE](#) testing S[260]. In her view this reinforced her view that encapsulation was required.
111. Ms Sheehan confirmed she had seen [74-76] of the bundle which set out the list of defects. She stated she believed the issue of self closers being required was agreed. She agreed there was no evidence of these or the doors being defective when first installed upon construction. She agreed the gaps should not exceed 15mm for certain doors and 8mm for other doors. The Property included a mixture of both types. She agreed this was different from what she had measured. She agreed usage could cause increase in gap together with maintenance undertaken. Equally if the floor had been changed then this may affect the size of the gap.
112. Ms Sheehan agreed there was etching in the glass on some doors but not all although it appeared most had the correct Georgian glass in place.
113. On questioning by the Tribunal Ms Sheehan explained the LPS test was more akin to testing on a warehouse. The BS8414 test was more like the situation outside a flat.
114. Mr Bowker re-examined.
115. Ms Sheehan agreed the SFS base track has no fire properties.
116. Ms Sheehan stated the panels themselves are not inherently unsafe. It is a question how they are built and in her judgment encapsulation and detailing is key.
117. Mr Nissen KC called Mr Brown.
118. Mr Brown confirmed his report [300-533] was true and he was aware of his duty to the Tribunal. Further subject to minor amendments he wished to make his supplementary report was true.
119. Mr Brown provided details of his professional qualifications. He confirmed that since 2018 he had run his own consultancy principally providing expert reports. He had reported on in excess of 75 residential cladding cases.
120. He was then cross examined.
121. He confirmed he had not had sight of the Global report until the bundle was prepared. He confirmed he received a mixture of oral and

written instructions from his client. He confirmed he did not initially undertake an FRAEW but did subsequently. He had not been instructed to consider the question of delay.

122. Mr Brown explained he was given documents to review, provided his initial views and then held a site inspection. Thereafter he reported back taking account of what he had seen on the ground.
123. In his view on the items not agreed in respect of the cladding systems was that whilst there is a risk it is at a reasonable level.
124. Mr Brown agreed that if the PIR was exposed to flames fire may spread rapidly but as manufactured sandwiched between steel outside there is no exposed insulation. Having considered the test results charring would build up over time.
125. He explained matters had been updated as a result of obtaining information from Kingspan. This was referred to at [357] and paragraph 4.3.4 of his report. He confirmed the information was obtained at his request. Mr Macklin of Kingspan was very helpful in providing technical information.
126. Mr Brown explained he included reports and documents he considered of value. He had not included the PhD thesis of Ms Sheehan's colleague who assisted her.
127. Mr Brown stated whilst he would give his opinion on issues or defects he did not consider it was for him to state what might be a relevant defect. That was a matter for the Tribunal to determine in his opinion.
128. Mr Brown was taken to [489]. He explained he had expressed a view as to a relevant defect since in his opinion if there was no risk of spread of fire there could not be a defect.
129. Mr Brown was referred to pages [384-386] of his report. He thought by putting matters in quotes he showed he was taking extracts. He agreed there was no mention that LPS testing was for industrial buildings. He did not see this as being relevant to the fire performance of the panels. Industrial buildings are typically the primary market for sandwich panels. In his opinion it is the output from the test which is relevant.
130. Mr Brown confirmed his FRAEW is an abbreviated risk assessment for this process. He wanted to capture the essence of the issues.
131. Mr Brown was taken to the ABI Technical Briefing dated May 2003 [3724] and in particular paragraph 3.5 [3733]. He confirmed this document relates to industrial premises. He suggests since it was introduced it has reduced losses due to fire spread. It references that

LPS 1181 certified products will not make a significant contribution to a fire. He agreed the context was targeted at industrial buildings but he was drawing out why it was promoted by insurers.

132. Mr Brown suggests one of the key differences in approach between him and Ms Sheehan is he looks at how the panels will react to fire. He considered the reaction of products to fire.

133. At [397 & 398] he referred to a paper prepared by a Mostyn Bullock. He had not been able to obtain a copy to review but was satisfied that Mr Bullock would not have placed his name to something he did not support. He had referred to it for generality.

134. Mr Brown confirmed he had seen the [BRE](#) report referred to the experts by the Tribunal. He had not specifically referred to it as he considered it to be of its time.

135. Mr Brown confirmed he had considered the charring within the timeframes of an evacuation. He thought this was likely to be 30 -60 minutes. In his opinion the contribution of exposed PIR would be negligible. The material would he believe self extinguish and he does not consider the presence of volatiles at the next window to be significant. He accepted there could be sporadic flaming but did not think it would cause any fire to spread. In his view the very large cost involved in total removal means that such action would be disproportionate.

136. Mr Brown confirmed he discussed this with his client. He did not see a risk that this could lead to a fire leapfrogging up the building. In his opinion if it would it would fail the BS test. He accepted if it had been a risk he may have taken a different view.

137. Mr Brown stated he had been involved in the spread of fire in relation to the way materials burn for coming on 40 years. He had covered a wide range of buildings and was satisfied he had the necessary experience.

138. Mr Brown stated he is always sceptical on testing. However in his opinion poor quality construction is often more likely to blame.

139. On questioning by the Tribunal Mr Brown stated that regulation is going from a performance based to regulation based approach.

140. At this point day 3 ended. Mr Brown was reminded he must not discuss his evidence.

141. On day 4 the cross examination of Mr Brown continued.

142. Mr Brown agreed the issue of cavity barriers and associated matters is the primary difference between him and [Ms](#) Sheehan in respect of the disputed wall types. In his view it partly comes down to installation. The suite of drawings Kingspan provided are dated 2013,

some ten years after the Property's construction. These are claimed to be relevant to their certified product. The product itself is unchanged from when installed on these buildings and they would have produced a similar drawings package but it was not available now.

143. Mr Brown acknowledged he had not looked at what design is now recommended.
144. Mr Brown was referred to the BRE report S[259] he explained this gives visual observation and the fire takes 16.5 minutes to reach 5/6m high. The crib for the test is set up 2 m below so the total height of the flames reached is 7 or 8m. The crib was extinguished after 28 minutes. Whilst there is charring the fire does not spread.
145. Mr Brown confirmed he understood that the product produced by Kingspan is now called Quadcore but was told by Mr Macklin this is the same. Whilst he is aware of the criticisms levelled at Kingspan he understands this relates to a separate part of the business. In his view if there were any suspicions he would have expected BRE to take action.
146. Mr Brown was asked about the doors. He did not accept the measurements of Ms Sheehan. He accepted some gaps but the building has been operating for 20 years so what one would expect.
147. Mr Brown was then questioned by the Tribunal.
148. He confirmed PAS9980 identifies three categories of risk:
High: remediation required
Low: nothing required
Medium: remediate to as low as reasonably practicable
149. In his view referring to insurance standards is acceptable. Insurers wish to reduce the spread of fire.
150. In his opinion the fact not everyone left the buildings during evacuation tests was not a factor to take account of.
151. In his opinion there is little difference between industrial and residential standards.
152. Mr Brown confirmed he had acted for Unite Group on three cladding disputes in Scotland. He believed he was helped by Unite throughout his instructions on these buildings. He would not put forward his view unless he was sure it was safe.
153. He accepted you would probably not install any of the cladding that is on the Property if you were constructing the same now.
154. Mr Nissen KC re-examined Mr Brown.

155. Upon conclusion the “hot tubbing” of the experts took place. The Tribunal first asked the same questions of each.
156. Ms Sheehan had not been aware of the document. Mr Brown was aware but neither wished to change their evidence having had sight of the same.
157. Both agreed requirements for fire safety had changed over time. Mr Brown referred again to changes resulting in a compliance based approach which in his opinion had unintended consequences including leading to increased costs for the industry. In his opinion a degree of flexibility would be useful.
158. Both were referred to page 16 and paragraph A2.7.1.8 of the [BRE](#) Research Paper introduced by the Tribunal.
159. Ms Sheehan agreed with the findings that LPS1181 is not an appropriate test for fire performance of external walls and facades given the way the test operates.
160. Mr Brown referred to the fact that at A2.3 mentioned reviewing in connection with residential buildings and the type of cladding systems used. It was he stated being looked at in that context. Further whilst published by [BRE](#) the paper was prepared by academics. In his opinion it is of its time and that causes a big difference.
161. Mr Bowker then questioned the two experts.
162. Ms Sheehan agreed the report could assist as part of all the documents one considers. Mr Brown [was](#) of the view that it provides background and consideration of the tests was more important. This was one of many documents which he had read and he did not list all. It was not a document which he considered was helpful.
163. Mr Nissen KC then questioned the experts.
164. Upon conclusion the first part of the hearing concluded. It was agreed with all present that the final day would be listed in person at Havant on 3rd March 2025.
165. Upon resumption on 3rd March 2025 the Tribunal apologised to the parties as it appeared the recording equipment used for the first part of the hearing had malfunctioned and a transcript could not be produced from the recordings.
166. Mr Bowker relied upon his skeleton argument and an updated bundle of authorities.
167. Mr Bowker suggested the making of a remediation order is essentially a binary choice. He looks to rely on the evidence as a whole.

168. He suggested there were 3 concerns in relation to the risk: seriousness, delay and effective management.
169. Mr Bowker highlighted that neither the actual manager for the Property or Mr Sorrenti were called to give evidence. As to the latter he suggested he should have been called as the ultimate decision maker.
170. Mr Bowker suggested it is still not clear that works will be undertaken in 2025. He referred to the fact that on occasion Unite Group had prioritised lender requirements in determining the scheduling of works.
171. Mr Bowker suggested that Mr Buckley-Sharp in giving his evidence did not give the impression that the Applicant was only interested in its reversionary interest. He suggested his evidence was reliable. He was not satisfied with the speed at which the works were being moved forward. He suggests that the facts point to the need for a Remediation Order so there is a risk of enforcement.
172. Mr Bowker suggested that a Remediation Order is required as there is a lack of insight on the part of the Respondent. If a Remediation Order is made it will not interfere with any works being undertaken. He suggests that there is a deliberate difference between Sections 123 and 124 of the Act. He suggests this is because section 123 of the Act is a precision tool for getting work done.
173. Turning to the programming Mr Bowker suggested that even taking Mr Joel's evidence the works could be undertaken by June 2026. He reminded the Tribunal that the Respondent could apply for a variation of any Order if required.
174. Mr Bowker submitted that both experts were competent. He referred to Mr Brown's analysis [420]. He suggested that Mr Brown was not a reliable witness as he didn't speak to his report and not reliable. He suggests Ms Sheehan demonstrated she was reliable.
175. Mr Bowker suggested the only consequence of not remediating EWT2 and EWT5 is purely financial. Mr Brown on occasion crossed the line into advocating for his client and had a selective approach to the evidence.
176. He relied on testing and documents such as that produced by the Association of British Insurers [3724] which related to commercial buildings or even more niche industries such as the food manufacturing industry. His approach was not balanced such as relying upon the LPS1181 test without explanation as to its context.
177. Mr Bowker referred to various instances where he quoted Mr Brown such as "they are very pro active on fire safety", "I'm arguing on another case" which suggest he was going into battle for his client.

178. Further Mr Bowker relied on the email Mr Brown sent to Kingspan [1499] which he suggests shows Mr Brown had crossed the line as an expert.
179. Mr Nissen KC relied upon his skeleton argument which the Tribunal had read in advance of the hearing.
180. He did not accept there was a distinction between sections 123 & 124 of the Act. He suggests there is no material difference. Mr Nissen KC suggests there must be a qualitative assessment in determining if a Remediation Order should be made.
181. Mr Nissen KC suggested that Mr Brown considered the level of risk and referred to PAS [5770] and the objectives [5782]. This can be used to inform the identity of the risk. He did not accept the criticisms of Mr Brown. He suggested both experts wanted information from Kingspan and this email [was](#) not concealed but disclosed.
182. Turning to Ms Sheehan he suggested that she accepted the orientation of the panels was irrelevant. At paragraph 22 of her supplemental report S[216] she accepted that her view was speculation.
183. Mr Nissen KC stated that whilst Mr Brown produced selective quotes in the body of his report he attached the whole documents. He relied on documents for different purposes and considered all in the way a careful expert would. He submitted both experts agreed that EWT2 & 5 did not require removal of the panels but Ms Sheehan wanted encapsulation and cavity barriers. In Mr Brown's opinion there was no risk of fire spread on the evidence. It would burn until a char layer forms and is not self igniting.
184. He submitted that Ms Sheehan did not explain the risk. The burden is on the Applicant and must show it is intolerable. He submits that no mechanism for fire spread was shown. He suggests that fire will not spread on its own.
185. Mr Brown gave an analysis and both experts relied on tests but for different purposes. He suggests Ms Sheehan had no evidence for her theory of the need for cavity barriers. Mr Brown relied on the BRE test to show the effect a fire would have on a panel. He submitted Ms Sheehan accepted the drawing re charring and was comfortable with the results.
186. Mr Nissen KC suggested you could rely upon the LPS 1181 test. Whilst there may be a focus on commercial property the objective of the tests the market place would place reliance upon these test results. Both experts agreed the [BRE](#) document introduced by the Tribunal did not change the evidence given.
187. Mr Brown was asked no questions on the FRAEW yet he determined the risk was low or at least tolerable [439 onwards]. The FRAEW is evaluative and Mr Brown quantified the level of risk.

188. He suggested that Kingspan did not require encapsulation within its designs. The documents produced are relevant to the product. The drawings produced show Kingspan turned its mind to encapsulation [4102]. He suggested there was no criticism of Kingspan from either expert who were supportive and produced documents. It was a different side to the business than that which had been criticized in the Grenfell Tower Inquiry. Mr Brown was happy with the information supplied.
189. He suggests on the evidence there is no relevant defect in the EWT2 & 5 panels.
190. Mr Nissen KC suggested that Mr Buckley-Sharp was unduly critical of Unite. He suggests not one document was produced which show that Barclays were putting the student occupants first. They have no relationship with the students. He submits it is notable no public entity has sought a Remediation Order. He suggests his client has a constructive relationship with the local authority and whilst an improvement notice was served this was withdrawn once new information was provided.
191. Further he suggests control measures are in place. Simply because there is combustible PIR this does not in his submission mean it must be removed.
192. Mr Nissen KC suggests his client cannot just focus on this Property. They have adopted a risk based approach which he suggests is legitimate and aims to undertake work to the high risk properties first subject to lender requirements. He suggests there is no evidence this has adversely impacted on this Property.
193. He suggests there must always be a relationship with the costs of undertaking works. Further he submits the landlord could abuse the lease covenants in terms of withholding consent for any works and this is an important factor which weighs heavily against the making of a Remediation Order.
194. Mr Nissen KC invited us to accept the evidence of Mr Joel and add a contingency of 6 months if we are to make an order.
195. As to the internal doors in his submission these are not relevant defects within the definition of Section 120(3)(a) of the Act. Ms Sheehan accepted the self closers are fair wear and tear. In his submission there was no evidence of defects although his client has contracted with Checkmate [to](#) undertake works to the doors. However ongoing maintenance will always be required.

Decision

196. The Tribunal wishes to thank both counsel for their submissions. We also pass on our thanks to those who prepared the electronic bundles. Whilst voluminous these worked well and greatly assisted all in the conduct of the proceedings.

197. We record that we are only determining those issues which remained live by the end of the hearing and submissions. The parties had helpfully agreed certain matters so that the decisions we had to make were limited. We had before us some 22 reports, 4 fire risk assessments and 11 miscellaneous reports which had been obtained over the past 5 or 6 years. We were provided with a bundle of authorities which contained the majority of Remediation Order decisions made by the First Tier Tribunal.

198. In making our decision we record that we have had regard to:

- The hearing bundle of 6355 pages;
- The supplemental bundle of 1175 pages;
- The supplemental report of Mr Brown dated 21st January 2025;
- The bundle of authorities
- Counsel's respective skeleton arguments;
- Fire Experts note on Cladding Types 22nd January 2025;

199. At [139-160] was the updated joint statement prepared by the experts dated 2nd December 2024. We do not address those parts of the statutory test required for making a remediation order which we have recorded above were agreed.

200. We consider firstly the witnesses of fact.

201. We found Mr Buckley-Sharp to have been honest and straight forward in giving evidence. We find that whilst of course maintaining the value of the assets he manages for the Applicant is a key responsibility we accept that his client will have agreed other core principles with his company. Further we find that requiring remediation of defects is a legitimate aim for Mr Buckley-Sharp to pursue on behalf of his client.

202. Turning to the Respondent's witnesses of fact. We record as to those witnesses from the Respondent themselves all were relatively junior and had little say over the making of decisions of substance. All referenced Mr Sorrenti who did not attend or give evidence and yet he appeared to be the key decision maker outside of the Board for determining what works were to be undertaken and the programming of the same.

203. Mr Pyrah was only recently appointed to his current role. He could give little meaningful evidence and often simply replied that matters took place prior to his appointment. We do note what he told us in respect of the fire evacuation drills. What was plain was that this seemed less than satisfactory with no one being sure as to the percentage of occupants who remained in situ during these drills save he was satisfied it was not “in the 100’s”. This is concerning given that measures have been adopted to mitigate the current risks to the Property as a whole and by implication it is recorded not all students do vacate.
204. Mr Parmar we considered did his best to fully answer the questions put to him as far as he was able. Equally he had not been in post for all the time period being questioned and his role was relatively junior. We found it telling that in answer to questions he explained the programming was changed to enable less high-risk buildings to be remediated due to the requirements of lenders. Whilst the Respondent’s case was that it had a programme to remediate the buildings within its portfolio on a risk basis it was clear this is not always followed. Pressure from those providing funding to Unite Group seems to attract greater weight than risk and this was not properly explained.
205. Mr Walker’s evidence added little save for confirming the details as to the door replacement by eCheckmate.
206. Mr Joel gave some background to the proposed programme of works. He accepted from a construction point of view the preliminaries need not take that long, certainly not longer than 6 months. Where we were less clear is why the work would take 2 years if works were required to EWT2 & 5.
207. The Tribunal considers the expert evidence.
208. We must say we did not find either of the experts entirely satisfactory.
209. We were asked to consider three items which may be a relevant defect: EWT2 & 5 and issues surrounding the internal doors. Other items were agreed or conceded. For clarity we note that it is accepted that EWT3, 4 and 6 are relevant defects.
210. Mr Brown was of the view he could not offer an opinion as to whether something amounted to a relevant defect under the terms of the Act. He stated that was a matter for the Tribunal. Ms Sheehan was prepared to offer her opinion on whether something amounted to a relevant defect.
211. We find that an expert can and should offer opinion on whether or not something amounts to a relevant defect under the terms of the Act. Whilst we agree with Mr Brown the ultimate decision is one for the Tribunal to make, we would expect an expert witness to offer opinion on this point. We are however only able to determine those matters which

the parties have contended are relevant defects. We have concerns that certain items have been conceded by the Applicant which may be relevant defects or require a different approach to remediation which would go beyond the submissions and evidence before us.

212. We were concerned both experts appeared to simply accept without critical analysis the information provided by Kingspan. In particular given there appeared to be no testing that related to the use of the panels being considered in this case on residential buildings. We found this approach surprising in the context of the Building Safety Act and the circumstances leading to the same.

213. Mr Brown admitted he was aware of the [BRE](#) report which the Tribunal drew to the parties' attention. He did not consider it relevant to draw to the Tribunal's attention being as he described it as "of its time". We were surprised given this document expressly related to residential premises and post dated the events of Grenfell Tower. Mr Brown was critical of a compliance based approach to fire safety with much of his approach being one of considering risk relative to cost and making what he referred to as a proportionate determination to such matters. This is not the approach which statute has adopted.

214. It was clear Mr Brown had worked alongside the Respondent and its parent Unite. He referred at times in his evidence to obtaining information from them and the discussions he held. Certainly at points we did have concerns that certain opinions made by Mr Brown were him advocating his clients position. A good example related to the evacuation policy which Mr Brown tried to suggest was effective and yet we heard from Mr Pyrah how on one recent test a large number of students which he advised did not "number 100's" had not evacuated. This did not appear to be an effective methodology to this Tribunal.

215. Further we were concerned that Ms Sheehan equally accepted the information from Kingspan without any critical analysis. This seemed to flow into her change of position that the EWT2 & EWT5 panels could be remediated in a way less than total replacement.

216. We had regard also to our inspection of the Property and what we have recorded above.

217. We turn to the items in dispute and deal firstly with the internal alleged relevant defects. We do not find these are proved.

218. It was plain to us from our inspection that a relatively large number of the doors required works to be undertaken. This is supported by the Checkmate report and the fact that Checkmate have been contracted to replace about 1200 doors. We are told that during the course of the hearing the Building Safety Regulators consent was obtained this work would be taking place. Certainly many seemed to have significant gaps or other defects and are likely to cause a building safety risk including the spread of fire and smoke. However under the

definition in section 120 of the Act to be a relevant defect Section 120(3) must be satisfied. It was contended by the Respondent that any defect was as a result of wear and tear or changes to flooring or similar at the Property. It was suggested there was nothing to show that when originally constructed the doors would have been defective.

219. We comment that we are satisfied that the doors are defective and as we say amount to a building safety risk. However on balance taking account of all the evidence including the inspection we cannot be satisfied on the balance of probabilities that the doors and their furniture as constructed were defective.

220. We consider the two wall types EWT2 & 5. The two types are:

EWT 2 – Terracotta
tiles[2119]

EWT 5 – Insulated
Steel Kingspan Panels
[2125]

221. EWT2 can be found on the front and side elevations of block A Purbeck House. It is as the name suggests terracotta tiles with behind Kingspan steel encased panels with aluminium support rails. EWT5 is essentially simply the Kingspan panels and is found on the side and rear elevations. We consider both together as neither party considered that these should be treated differently. We did however stand back and consider whether we should do so but determined this was not required.

222. Mr Brown contended that if there was any risk such risk was “tolerable” and do not present a building safety risk. He suggests that the insulation will form a char which would inhibit the spread of fire. Ms Sheehan suggests if properly installed would not require remedial works but, in her opinion, due to the lack of firestopping this could lead to spread of fire and amounts to a Building Safety Risk and a Relevant Defect. Ms Sheehan referred to the potential for fire leapfrogging up the building and see paragraph 92 above.

223. Both experts referred to the FRAEW and the need for further FRA and FRAEW^s to be undertaken under the PAS9980 framework.

224. Mr Brown placed significant weight on the LPS1181 test and various other reports and testing. We note that none reference residential property use and all were said to relate to some form of commercial or industrial usage. As Mr Brown explained this was where his background in fire safety had been developed, initially working for a commercial insurer.

225. Ms Sheehan also placed some weight on the LPS1181 test but also considered other matters such as the potential spreads of fire up the building within her report. This evidence was disputed.
226. We note that no results of BS8414 tests on the panels either before the construction date or in the 22 years since have been provided. As a Tribunal we are surprised that no tests were undertaken and would have expected a manufacturer to have had such tests conducted. We note the documents supplied by Kingspan are not contemporaneous with the date of construction. We are mindful of the Grenfell Inquiry conclusions and note both experts seem to have simply accepted the information provided by Kingspan without the healthy scepticism we would expect in these circumstances.
227. Both experts at points referred to a cost risk analysis being necessary. We are not satisfied that in determining whether or not there is a relevant defect this is relevant. The test makes no reference to cost. In our judgment in defining if there is a relevant defect one considers whether or not there is a building safety risk which in this instant would be the spread of fire.
228. Overall we believe there is a risk of a spread of fire from EWT2 & 5. Both have exposed PIR core which is combustible. We have considered carefully the testing and reports. However the tests, notably the LPS1181, relate to and are designed for commercial premises. The various examples of fires shown within the bundle are very different premises to the instant Property. We prefer the evidence of Ms Sheehan and that within the bundle that fire could spread from these panels due to the exposed cores. We also find that there is a lack of cavity barriers which is of itself a further relevant defect. Both experts accepted there was a lack of cavity barriers. We find that there is a risk of the spread of fire from one panel to the next including by way of leapfrogging notwithstanding any charring that may occur.
229. We do not consider the documents from Kingspan to be helpful. It is not clear whether or not cavity barriers and encapsulation should be required. However looking at the tests and what we now all know, in our judgement a failure to have such in place could lead to a spread of the fire. Mr Browns analysis within his supplemental report of the BS8414 appears to show that flames could rise significantly and in our judgment this shows a spread of fire. We are not satisfied that the charring which both experts accept would occur would prevent the spread of fire. The charring may limit spread but not prevent the same. As a result we are satisfied that the EWT2 & 5 panels constitute a Building Safety Risk of spread of fire and a relevant defect.
230. We must consider now whether or not we should make a Remediation Order.
231. Both parties agree we have a discretion. We agree.

232. We note that it is accepted that the Respondent has been aware that the Property has defects for about 5 years. To date work has not been undertaken. We do accept that an organisation such as the Respondent and its parent company Unite need to balance their overall obligations across their portfolio as a whole. We were told at the outset that they undertook a risk based approach. However it became apparent as the evidence developed that this was only part of what was taken into account. Costs and financial matters generally appear to have weighed heavily as was acknowledged by Mr Parmar when he referred to the requirements of lenders.
233. We accept for commercial entities that costs will always be a consideration. It would be unrealistic to not accept this and it was perhaps unfortunate that the Respondent did not adopt a more straight forward approach in presenting its evidence on this point.
234. Equally we have no doubt that Mr Buckley-Sharp and his client have the value of their interest in mind. However we were satisfied that the need for remediation of a defective building was also important to the Applicant. This is what one would expect from a large corporate entity following on from the dreadful events of the Grenfell Tower tragedy.
235. We note that the making of a Remediation Order is not a punitive step. It is an aim of the Act to improve the safety of all residential buildings.
236. We have considered the various authorities and in particular that relating to the The Chocolate Box, being another large building in Bournemouth. In that case it was the Secretary of State who sought an order. By the time the matter came to hearing works were underway. Notwithstanding this the Tribunal did make a remediation order.
237. In this case there is no certainty as to when works will begin. We are told they are to be included within this year's scheduled works but it was unclear following the Respondents witnesses evidence and in particular that of Mr Pyrah and Mr Parmar as to whether or not further board approvals would be required. We heard the opportunities for obtaining Board approvals are limited to Board meetings in the summer of each year.
238. Mr Nissen KC suggested that no statutory authority had taken action. He explained when an improvement notice had been served upon provision of information this had had withdrawn. We note however there was no evidence as to the satisfaction or otherwise from the local authority or the fire service. We place little emphasis on the fact no authority had taken any action, cogent as we are as to the limited resources available to such bodies.
239. Overall we are satisfied that we should exercise our discretion and make a Remediation Order. We take account of the actual day to day

occupants of the Property and our findings as to defects which require works to be undertaken. These works are significant. We consider that the Respondent has been aware of the need for works for at least 5 years. The works are to remedy a building safety risk being the spread of fire and we consider it is consistent with the previous decisions in circumstances such as this to exercise our discretion and make such an Order. In our judgment the making of such an Order is in furtherance of the objectives of the Act.

240. We therefore make an order in the terms attached. We have considered the period of time and have taken account of the evidence of Mr Joel. We are satisfied that such a lengthy contingency period as suggested by Mr Nissen KC is not required.

241. We have also considered carefully the need for the Respondents to obtain consent from the Applicant. Whilst issues were raised as to the form of licence and whose solicitor should provide the form to be used these are in our judgment usual commercial matters that parties should be able to agree. Plainly the Applicant wants works undertaken. We believe such negotiations can take place in tandem with any application to the Building Safety Regulator. In our judgement if agreement cannot be reached this may be grounds to seek a variation of the order.

242. As to the extent of the works we have considered matters carefully. We are concerned that due to the lack of evidence encapsulation alone of EWT2 & EWT5 may not be sufficient to ameliorate the risk found. However this is Ms Sheehan's position (Mr Brown contends no works are required and the risk is tolerable). We did struggle to understand how she reached this view given her concerns expressed in her reports as to the panels. It seems to us such panels as are in place are a Building Safety Risk and ought to be removed notwithstanding the very high cost. However that was not what either party contended for and we make our Order on the basis of the submissions made to us.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.



FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference(s) : HAV/00HN/BSA/2024/0001 and 002

Property : Blocks A and B Purbeck House, 3 Oxford Road, Bournemouth BH8 8ES

Applicant : Barclays Nominees (George Yard) Limited

Representative : Robert Bowker instructed by CMS
Cameron McKenna Nabarro Olswang LLP

Respondent : LDC (Oxford Road Bournemouth)
Limited

Representative : Alexander Nissen KC instructed by
Walker Morris LLP

Type of Application : Application for a Remediation Order
Section 123 Building Safety Act 2022.

Tribunal Member(s) : Regional Judge Whitney
Andrew Thomas FRICS MIFireE RBI
Amanda Clist MRICS

Date of Hearing : 21, 22, 23 and 24 January 2025 and 3
March 2025

Date of Order : 8th May 2025
Corrected pursuant to Rule 50 on 16th
May 2025

REMEDIATION ORDER

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

AND for the reasons set out in its Decision dated 8th May 2025

THE TRIBUNAL ORDERS THAT:

1. The Respondent, LDC (Oxford Road Bournemouth) Limited (the relevant landlord) shall remedy the relevant defects as determined by the Tribunal in accordance with the attached schedule (the "Works") in Block A and Block B, Purbeck House, 3 Oxford Road, Bournemouth (the "Building").

The Respondent shall do so within 24 months from the date of this order

2. The parties have permission to apply, including but not limited to in relation to paragraphs 1 and 2 and the schedule of Works overleaf. In particular, the Respondent has permission to apply:

- To be permitted to undertake different Works to those specified in attached Schedule by this Order, if it is revealed by investigation and analysis by a suitably qualified consultant that reasonable alternative works will remedy the relevant defects and
- to extend the time for compliance with this Order.

3. Any application to the Tribunal must:

- i) be made using the Tribunal's Form "Order 1";
- ii) be supported by detailed evidence explaining the reason for the application and a proposed draft order setting out the variation sought;
- iii) There is permission to the Respondent to rely on relevant expert evidence in support of the application; and
- iv) include a realistic time estimate for the application to be heard.

4. The Respondent must notify the Tribunal and the Applicant, that it has complied with this Order, within one month of the certified date of practical completion of the Works. The form of this shall be

- a Section 16 (Building Regulations 2010) declaration of compliance with the Building Regulations.
- Statement from the respondent that all remediation works to remove relevant defects are completed.
- Copy of the post works Fire risk assessment with particular reference to External walls, Cavity Barriers and Fire doors. This may contain a FRAEW.

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

SCHEDULE OF WORKS

By [8 May](#) 2027 LDC (Oxford Road Bournemouth) Limited is required to remedy the relevant defects in Block A and Block B, Purbeck House, 3 Oxford Road, Bournemouth as specified below:

1. In respect of the terracotta rainscreen system (EWT2), carry out all work necessary to remedy the relevant defects such works to include:
 - (a) closing the exposed edges of the PIR core of the Kingspan MR panel behind the window, sill, head and jambs;
 - (b) installing cavity barriers around the reveals that cross the rainscreen cavity;
 - (c) adding steel flashings around the service penetrations;
 - (d) adding steel flashings around the vertical edges of panels where the insulation core is exposed;
 - (e) adding flashings to the openings formed by mast climbers during the original project;
 - (f) adding steel flashings to openings formed by and replacing insulation material removed during intrusive inspections carried out in the course of investigations.
2. In respect of the Kingspan MR panels (EWT5), carry out all work necessary to remedy the relevant defects such work to include:
 - (a) closing the exposed edges of the PIR core of the Kingspan MR panel behind the window, sill, head and jambs;
 - (b) adding steel flashings or an alternative suitable form of protection
 - (i) on the vertical edges of the panels where the insulation core is exposed
 - (ii) on the horizontal edges of the panels where the insulation is exposed;
 - (iii) to the openings formed by mast climbers during the original project;
 - (iv) to openings formed by and replacing insulation material removed during intrusive inspections carried out in the course of investigations
3. In respect of the insulated curtain walling (EWT4):

- (a) carry out all work necessary to remedy the relevant defects such work to include removing and replacing the combustible insulation with a suitable alternative, namely, to replace with materials which are classified in accordance with A2-s1, d0 or A1, classified in accordance with BS EN 13501- 1:2007+A1:2009; and
 - (b) new cavity barriers should be installed to compartment lines and edges of cavities.
- 4. In respect of the metal window pods (EWT3), carry out all work necessary to remedy the relevant defects such work to include removing and replacing the combustible insulation with a suitable alternative including the replacement of cavity barriers.
- 5. In respect of the metal louvre cladding (EWT6), carry out all work necessary to remedy the relevant defects such work to include removing and replacing the combustible insulation with a suitable alternative including replacing cavity barriers.
- 6. In respect of the undercroft parking soffit, carry out all work necessary to remedy the relevant defects such work to include removing and replacing the combustible insulation with a suitable alternative.
- 7. Carry out the works identified at paragraphs 1 to 6 above (the “Works”) and remedy the specified relevant defects in compliance with the Building Regulations applicable at the time the Works are carried out.
- 8. Carry out the Works so that the relevant defects no longer exist.
- 9. Carry out the Works in accordance with PAS 9980 so that a satisfactory FRAEW is issued.
- 10. Make good any damage caused as a consequence of the Works.



Neutral Citation Number: [2025] UKUT 157 (LC)

Case No: LC-2024-661

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

Ref: LON/OOBG/HY1/2023/0024

Royal Courts of Justice, Strand,
London, WC2A 2LL

28 May 2025

Corrected under rule 53, 4 June 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FTT PROCEDURE – points raised by the First-tier Tribunal of its own motion – remediation order under the Building Safety Act 2022 made in relation to “specified defects” that were not properly before the First-tier Tribunal – order made on the basis of the First-tier Tribunal’s opinions, contrary to the evidence before it and in the absence of evidence supporting the FTT’s view

BETWEEN:

MONIER ROAD LIMITED

Appellant

and-

NICHOLAS ALEXANDER BLOMFIELD AND OTHER LEASEHOLDERS

Respondents

**Smoke House and Curing House
18 Remus Road, E3 2NF**

**Upper Tribunal Judge Elizabeth Cooke and Mrs Diane Martin TD MRICS FAAV
14 May 2025**

Mr Jonathan Selby KC for the appellant, instructed by Donald Pugh solicitors
Mr Nicholas Blomfield for the respondents

The following cases were referred to in this decision:

Admiralty Park Management Company Limited v Olufemi Ojo [2016] UKUT 421 (LC)

Dugdale v Kraft Foods Limited [1976] 1 WLR 1288

Birmingham City Council v Keddie [2012] UKUT 323 (LC)

Regent Management Limited v Jones [2010] UKUT 369 (LC)

Sovereign Network Homes v Hakobyan and others [2025] UKUT 115 (LC)

Introduction

1. This is an appeal against a remediation order made by the First-tier Tribunal under the Building Safety Act 2022. The appellant is content that an order was made but challenges the breadth of the order, arguing that most of the defects specified in it were not properly before the FTT and that the decision was at variance with the evidence before the FTT.
2. The appellant, Monier Road Limited (“MRL”) was represented by Mr Jonathan Selby KC. The respondents, whose names are listed at the end of this decision and to whom we refer as “the leaseholders”, filed a Respondents’ Notice within the time directed by the Tribunal when permission to appeal was granted, but did not file a Statement of Case in the appeal until a week before the hearing. Mr Blomfield, who is one of the leaseholders and represented the rest, made an application in writing for that Statement of Case to be admitted despite the very late service. The Tribunal stated that it would hear the application at the hearing of the appeal; at the beginning of the hearing Mr Blomfield communicated with MRL’s solicitor by text to say that he would not be attending. Accordingly his application for permission to file a Statement of Case on behalf of the respondents was not heard and the Statement of Case has not been admitted. Nevertheless we make reference to it in the course of the decision so as to indicate why its admission would have made no difference to the outcome of this appeal. We are grateful to Mr Blomfield for his presentation of the appellant’s case and for addressing points raised by the leaseholders.
3. Not for the first time this year the Tribunal has to discuss the extent to which the FTT can raise points which are not part of either party’s case, and how it should proceed if it chooses to do so. The relevant law has recently been discussed in detail in the decision of the President of the Lands Chamber (Mr Justice Edwin Johnson) in *Sovereign Network Homes v Hakobyan and others* [2025] UKUT 115 (LC), and in terms of legal principle there is nothing we could add to that decision. But this is the first time the issue has arisen in the context of the Building Safety Act 2022 and the appeal provides a useful opportunity for the Tribunal to re-iterate the relevant legal principles in that context.

The statutory background: the Building Safety Act 2022

4. The Building Safety Act 2022 was enacted following the fire at Grenfell Tower in 2017, and it contains provisions intended to secure the safety of people in buildings and to improve the standard of buildings. Part 5 is about the protection of leaseholders; among its provisions are sections 119 to 124 about remediation orders in relation to “relevant buildings”. A relevant building is defined as a self-contained building or part of a building containing at least 2 dwellings and being at least 11 metres high or having at least 5 storeys.
5. Section 123 of the Building Safety Act 2022 reads, so far as relevant, as follows:
 - “(1) The Secretary of State may by regulation 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.

...

In this section—

... "*specified*" means specified in the order."

6. A "relevant defect" is defined in section 120(2):

"(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."

7. The provision made pursuant to section 123(1) is made in regulation 2(2) of the Building Safety (Leaseholder Protections) (Information etc) (England) Regulations 2022, which provides:

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

8. Part 4 of the 2022 Act is entitled "Higher-Risk Buildings" and makes provision about the management of "building safety risks" in relation to such buildings – defined in section 65 as being at least 18m tall or at least seven storeys, containing two or more residential units. Part 4 creates the status of an "accountable person" who has certain duties and responsibilities for the safety of the building. The Act gives the FTT jurisdiction to decide who is an accountable person, but not to decide whether or not a building is a higher-risk building.

The factual background

The building and the parties

9. Smoke House and Curing House are two blocks or wings of a single mixed use residential and commercial building, purpose-built between 2016 and 2018. There are 20 flats in Smoke House and 25 in Curing House; the building is a quadrangle enclosing a courtyard, laid out as a shared garden with planting in large wooden planters. The building obviously has two sets of external walls. Those facing the street are of brick; many of the flats have balconies on the street-facing walls, some protruding and some recessed. The courtyard walls on the other hand were constructed with timber cladding and combustible insulation. The courtyard is quite a striking feature with communal walkways and external staircases leading down to the garden and up to the roof terrace. There are bin stores on the street sides of the building, with louvered metal doors.

10. MRL holds the freehold of the building. The 29 leaseholders each hold a long lease of one of the flats. It is not in dispute that the building is a relevant building and that MRL is a relevant landlord as defined by the 2022 Act.

The MAF report and the application to the FTT

11. In October 2022, on the instructions of MRL, Michael A Fox Associates produced a report (“the MAF report”) assessing the fire risk of the external walls of the building; such a report is known in the building safety context as a Fire Risk Assessment for External Walls, or FRAEW. It was signed by four inspectors all with experience and qualifications specific to fire safety. The MAF report assessed the façade of the building against PAS9980:2022, which is a risk assessment tool produced by the British Standard Institute. The report gave the building an EWS1 rating of B2; an EWS1 Form provides evidence to valuers and lenders of the fire risk rating of a property’s external wall system. A rating of B2 indicates that the cladding contains combustible materials and that the fire risk is high enough to require remedial work. The MAF report recommended four actions, of which the principal one was that the timber cladding and combustible material on the external walls within the courtyard must be removed and replaced with a non-combustible alternative. The other three action points were the removal of commercial bins from against the external wall to a secure non-combustible bin store, the repair of the doors to the bin stores, and the installation of smoke detectors in rooms with walls within the timber cladding system. The report stated that that would “reduce the fire risk to as low as reasonably practicable”
12. Those were the only actions recommended following a comprehensive examination of the whole of the exterior of the building. The MAF report discussed the street-facing brick walls, the balconies on those walls, the roof terrace, and the planters and recommended no action. It noted that there was timber cladding inside some of the balconies (all of which are on the street side of the building and surrounded by brick walls) and said that the risk of fire spread between balconies was low. It noted that there was timber decking on the walkways, and that there was a risk of fire spread on the gallery walkways as a result of the cladding; it recommended replacement of the cladding as noted above, but did not recommend any action as regards the walkways themselves. It considered the fire escape strategy, which it regarded as satisfactory; and it noted that the nearest fire station was 1.4 miles away and that the fire service had good access to the building.
13. On 22 November 2023 the leaseholders applied to the FTT for a remediation order. The application was made against “The Aitch Group”, which is a company connected to the appellant and was later replaced by MRL as respondent to the FTT application.
14. On the FTT’s application form in box 5 headed “Defects to the building for which a remediation order is sought” the leaseholders said:

“This application to the Court is for a Remediation Order to instruct Aitch Group to, without delay, undertake works to replace the high-risk cladding used on the property.

Aitch Group has a ringfenced fire cladding rectification fund which we request should be used to, without delay, complete the replacement of the high-risk non-compliant materials they used in constructing Smoke House and Curing House.

Aitch Group have accepted full responsibility and liability in a letter to leaseholders, however, they have declined to provide any further information on when they will instruct a building firm to undertake rectification works ...”

15. On the next page in the box headed “Reasons for Application” the leaseholders explained that the freeholder had commissioned a survey but had done nothing except install fire alarms in the common areas. They pointed out that the Aitch Group had

“a fund of over £1,500,000 specifically ring-fenced to rectify cladding issues with Smoke House and Curing House”.

16. The leaseholders complained that without an EWS1 rating of B1 they could not sell or mortgage their flats. They concluded

“We request that the Court direct the Aitch Group to without delay, instruct, at their cost, a reputable and independent builder to undertake the necessary cladding replacement works to ensure the building is safe and compliant with applicable fire safety regulations. ...

17. The FTT conducted a case management hearing on 12 January 2024 and recorded in its directions that there was broad agreement regarding the works to be carried out to deal with fire safety issues and that:

“These are works identified by Monier Road Limited and concern the removal and replacement of the timber cladding and combustible insulation within the courtyard area.

... The likely dispute between the parties is the timing of the works.”

18. Directions were given for disclosure and for statements of case, and for the provision of a bundle for the hearing including “all relevant reports.” A hearing was listed for 27 March 2024. In their statement of case the leaseholders set out the work they wanted done, including an extra element: “the front fire doors of each of the properties and the internal fire doors of the communal areas (if required to be replaced)”.

19. We pause there to say that the defects specified in the application to the FTT were the cladding and combustible insulation in the courtyard, and nothing else. The leaseholders relied upon the MAF report and the purpose of the application was to make the freeholder get on with the work recommended in that report. The replacement of doors was added in the leaseholders’ Statement of Case in the FTT. Mr Blomfield in his statement of case in the appeal (see paragraph 2 above) argued that the application was for an order requiring the removal of all combustible material in the building; it will be clear from the extracts quoted above that that was not so. Only the cladding and insulation were specified, as the FTT recognised in its directions and later in its decision.

The hearing on 27 March 2024

20. The authors of the MAF report did not attend the hearing; there was no need for the leaseholders, who relied upon their report, to call them because there was no dispute about

the contents of the report. Indeed, by the date of the hearing MRL had put together a specification of works and put it out to tender.

21. In its later decision the FTT summarised what happened at the hearing on 27 March. It said that at the outset of the hearing it “put to the parties its concerns” that the building might be a higher risk-building, that the recommended works did not include dealing with substantial amounts of timber on the walkways, balconies and roof terrace, that the courtyard contained wooden planters and planting, and that it wanted to know what account had been taken of the risks generated by the bin store, flat entrance doors, louvres and panels to windows and balconies. The FTT decided to adjourn the hearing; it wanted the authors of the MAF report to have the opportunity to consider and respond to the FTT’s concerns.
22. Mr Selby KC explained to the FTT at the March hearing that MRL no longer wanted to work with MAF and, if required to produce a further report, it wanted to instruct Building Envelope Fire Solutions (“BEFS”). He asked for a direction listing precisely what the FTT wanted BEFS to report on. The FTT gave directions for the hearing to be re-listed and for it to conduct a site visit on the day of the adjourned hearing. It set out the following requirements (the “Respondent” of course being MRL):

“5. The tribunal (being satisfied that the cladding to the external courtyard walls is a Relevant Defect and that it will be included in a Remediation Order) is concerned regarding the following issues:

Whether the following are a relevant defect and their remediation be required in a Remediation Order

- (a) Balconies
- (b) Communal walkways
- (c) Flat entrance doors
- (d) Louvres and panels
- (e) Roof terrace
- (f) Bin store

Whether the flat entrance doors are identified as relevant defects.
Confirmation of and proof of remediation of communal doors.

6. The Respondent to provide a report from Building Envelope Fire Solutions which addresses Relevant Defects (as defined by the Building Safety Act 2022) and the extent to which remediation works are required to the above, and if so in what respect.”

The FTT’s decision and the remediation order

23. On 18 June 2024 the FTT visited the building and then conducted the adjourned hearing. MRL by then had filed a report about the height of the building and whether it was a higher-risk building, and a report by BEFS dated 17 May 2024; the authors of the BEFS report attended the hearing. The FTT issued its decision and a remediation order on 3 July 2024.
24. The decision first recorded what had happened at the hearing on 27 March 2024, and set out the issues that had been discussed at that hearing under two headings. Under

“Leaseholders’ issues” it noted that the leaseholders were concerned about the aesthetics of the remediation work, about the cost (as to which MRL confirmed that it would fund the works itself) and about the choice of contractor. Under “The tribunal’s issues” the FTT recorded that at the March hearing it had been concerned about the timber elements of the walkways and balconies and about the timber planters; it recorded MRL’s position that those items would not present a risk once the cladding was replaced. It also recorded its concern about doors and about the bin stores. The FTT acknowledged that the BEFS report concluded that if the timber cladding was replaced, that would sufficiently reduce the risk presented by other combustible materials, and that no further remediation works were required.

25. The FTT then went through the concerns raised by the leaseholders. It concluded that it had no power to impose requirements about aesthetics and materials, nor about the choice of contractor.
26. Paragraphs 59 to 91 of the decision, extending over 6 pages, comprised a discussion of whether the building was a higher-risk building as defined in section 65 of the 2022 Act, the meaning of the word “storey” and the status, authorship and accuracy of government guidance. It said:

“88. The [leaseholders] requested that the building is declared a Higher-risk building under Part 4 of the Building Safety Act 2022. The Respondent refutes this, and the tribunal has no jurisdiction to make this declaration.”

27. The FTT went on to criticise the evidence adduced by MRL about the height of the building and concluded that the building is a higher-risk building, that it should be registered with the Building Safety Regulator and that it should have an accountable person appointed. It added:

“This is not for the Tribunal to specify under the terms of a Remediation Order...”

28. The FTT then moved on to the remediation work and the contents of the BEFS report, which did not agree that the items it was instructed to investigate (paragraph 22 above) were relevant defects. The FTT said that there had been no risk assessment under PAS9980 (which, as we have seen, was incorrect; that is precisely what the MAF report was), and criticised BEFS’s use of Building Regulations and of Approved Document B (being one of the documents issued by the Secretary of State explaining how Building Regulations can be complied with; Approved Document B deals specifically with fire safety requirements).
29. The FTT said that it accepted the professional judgment of the authors of the report that the flat entrance doors were not a fire risk.
30. The FTT devoted a lengthy discussion to the fire escape strategy in the building, which it said was raised as a concern by the leaseholders at the June hearing. It expressed concern about space for fire-fighting, and again asserted that although this was one of the criteria in PAS9980 it had not been addressed in the BEFS report.

31. Finally in six paragraphs the FTT went through the issues it had raised at the first hearing and listed in the order of 27 March 2024. It stated that the walkways should be constructed of non-combustible materials. It stated that the wall cladding in the balconies should be replaced with non-combustible materials, referring to comments in PAS9980 about balconies that are used as escape routes (despite the fact that these balconies, on the external walls, are not). It stated that there is a risk of fire spread from one balcony to another or from the bin stores. It stated that it had been given no evidence about the implications of a fire in the bin stores and therefore considered that there was a considerable risk of fire spread. It stated that the decking on the roof (which it said it had measured at the site visit) and the planters were an unacceptable risk of fire spread.
32. The remediation order made on 3 July 2024 included standard text in the body of the order and scheduled the following requirement:
- “The Respondent shall remedy the
- A. balconies, including the walls and floor decking and construction,
B. external walls, including the courtyard and street elevations,
C. bin stores
D. courtyard walkways
E. courtyard floor area – including planters, flooring and other combustible materials
F. roof terrace, including flooring and planters
33. We refer to the requirements of the order other than the courtyard cladding and combustible insulation (which we take to be comprised in item B under “external walls including the courtyard”) as the “Additional Items”. The appellant appeals their inclusion in the order.

The appeal

34. The FTT refused permission to appeal its decision (and we return later to some of its comments in the text of its refusal). The appeal is brought with permission from this Tribunal, on the ground that (a) the Additional Items were not properly before the FTT and (b) even if they were, they were not on the evidence before the FTT relevant defects. For both those reasons Mr Selby KC argued that the inclusion of the Additional Items in the remediation order was a serious procedural irregularity and a breach of natural justice.
35. There is no appeal in relation to the FTT’s statement that the building is a higher risk building because the FTT in refusing permission to appeal stated that that statement was an expression of opinion, not a decision:
- “... the tribunal had no jurisdiction to make a declaration that the subject building is a higher-risk building. ... Accordingly, the tribunal’s comments; (a) form no part of its operative decision, and; (b) are accordingly no more than a statement of the tribunal’s opinion on the matter which is not binding on any party.”
36. Mr Selby KC developed his argument under five headings. He argued that the FTT should not have raised the Additional Items at the hearing in March and did not follow a fair procedure having done so; that there was no evidence before the FTT that the Additional

Items were relevant defects, let alone that they required remediation; that the FTT inappropriately used its own expert knowledge to make findings contrary to the evidence before it; that the FTT never put it to MRL or to its experts that the Additional Items were, contrary to their unchallenged evidence, relevant defects, nor that they required remediation; and that two of the Additional Items (the street-facing walls and the courtyard floor) were not identified at the March hearing as matters to be addressed by the BEFS report. We look at those points in turn

(1) The FTT's raising of the Additional Items on its own initiative

37. It will be clear from the account we have set out above that none of the Additional Items (see paragraphs 32 and 33 above) was specified as a defect in the respondents' application to the FTT. Their pleaded case went a little wider by introducing the possibility of a requirement to replace fire doors (paragraph 18 above), but the FTT accepted that the doors were not relevant defects and they were not among the Additional Items. Most (but as we shall see later not all) of the Additional Items were raised by the FTT at the hearing in March 2024, and in its decision of 3 July 2024 the FTT discussed them under the heading "The Tribunal's issues", as distinct from "The Leaseholders' issues". As the FTT itself acknowledged (paragraph 54 of its decision) the remediation order required MRL to "undertake considerably more work than it envisaged".
38. Consideration of the circumstances in which the FTT may raise issues on its own initiative, when they do not form part of a party's case, takes us again to the ground trodden by the President in *Sovereign Network* (paragraph 3 above). His discussion of the authorities was comprehensive, and there is no point in our reproducing it and no need for us to present the authorities in the same detail. We commend *Sovereign Network* to readers who seek a full account of the law. What we aim to do here is to present a summary, based on Mr Selby KC's excellent skeleton argument, which FTT judges and members may find useful when deciding, before or during a hearing, whether they should raise a new point.
39. The law can be summarised in five propositions. First, the FTT can raise points that the parties have not raised. In *Regent Management Limited v Jones* [2010] UKUT 369 (LC) the Tribunal (HHJ Mole QC) said this in the context of service charge disputes, and with reference to the Leasehold Valuation Tribunal which is now the FTT:

"29. The LVT is perfectly entitled, as an expert tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much."
40. Second, and as an important qualification of that first principle, legal proceedings in England and Wales (with a few exceptions not relevant to this appeal) are adversarial, not inquisitorial; that means that it is for the parties to present their cases and for the tribunal (by which we mean the court or tribunal, whether a single judge or a panel) to decide between them. It is not for the tribunal to suggest, let alone to argue, a case for either party. To do so is to step out of its proper role and into the arena of dispute; it is unfair, because it involves taking sides. As the Tribunal (HHJ Nigel Gerald) said in *Birmingham City Council v Keddle* [2012] UKUT 323 (LC):

“17. ...It is the jurisdiction and function of the LVT to resolve issues which it is asked to resolve, provided they are within its statutory jurisdiction. It is not the function of the LVT to resolve issues which it has not been asked to resolve, in respect of which it will have no jurisdiction. Neither is it its function to embark upon its own inquisitorial process and identify issues for resolution which neither party has asked it to resolve, and neither does it have the jurisdiction to do so.

18. [...]

19. That said, there may of course be rare cases in which it is appropriate or necessary for the LVT to raise issues not expressly raised by the parties but which fall within the broad scope of the application in order to properly determine the issues expressly in dispute.”

41. Third, the authorities have identified three types of occasion when it will be appropriate for a tribunal to raise a new point:

- a. Where the tribunal needs to raise a new point on the basis that it may not have jurisdiction to decide the issue before it, or on the basis that there is a fundamental problem with a party’s case. This will often be a point of law but it may be one of fact. As the Deputy President (Martin Rodger KC) put it in *Admiralty Park Management Company Limited v Olufemi Ojo* [2016] UKUT 421 (LC) at paragraph 30, the FTT is not required “to shut its eyes to an obvious and potentially fatal irregularity.”
- b. Where a statute requires the tribunal to address a matter that the parties have not raised. The example that springs to our minds is the requirement in section 84 of the Law of Property Act 1984 which requires the Tribunal, when considering an application for discharge of a restrictive covenant, in some circumstances to consider town and country planning considerations such as the local plan.
- c. In order to clarify a party’s case (see the passage quoted above from *Keddie*, and see paragraph 127 and following of the President’s decision in *Sovereign Network*).

42. Fourth, whether or not to raise a new point is a matter of discretion, and the decision to do so will not be interfered with on appeal unless the appeal court takes the view that the decision to raise the new point was one which no reasonable tribunal could have taken (see paragraph 147 of the President’s decision in *Sovereign Network*).

43. Fifth, if the tribunal does raise a new point it must follow a fair procedure. That has been stressed repeatedly in the authorities. As the President put it in *Sovereign Network* at paragraph 195(4):

“In raising a new point the FTT should not descend into the arena or give the appearance of descending into the arena. The role of the FTT is limited to raising the new point, assuming that it is appropriate to raise the point at

all. Thereafter, it is for the relevant party, to whose advantage the new point may be, to decide whether to pursue the new point.”

44. As the President explained, for the point to be pursued it must be pleaded, and the first question will be whether the relevant party can amend its statement of case in order to add the new point; the tribunal must hear from both parties as to whether that should be allowed. If it is allowed then it is for the party now taking the point to argue it and for the other party to respond to it; if evidence is required to prove it then both parties must be able to adduce evidence on the new point. An adjournment may be needed and case management directions will then be given.
45. In light of the law, Mr Selby KC framed his argument in a number of ways.
46. First, he argued that the FTT had no jurisdiction to make a remediation order in respect of the Additional Items because they were not specified in the leaseholders’ application. The FTT has jurisdiction to make a remediation order only on the making of an application (section 123(2) of the Buildings Safety Act) and, said Mr Selby KC, only in respect of defects specified in the application as required by the regulations and as invited by the layout of the application form.
47. We agree that the FTT has jurisdiction to make a remediation order only if an application has been made. We do not agree that the FTT can order the remediation of a relevant defect only if it was specified in the application. “Specified” in section 123 means “specified in the order”; we are not persuaded that any problem of jurisdiction arises where the FTT is asked by an applicant to make an order that goes rather wider than envisaged in the application. The extent of the application may well change once the parties have formally pleaded their cases (as the leaseholders’ case did here, in adding the fire doors when they filed their statement of case), or they may seek to amend their pleading later and may be permitted to do so. Either way, a defect not actually listed in the application form may become part of a party’s case, and the FTT may be persuaded by evidence to specify that defect in the remediation order after hearing both parties on the point. That is not what happened here; but our point is that the fact that a defect is not specified in an application does not mean that the FTT cannot make a remediation order in respect of it. It can, provided the correct procedure is followed.
48. Second, Mr Selby KC argued that the FTT had no jurisdiction to raise the Additional Items.
49. We agree that the FTT should not have raised them, although we would not put it the same way; jurisdiction is about the ability to decide things, and the question here is whether the FTT exceeded not its jurisdiction to decide but its discretion to raise a new point. The exercise of a discretion will rarely be appealable, unless the decision concerned was one that no reasonable tribunal could have made. That was the case here. We can explain that by reference to the third point in our summary of the law, at paragraph 41 above. The FTT’s concerns about the Additional Items were not points about jurisdiction, nor was the FTT under any statutory direction to raise them; the Building Safety Act 2022 does not require or enable the FTT to conduct a building safety audit, which is what it did here. Nor did the FTT raise the Additional Items in order to clarify the leaseholders’ case. Their case was perfectly clear. They relied upon the MAF report, with which MRL had no quarrel, and which not only set out what was wanted by way of remediation but also

considered the Additional Items and concluded that they were not relevant defects and did not require remediation. The leaseholders' case needed no clarification; and these were not items that no-one had thought of. The FTT's decision discloses no good reason for its having raised the Additional Items and we conclude that it exceeded its discretion in doing so.

50. Moreover, having raised the Additional Items the procedure adopted by the FTT was unfair. We refer here to the fifth point in our summary, at paragraphs 43 and 44 above. The FTT did not invite the leaseholders to amend their pleadings or in any way to make a case about the Additional Items themselves. Instead the FTT became a party to the dispute. The issue about the Additional Items was between the FTT and MRL. We are told by the FTT in its refusal of permission to appeal that Mr Blomfield in his closing submissions expressed the wish for the FTT to resolve all the building safety matters at the building; but the new case was raised by, and argued by, the FTT without the leaseholders' involvement. It required nothing from them; it gave directions for MRL to produce evidence but sought neither argument nor evidence from the leaseholders; at the adjourned hearing it questioned the authors of the BEFS report but the leaseholders did not until after the FTT had done so. It set out its decision about the Additional Items under the heading "The Tribunal's issues", thus making it explicit that these were not the leaseholders' issues.
51. In light of the circumstances in which the FTT raised the Additional Items, and the procedure it adopted having done so, we take the view that its decision to require the remediation of the Additional Items was vitiated by a serious procedural irregularity and was a breach of natural justice, and we set it aside.

(2) Decision contrary to the evidence

52. Equally fatal to the FTT's decision is that it was taken contrary to the evidence before it and gave no reason for its disagreement. Mr Selby KC referred to *Re B (Care: Expert Witnesses)* [1006] 1 FLR 667 where Butler-Sloss LJ said 674F:

"... it is important to remember that the decision is that of the Judge and not of the professional expert. Judges are well accustomed to assessing the conflicting evidence of experts. As Ward, LJ said, Judges are not expected to suspend judicial belief simply because the evidence is given by an expert. An expert is not in any special position and there is no presumption of belief in a doctor however distinguished he or she may be. It is, however, necessary for a Judge to give reasons for disagreeing with experts' conclusions or recommendations. ... A Judge cannot substitute his views for the views of the experts without some evidence to support what it is he concludes."
53. We have already observed that the MAF report, prepared by qualified experts whose competence was not challenged before the FTT, was a comprehensive survey of the building. It considered the street-facing walls and balconies, the walkways, the bin stores, escape arrangements and firefighting capacity and concluded that no remediation was needed. The BEFS report too examined those items that were referred to it and concluded that no action was needed. No other evidence was presented to the FTT.

54. Why the FTT disagreed with that evidence we do not know. Its views about the Additional Items, or rather most of them – some are not even mentioned in its decision, as to which see paragraph 64 below – are set out in six paragraphs, on a single page, and consist only of assertions. For example, the FTT said this about the walkways:

“Walkways: It is of vital importance in fire safety risk terms to ensure that the walkways are a safe route for both residents to escape and firefighters to gain access to the floors at all levels. The walkways should be constructed of non-combustible materials.”

55. That is all. No reason is given for the FTT’s disagreement with the assessment, in both the expert reports before it, that the walkways would present a low risk once the cladding was removed. The following paragraphs, relating to balconies, bin stores and so on, present the same difficulty. Either the FTT had no reason for disagreeing with the experts’ opinions or it did not give its reasons; either way, the decision has to be set aside.

(3) Inappropriate use of the FTT’s expertise

56. This point arises only from the FTT’s refusal of permission to appeal; there was no mention of the FTT’s expertise in the decision of 3 July 2024. In its refusal of permission to appeal the FTT said:

“The tribunal’s decision contains its reasons, in respect of each of the matters listed above, as to why it, as an expert tribunal, disagreed with the expert, and why it found that these matters were Relevant Defects and why they should be included in a Remediation Order.”

57. As we said above, the decision of 3 July 2024 does not give the FTT’s reasons why the FTT disagreed with all the evidence before it. The reference to its expertise does not help matters. Certainly the FTT is a tribunal whose judges and members have considerable expertise in property law and in a number of other disciplines. The non-legal member of this panel is a Registered Building Inspector, a Fellow of the Royal Institution of Chartered Surveyors, and a Member of the Institute of Fire Engineers. But expertise is not evidence, and the possession of expert knowledge does not enable the FTT to ignore evidence without giving reasons for doing so.

58. In *Dugdale v Kraft Foods Limited* [1976] 1 WLR 1288 Phillips J sat as a judge in the Employment Appeal Tribunal, and his comments are equally relevant to other tribunals:

“The members of industrial tribunals are appointed because of their special knowledge and experience, and we have no doubt that they are entitled to draw upon it in playing their part in assisting the tribunal as a whole to reach a decision. The main use which they will make of this knowledge and experience is for the purpose of explaining and understanding the evidence which they hear. Certainly, they are entitled to use their knowledge and experience to fill gaps in the evidence about matters which will be obvious to them but which might be obscure to a layman. More difficult is the case where evidence is given which is contrary to their knowledge and experience. If such an occasion arises, we think that they ought to **draw to the attention of the witnesses the experience which seems to them to suggest that the evidence given is wrong**, and ought not to

prefer their own knowledge or experience without giving the witnesses an opportunity to deal with it. Provided that this opportunity is given there seems to us to be no reason why they should not draw on their own knowledge and experience in this way also. But it is highly desirable that in any case where particular use is made by an industrial tribunal of the knowledge or experience of one or more of their members in reaching their decision this fact should be stated, and that particulars of the matter taken into account should be fully disclosed.”

59. The emphasis there is ours, and that is what the FTT did not do. The FTT in its decision did not explain why its expertise led it to draw conclusions contrary to the evidence; it did not, for example, set out professional guidance which pointed to contrary conclusions, nor to practical examples of buildings of which the judge or member had knowledge, nor to previous cases in the FTT nor to authoritative decisions that led them to doubt the contents of the MAF report or the BEFS report. There is no indication that they did so at the hearing and therefore whatever it was that influenced them the witnesses had no opportunity to deal with it. We really have no idea why the panel’s expertise led it to contrary conclusions; nor have the parties. Insofar as the FTT’s decision was reached in reliance, in some undisclosed way, on its own expertise it was unfair and for this additional reason must be set aside.

(4) The matters were not put to MRL or its expert witnesses

60. The FTT in its decision of 3 July 2024 devoted just six paragraphs to the Additional Items, or rather to some but not all of them. It did not set out what was MRL’s position on any of those items, nor did it say what was the view of the authors of the BEFS report (apart from the generic comment earlier in the decision that their report concluded that none of the items referred to it by the order of 27 March 2024 were relevant defects). Mr Selby KC said that the FTT’s views about the Additional Items were not put to the authors of the BEFS report.
61. In its refusal of permission to appeal the FTT said:
- “The tribunal’s notes of the final hearing record that there was discussion between the tribunal and the Respondent’s expert regarding all the above matters.”
62. That is not an assertion that matters were put to the authors of the report. We accept what Mr Selby KC told us about this aspect of the hearing and regard it as confirmed by the FTT’s comment in response to the point.
63. It is crucial that a party and its witnesses have the opportunity to answer the case against it before a court or tribunal reaches its conclusion. In these proceedings of course the FTT’s concerns about the Additional Items were its own concerns; they were not part of the leaseholders’ application nor of its pleaded case. For that reason we have already concluded that the decision was unfair and must be set aside, but this further point is an additional reason why the decision was unfair and cannot stand.

(5) Additional Items not identified in the March order

64. Finally, Mr Selby KC pointed out that two of the Additional Items, namely the external street-facing walls and the courtyard floor, were not listed in the order of 27 March 2024 as matters that BEFS was to report on. All that has been said about the rest of the Additional Items applies to these two items, with the further problem that MRL had no warning before the hearing in July 2024 that these two parts of the building were a concern to the FTT. Their inclusion in the remediation order was therefore particularly unfair. We agree, and would add that the street-facing walls are not even discussed in the FTT's substantive decision. We fail to see what MRL was supposed to do about the street-facing walls, which were made of brick.
65. Mr Selby KC also observed that the FTT's expressed concern about fire escape routes, external stairs and firefighting capacity were inappropriate since BEFS was not asked to report on those matters. Further, its complaint that it did not have a PAS9980 risk assessment was doubly inappropriate because it did not direct such an assessment on 27 March 2024 and because of course it already had one since that was what the MAF report was. We agree.

Conclusion on the grounds of appeal

66. For all the reasons set out above the FTT's decision to include the Additional Items in the remediation order was procedurally irregular and unfair, and is set aside.

Consequences

67. The appeal was, as we said at the outset, opposed by the leaseholders. We accept that they were content with what the FTT did and believed what the FTT said; and in that response is seen the damage that the FTT has done. The leaseholders are now convinced that they live in a dangerous building. The cladding and combustible insulation in the courtyard have now been removed and replaced, and the building has an EWS1 B1 rating so that the flats can be sold and mortgaged, yet the leaseholders do not feel safe because the FTT has convinced them that they are not. Their relationship with MRL is seriously damaged. We do not know to what extent our decision might begin to put things right; we hope that they will read it and come to understand that the course taken by the FTT was not only unfair but substantively wrong because there is no evidence that the building is unsafe and ample evidence that it is now safe.
68. It is appropriate that we add a comment about the FTT's "expression of opinion" that the building is a higher-risk building. By contrast with its position about the Additional Items, the FTT knew and acknowledged in its decision that it had no jurisdiction to decide or declare that the building was a higher-risk building and that what it said had no legal effect. It confirmed as much in its refusal of permission to appeal. Why it did not therefore review its decision in response to that application so as to remove the lengthy discussion about higher-risk buildings is impossible to understand.
69. The FTT's comments in its refusal of permission to appeal did not mend the damage that has been done. Before the March hearing neither party took the view that this was a higher-risk building. The FTT in raising the point caused MRL to incur the expense of

producing evidence about the height of the building, pointlessly since the FTT had no jurisdiction to say anything about the point. We see from the leaseholders' statement of case in the appeal that Mr Blomfield is now convinced, and perhaps other leaseholders are too, that the building is a higher-risk building; yet there was no evidence before the FTT to support that opinion. And its public expression of its opinion in its decision, including its comments on government guidance, has doubtless caused concern and confusion for building safety professionals. All of this illustrates how dangerous it is for a tribunal to express a view about a matter that is not within its jurisdiction.

70. So what should the FTT do in a case where an application has been made for a remediation order and the FTT spots a serious fire safety risk that neither party has noticed and which it thinks is a relevant defect that requires remediation? Imagine a case where the application before the FTT is clear, and the defect the FTT has spotted has nothing to do with the defects specified in the application. It is not addressed in any of the evidence before the FTT. The FTT has visited the building and thinks that there is a problem that no-one has spotted. Is it required to close its mind to a problem that is not figuratively (as in *Admiralty*, see paragraph 41(a) above) but literally potentially fatal?
71. We discussed this question with Mr Selby KC at the hearing and we agree with his answer. The FTT has a discretion to raise new points. In the case we have imagined there is a sound reason for doing so. But having done so the FTT must then follow the correct procedure, and if the applicant for the remediation order declines to pursue the point there is nothing the FTT can do about that and it has discharged its responsibility.
72. We would add that the likelihood of that happening is vanishingly small. Usually an application for a remediation order will be made after a comprehensive risk assessment, as was the one in the present proceedings. It is unlikely that a real risk will have gone unnoticed by professionals charged with a risk assessment and yet be obvious to the FTT from a hearing bundle and a site visit. Furthermore if that does happen and the FTT is able to explain why there is a real risk to life it is very unlikely that neither party will be willing to address it.
73. What we saw in the present case was a very long way from that situation. The FTT raised its concerns without having seen the building and in the face of unchallenged evidence that its concerns were unfounded. Nothing that we have said in this decision, and nothing in the law we have discussed, gives rise to concerns that real fire risks will go unremedied because of a legal technicality. On the contrary, the law is designed to ensure that risks are properly assessed and the FTT's discretion can safely be exercised within that framework.

Re-making the order

74. There is no question of any need to remit the matter to the FTT. We are asked to re-make the remediation order so as to exclude the Additional Items, and we will make an order in the form of the draft submitted by Mr Selby KC. He has asked us also to delete from the order the FTT's requirement that MRL submit the order to the Building Safety Regulator; that order arose from the FTT's view that the building is a higher risk building. Since the FTT had no jurisdiction to determine that the building fell into that category the requirement had no rational basis and we delete it.

28 May 2025

Corrected in paragraphs 9, 50, 64 and 67 under rule 53 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010

4 June 2025

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

List of Respondents

MARIA ESCRIBANO (2)
HELENA LENDRUM AND MATTHEW RANKIN (3)
JAMES MICHAEL FORSTER (4)
SARA AND ALEXANDER GRADY (5)
KERRI ANNE PRITCHARD (6)
CLAIRE WAXLER AND TANJA LAUTENSCH LAEGER (7)
AMY AND JOHN ACKERLEY (8)
JUSTIS JUSTIN (9)
PAVIR AND CHERYL PATEL (10)
JONATHAN SMITH (11)
MICHAEL ELSDORFER AND SEYEDEHAMAGHAN FATEMI (12)
M A MOTTALIB (13)
HEIDI OLSEEN (14)
DHEARAEN QUICK (15)
EDOARDO PASCALE AND KATE PENWARDEN (16)
ROBYN YON (17)
ANNE MARIE MCLOUGHLIN (18)
ISABEL HARRIS (19)
WAYNE HOLLAND (20)
RICHARD PAYNE (21)
ROBERT PILKINTON (22)
ANDREW SIEPRATH AND KATE PEARSON (23)
AMAKA UKPABI (24)
ANDREI ZAMFIRACHE AND AMY SHIELDS (25)

MAGDALEN A KOZAK (26)

JO COLE (27)

CLARISSA CAPPELLETTI (28)

NICK WALTERS AND LOMA ROBERTSON (29)



**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 Hamlin
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

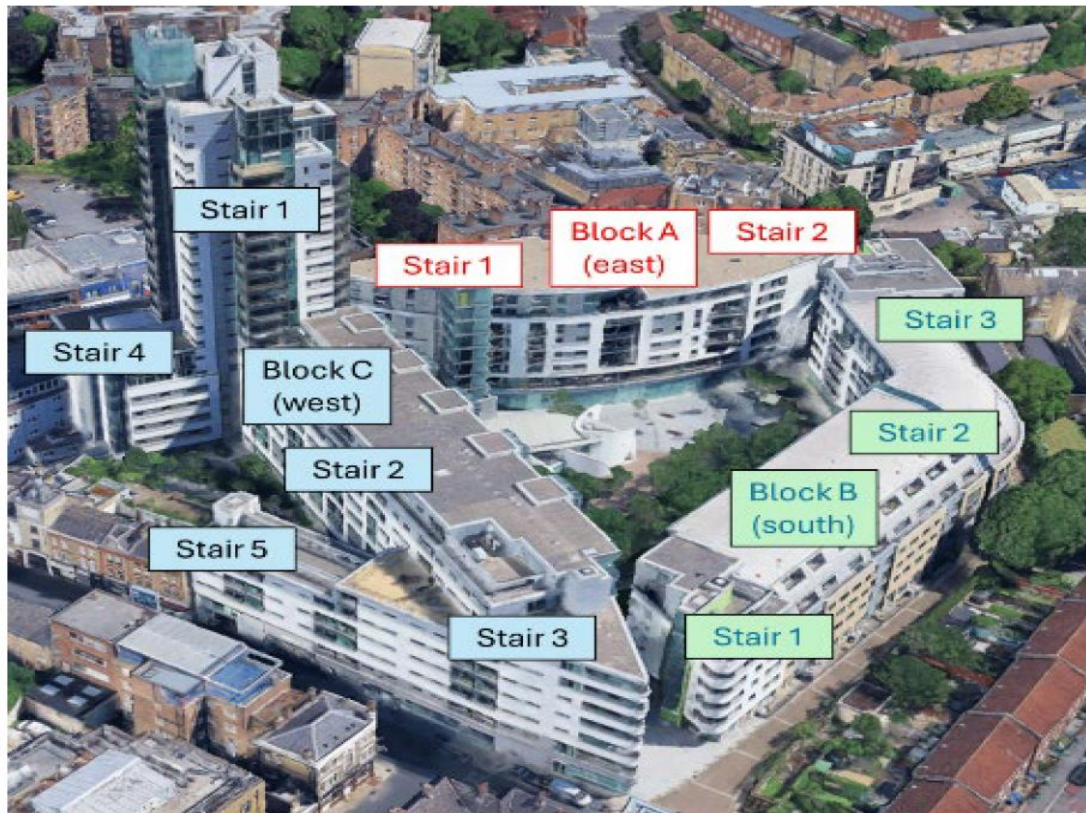
- (4) Inevitably, despite the two applications that have been made involving different parties and different tests to be applied, the material history is the same. While we intend to deal with the applications separately in decisions below in order to avoid any confusion or inappropriate cross-pollination (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 like 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 provide 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 themselves 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 $N \times £2,000,000$,

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

- (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 known 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 Tillison 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 Tillison 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 it 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 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 "*resource 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) 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.

(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.

Legal Costs

(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, among others, 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 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 at 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 than 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



Neutral Citation Number: [2025] EWCA Civ 846

Case No: CA-2024-001256

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Upper Tribunal Judge Elizabeth Cooke
Case Nos: LC-2023-134 to LC-2023-138

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 July 2025

Before :

LORD JUSTICE NEWAY
LORD JUSTICE NUGEE
and
LORD JUSTICE HOLGATE

Between :

TRIATHLON HOMES LLP

Applicant/
Respondent to
Appeal

- and -

**(1) STRATFORD VILLAGE DEVELOPMENT
PARTNERSHIP**
(2) GET LIVING PLC

Respondents to
Application/
Appellants

(3) EAST VILLAGE MANAGEMENT LTD

Respondent to
Application and
Appeal

- and -

**SECRETARY OF STATE FOR HOUSING,
COMMUNITIES AND LOCAL GOVERNMENT**

Intervener

Jonathan Selby KC and Cecily Crampin (instructed by **Mishcon de Reya LLP**)
for the **Appellants**

Alexander Nissen KC and Paul Letman (instructed by **Gowling WLG (UK) LLP**)
for **Triathlon Homes LLP**

Timothy Polli KC (instructed by **Bevan Brittan LLP**) for **East Village Management Ltd**

Michael Walsh KC, Camilla Chorfi and Richard Miller (instructed by the **Treasury Solicitor**) for the **Intervener**

Hearing dates: 19, 20 and 21 March 2025
Further written submissions: 27 May 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 8 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This appeal concerns orders known as remediation contribution orders (“**RCOs**”) made by the First-tier Tribunal (“**FTT**”) under powers conferred by Part 5 of the Building Safety Act 2022 (“**the BSA**” or “**the Act**”). The RCOs require the Appellants, Stratford Village Development Partnership (“**SVDP**”) and Get Living plc (“**Get Living**”), to pay substantial sums in respect of the costs of remedying fire safety defects in the external walls of five residential blocks in the East Village Estate in Stratford in East London. SVDP was the original developer of the estate, and Get Living is (now) in effect the owner of SVDP.
2. The RCOs were made on the application of the 1st Respondent, Triathlon Homes LLP (“**Triathlon**”). Triathlon is a provider of social housing and has long leasehold interests in the social housing in the blocks. The management of the estate is the responsibility of the 2nd Respondent, East Village Management Ltd (“**EVML**”). EVML has incurred the cost of engaging contractors to do the work required to remedy the fire safety defects. But for the BSA, Triathlon would have been liable to contribute to the costs incurred by EVML through its service charges; but it is common ground that one of the effects of the BSA is that Triathlon is not liable to make any such payments. The main effect of the RCOs is to require SVDP and Get Living to pay to EVML what would have been Triathlon’s share of the costs incurred by EVML; they also provide for Triathlon to be reimbursed certain costs it had already paid.
3. The RCOs were among the first made under the BSA. It had initially been intended that the applications for them should be heard by the Upper Tribunal (“**UT**”), and they were transferred to the UT to be heard by Edwin Johnson J and Martin Rodger KC, the President and Deputy President respectively of the Lands Chamber of the UT. But it became clear at the hearing that the UT has no original jurisdiction to make RCOs (the jurisdiction being conferred by the BSA solely on the FTT), and they therefore re-transferred the case to the FTT and continued to hear it sitting in their capacity as judges of the FTT. They concluded that RCOs should be made, for reasons given in a thorough and careful decision dated 19 January 2024 at [2024] UKFTT 26 (PC); and that was given effect to by an Order dated 5 March 2024. Their decision was appealed with their permission to the UT but the UT (Judge Elizabeth Cooke) agreed at the joint invitation of the parties to dismiss the appeal and grant permission to appeal to this Court without herself engaging with the substance of the argument, thereby in effect creating a leapfrog appeal to this Court from the decision of the FTT. Formally therefore we have before us an appeal from the UT, but there is no reasoned decision of the UT and in effect we are hearing an appeal from the detailed decision of the FTT.
4. This is the second of two appeals to this Court concerning the operation of Part 5 of the BSA, the other being *Adriatic Land 5 Ltd v The Long Leaseholders at Hippersley Point* (“**the Adriatic appeal**”). The detailed issues in the *Adriatic* appeal are rather different, but there is an inevitable overlap in some respects, and by Order dated 14 October 2024 Lewison LJ directed that the *Adriatic* appeal and this appeal should be heard sequentially by the same constitution. We therefore heard this appeal directly after the *Adriatic* appeal. They do however raise different issues, and we have written

separate judgments for each appeal.

5. In this appeal there are two grounds of appeal. By section 124 of the BSA the FTT may make an RCO if it considers it just and equitable to do so. By Ground 1 the Appellants contend that the FTT erred in concluding that it was just and equitable to make the RCOs. By Ground 2 they contend that the FTT erred in concluding that an RCO can be made in respect of costs incurred before the relevant part of the BSA came into force on 28 June 2022.
6. Those appearing before us were as follows:
 - (1) The Appellants (SVDP and Get Living) were represented by Mr Jonathan Selby KC and Ms Cecily Crampin.
 - (2) Triathlon was represented by Mr Alexander Nissen KC and Mr Paul Letman.
 - (3) EVML, as explained below, although the intended beneficiary of the RCOs, was not an applicant for them before the FTT. It was joined as a respondent to enable it to participate, but until a late stage took no active part in the proceedings; it was not represented at the hearing before the FTT, although it did make written submissions through counsel supporting Triathlon's applications. Before us it appeared by Mr Timothy Polli KC, and has aligned itself with Triathlon in resisting the appeal.
 - (4) The Secretary of State for Housing, Communities and Local Government ("**the Secretary of State**"), who was permitted to intervene by Order of Lewison LJ dated 10 September 2024, was represented by Mr Michael Walsh KC, Ms Camilla Chorfi and Mr Richard Miller.
7. We have had wide-ranging and well-argued submissions from counsel for all parties. For the reasons that follow I prefer those for the Respondents and would dismiss the appeal on both grounds.

The Building Safety Act 2022

8. It is convenient next to refer to the BSA. We have given an account of the background to the Act and the relevant provisions of Part 5 in our judgments in *Adriatic*, which we are handing down at the same time as our judgments in the present appeal. I will not repeat it all here, but I can summarise it as follows. The BSA was Parliament's main legislative response to the Grenfell Tower tragedy. Much of the Act was passed to implement the recommendations of the review into building regulations and fire safety led by Dame Judith Hackitt, and Parts 2 to 4 duly establish a new regulatory regime for high-rise buildings, improving the focus on safety both at the design and construction stage and at the stage when buildings are occupied.
9. Part 5 contains a variety of provisions, including a group of sections headed "Remediation of certain defects", consisting originally of sections 116 to 125 (although section 125 has subsequently been repealed). In *Adriatic* I referred to these sections together with schedule 8 (which contains much of the detail and is given effect to by section 122) as "the remediation provisions". The BSA was passed on 28 April 2022 and by section 170(3)(a) the remediation provisions all came into force

two months later, that is on 28 June 2022. Unlike Parts 2 to 4 which are forward-looking and set up new regulatory provisions for the future, the remediation provisions were designed to deal with a one-off problem, referred to as the building safety crisis, which saw many leaseholders of flats in high-rise blocks facing unprecedentedly high, and often unaffordable, service charge bills to pay for the costs of existing fire safety and structural safety defects in their blocks. As explained in more detail in *Adriatic*, a central purpose of the remediation provisions was to provide a substantial measure of protection against such service charges for leaseholders. These protections are found in schedule 8 and in most cases are confined to those with “qualifying leases” – that is where the lessee occupied the flat as their only or principal home, or owned at most 2 other properties in the UK, on the qualifying date of 14 February 2022: see sections 119 and 119A.

10. Paragraph 2 of schedule 8 however contains a more wide-ranging protection, the effect of which is to relieve any lessee from having to pay via their service charges for the costs of remedying fire safety defects if the original developer – or an associated company – is their landlord, or is a superior landlord. It provides as follows:

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

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- (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.”

11. Subject to certain exceptions, a “relevant building” is “a self-contained building, or self-contained part of a building, in England that contains at least two dwellings and (a) is at least 11 metres high, or (b) has at least 5 storeys”: see section 117(2). There is no dispute that the blocks in the present case are relevant buildings.
12. There is also no dispute that the fire safety defects in the present case are relevant defects, and that the proposed works are relevant measures. “Relevant defect” is defined by section 120(2) to refer to “a defect ... 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”. By section 120(5) and section 120(3) respectively, “building safety risk” is “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”; and “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” is specified as the period of 30 years preceding the coming into force of section 120 (that is, 28 June 2022): see section 120(3). And “relevant measure” includes a measure taken to remedy a relevant defect: see paragraph 1 of schedule 8.

13. It is common ground that the effect of paragraph 2 of schedule 8 in the present case is that Triathlon is not liable for service charges related to the remedying of the fire safety defects. This is because SVDP is the developer (as defined in paragraph 2(4)) and the freehold is held by two property holding companies called Stratford Village Property Holdings 1 Ltd and Stratford Village Property Holdings 2 Ltd (“**SVPH 1**” and “**SVPH 2**”). SVPH 1 and SVPH 2 are therefore together a superior landlord and they are associated with SVDP.
14. Paragraphs 3 to 9 of schedule 8 to the BSA provide protection against service charges for lessees under qualifying leases, the effect being either that no service charge is payable in the circumstances variously referred to, or that the lessee’s liability is capped at a certain amount (the amount of the cap depending on whether the flat is in Greater London or not, and the value of the lease on 14 February 2022). We have given a more detailed account in our judgments in *Adriatic* to which reference can be made if necessary.

15. Section 123 empowers the Secretary of State to provide by regulations for the FTT to make “remediation orders” requiring relevant landlords to remedy defects.
16. Section 124 empowers the FTT to make RCOs. This is the provision with which we are directly concerned in this appeal. As enacted it provided as follows:

“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 relevant defects (or specified relevant defects) relating to the relevant building.
- (3) A body corporate or partnership may be specified 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, or payments of a reasonable amount in respect of the remediation of specified relevant defects (or in respect of specified things done or to be done for the purpose of remedying relevant defects);
 - (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;

“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;

“specified” means specified in the order.

- (6) The Secretary of State may by regulations provide that this section applies, with or without modifications, in relation to a building that would, but for section 117(3), be a relevant building.”

The section has since been amended, but we are concerned with it in its original form.

- 17. Section 121 of the BSA explains when a partnership or body corporate is “associated” with another person for the purposes of sections 122 to 124 and schedule 8. It is not disputed that Get Living is associated with (at least) SVPH 1 and SVPH 2 (the landlords of the blocks), and hence is within the scope of section 124(3).
- 18. Other provisions of the BSA can be briefly noted:
 - (1) Section 130 empowers the High Court, “if it considers it just and equitable to do so”, to make an order providing for a body corporate which has been associated with another body corporate to share a liability which the latter has incurred under the Defective Premises Act 1972 (“**the DPA 1972**”) or section 38 of the Building Act 1984 (“**the BA 1984**”) or as a result of a building safety risk.
 - (2) Section 135 extended the limitation period for claims under section 1 or 2A of the DPA 1972 or section 38 of the BA 1984. The practical effect was to extend the limitation period for historic claims under section 1 of the DPA 1972 from 6 years to 30 years, thus enabling claims to be brought for buildings completed from 1992 onwards.

- (3) Section 149 introduced a new cause of action allowing claims to be made where cladding products that were defective when manufactured, misleadingly sold or in breach of regulations have contributed to a building being unfit for habitation.
19. There are also regulations made under the BSA. In particular paragraph 12 of schedule 8 empowers the Secretary of State to make regulations for the recovery from a relevant landlord of any amount not recoverable under a lease as a result of the leaseholder protections in schedule 8. Pursuant to this power regulations 3, 4 and 5 of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 SI 2022/589, made in July 2022, (**“the 2022 Regulations”**) enable landlords who are unable to recover service charges from their tenants as a result of schedule 8 to the BSA to pass on costs to other landlords.
20. Regulation 3 of the 2022 Regulations allows a landlord who has paid or is liable to pay the cost of a relevant measure relating to a relevant defect which, but for paragraph 2 of schedule 8 to the BSA, would have been payable as a service charge by a tenant under the lease to recover the cost from the “responsible” landlord(s). By regulation 3(8), the “responsible” landlord is:
- “(a) the person who, at the beginning of 14th February 2022, was the landlord of the tenant referred to in paragraph (1) or any superior landlord and was on that date—
 - (i) responsible for the particular relevant defect to which the relevant measure relates; or
 - (ii) associated with a person responsible for that relevant defect; or
 - (b) the person who, on or after 14th February 2022, became the owner of that landlord’s, or superior landlord’s, interest.”
21. Regulation 4 of the 2022 Regulations allows a landlord who has paid or is liable to pay the cost of a relevant measure relating to a relevant defect which, but for paragraph 3 of schedule 8 to the BSA, would have been payable as a service charge by a tenant under the lease to recover the cost from the “contributing” landlord. By regulation 4(7), the “contributing” landlord is the person who is “the landlord under the qualifying lease referred to in paragraph (1) provided that they met the contribution condition in paragraph 3 of Schedule 8 to the Act on 14th February 2022” or “after 14th February 2022 became the owner of that landlord’s interest”.
22. Regulation 5 of the 2022 Regulations applies where a landlord has paid or is liable to pay the cost of a relevant measure relating to a relevant defect which, but for paragraphs 4 to 9 and 11 of schedule 8 to the BSA, would have been payable as a service charge by a tenant under the lease. In such a case, each landlord under any lease in the building is liable to pay a share of the cost.

The scheme of the remediation provisions

23. Before coming to the facts, it is worth standing back from the detail and considering

the legislative scheme of these provisions. In my judgment in *Adriatic* I attempted to identify a number of features that can be discerned from the remediation provisions taken as a whole (see paragraphs [164] to [175]). As there set out in more detail, they can be summarised as follows:

- (1) If the person responsible for the defect retains an interest in the building (as at the relevant date, 14 February 2022), they will be likely to have to bear the costs of remedying it (paragraph 2 of schedule 8, and regulation 3 of the 2022 Regulations).
 - (2) If the lessee has more than a very small portfolio of properties, they get no further protection (this is the effect of confining the other protections to those with qualifying leases); conversely if the landlord is part of a well-resourced corporate group they meet the “contribution condition” and cannot pass on costs to protected lessees at all (paragraph 3 of schedule 8). In other words those who are more likely to be able to afford to pay are required to do so.
 - (3) Next there are certain categories of costs (cladding remediation under paragraph 8 of schedule 8, and legal and other professional costs under paragraph 9 of schedule 8) which protected lessees do not have to contribute towards at all.
 - (4) In other cases remediation costs can in principle be passed on to protected lessees, but subject to a cap on their liability (or a complete exemption from liability) depending on the value of their flats (paragraphs 4 to 6 of schedule 8).
 - (5) The inevitable corollary of relieving lessees of their contractual service charge liabilities is that (unless Government was proposing, which it was not, that the taxpayer would pick up all the costs) costs will be incurred by whoever is doing the work (whether landlord or management company) that would otherwise have been met by the lessees through their service charges but will now not be. The BSA therefore contains provisions enabling those costs to be passed on to others. This includes section 124 under which the FTT can make RCOs where it is just and equitable to do so, and regulations 3, 4 and 5 of the 2022 Regulations.
 - (6) Whoever ends up bearing the costs is given new rights against those ultimately responsible, namely (i) by an extended limitation period under the DPA 1972 (section 135 of the BSA) and (ii) by a new cause of action against those manufacturing or mis-selling cladding products (section 149). In addition the High Court is given power to make associated companies liable for breaches of the DPA 1972 (section 130).
24. As I said in *Adriatic*, this statutory scheme all flows from the decision to intervene in the contractual scheme of obligations by protecting leaseholders from the full extent of their contractual service charge liabilities. Once this decision had been made, it was necessary not only to define who could benefit from the leaseholder protections, but also to make provision for the level of protection they would receive; for who would pick up the costs that were no longer to be met through the service charges; and for what rights the latter would have to make claims over against others, including

those ultimately responsible.

25. It is convenient to mention here that after the hearing but before judgment could be finalised the Supreme Court handed down judgment in another case concerning the BSA, *URS Corporation Ltd v BDW Trading Ltd* [2025] UKSC 21 (“**URS**”). We gave the parties an opportunity to file further written submissions on any implications of the decision for the present appeal. *URS* concerned a different aspect of the BSA, namely section 135, but the judgments do contain some helpful statements as to the Act generally, which I will refer to below as appropriate.

The facts – background and corporate structure

26. The detailed facts are set out by the FTT with great clarity in their decision. For present purposes I can summarise them more shortly. The appeal concerns five blocks in East Village at Stratford in East London. The Village was originally constructed to provide accommodation for 17,000 athletes and officials participating in the Olympic Games in London in 2012, but it was always intended that after the Games were over the athletes’ village would be converted to provide housing, and East Village is now a large permanent residential estate providing nearly 3,000 new homes, most contained in 66 blocks of between 8 and 12 storeys.
27. The five blocks with which we are concerned, referred to by the FTT as Blocks A to E, therefore form only a small part of the estate. They are all in a part of the Village referred to during its development as Plot N26. Each contains a mix of three-storey “town houses” or maisonettes and retail units on the lower levels, and flats or apartments on the upper levels. It was always intended that East Village would include both affordable housing and market housing and from the start it was an important design principle that units occupied under different tenures should not be identifiable by their appearance, nor concentrated in particular areas, but distributed through the Village, so the blocks contain a mix of different tenures. As elsewhere on the estate ownership is therefore split between Get Living which specialises in the private rental market and owns (through subsidiaries) the private rented housing, and Triathlon which owns the social and affordable housing. In practice this means that Triathlon has long leasehold interests in each of the five blocks, while Get Living has such interests in Blocks C to E.
28. After the right to host the 2012 Games had been awarded to London, the Olympic Delivery Authority (“**the ODA**”), a public body, was established in March 2006.
29. Triathlon is a limited liability partnership of three housing providers, two of them subsidiaries of much larger registered social housing providers and the third a property development and investment company which was part of a consortium selected by the ODA in March 2007 as its private sector development and funding partner for the development of East Village. Triathlon came into existence with the intention of purchasing the affordable housing at East Village when the buildings became available after the 2012 Games.
30. In 2009 the ODA set up (and thereafter owned) SVDP, a limited partnership consisting of three corporate partners (one general and two limited), for the sole purpose of funding and developing East Village for legacy use after its occupation by the 2012 competitors.

31. The development of Plot N26 took place pursuant to a Framework Agreement concluded in June 2009 between SVDP as Developer, SVPH 1 and SVPH 2 as Landlord, and Triathlon as Tenant. This, supplemented by separate Development Agreements for each Plot, provided for the construction of the affordable housing at East Village and the grant of leases to Triathlon of the affordable housing in each block on completion of post-Games retrofitting works.
32. SVDP did not carry out the development itself. It entrusted the management of the project to Lend Lease Development Ltd which in turn commissioned Galliford Try Construction Ltd as its design and build contractor in respect of Plot N26. It is however common ground that SVDP is the “developer” of East Village within the meaning of section 124(5) of the BSA (see paragraph 16 above). The contract between Lend Lease and Galliford Try was entered into in December 2009, and the athletes’ accommodation was opened in March 2012.
33. Meanwhile the ODA was also taking steps for the disposal of East Village after the Games were over. From September 2010 it conducted a bidding process under which the successful bidder would acquire the East Village, subject to Triathlon’s interests in the affordable housing, and so be able to sell or let the other housing (nearly 1,500 units) on the open market. In the event the successful bidder was a joint venture between the Qatari sovereign wealth fund and a BVI investment fund. The ODA was prepared to sell either the land itself or SVDP (which was the beneficial owner of the land) but in the event the purchasers decided to acquire SVDP, and contracted to do so (through a specially incorporated company called QDD Athletes Village UK Ltd (“QDDAV”)) in August 2011.
34. In September 2012 after the Games were over the retrofitting of the athletes’ accommodation began. This work was to the interior of the buildings only and did not change the facades.
35. The sale of SVDP to QDDAV was completed on 6 August 2014. There have since then been various changes in both the corporate structure, and the identity of the investors who are interested, but the details do not matter. The current owner of SVDP is (and has been since 2018) Get Living, whose wholly-owned indirect subsidiaries include QDDAV, the three corporate partners in SVDP, and the two property holding companies SVPH 1 and SVPH 2, who hold the freehold on trust for SVDP.

EVML

36. I should also briefly refer to the position of EVML. EVML was established in 2009 by agreement between SVDP and Triathlon. Its role is to manage the estate. The current position is that most of the voting rights in EVML are held by either Triathlon (some 39%) or Get Living (some 58%), with the balance (some 3%) held by private individuals. Triathlon and Get Living appoint two directors each, and a fifth is appointed by SVDP.
37. EVML is contractually responsible for remedying defects in the blocks. But, as found by the FTT, from the commencement of the BSA (and before that when its provisions became known) the interests of its two major shareholders diverged, SVDP being the developer against whom both EVML and Triathlon had rights under the Act, and it

was, the FTT said, hardly surprising that this made taking decisions at board level a slow and difficult process. Until very late in the day that made it impossible for EVML to initiate or take part in the proceedings, but eventually the board agreed that the two Triathlon directors alone should take advice and make decisions in connection with the proceedings, and EVML, as already referred to, is now supportive of the RCOs.

Property structure

38. So far as the property interests in the five blocks are concerned the position is as follows:

- (1) The freehold is vested in SVPH 1 and SVPH 2 as trustees for SVDP.
- (2) Below the freehold is a headlease granted to EVML in November 2016 for a term of 1000 years (of Plot N26 among other plots). This was inserted above the leases next mentioned.
- (3) Below the headlease are long (999 year) leases granted to Triathlon and a company called QDD EV N26 Ltd respectively.
- (4) Triathlon has 7 such leases (one for each of Blocks A to D, and three for Block E). They demise the interior of the social and shared ownership units in the blocks, amounting to 129 homes in all. Each lease requires payment of a service charge to EVML in return for services, including the repair and maintenance of the structure and exterior. Triathlon has granted shared ownership leases or assured tenancies of the 129 units let to it.
- (5) In Blocks A and B, all the units are in fact comprised in Triathlon's leases. But in Blocks C, D and E, there are other units, amounting to 77 in all, which are not. These (and the retail units) are the subject of 999 year leases to EV N26 Ltd (formerly named QDD EV N26 Ltd), and in turn sub-leased for 125 years to a Get Living subsidiary, Get Living London EV N26 Ltd. The leases provide for service charges to be payable to EVML. Get Living London EV N26 Ltd has let these units on assured shorthold tenancies at market rents.

The defects

39. The Grenfell Tower tragedy took place on 14 June 2017. It prompted EVML to review the cladding materials used at East Village. Initial investigations revealed that some blocks, but not those at Plot N26, used the aluminium composite material ("ACM") cladding responsible for the spread of fire at Grenfell Tower. But publication of Advice Note 14 in December 2018 by the relevant Government Department (then called the Ministry of Housing, Communities and Local Government), which was addressed to the owners of high-rise residential buildings with external wall systems not incorporating ACM, led to further investigations.
40. The position with Plot N26 was not clearly identified until November 2020, but serious fire safety defects were ultimately discovered in each of the five blocks both as regards design and construction of the non-ACM cladding adopted for the facades.

It is not necessary to go into any detail as there is no dispute that the defects are “relevant defects” for the purposes of the remediation provisions: see paragraph 12 above. In response to the discoveries a waking watch was implemented in November 2020 which remained in place until additional alarm and heat detection systems were installed as temporary measures.

41. Applications were made by EVML to the Building Safety Fund (“**the Fund**”). The Fund is one of three central government schemes to provide assistance to building owners to meet the cost of remedying fire risks. In Greater London it is administered by the Greater London Authority (“**the GLA**”). In October 2021 the GLA approved the blocks at Plot N26 as eligible for funding, and in September 2022 the Fund agreed in principle to fund the majority of the works at East Village; a Pre-tender Support Agreement was entered into between the GLA and EVML in October 2022.
42. It took some time for EVML’s board to agree on what works were required but a contract for remediation works at the five blocks, which involves removing and replacing the exterior cladding (“**the Major Works**”), was ultimately entered into in December 2022 by EVML with Errigal Facades Ltd (“**Errigal**”) and work started in April 2023; the FTT said that full remediation was expected to be complete by August 2025. We were provided with a note of the updated position by EVML which indicated that as at 18 March 2025 works on three of the blocks had completed, and works on the other two were due to complete on 2 April 2025, ahead of schedule.
43. In February 2023 it was confirmed that the Fund would cover the costs of the Major Works and a detailed Grant Funding Agreement was entered into between the Secretary of State, (then called the Secretary of State for Levelling Up, Housing and Communities and referred to in the agreement as “**DLUHC**” – the department is now known as the Ministry of Housing, Communities and Local Government), the GLA and EVML on 1 June 2023 (“**the Grant Funding Agreement**”). It provides for DLUHC to provide funding up to a maximum sum of some £24.5m. At the time of the hearing before the FTT a first tranche of over £7m had been received, and a second of some £10m had been approved for release. The FTT heard some submissions as to suggested concerns that the Fund might not in the event cover the entirety of the cost of the Major Works; but it concluded that there was “no good reason to believe that the remedial works will founder for lack of money, whatever we decide.” EVML’s Update Note of 18 March 2025 indicated that it had applied to the Fund for an increase in the amounts payable. The application was partially successful and the total amount to be provided was increased to some £27.5m, of which over £26m had been paid to EVML to date.

The applications

44. It is common ground that none of the costs of the Major Works are recoverable as service charges from Triathlon (this is the effect of paragraph 2 of schedule 8). Triathlon’s apportioned share of the expected costs at the time of the hearing before the FTT was over £16m, although the final sum will not be known until the completion of the Errigal contract. Triathlon has not paid anything towards these costs, although, as set out above, its share of the costs is currently being funded by the Fund (although it seems likely there will be some shortfall). The main purpose of Triathlon’s applications for RCOs against SVDP and Get Living, which it brought in December 2022, is to require them to pay its share of the costs of the Major Works to

EVML.

45. In addition Triathlon has incurred other costs as a result of the discovery of the relevant defects; examples include such matters as the original investigations, the waking watch and installing the temporary fire alarm system. Triathlon also sought RCOs to cover these costs as well; where it had paid the costs (some before and some after the BSA came into force), it sought payment to itself by way of reimbursement; and where it had not paid the costs, it sought an order for payment to EVML. The sums involved are very much less than the costs of the Major Works: details are given below.
46. The FTT heard evidence as to the financial position of SVDP and Get Living. In summary they concluded that SVDP had (at the end of 2021) a net asset value of over £12m, but that was underpinned by fixed assets in the form of illiquid real estate which would take time to sell if that became necessary; its current asset position was negative and it was only possible for it to prepare its accounts on a going concern basis due to the continued financial support of Get Living. It would be unable to comply with an RCO in any significant sum without the support of Get Living. Get Living on the other hand would be more than able to meet any obligation imposed in these proceedings: its accounts for 2022 showed that the value of the Group's investment property had increased by nearly £300m, and totalled more than £2.6bn.

The FTT's decision

47. In their decision of 19 January 2024 the FTT, after an introduction and an account of the relevant provisions of the BSA, first considered a number of issues of principle. One of these was whether an RCO can be made in respect of costs incurred before the commencement of the remediation provisions on 28 June 2022. This question has no relevance to the RCOs for the Major Works as the Errigal contract was entered into in December 2022, but does affect some of the more minor costs previously incurred (and paid) by Triathlon. The FTT concluded that section 124 of the Act does allow RCOs to be made in respect of costs incurred before 28 June 2022 ([73]). This conclusion is challenged by Ground 2 of the appeal.
48. Another issue that was raised was whether a company that was associated with each of the corporate partners in a limited partnership was also associated with the partnership itself. In the present case Get Living was accepted to be associated with each of the corporate partners in SVDP, but there was a dispute as to whether that meant that it was also associated with SVDP.
49. The FTT declined to answer this question because in their view it did not matter. It was accepted that Get Living is an associate of the freeholder (SVPH 1 and SVPH 2) and of each of the landlords in the relevant chain of title. That meant that it came within section 124(3)(d) and so could be specified in an RCO. The question whether it was also an associate of SVDP therefore made no difference to the FTT's jurisdiction; and it was not argued on behalf of Get Living that the capacity in which it might be specified as an associate made any difference in the present case to the Tribunal's determination whether it was just and equitable that an order should be made against it ([124]-[125]). None of that has been challenged before us.
50. After a careful and detailed account of the facts, the FTT then turned to the question

whether it was just and equitable to make the RCOs. It was agreed that the qualifying conditions for making RCOs against both SVDP and Get Living were met, but that that was not enough; section 124 conferred a discretionary power that should be exercised having regard to the BSA and all relevant factors ([236]-[237]).

51. They then considered the factors relied on on each side, discounting some of them as not carrying much weight ([245]-[263]). They then set out the factors which seemed to them more important. This conclusion is challenged in Ground 1 of the appeal and it will be necessary to look at some of their reasoning in more detail below, but in essence it was as follows:

- (1) First, SVDP was the developer. It was the policy of the BSA that primary responsibility for the cost of remediation should fall on the original developer ([265]).
- (2) If it was just and equitable to make an order against SVDP it would also be just and equitable to make one against Get Living; the obvious purpose behind the association provisions was to ensure that where a development has been carried out by a thinly capitalised or insolvent development company a wealthy parent or other associate could not evade responsibility for meeting the costs by hiding behind the separate personality of the development company ([266]).
- (3) There was a risk that there would be a shortfall in the funding of the Major Works by the Fund, but they thought the risk a very modest one. They therefore gave little weight to the risk that the Major Works would not be completed without an order; but gave some weight to the possibility that there might be uncertainty for a time if the Fund refused further help, and that there might even have to be further tribunal proceedings. That would be undesirable ([267]).
- (4) They then considered what was called the “public purse point”, namely why not leave the work to be funded by the Fund, allowing EVML to pursue its remedies against the contractors who built East Village, with SVDP picking up any shortfall? There was every intention that EVML would bring claims against Galliford Try, the main contractor. There was however no knowing how long it would take for a claim to come to trial (liability had already been disputed by Galliford Try) and no guarantee of how much would be recovered ([269]). “The question is”, they said, “who should fund the work in the meantime?” ([274]).
- (5) On this they said ([273]) that:

“The public interest in securing reimbursement of those funds as quickly as possible seems to us to point strongly in favour of making an order.”

And ([270]) that Mr Selby:

“found it difficult to identify a clear and convincing reason why it would be just and equitable to allow the best part of £20m to

remain in Get Living's bank account, earning interest or being put to account for its benefit, rather than being returned to the Building Safety Fund where it could be used to remediate other buildings."

- (6) They said that Mr Selby's position cut across two of the principal objectives which section 124 was plainly intended to achieve. First, section 124 and the regulations contained a hierarchy or cascade of liability which did not include the taxpayer, such that public funding was a matter of last resort ([278]). Second, it was plainly the intention of Parliament that an RCO should provide a route to securing funding without the applicant having to become involved in or wait on the outcome of other claims, which might involve complex, multi-handed, expensive and lengthy litigation. If the Fund was left to fund the works while the claims against Galliford Try were resolved, the respondents would effectively achieve the very thing which section 124 was intended to avoid ([279]).
 - (7) Finally they considered, and rejected, the argument that it was not just and equitable for RCOs to be made in respect of costs incurred before the commencement of the remediation provisions on 28 June 2022 ([280]-[283]).
52. They therefore concluded that it was just and equitable to make the RCOs sought by Triathlon ([291]). This decision was given effect to by their Order dated 5 March 2024. This provided for the following payments to be made by SVDP and/or Get Living:
- (1) Reimbursement to Triathlon of a total of £1,158,358.18 paid by Triathlon to EVML.
 - (2) Payment to EVML of £725,019.91 (Triathlon's share of costs of other remedial measures to the blocks).
 - (3) Payment to EVML of £42,418.88 or Triathlon's share of such other reasonable amounts incurred by EVML in servicing and decommissioning the temporary fire alarms.
 - (4) Payment to EVML of £3,631,766.33 (Triathlon's share of the amount paid by EVML to date to Errigal).
 - (5) Payment to EVML of £11,324,264.11 (Triathlon's share of the forecast cost of the remaining Major Works); and Triathlon's share of such further or other reasonable amounts as are incurred by EVML in completing the works.
 - (6) Payment to EVML of £1,075,214.09 (Triathlon's share of the forecast cost of professional fees relating to the Major Works); and Triathlon's share of such further or other reasonable amounts as are incurred by EVML in respect of such fees.
53. The FTT gave permission to appeal to the UT. It was the FTT's suggestion (and the parties agreed) that the UT be jointly invited to dismiss the appeal and grant permission to appeal to this Court without engaging with the substance of the

arguments, and, as already referred to, this is what happened. By Order dated 7 May 2024 Judge Elizabeth Cooke in the UT formally dismissed the appeal and granted permission to appeal to this Court.

Grounds of appeal

54. There are two Grounds of Appeal. Ground 1 is that the FTT erred in concluding that it was just and equitable to make RCOs against SVDP and Get Living for the costs of the Major Works (for which EVML has funding from the Fund). It is said that the FTT erred in 10 separate respects, and had it not done so, it would not have made an RCO for the costs of the current remediation works; or alternatively it would have made an RCO on terms that SVDP and Get Living pay for the remediation works following the outcome of the Galliford Try litigation. I give the details of the 10 sub-Grounds below.
55. Ground 2 is that the FTT were wrong to conclude that an RCO could be made in respect of costs incurred before section 124 of the BSA came into force on 28 June 2022.

Ground 1.1 – an unexpressed presumption

56. Ground 1.1 is that the FTT wrongly created a presumption (without expressly saying so) that it is just and equitable to make an RCO against a developer, or indeed any body corporate or partnership falling within the terms of section 124(3) of the BSA, who is able to fund the remediation works.
57. This Ground is based on what the FTT said in two passages, at [265] and [278] of their decision. Having considered a number of matters that were relied on by the parties but which appeared to them “merely to provide the context for our decision or to be matters which do not carry much weight”, they said that they would then deal with “the factors which seem to us to be more important in determining whether it is just and equitable to make an order” (at [264]). They continued:

“265. The first is that SVDP was the developer of East Village. 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 a liability to contribute may pass on the costs they incur to the developer. That policy is most apparent from the LPI Regulations which give every landlord who has contributed to the cost of relevant measures the right of recoupment from the responsible landlord (meaning the person who was, or was in a joint venture with, the developer or who undertook or commissioned work relating to the defect – regulation 3(2) and (8), LPI Regulations and paragraph 2(3) of Schedule 8, 2022 Act). SVDP (or to be strictly accurate, SVPH-1 and SVPH-2 which hold the freehold on trust for SVDP) is the responsible landlord in this case and it, and its associates, would therefore be under an obligation to pay costs of remediation which had been met by other landlords if they were served with notices under regulation 3. That is not the route to recovery which is being pursued in these applications, and section 124 requires us additionally to be satisfied that it is just and equitable to make an order against SVDP, but the availability of an

alternative, and unanswerable, route to recovery against its trustees is a strong indicator that it is likely to be just and equitable for SVDP to be ordered to pay.”

58. They then addressed Mr Selby’s argument that the purpose of section 124 was to ensure that remediation works that were required were carried out without delay – or as he put it before us, to get the work done – and that in the present case an order was not needed for that purpose as funding was in place from the Fund and the works were being done. They rejected that argument on the basis that there was still a question as to who should fund the works for the time being (the public purse point), and concluded that Mr Selby had no convincing reason why it would be just and equitable to allow Get Living to retain the best part of £20m rather than this sum going to the Fund ([277]), adding: “We say this because Mr Selby KC’s attempts to justify this result cut across two of the principal objectives which section 124 was plainly intended to achieve.”
59. They then continued at [278] as follows:
- “278. First, section 124 contains a list of persons against whom a remediation contribution order may be made. Section 124, combined with the LPI Regulations, creates a hierarchy or cascade of liability in relation to a relevant defect. The taxpayer does not appear in section 124 or in this hierarchy, save in so far as a taxpayer funded entity may constitute a body corporate or partnership within the terms of section 124(3) or a landlord within the terms of the LPI Regulations. **Given this position, it is difficult to see how it could ever be just and equitable for a party falling within the terms of section 124(3) and well able to fund the relevant remediation works to be able to claim that the works should instead be funded by the public purse.** We do not see that this point loses any of its essential force in circumstances where it is said that the public purse will eventually be reimbursed from the fruits of successful litigation against third parties. Even if we were persuaded that the Building Safety Fund could be confident of this result on the facts of the present case, and we are not in a position to be so confident, we do not see why the public purse should act as interim funder and underwriter of the risk of failure, while claims against third parties wend their way to a conclusion. We agree with a point made by Mr Nissen KC in opening, which is that public funding is a matter of last resort, and should not be seen as a primary source of funding where other parties, within the scope of section 124, are available as sources of funding.” (emphasis added).
60. Mr Selby relies on the sentence I have highlighted from [278] and submits that in effect the FTT has created a presumption that an RCO should be made against a developer with means. He accepts that it is of course relevant, as the FTT said in [265], that SVDP was the developer; but he said that it was not determinative. And the FTT had in any event gone further than simply confine what it said in [278] to developers but had referred to “a party falling within section 124(3)”, which was much wider than developers.
61. I do not accept this submission. The FTT were I think making two different points in

[265] and [278]. The point they were making in [265] was that the policy of the Act was to place primary responsibility on the developer. I did not understand Mr Selby to dispute that as a general proposition: he accepted that in a simple case where the only parties were lessees, their landlord and a developer, the developer sits at the top of the hierarchy. This policy can be clearly seen from the Act where (i) if a developer retains an interest in the building no service charges are payable by any lessee (paragraph 2 of schedule 8) and (ii) if another landlord is in those circumstances liable for costs which they cannot recover through the service charge, they can pass the costs on to the developer by serving notices under regulation 3 of the 2022 Regulations (see paragraph 20 above). It may be noted that in *URS* the Supreme Court accepted that a central purpose of the Act was to hold those responsible for building safety defects accountable: see at [104] and [106] per Lord Hamblen and Lord Burrows, and at [274] per Lord Leggatt.

62. The point the FTT were making in [278] is a slightly different one. Here they were considering the public purse point, namely whether the works should be funded by Get Living or the Fund pending any recovery from Galliford Try, and the point they were making was that as between public funding and those listed in section 124 as potential contributors to the cost of works, public funding was to be seen as a matter of last resort.
63. Again I think they were justified in making this point. Indeed Mr Selby accepted that he could not quarrel with the proposition that as between those connected to the building and the taxpayer, those who were connected to the building and could afford to pay should do so rather than expect the taxpayer to do so.
64. In those circumstances I do not see what is left of this Ground. In the present case SVDP as developer was “responsible for the relevant defect” within the meaning of paragraph 2 of schedule 8 (and SVPH 1 and SVPH 2 were associated with SVDP) with the result that no service charges were payable to EVML. EVML has no other income; as Mr Polli pointed out, it is a management company with a right to only peppercorn rents and does not otherwise trade. But it is still liable to carry out the works, and these still need to be funded. Since the Act has taken away EVML’s contractual right to look to the service charges for such funding, the Act, as one would expect, puts in place mechanisms to enable the costs to be passed on to others. One of those mechanisms is section 124 under which the costs can in an appropriate case be passed on to the developer or other landlords. It is true that Government has also made available public funding in the shape of the Fund, but there is no reason to think that this was intended to displace the provisions of the Act which regulate which parties with a connection to the building should, if able to, contribute to the cost. In those circumstances I think the FTT were entirely justified in concluding that as between SVDP and Get Living on the one hand and the public purse on the other, it was difficult to see why the public should fund the works in the interim rather than the developer and its associates who continue to own the buildings and who can (in the case of Get Living) well afford to fund the works.
65. I do not think it is necessary to consider whether the FTT were right to say that it was difficult to see how it could “ever” be just and equitable for “a party falling within the terms of section 124(3) and well able to fund the relevant works” to be able to claim that the works should instead be funded by the public purse. In saying that, they were expressing themselves rather more widely than was needed for the present case, and

there may indeed be cases where it would not be just and equitable to make an RCO against those within section 124(3), even if the result was to leave the costs to be funded by the public. Those who can be required to contribute by means of an RCO include (by section 124(3)(d)) associates of the developer (or of a landlord), and the effect of section 121(5)(a) is that a body corporate is associated with another body corporate if at any time in the relevant period (the 5 years before the qualifying time of 14 February 2022) a person was a director of both of them. Suppose a case where a director of a landlord was also a director of other companies which have no other connection with the landlord or its group; such companies might have had nothing to do with the development and be engaged in entirely different businesses, or might include a charitable company to which the director had given his time voluntarily. It is not obvious that it would always be just and equitable to make RCOs against such associated companies even if the effect of refusing to do so was to leave the costs to be borne by the public. So the FTT may have gone too far in what they said. But none of that affects their decision in the present case.

66. In those circumstances I would dismiss this Ground of appeal.

Ground 1.2 – passing on costs to developers

67. Ground 1.2 is that the FTT wrongly found that the policy of the BSA is that primary responsibility for the cost of remediation works should fall on the original developer, and that others may pass on the costs they incur to the developer, and that such a policy is most apparent from the LPI Regulations.
68. This is another criticism of the FTT's decision at [265] which I have set out above. The point that Mr Selby made is that regulation 3 of the 2022 Regulations only applies to allocate costs as between landlords: it enables a landlord who has paid, or is liable to pay, the costs of relevant works, but is precluded by paragraph 2 of schedule 8 from recovering the costs through the service charge, to pass on the costs to "the responsible landlord". To be the responsible landlord a person must have been either the landlord or any superior landlord at 14 February 2022 and either itself responsible for the relevant defect in question, or associated with a person responsible for that defect; or have since 14 February 2022 become the owner of that landlord's interest (see paragraph 20 above). Regulation 3 imposes no liability on those who are not (and were not) landlords. In the present case neither SVDP nor Get Living is a landlord and they could not be made liable under regulation 3, nor indeed could Triathlon have applied under regulation 3 as Triathlon have not paid and are not liable to pay the costs (at any rate of the Major Works).
69. All of that is true, but I do not see that it undermines the reasoning of the FTT. The point they were making is that the policy of the Act is that primary responsibility for the costs should fall on the original developer. As I have already said I did not understand Mr Selby to dispute this as a general proposition, and it has now been endorsed by the Supreme Court in *URS*. The FTT referred to regulation 3 of the 2022 Regulations as giving a clear indication of that policy. I think they were justified in doing so. The effect of paragraph 2 of schedule 8 and regulation 3 taken together is that where the original developer (or its associate) retains (or retained as at 14 February 2022) an interest in the building in question, lessees do not have to pay the service charges, and any other landlord who ends up bearing the cost as a result can pass that liability to the landlord-developer or the landlord that is an associate of the

developer. That, unlike section 124, is not a discretionary matter: regulation 3(2) provides that where the regulation applies the responsible landlord “is liable to pay” (and where there are two or more persons who are responsible landlords, each “is jointly and severally liable” for the remediation amount). Recovery is triggered by the claiming landlord simply serving a notice specifying the amount (regulation 3(3)). The recipient of a notice may appeal to the FTT but only on very limited grounds, namely that the remediation amount does not represent the cost of the relevant measure, or that the recipient is not a responsible landlord (regulation 3(5) and (6)).

70. That does to my mind provide, as the FTT said, a clear illustration of the policy that costs should fall on the original developer. I do not think that it matters that Triathlon could not itself have invoked regulation 3; the point the FTT made was that EVML (which is a landlord and has incurred costs) could have done so. Nor do I think it matters that regulation 3 only permits claims to be made against other landlords and neither Get Living nor SVDP was itself another landlord. There is no reason to think that the FTT overlooked this point. As they say, strictly speaking SVDP is not a responsible landlord as it is not a landlord at all, but SVPH 1 and SVPH 2, which hold the freehold on trust for SVDP, are responsible landlords. They are the superior landlord and are associated with a person responsible for the defect, namely SVDP. On the face of it the FTT were right to say that regulation 3 appears to give an alternative, and unanswerable, claim against SVDP’s trustees (that is by EVML rather than Triathlon). We were told that EVML has now served such notices but they are under challenge, and although we were not given the details of the challenge, I do not mean to prejudge anything that may be raised in that respect; but whatever the particular issues on the facts I see no reason to doubt that the FTT were right to say that in principle EVML could bring such a claim.
71. On that basis I also agree with the FTT that the fact that the costs could in principle be claimed from SVDP’s trustees (and hence, by being enforced against the assets held on trust for SVDP, effectively against SVDP itself) was a factor of considerable weight in deciding whether it would be just and equitable to make an RCO against SVDP.
72. Nor does it matter for these purposes that Get Living could not itself have been made liable under regulation 3. The reasoning of the FTT was (i) it is *prima facie* just and equitable to make an RCO against SVDP as developer (at [265]) and (ii) if that is so, it is also just and equitable to make an RCO against Get Living (at [266]). They explained their reasoning for the latter conclusion as follows:

“266. ...The obvious purpose behind the association provisions is to ensure that where a development has been carried out by a thinly capitalized or insolvent development company, a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedying the relevant defects by hiding behind the separate personality of the development company. It seems to us that the situation of SVDP, with its relatively precarious financial position and its dependence for financial support upon Get Living, its wealthy parent, constitutes precisely the sort of circumstances at which these association provisions are targeted.”

73. That reasoning, as can be seen, has nothing to do with the scope of regulation 3; and the fact that Get Living could not itself have been pursued under regulation 3 does not affect the cogency of the FTT's analysis.
74. I would therefore dismiss this Ground of appeal.

Ground 1.3 – Triathlon's motivation

75. Ground 1.3 is that the FTT erred in finding that it was not necessary to consider the motive or the identity of the applicant for an RCO or the basis of the applicant's eligibility.
76. This is aimed at two passages from the FTT's decision, at [246] and [271], as follows:

“246. We do not think it is relevant to the exercise of our discretion to draw conclusions about Triathlon's motivation in bringing these applications. Triathlon directors who gave evidence stressed the importance to them of ensuring the safety of the leaseholders and complying with Triathlon's responsibility to the Homes and Community Agency to maintain standards of building safety. The respondents suggested that the real motivation was to ensure that Triathlon was not called on to meet any of the cost of remediation itself. It was not suggested that that was an improper motive, nor could it have been, and no doubt it is part of Triathlon's thinking. In the absence of any submission that Triathlon was acting out of malice towards the respondents or some other motivation which might be said to taint its case, we do not need to make any findings about why it seeks these orders. Parliament has made them available and Triathlon is entitled to take advantage of them.”

And:

“271. The first point Mr Selby KC made was that the application would have been stronger if it had been made by the Secretary of State or the GLA, and was weakened by the fact that Triathlon's only real interest was in protecting itself from having to pay for remediation, rather than protecting the public purse. That was clear from the form of the order it sought, covering only its share of the costs of remediation. We have already said that we do not think the motivation of an applicant will usually be of much significance and nor do we think it matters much who the applicant is. Any eligible applicant coming within section 124(5) will have an interest in the building or an interest or responsibility for building safety and we do not see why the basis of their eligibility should be significant.”

77. Mr Selby said that the *motive* of the applicant was a relevant factor. The Act provided that an application under section 124 could be made by an “interested person” which itself suggested that the applicant's interest in the order was a relevant consideration; in exercising the statutory discretion the FTT had to balance the interests of the parties; the FTT should not make an order without understanding why it was being asked for; and to avoid an infringement of the respondent's rights under Article 1 of

the First Protocol to the European Convention on Human Rights it was necessary to identify the aims sought to be achieved.

78. But I consider that the FTT were right that it was not necessary for them to resolve any issues as to Triathlon's motivation. In general parties who have legal rights or remedies are entitled to pursue them without having to explain why they have decided to do so, and a litigant's subjective reasons for litigating (save in the unusual case where a litigant is acting out of malice or the like) are usually irrelevant to the merits of its claim. What may be relevant is whether an applicant has a legitimate interest in pursuing an application, but here I do not think there is any difficulty. There is no dispute that Triathlon is an interested party as defined; it is the owner of long leasehold interests in the blocks; it is the landlord of a large number of occupying tenants and naturally concerned for the safety of its residents; and it undoubtedly has an interest in the defects being remedied efficiently and effectively. In those circumstances it does not seem very surprising that it should also have an interest in how the works were to be funded.
79. What makes the application somewhat unusual is that the obvious applicant for RCOs would normally have been EVML. Mr Selby accepted that if EVML had itself applied, it would have been very difficult to query its motive for doing so. But, as already explained, EVML found it difficult to make decisions due to the divergent interests of its shareholders and directors; and in those circumstances it is understandable that Triathlon might think it appropriate to take the initiative. As Mr Nissen put it, the reasons for Triathlon doing so were as plain as a pikestaff: the disagreements at board level of EVML had led to delays in doing the works due to significant disagreements about the scope of the works to be done and the like, and Triathlon had an interest in doing what it could to ensure the smooth completion of the works. It could legitimately form the view that securing funding from Get Living (and hence reducing EVML's dependence on funding from the Fund) would assist in that objective.
80. As to the *identity* of the applicant, again I think the FTT were right. Triathlon undoubtedly had standing to apply for an RCO. An RCO is an order that the respondent make payments to a specified person for the purpose of meeting costs incurred or to be incurred in remedying relevant defects (see section 124(2)), and here Triathlon of course sought payment by SVDP to EVML for that purpose. The question for the FTT was whether that order should be made; and that depended on whether it was just and equitable to do so. The fact that it was Triathlon, rather than EVML, or the Secretary of State, who sought the order did not change the nature of the order sought; and I do not think it changed the answer to the question whether it was just and equitable to make such an order. Mr Selby said that the RCO was not needed as the works were being done; they were being funded; the FTT concluded that "with the support of the Fund there is no good reason to believe that the remedial works will founder for lack of money, whatever we decide" (at [215]); and further concluded that there was only a very modest risk of a funding shortfall (at [268]). In those circumstances Mr Selby said that the RCO was not needed to fulfil any of the statutory objectives which he identified as being (i) to ensure that remedial works were carried out; (ii) to protect leaseholders from excessive service charges; and (iii) to ensure the safety of residents.
81. Those submissions address the substantive question whether it was just and equitable

to make an RCO in those circumstances at all. But for present purposes the significance of the submission is that it illustrates that none of those matters is affected by the fact that the applicant for the RCO was Triathlon. Exactly the same considerations would apply whether the application had been brought by EVML or by Triathlon. The substantive question was whether Get Living should be ordered to make payments to EVML; I agree with the FTT that in the circumstances of the present case, the answer to that question does not depend on who the applicant was, or the basis on which Triathlon was eligible to apply.

82. I would therefore dismiss this Ground of appeal.

Grounds 1.4 and 1.10 – the public purse

83. Ground 1.4 is that the FTT erred in finding that the public purse would be the underwriter of the risk of failure if not reimbursed from the fruits of litigation against third parties, and wrongly found that if the Fund was left to fund the works while the claims against Galliford Try are resolved, an applicant for an RCO would have to become involved in, or wait upon, other claims.

84. Ground 1.10 is that the FTT erred in concluding that public funding is a matter of last resort. Mr Selby argued both Grounds together.

85. Ground 1.4 is based on what the FTT said in their decision at [278]-[279], and Ground 1.10 on [278]. I have set out [278] at paragraph 59 above. The FTT continued at [279]:

“279. Second, as we have already noted, it was plainly the intention of Parliament that an application for a remediation contribution order should provide a route to 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. If the Building Safety Fund was left to fund the works while the claims against Galliford Try are resolved, the respondents would effectively achieve the very thing which, as it seems to us, section 124 is intended to avoid.”

86. In oral argument Mr Selby advanced a number of reasons why it was wrong to use an RCO in effect to reimburse the public purse. He said that at [270] and [277] the FTT had posed the question whether there was any reason why it would be just and equitable to allow the best part of £20m to remain in Get Living’s bank account rather than be returned to the Fund where it could be used to remediate other buildings. That, he suggested, was the wrong question; what the FTT should have asked themselves is why it would be just and equitable to require Get Living to pay the best part of £20m, something that required a compelling reason. He said that it was wrong to characterise the Fund as a last resort – the provisions of the Act and the establishment of the Fund were both part of the legislative and non-legislative measures to deal with the building safety crisis; and he submitted that RCOs should only be made if the funding agreement was not working adequately.

87. I do not accept these submissions. They are in effect a repeat of the point made to the

FTT that no RCOs were needed as the works were being adequately funded and were being carried out. But this is I think to take too narrow a view of the statutory purposes of the Act. I accept that one of those purposes is to ensure that works that are required are actually done. But another purpose is to deal with the “who pays” question, and as set out above, the Act provides a complex set of answers to this question with a number of facets. The starting point is the protection for leaseholders. One of these (and the most far-reaching) is that provided by paragraph 2 of schedule 8 which applies to all leaseholders (not just qualifying leaseholders) and exempts them from service charges for relevant costs where the developer or its associates retain an interest in the building. As I have sought to explain, that necessarily requires the Act to make provision as to how the costs which would otherwise have fallen on the leaseholders should be borne. It does this through a number of mechanisms including section 124. But the Act does not itself contemplate that taxpayer funding in the shape of the Fund (and other taxpayer-funded initiatives) will provide the solution to the problem. Instead it provides for costs to be allocated between those who have relevant connections to the building. As the FTT said, one discernible principle is that a developer responsible for the defect who retains an interest in the building should stand at the top of the hierarchy or cascade of those who will pick up the costs.

88. Given this, I think the FTT were right to say that the Fund is to be characterised as a last resort. It does not take its place in the hierarchy of those whom the Act contemplates as potential funders of the costs which the leaseholders are relieved from meeting: it stands outside the Act (and in fact pre-dates it). If the mechanisms in the Act can be operated, then I think the FTT were right to consider that they should be, despite the fact that funding was being provided through the Fund. In practical terms that means that if the FTT concluded, as it did, that it was *prima facie* just and equitable for SVDP as developer and Get Living as an associate to pay what would otherwise have been Triathlon’s share of the costs, then it was not a reason not to make an RCO that the works were being funded by the Fund. That way of looking at it explains why at [270] and [277] the FTT posed the question in terms of whether there was any clear and convincing reason why the best part of £20m should remain in Get Living’s bank account rather than be repaid to the Fund: by that stage of their analysis they had already said at [266] that they were “provisionally minded” that it was just and equitable to make an RCO against SVDP because it was the developer, and hence also against Get Living. So the question was naturally posed as to whether the fact that the Fund was funding the works constituted a good reason not to give effect to their provisional conclusion. It does not betray any failure to ask the right overall question.
89. Seen in that light, none of the other points made by Mr Selby seem to me sufficient to displace the FTT’s conclusion that there was no good reason not to make the RCO, and that it should therefore be made. The fact that it was not needed to fund the work as the funding by the Fund was working perfectly well is no answer if the position is, as the FTT (rightly in my view) concluded that it was, that the policy of the Act was that primary responsibility should fall on a developer in the position of SVDP (and hence on Get Living). Why should the public continue to fund remediation works when the developer and associated companies are available and able to pay? That is the question considered in detail by the FTT at [269]-[279], and they expressed their overall conclusion at [276] as follows:

“276. None of these points [ie those advanced by Mr Selby] seem to us to provide a good reason why the respondents should not now be the subject of a remediation contribution order, or a justification as to why the works should be funded at public expense.”

I consider that to be a conclusion that was undoubtedly open to them, and that cannot be faulted.

90. There remain three specific points raised by Mr Selby. One is that it was wrong for the FTT at [278] to refer to the Fund as being the “underwriter of the risk of failure”. Mr Selby said that the risk of failure of EVML’s claims against Galliford Try could have been catered for by either making no order with liberty to apply for an RCO in the future, or by making RCOs requiring SVDP and Get Living to pay any shortfall following the conclusion of the claim against Galliford Try. It is not clear to what extent these possibilities were advanced below, but in any event I think this criticism is misplaced. The FTT when referring to the Fund as the underwriter of risk of failure must have had in mind the case where no RCO was made at all. But, more significantly, even if that risk could have been mitigated as suggested by Mr Selby, it does not answer the main point made by the FTT in this passage which is that they did not see “why the public purse should act as interim funder ..., while claims against third parties wend their way to a conclusion”. Neither of his suggested mechanisms addresses this question.
91. Second, Mr Selby took issue with the FTT’s statement at [279] that if the Fund were left to fund the works pending the litigation against Galliford Try it would achieve the very thing that section 124 was intended to avoid. Mr Selby said that this was wrong because in the present case the works were being funded, and carried out, and so there was no need for EVML to await the outcome of the Galliford Try litigation before funding was provided. I think this misunderstands the point the FTT were making. This was that section 124 contemplated that RCOs could be made at an early stage without the applicant having to wait on the outcome of other claims. In effect Mr Selby’s point therefore collapses into the same point that I have already addressed, namely that RCOs are not needed when the necessary works are being funded by the Fund.
92. Third, Mr Selby said that on the facts of this case the development of East Village was a public project, developed by SVDP which was originally owned by the ODA; when SVDP was sold the capital value went to the public in the shape of the ODA. So it was right for the public to share in the costs by providing the forward funding. This point also arises under Ground 1.8, and it is more convenient to consider it there.
93. I would therefore dismiss these Grounds of Appeal.

Ground 1.5 – pursuing other claims

94. Ground 1.5 is that the FTT erred in holding that there was nothing unfair in Triathlon taking advantage of its ability to apply for an RCO instead of pursuing other claims or potential claims available to it.
95. This is a reference to the FTT’s decision at [261]-[262] where they said:

“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 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. It also seems clear to us that Parliament intended that an application for a remediation contribution order should provide a route to 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. By the same token, and concentrating on the question of what is just and equitable, 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.

262. The same reasoning applies to the argument that Triathlon should follow the contractual route constituted by the network of agreements relating to the sale and development of East Village and, in particular, to the argument that Triathlon should respect the agreement constituted by clause 7 of the Members Agreement. The 2022 Act, and its creation of the independent remedy of a remediation contribution order postdates all of this. The same applies to the new legislative restrictions which now operate on EVML’s ability to fund the remedial works by the service charge. Parties cannot contract out of this new statutory regime. In all these circumstances we see nothing unfair in Triathlon taking advantage of the ability which it has been given to act independently of the network of contractual provisions relied upon by the respondents, or in our making remediation contribution orders on the applications.”

96. This is a short point. Mr Selby said that the FTT were wrong to say that Triathlon should not have been required to pursue other claims first, in circumstances where the works were being funded and were under way. Before the Act, the remedies available to leaseholders would have been to claim against SVDP; SVDP could then bring in Galliford Try, and Galliford Try could bring in any others responsible such as architects and contractors. The availability of an RCO under the Act cuts through that process. That is understandable where an RCO is needed to get the funding in place to get the work done. But if the work is already being funded and underway, an RCO is not necessary, and the mischief is that neither SVDP nor Get Living can join Galliford Try into the proceedings before the FTT.
97. I do not think this Ground really raises any separate point from those already considered. It is true that the works are already being funded and under way, but that funding is at public expense and the effective question is who should provide interim funding while claims against third parties are pursued. For the reasons already given, I think the FTT were entitled to conclude that the policy of the Act was that the costs

of remediation should primarily fall on developers; that this was not intended to await the outcome of other claims but to be available from the outset; and that there was no good reason why interim funding should be at public expense if there were a developer against whom it would otherwise be just and equitable to make an RCO. That conclusion necessarily involves the funding being provided by SVDP and Get Living while claims against third parties are outstanding, but such funding has to be provided either by the public purse or by them at a stage when the third party claims are unresolved, and as already discussed the FTT were entitled to conclude that the interim funding should be provided by Get Living rather than the Fund.

98. In those circumstances I do not think that this Ground really raises any separate issue, and I would dismiss it.

Ground 1.6 – the context of the applications to the Fund

99. Ground 1.6 is that the FTT failed to take into account that the applications to the Fund had been made at Triathlon’s request, that the scope of remedial works that were being undertaken was the only scope that met the requirements of the Fund, and that the parties were working on the basis that the remedial works would be funded through the Fund.
100. Mr Selby relied on the following facts (all set out in the FTT’s decision). First, the application to the Fund by EVML was made at Triathlon’s request ([191]). Second there was initially disagreement between Get Living and Triathlon as to the appropriate remediation scheme. A number of schemes were considered but only the most comprehensive option would be eligible for funding from the Fund. Get Living wished to investigate less expensive options, not least because under UK domestic regulations introduced to replace EU state aid rules the support available from the Fund for Get Living was capped; Triathlon was consistently opposed to any scheme less than complete remediation. By June 2022 Get Living had however agreed to comprehensive remediation of all the blocks, among other things because a change to the state aid rules meant that Get Living could benefit equally from the Fund ([194]-[198]). The parties then worked together to secure the funding from the Fund, which led to the Fund approving pre-tender support in August 2022, and confirming in February 2023 that it would cover the costs of the Major Works ([201]-[206]).
101. Mr Selby said that in these circumstances it was something of a “kick in the teeth” for Triathlon to have applied for RCOs against SVDP and Get Living. The FTT had given no consideration to these matters when considering whether to make the orders. It was wrong not to do so: when the issue was whether the public purse should be the forward funder of the works, it must be relevant that it was the applicant Triathlon that had caused the public funding to be applied for in the first place.
102. We were shown the transcript from the hearing below which shows that although Mr Selby did make this point, he did so very briefly and quite lightly, simply saying that:
- “a reason against the public purse argument is that the parties were always working on the basis that the remedial works would be funded through the BSF. And that culpable contractors, such as Galliford Try, would be pursued. And that is clear from the lengthy discussion in

cross-examination with Mr Lipton of events between 2021 and 2023.”

103. It is true that the FTT does not in its decision deal with this submission separately, but it is not incumbent on a tribunal to examine in its decision every point made by counsel, and I am not surprised that the FTT did not think it necessary in the circumstances to say anything about this argument. The fact that all parties were ultimately in agreement that EVML should apply to the Fund, and that this was successfully done with the co-operation of both Get Living and Triathlon, does not by itself tell one anything much about whether, when an application for an RCO is made, the works should continue to be funded at public expense rather than by the developer (SVDP) and its parent (Get Living) against whom an RCO would otherwise be just and equitable. It is not as if it is suggested that Triathlon ever promised not to apply for an RCO, or had estopped itself from doing so.
104. I think the real question is whether there is anything inconsistent in Triathlon on the one hand pressing for EVML to obtain public funding, and on the other then seeking an order that SVDP and Get Living cover what would have been Triathlon’s share of the costs.
105. EVML, as already referred to, had no other income to cover the cost of the works and once its right to look to the service charges had been taken away by the BSA, it made obvious sense to secure funding if possible as its directors could not properly place the contracts without being comfortable that they would be funded. In those circumstances I do not think that Triathlon (or more precisely the Triathlon directors on the board of EVML) by applying for public funding were precluding themselves from later pressing for Get Living to pay Triathlon’s share of costs and seeking RCOs to that effect. Once that had been done the question for the FTT was whether there was any need for RCOs given that the works were under way and being funded, or as they put it at [269]:

“269. If the funding of the Major Works is subject to only a small shadow of doubt, and if they will properly remedy the defects (as we are sure they will) what reason is there for making an order at this stage? Why not leave the work to be funded by the Building Safety Fund and allow EVML to pursue its contractual remedies against the contractors who built East Village, with SVDP then picking up any shortfall? In short, why shouldn’t the costs of remediation be borne for the time being by the public?”

That (the public purse point) was a point that they undoubtedly did consider fully, and I do not think that they can be criticised for not taking into account as part of that consideration the fact that Triathlon and Get Living had co-operated in securing the public funding in the first place. That could not really help to answer the public purse point; it merely provided the setting for the question to arise.

106. I would therefore dismiss this Ground of appeal.

Ground 1.7 – No expectation by the Fund

107. Ground 1.7 is that the FTT failed to take into account that the funding from the Fund was provided irrespective of the position under the BSA, such that the public

authorities do not expect SVDP and Get Living to provide the forward funding.

108. It is based on what the FTT said at [273] as follows:

“273. Next Mr Selby KC referred to the fact that funds had been secured from the Building Safety Fund after the commencement of the Act and confirmed and disbursed after these applications had been commenced. There was no evidence to suggest that the Fund expected Get Living to forward fund the work or that its continuing support was dependent on the outcome of these applications. Mr Selby went further and suggested that the Grant Funding Agreement prohibited EVML from pursuing claims against Get Living, as an associate of a leaseholder (an optimistic interpretation of the Agreement where Get Living is also an associate of the developer). The Fund was also meeting the remediation costs of 33 other buildings at East Village. Those points seem to us at best to be neutral, but did serve also to highlight the scale of the public resources being committed to remediation. The public interest in securing reimbursement of those funds as quickly as possible seems to us to point strongly in favour of making an order. ”

(The argument that the Grant Funding Agreement in fact prohibits EVML from pursuing claims against Get Living is the subject of Ground 1.9, which I consider below.)

109. Mr Selby said that it was not the role of the FTT to second-guess the public interest in circumstances where public bodies (in particular DLUHC and the GLA) have already made a funding decision in the public interest and there is not (and could not be) any public law challenge to that decision. He also suggested that the public interest is not as clear-cut as the FTT suggests in [273]. There is for example also a national housing shortage, and it is a political decision as to how hard developers and investors are pushed to rectify fire safety defects in circumstances where they are also needed to invest capital for new housing. In those circumstances the willingness of DLUHC and the GLA to grant funding on the terms they did should not have been treated as a neutral factor but as a factor in favour of refusing the application.

110. I do not accept this submission. I think the FTT were entitled to regard this factor as a neutral one. The funding provided by the Fund is not an out-and-out grant: the Grant Funding Agreement, which we were told is in a standard form, by clause 5.4.1 requires the applicant (here EVML) to use all reasonable endeavours to pursue claims as follows:

“Save where there has been an assignment under Clause 5.4.4, the Applicant shall use all reasonable endeavours to pursue reasonable remedies available to it in respect of the Unsafe Non-ACM Cladding on any Building (including, without limitation, any claims against insurers, any relevant contractors and/or manufacturers and/or warranty providers responsible for the manufacture and/ or installation of the Unsafe Non-ACM Cladding and/or with any liability in relation to the Building) ("**Non-ACM Remedies**").”

By clause 5.4.3 the Applicant is required promptly to pay over any net monies recovered in the next 12 years from such claims to DLUHC or the GLA (so far as attributable to the matters funded by the Fund). In reply Mr Selby accepted that the obligation under clause 5.4 could include applying for an RCO in an appropriate case.

111. That illustrates that there is, as one would expect, a public interest in the Fund being reimbursed if and when claims against others are successfully made. In other words it is only intended as temporary funding pending recovery from those who can be made legally liable. Although there is what may appear to be a generous 12 year period, this is explicable by the fact that such litigation may be long and complex; it does not affect the fact that the Applicant is under an obligation to pursue claims, to notify DLUHC within 10 working days of receiving any monies, and to pay them over promptly.
112. Against that background I do not think one can infer from the fact that the Fund provided funding to EVML that the public bodies concerned had no interest in RCOs being made where appropriate. On the contrary, I think the FTT were entitled, indeed plainly right, to take the view that there was a public interest in securing reimbursement of the funds as quickly as possible. And they recorded at [270] that Mr Selby “recognised the attraction of the proposition that the public should not have to pay for work when there was a well resourced commercial entity which could be made liable under the Act” and “did not suggest that protecting the public purse by securing the earliest possible reimbursement of remediation costs was irrelevant.”
113. As to the suggestion that pressing developers and investors too hard might discourage investment in the provision of new housing, that seems to me quite speculative. I accept that it is a political question, and had Government (or Parliament) been persuaded that there was a significant risk of that, it could have made some express provision to that effect. But there is no suggestion that this formed any part of Government thinking or found expression in the Act, and in the absence of that, I think the FTT were fully justified in concluding that the public interest in the Fund being reimbursed was a strong reason in favour of making the order.
114. I would dismiss this Ground of appeal.

Ground 1.8 – the changing identity of the beneficial owners of SVDP and Get Living

115. Ground 1.8 is that the FTT wrongly gave no weight to the changing identity of the ultimate beneficial owners of SVDP and Get Living, in particular that the East Village development had been a public project from which the public, through the ODA, had benefited.
116. This is based on what the FTT said at [251], but it is helpful to set out the whole passage from [251]-[254] as follows:

“251. We give no weight to the changing identity of the ultimate beneficial owners of SVDP and Get Living. Mr Selby KC submitted that the SVDP of today is not the SVDP that designed and built the Blocks. That SVDP was owned by the ODA; today’s SVDP is owned by QDDAV and its various investors. He argued that since the Act ignores the distinctions between corporate entities in its search for

pockets close enough to the original developer and deep enough to pay for remediation, it was also relevant to take account of the changes which have occurred in beneficial ownership. We do not agree, and we consider that it is unnecessary to go higher up the corporate chain than Get Living when considering what is just and equitable in his case.

252. Mr Selby is right that the Act erodes and elides corporate identity and deprives it of some of its main advantages, but it does so for specific purposes and within specific limits. It does not require or permit the normal consequences of incorporation to be ignored for different purposes. When QDD opted to acquire SVDP it could instead have taken a transfer of the land and buildings, leaving the liabilities of the developer behind, but it chose not to do so for its own reasons, knowing that it was acquiring not only the assets of the partnership but also its liabilities, including latent and consequential liabilities. The same is true of each of the investors who has subsequently bought in to the corporate structure above SVDP. Each willingly assumed the risks associated with their investment. In our judgment it is not open to any of them to ask that the timing and circumstances in which they made their investment in those assets be taken into account in determining whether it is just and equitable for the companies in which they invested to be the subject of contribution orders.

253. The same applies to the fact that Get Living was inserted in the corporate structure only as late as 2018; when it acquired East Village it acquired both its assets and its liabilities. Additionally, as Mr Millett KC put it, Get Living is the latest holding parent in a group which has been involved as owner of East Village since 2014 and as prospective purchaser since 2011.

254. As for the fact that SVDP was originally in public ownership, through the ODA, that is also irrelevant for the same reasons. In any event, QDDAV had rights against the ODA which it has released for valuable consideration.”

117. Mr Selby reiterated a number of these points before us. He said that the reality was that the developer in this case was the ODA through its then subsidiary SVDP, and that Get Living, which only acquired SVDP subsequently, was in no sense a developer and had no connection with the development. Indeed the FTT said (at [172]) that they were satisfied that when QDDAV acquired SVDP “there was no reason for QDDAV not to proceed at that time on the assumption that the Blocks had been constructed competently and in accordance with current building standards and were safe”.
118. I think there are a number of points run together here which it is helpful to keep distinct. The first is the changing identity of the ultimate beneficial owners of SVDP and Get Living, which is addressed by the FTT at [251]-[252]. This as I understand it is a reference to the fact that the investors who are now the beneficial owners of Get Living (and hence of QDDAV and SVDP) are not the same as those who initially

bought SVDP from the ODA. That, as the FTT says at [252] does not seem to me to be relevant: if you invest in a company, you take the risk of unforeseen liabilities attaching to that company.

119. The second, which I think is a separate point, is that Get Living itself had no involvement with the development. It had no association with SVDP at the time of the development. Mr Selby said that it is not therefore a development company that used a thinly capitalised SPV to build a development, sold off the completed blocks, and then walked away; it is not the sort of associate that is the paradigm case for an RCO. The answer given by the FTT was that the original purchasers had the choice between acquiring the land and acquiring SVDP. They chose for their own reasons to acquire SVDP through QDDAV rather than the land. Having done so, they took the risk of liabilities attaching to SVDP. One of those risks, although unknown at the time, was that SVDP might be made liable to contribute to the costs of remedying defects in the development; and another risk, which I accept was quite unforeseeable, was that there would develop such a serious building safety crisis that Parliament thought it right to enact very far-reaching legislation under which the well-resourced parent of a poorly-resourced developer could also be made to contribute without being at fault in any way. That was another risk in acquiring SVDP; and the FTT explained at [266] (set out at paragraph 72 above) why in the circumstances they thought it appropriate to make RCOs not only against SVDP as developer but also against Get Living as its parent. That passage is not directly challenged but in any event seems to me to be cogent.
120. The third point is that SVDP was originally owned by the ODA which was a public body. This was relied on by Mr Selby both under this Ground and under Ground 1.4 (the public purse point). The answer that the FTT gave to it is in [254], namely that the purchasers chose to acquire SVDP through QDDAV and the fact that it was formerly in public ownership does not affect the current position. As the FTT point out, QDDAV did in fact have the benefit of warranties from the ODA, but they were released some time ago in a separate transaction, no doubt for what seemed then to be sound commercial reasons.
121. I consider that the FTT were entitled to come to the conclusions that they did. I do not think it can be said that their consideration of these points was wrong, or outside the generous ambit of the discretion entrusted to them. I would dismiss this Ground of appeal accordingly.

Ground 1.9 – terms of Grant Funding Agreement

122. Ground 1.9 is that the FTT failed to take into account that the terms of the Grant Funding Agreement expressly prohibit a claim against Get Living.
123. This point turns on the construction of the Grant Funding Agreement. It was dealt with very shortly by the FTT at [273] (set out at paragraph 108 above) where they described the interpretation contended for as optimistic.
124. Clause 4.3.1(d) of the Grant Funding Agreement provides as follows:

“The Applicant undertakes and warrants to DLUHC and the GLA that:

...

- (d) it shall not claim the cost of any Qualifying Expenditure funded by the Funding ... from any Leaseholder, and shall recompense Leaseholders for any expense they have incurred in paying for Works reimbursed by the Funding (including repaying any deductions from a sinking fund) irrespective of whether that Leaseholder is a Protected Leaseholder with such recompense paid directly to the bank account of the relevant Leaseholder or such other appropriate payment method of the Leaseholder's choosing promptly following the first payment of Funding to the Applicant under this Agreement and by no later than the date of second payment of Funding under this Agreement. The Leaseholders may enforce the terms of this clause 4.3.1 (d) against the Applicant in the event that the Applicant breaches the terms of this clause 4.3.1 (d)”

125. Clause 1.1 contains a definition of “Leaseholder” as follows:

- “(a) a person (other than the Applicant) that is a party to a Lease Document;
 - (b) any person that controls any person (other than the Applicant) that is a party to a Lease Document;
 - (c) any sub-lessees in respect of any Lease Document,
- and “control” means the power to direct the management and policies of an entity, whether through the ownership of voting capital, by contract or otherwise”

and a definition of “Lease Documents” as meaning:

“a lease of a Residential Unit or a Commercial Unit and a reference to a Lease Document is a reference to any of the lease documents”.

- 126. Mr Selby’s argument is very simple. Get Living subsidiaries are parties to leases in the blocks (see paragraph 38(5) above). Get Living controls these subsidiaries. It is therefore a Leaseholder as defined. That means that the effect of clause 4.3.1(d) is that EVML has agreed not to claim any costs from Get Living. That must be relevant to the question whether an RCO should be made requiring Get Living to pay such costs to EVML.
- 127. Mr Nissen said that Triathlon was not a party to the Grant Funding Agreement and not bound by it and Triathlon’s application for RCOs was therefore not a breach of the agreement. That is no doubt true, but I think there is force in the point that if EVML has agreed not to bring such a claim in its own name, that is a potentially relevant factor when considering whether it is just and equitable to make an RCO in favour of EVML at the instance of Triathlon.
- 128. It fell to Mr Polli to advance submissions as to why EVML was not in fact precluded from bringing such a claim. He had three arguments:

- (1) The inclusion in the definition of Leaseholder of those who controlled a party to a lease could be seen to be an error that could be corrected as a matter of construction (that is, on the *Chartbrook* principle: see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101).
 - (2) Clause 4.3.1(d) is to be understood as only preventing EVML from pursuing claims against leaseholders in their capacity as parties to the lease in question.
 - (3) There is a conflict between clause 5.4.1 which requires EVML to use all reasonable endeavours to pursue claims to recover monies which can be used to reimburse the Fund and clause 4.3.1(d) which appears to prevent such claims being pursued. That conflict should be resolved in favour of permitting such claims to be brought.
129. I do not think the first argument (that the inclusion of controlling parties in the definition of Leaseholder was a mistake and can be omitted as a matter of construction) is right. It is true that there is “not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed” (*Chartbrook* at [25] per Lord Hoffmann). But it must be “clear that something has gone wrong with the language”, and it requires a “strong case” to persuade the Court of this, as “we do not easily accept that people have made linguistic mistakes, particularly in formal documents” (*Chartbrook* at [14], [15] and [25] per Lord Hoffmann). What Mr Polli seeks is not just a rearrangement or correction of infelicitous language but the wholesale removal of one limb of the definition. I do not think it can be said to be clear that this was included by mistake: that is both *prima facie* unlikely, and would I think require a careful examination of every instance where “Leaseholder” was used in the Grant Funding Agreement, an exercise that has not been done.
130. To take one example, clause 13 imposes obligations of confidentiality on the parties. Clause 13.1.3 provides a number of exceptions, including at (e):
- “where to do so is deemed necessary by the Applicant (acting reasonably) in order to keep Leaseholders in the building informed as to the progress of any Works...”
- If the definition of Leaseholder were construed as omitting the reference to controlling parties, this might prevent EVML from communicating information to them. It is not obvious that this would be what the parties intended.
131. Nor am I persuaded by Mr Polli’s third argument (that there is a conflict between clause 5.4.1 and clause 4.3.1(d) and that it should be resolved in favour of the latter). As Mr Selby said, the obligation on EVML in clause 5.4.1 (set out at paragraph 110 above) is to use “all reasonable endeavours” to pursue claims. But this cannot sensibly be read as requiring EVML to pursue a claim which the parties have agreed it should not pursue.
132. That leaves the second argument (that clause 4.3.1(d) only applies to claims against leaseholders in their capacity as parties to the lease). I think this argument is well-founded. It is true that as a matter of language the clause simply refers to EVML not claiming “the cost ... from any Leaseholder”. But as has been established by a series

of well-known cases which it is not necessary to cite, the construction of a contract is not simply a literalist exercise of parsing the language, but an iterative process in which the context and background of the contract, the apparent purpose of its provisions and the practical implications of rival constructions can all be taken into account; and where there are rival constructions, the Court can prefer the construction which is more consistent with business common sense.

133. The evident purpose of clause 4.3.1(d) is to prevent the Applicant from claiming costs which are covered by the Fund from leaseholders (and indeed to reimburse those who have already contributed). That makes sense if it is interpreted as conferring protection on leaseholders in their capacity as lessees, who might otherwise be liable to contribute to the costs through their service charges. But it makes no commercial sense if EVML has a claim against someone in a different capacity (such as a developer) and is precluded from pursuing it simply because such a person also happens to be a Leaseholder as defined. It would mean for example that if a developer thought that it might be the target of an RCO, it could prevent any such action being taken by buying a flat in the block in question. The same would apply to others such as contractors, or the suppliers of cladding materials. It is impossible to see what rational purpose could be served by such an interpretation, and it would cut across the policy of the BSA which it cannot be supposed Government intended.
134. In those circumstances I accept Mr Polli's second argument. Clause 4.3.1(d) prevents EVML from pursuing leaseholders in their capacity as leaseholders. But it does not in my judgement prevent EVML from pursuing those such as Get Living in other capacities such as here as the associate of the freeholder, even if they happen to satisfy the definition of Leaseholder. So construed it provides no obstacle to the grant of RCOs in favour of EVML.
135. I would therefore dismiss this Ground of appeal.
136. I have now considered each of the various Grounds relied on in support of Ground 1. For the reasons I have given I would dismiss the appeal against the decision of the FTT that it was just and equitable to grant RCOs against SVDP and Get Living.

Ground 2 – retrospectivity

137. Ground 2 is that the FTT were wrong to find that an RCO could be made in respect of costs incurred before section 124 of the BSA came into force on 28 June 2022.
138. This issue relates to some £1.1m of Triathlon's claims that relate to costs that were incurred before that date. Mr Selby's contention is that section 124 does not have retrospective effect and that such costs are irrecoverable because they were incurred before section 124 came into force.
139. The FTT dealt with this at [70]-[79]. They gave a number of reasons for concluding that section 124 enables an RCO to be made in respect of costs incurred before 28 June 2022. First, the language of section 124(2), which simply refers to making an order "for the purpose of meeting costs incurred or to be incurred in remedying relevant defects", is unlimited. The language, they said, appeared to them to be clear and explicit, and the absence of any temporal limitation or transitional provision was telling [73].

140. Second, they found confirmation in paragraph 1012 of the Explanatory Notes [74].
141. Third, they did not regard this construction as either improbable or unfair. On the contrary, it was consistent with the purpose and structure of Part 5 of the Act that the radical protection it extends to leaseholders should not be restricted by precise distinctions of time [75]. The Act [75]:

“provides for wholesale intervention in and beyond normal contractual relationships in order to transfer the potentially ruinous cost of remediation from individual leaseholders to landlords, and to distribute it between landlords and developers and their associates according to criteria which Parliament has decided are necessary and fair. We agree with Triathlon’s submission that the Act and the LPI Regulations disclose a hierarchy of liability, with the original developer and its associates at the top. An interpretation of the Act which resulted in some leaseholders bearing the cost of remediation, and some developers, landlords and their associates avoiding responsibility, would not give effect to the obvious purpose of the Act to protect leaseholders to the fullest extent possible.”

142. Moreover, such an interpretation would create serious inconsistencies in the operation of the legislation between the functioning of section 124 (and section 123) on the one hand and schedule 8 on the other, and would discriminate between individual leaseholders in materially identical circumstances [75]-[76]. They assumed (as we have now decided in the *Adriatic* appeal) that schedule 8 protects only against the obligation to pay service charges and does not assist leaseholders who have already contributed to the cost of relevant measures before the commencement of the Act; those leaseholders must therefore rely on section 124 for a remedy. If section 124 did not apply to costs already incurred leaseholders who had already paid would have no remedy no matter how much they had already paid [77]. They continued [78]:

“78. It appears to us to be inconceivable that Parliament can have intended that the individual leaseholders of flats in a building which had not yet been remediated by the time the leaseholder protections in Schedule 8 came into force on 22 June 2022 were to enjoy those protections, but that the leaseholders of an identical building on the same estate which had already been remediated at their expense were to be left to bear the full costs themselves and prevented from seeking a contribution order under section 124. Similarly, it cannot have been intended that a leaseholder who paid a service charge demanded to meet the cost of remedial works before 22 June 2022 would be left with no remedy, whereas their neighbour in the same building who had refused or been unable to pay would have full Schedule 8 protection. The sums involved in remediation are too great, and the consequences for individuals too extreme, for such a haphazard pattern of protection to have been Parliament’s intention.”

143. There was no dispute between the parties as to the legal principles applicable to the question whether a statutory provision is to be interpreted as having retrospective effect. They are considered in our judgments in *Adriatic*: see per Newey LJ at paragraphs [53] to [59] and my own judgment at paragraphs [134] to [139]. It is not

necessary to repeat everything there said. The FTT summarised the position as follows:

“61. Legislation is said to be retrospective if it alters the legal consequences of things that happened before the legislation came into force. It is common ground that, as a matter of legal policy, changes in the law should not take effect retrospectively. Nevertheless, Parliament clearly has power to enact legislation which has retrospective effect, but it is presumed not to intend to do so unless that intention is clear. How clearly Parliament’s intention must appear depends on the degree of unfairness which would result from giving the legislation retrospective effect.”

They cited in support the speech of Lord Mustill in *L’Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 524, and the statement, approved by Lord Mustill, of Staughton LJ in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712 at 724, to the effect that “the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.” Mr Selby did not take issue with any of that.

144. I think it helpful to start with the judgment of the Supreme Court in *URS*. The particular issue with which the Court was concerned was the effect of section 135 of the Act which extends the limitation period for bringing claims under the DPA, but they unsurprisingly approached that question by a consideration of the general purposes of the Act, and specifically of Part 5.
145. The leading judgment is that of Lords Hamblen and Burrows JJSC (with whom Lords Lloyd-Jones, Briggs, Sales and Richards JJSC agreed), with a concurring judgment by Lord Leggatt JSC. In the joint judgment of Lords Hamblen and Burrows they consider the background to the Act at [78]-[83], and at [84] say of the Act that it:

“is part of the Government’s response to the need to identify and remediate historic building safety defects as quickly as possible, to protect leaseholders from physical and financial risk and to ensure that those responsible are held to account.”

They then at [85] say that the Act is both forward and backward-looking, and summarise the forward-looking provisions in Parts 2 to 4. Then at [86] they turn to Part 5, and say as follows:

“86. The backward-looking provisions are set out in Part 5, which includes section 135. Part 5 makes a number of changes to the law in order to address the problem of historical building safety defects. In summary, the main changes are:

- (1) Section 135 which provides for a new 30-year limitation period for accrued claims under section 1 of the DPA.
- (2) Section 124 which provides persons with a legal or equitable interest (such as leaseholders) in medium and high-rise buildings, the Secretary of State, and other bodies, with a new right to seek

remediation contribution orders from the First-tier Tribunal against the building's developer, landlord, or associate. Such an order requires a respondent to contribute to the costs of remedying historical building safety defects if this is considered "just and equitable" (see section 124(1)). Section 124 sits within a broader suite of "leaseholder protections" at sections 116 to 124 of, and Schedule 8 to, the BSA, which provides for a range of new safeguards that ensure owners of "qualifying leases" in medium and high-rise buildings are protected as far as possible from the costs of remediating historical building safety defects that they played no part in creating.

(3) Section 130 which provides the High Court with a power to grant "building liability orders". Section 130(2) and (4) provide that a building liability order will extend a "relevant liability" of a body corporate to another "associated" body corporate, so that both bodies are jointly and severally liable for the relevant liability.

(4) Sections 147 to 151 which introduce various new causes of action to hold the manufacturers and sellers of unsafe construction products to account.

87. All four sets of provisions have retrospective effect. As the Secretary of State explained at paras 24-25 of her written submissions:

"Retrospectivity is central to achieving the aims and objectives of the BSA. Many of the building safety issues identified in the wake of the Grenfell Tower fire arise in relation to buildings constructed many years ago.... A retrospective approach provides for effective routes to redress against those responsible for historical building safety defects that have only recently come to light, whatever level of the supply chain they operated at." "

146. This is picked up at [102] where they refer to "the importance of retrospectivity to Part 5" and add:

"As outlined above, this is reflected not only in section 135 but in all the main changes to the law made by Part 5."

147. At [104] they refer to a central purpose and policy of the Act being "to hold those responsible for building safety defects accountable".

148. So far as Lord Leggatt's judgment is concerned, Mr Selby drew our attention in particular to what he said at [273] about the presumption against retrospectivity:

"273. ...The presumption against retrospective operation of a statute does not cease to apply just because the statute is plainly intended to have some retrospective effect. A statute can be retrospective in some respects but not others. Retrospective effect can be a matter of degree. The basic principle requires a court "in a case where some retrospective operation was clearly intended, equally to presume that the retrospective operation of the statute extends no further than is

necessary to give effect either to its clear language or to its manifest purpose”.”

That must however be read with the next paragraph where he says this:

“274. The presumption against retrospective operation of a statute is, nonetheless, only a presumption. Sometimes the unfairness to potential defendants of reviving expired rights and corresponding liabilities may be considered by the legislature to be a necessary price of achieving an important policy goal. This was obviously the view taken in enacting the BSA. A central goal of the legislation is to seek to ensure that safety risks in multi-occupied residential buildings resulting from historical building defects are remedied by those who were responsible for the defects in the first place, and without the leaseholders having to bear the (potentially very large) costs. To achieve that goal, Parliament has decided to enable claims to be brought against property developers, contractors and others responsible for the construction of unsafe residential buildings even when the construction work was completed many years ago. That is only made possible by greatly extending the limitation period for bringing such claims, including where the limitation period had already expired before the BSA came into force.”

149. These passages are self-evidently strongly in favour of section 124 being given a retrospective interpretation. The joint judgment says so in terms. Indeed the Secretary of State submitted that this was a necessary part of the majority’s reasoning and dispositive of Ground 2 of this appeal. I am rather doubtful that this is technically part of the *ratio* of the decision, as the relevant issue in *URS* concerned the extent of the retrospective operation of section 135 and I do not see that what they said about section 124 was a necessary step in their reasoning. But even if not technically *ratio*, it is clearly a carefully considered statement of the position not a casual aside, and one that I consider we ought to be guided by unless convinced that it was wrong.
150. But I am very far from being so convinced. I accept that of the points relied on by the FTT, the language of section 124 by itself does not take one very far (as the import of the words “incurred or to be incurred” is that one can apply for an RCO both to cover costs already paid and to cover costs not yet paid and that makes sense whether or not the section has any retrospective effect); and the FTT’s reliance on Explanatory Notes which were added after the passage of the Bill through Parliament is of limited assistance for the reasons explained by Newey LJ in *Adriatic*. But the remaining points made by the FTT seem to me very persuasive, and to have received significant support from the analysis of the Supreme Court in *URS*.
151. It is necessary to interpret section 124 in such a way as to give effect to the purposes of Part 5 of the Act. These purposes include the protection of leaseholders from financial risk (*URS* at [84]), or to ensure that risks from historical defects are remedied without the leaseholders having to bear the potentially very large costs (*URS* at [274] per Lord Leggatt). One of the statutory mechanisms to give effect to this purpose is the protection for leaseholders in schedule 8, but, as we have decided in *Adriatic*, this only provides protection from being required to pay; it does not enable payments that have been made to be recovered. It seems to me that the FTT is right that it is very difficult to believe that Parliament intended that those leaseholders

who had *not* paid should receive this protection but those leaseholders – perhaps as the FTT says in the same block – who *had* paid should be left without any remedy at all, except the prospect of suing developers and contractors in what would no doubt be long, complex and expensive proceedings in the Technology and Construction Court. It is far more consonant with the purposes of the Act to interpret section 124 as providing the statutory mechanism for leaseholders who have paid to seek to pass on the costs they have already incurred – whether before or after the Act came into force. In *URS* at [115]-[116] the majority accepted a submission for the Secretary of State that there was no good policy reason why Parliament would have decided to “penalise” those developers who had been pro-active in investigating, identifying and remedying defects, and had thereby acted responsibly. Similarly there is no good policy reason why Parliament would have decided to “penalise” leaseholders whose landlords (perhaps at the leaseholders’ own instigation) had acted responsibly and got on with repairs; *a fortiori* there is no good reason why Parliament should have prejudiced leaseholders who had themselves (possibly at great sacrifice) discharged their service charge debts as opposed to those who had not.

152. Moreover in *URS* at [117] the majority gave an example of a developer who carried out remedial works which straddled the commencement date, and referred to the incoherence of a split regime for the application of section 135(3). In a similar way one can envisage a leaseholder who has started paying a large service charge by instalments which straddle the commencement date. To some extent this will indeed produce a split regime with schedule 8 providing protection against future instalments but not affecting those already paid; but it would be more coherent to interpret section 124 as the FTT did as applying to the past instalments than to interpret the Act as leaving leaseholders who had paid without statutory remedy.
153. Mr Selby said that such an interpretation would mean that section 124 was in principle capable of applying to the payment of service charges that had long since been regarded as settled – for example on replacement of fire doors some 25 years ago – and that this was unfair. I agree that that might in certain circumstances be regarded as unfair. But section 124 does of course contain its own safety-valve against unfairness because the FTT can only make an RCO if it is just and equitable to do so. It does not seem to me to be a sufficient reason to interpret section 124 as unable to be used for costs such as those incurred by Triathlon in the present case.
154. There is another consideration which persuades me that the FTT’s decision is right. The Act must of course be interpreted in such a way as to make it work as a whole. Our decision in *Adriatic* means that a leaseholder can be protected against service charges even if the person doing the work (landlord or management company) has already incurred the cost before the commencement of Part 5. Take a case like the present where the obligation to do the work falls on a management company with no income other than the service charges. If such a management company had incurred costs before the Act but not yet claimed, or received, reimbursement through the service charges, the effect of schedule 8 may be to leave it with a significant shortfall. It may be that the only realistic target for it to pass on such costs to would be an associated company of the developer. Such a target is, as the present case illustrates, within the scope of section 124. But if section 124 cannot be used to pass on costs incurred before the commencement of the Act, such a management company may be left without any obvious remedy. Again it seems difficult to believe that this would

be in line with Parliament's intention.

155. In those circumstances I consider that the FTT reached the right conclusion, and would dismiss this Ground of appeal.

Conclusion

156. For the reasons I have given I would dismiss the appeal.

Lord Justice Holgate:

157. I agree that the appeal should be dismissed for the reasons given by Nugee LJ.

Lord Justice Newey:

158. I also agree that the appeal should be dismissed.
159. So far as Ground 1 is concerned, I have nothing to add to Nugee LJ's comprehensive analysis.
160. With respect to Ground 2, section 124 of the BSA empowers the FTT to make an RCO "for the purpose of meeting costs incurred or to be incurred in remedying relevant defects (or specified relevant defects)". Having regard to the definition of the term given in section 120(2), a "relevant defect" may have arisen as a result of work done (or not done) many years before the BSA was enacted and, as the FTT pointed out in paragraph 73 of its decision, section 124 does not expressly impose any other temporal limitation. Nothing said in section 124, therefore, prevents the provision from having retrospective effect.
161. Even so, as Nugee LJ has observed in paragraph 150 above, "the language of section 124 by itself does not take one very far". In circumstances where there is a presumption against retrospectivity, the fact that section 124 is silent on the subject might be said to favour SVDP and Get Living rather than the FTT's construction.
162. There are, however, other reasons for concluding that section 124 has retrospective effect. In the first place, that interpretation is consistent with the evident purposes of Part 5 of the BSA. As Lords Hamblen and Burrows noted in *URS*, at paragraph 84, these include "protect[ing] leaseholders from ... financial risk" and "ensur[ing] that those responsible [for historic building safety defects] are held to account". Both aims are furthered by construing section 124 in such a way that RCOs can be made in favour of leaseholders, and against developers and persons associated with them, in respect of costs pre-dating the BSA.
163. More specifically, denying section 124 retrospective effect would result in RCOs being unavailable in circumstances where Parliament could be expected to have intended that such relief should be available and inconsistencies could arise were it not to be. Nugee LJ has pointed out in paragraph 151 above that it is difficult to believe that Parliament intended that leaseholders who had already paid service charges should be "left without any remedy at all, except the prospect of suing developers and contractors in what would no doubt be long, complex and expensive proceedings in the Technology and Construction Court" while leaseholders who had not paid were protected by schedule 8. I have explained in my judgment in *Adriatic*

that, in my view, schedule 8 does not apply in relation to costs incurred before schedule 8 came into force. Were that correct, the need for a leaseholder to be able to seek an RCO in respect of outstanding service charges would be all the greater. Further, there is good reason to think that Parliament would have wished landlords and management companies who are prevented from recovering service charges by schedule 8 to be able to apply for RCOs against developers and their associates. So interpreting section 124 allows costs to be passed on to those responsible for the defects. An allied point is that, as Nugee LJ has mentioned in paragraph 154 above, a management company facing a shortfall as a result of schedule 8 could find itself without any remedy were it unable to resort to section 124. The same could be true of landlords.

164. In *Granada UK Rental & Retail Ltd v Pensions Regulator* [2019] EWCA Civ 1032, [2020] ICR 747, Patten LJ, giving the judgment of the Court, observed at paragraph 56 that “legislation which removes or alters already-accrued rights is likely to be more objectionable, and therefore unfair, than legislation which imposes a new liability on past conduct”. Unlike schedule 8, section 124 of the BSA falls into the latter category. It allows a fresh liability, by way of an RCO, to be imposed on the strength of defects arising from works undertaken, and (as I see it) costs incurred, before the BSA was enacted.
165. Another, and important, difference from schedule 8 is that, under section 124(1) of the BSA, an RCO cannot be made unless the FTT “considers it just and equitable to do so”. That seems to me very significant to the assessment of the fairness of treating section 124 as having retrospective effect (as to which, see in particular *L’Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, at 525) and, more generally, to the likelihood of Parliament having intended retrospectivity. Nothing comparable is to be found in schedule 8.
166. Finally, as Nugee LJ has commented in paragraph 149 above, passages in *URS* plainly support a retrospective interpretation of section 124 of the BSA.
167. In all the circumstances, I agree that section 124 of the BSA allows RCOs to be made in relation to costs pre-dating its coming into force and, hence, that Ground 2 fails.



Neutral Citation Number: [2025] EWCA Civ 856

Case No: CA-2024-000196

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(LANDS CHAMBER)
Mr Justice Edwin Johnson, Chamber President
[2023] UKUT 271 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2025

Before:

LORD JUSTICE NEWEY
LORD JUSTICE NUGEE
and
LORD JUSTICE HOLGATE

Between:

ADRIATIC LAND 5 LIMITED	<u>Applicant/</u>
- and -	<u>Appellant</u>
LONG LEASEHOLDERS AT HIPPERSELEY POINT	<u>Respondents</u>
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES & LOCAL GOVERNMENT	<u>Intervener</u>

Simon Allison KC, Malcolm Birdling and Mattie Green (instructed by **Fieldfisher LLP**) for
the **Appellant**

Mark Loveday and Hugh Rowan (instructed by **Velitor Law**) for the **Respondents**
Sir James Eadie KC, Michael Walsh KC, Jason Pobjoy KC, Camilla Chorfi, Will Perry
and **Richard Miller** (instructed by **The Treasury Solicitor**) for the **Intervener**

Hearing dates: 17, 18 and 21 March 2025
Further written submissions: 27 May 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 08 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. The question raised by this appeal is whether the Building Safety Act 2022 (“the BSA”) prevents the appellant, Adriatic Land 5 Limited (“Adriatic”), from recovering service charges from tenants of a building it owns in respect of certain costs which it had incurred before the relevant provisions of the BSA came into force. The Upper Tribunal held that it does. Adriatic now challenges that decision in this Court.
2. In the same week that we heard this appeal, we heard another relating to the BSA: *Triathlon Homes LLP v Stratford Village Development Partnership* (CA-2024-001256) (“*Triathlon*”). By an order dated 14 October 2024, Lewison LJ directed that the two appeals should be heard sequentially by the same constitution. While, however, there is some overlap between the cases, they raise distinct issues. We have therefore written separate judgments for each matter.
3. On 21 May 2025, the Supreme Court gave judgment in *URS Corporation Ltd v BDW Trading Ltd* ([2025] UKSC 21, [2025] 2 WLR 1095) (“*URS*”), in which one of the issues was whether section 135 of the BSA applied to the facts of that case. The parties to both the present appeal and *Triathlon* filed written submissions addressing potential implications of that decision.

Basic facts

4. The building at issue is Hippersley Point in Abbey Wood, London. Hippersley Point was constructed in about 2015 by Development Securities (Abbey Wood) Limited, a subsidiary of Land Securities plc. It has 10 storeys, is more than 18 metres in height, and contains both a commercial unit (on the ground floor) and 32 residential flats which are the subject of long leases.
5. Adriatic was registered as the freehold proprietor of Hippersley Point on 12 April 2017. A witness statement made on behalf of Adriatic by Mr Eyvind Andresen explains that the company holds residential freehold and long leasehold assets and is a subsidiary of entities whose purpose is to issue securities to liability driven investors (pension funds and life insurance companies) so that the investors can receive the long-dated inflation-linked income for which long leases provide. Mr Andresen further explains that the total ground rent payable for Hippersley Point as a whole is at present £9,250 per year. In a second witness statement, Mr Andresen estimates Adriatic’s financial interest in the building, having regard to the limited rents to which it is entitled and the value of the long leases held by tenants, at 2.52%.
6. In the latter part of 2020, it emerged that substantial remedial works were required to deal with defects in the external construction of Hippersley Point which gave rise to fire risk. Interim fire safety works were needed, too.
7. As would be expected, the leases of the flats at Hippersley Point all include service charge provisions. However, section 20 of the Landlord and Tenant Act 1985 (“the L&TA 1985”) barred Adriatic from recovering more than £250 per flat by way of service charge as regards the requisite works unless the “consultation requirements” prescribed by the Service Charges (Consultation Requirements) (England) Regulations 2003 were either complied with or dispensed with.

8. Adriatic applied to the First-tier Tribunal (Property Chamber) (“the FTT”) for the consultation requirements to be dispensed with in respect of the works. In a decision dated 20 December 2021, the FTT acceded to that application. The FTT explained in its decision that “the building is presently unsafe in terms of fire risk” and that it was “simply not an option to delay works to unsafe premises”. It therefore had “no hesitation in confirming that dispensation should be given unconditionally”. It added, however:

“The Tribunal does ... consider that the Applicants should be precluded from pursuing any costs in relation to this application from the leaseholders themselves. It is considered that they would be unlikely to do this however the Tribunal makes such a determination pursuant to section 20C of the Landlord and Tenant Act 1985.”

9. Following a request for a review of its decision, the FTT substituted the following in a revised decision dated 30 June 2022:

“The Tribunal does ... consider that the Applicants should be precluded from pursuing any costs in relation to this application from the leaseholders themselves. This is because dispensation is essentially a forbearance by the Tribunal and it would be unfair for the landlord to recover costs from any of the leaseholders living at Hippersley Point in the present case. Although not all of the leaseholders raised objections the Tribunal were satisfied that those that did were making general submissions which applied to all leaseholders. Accordingly, the dispensation is given on condition that the Applicants are prohibited from seeking their costs of this application from the leaseholders at Hippersley Point.”

The FTT thus reversed its order under section 20C of the L&TA 1985 but instead made dispensation conditional on Adriatic not being entitled to recover costs of the dispensation application from tenants.

10. Adriatic sought permission to appeal to the Upper Tribunal (Lands Chamber) against the costs condition. The Deputy President, Martin Rodger KC, granted permission, but he pointed out that an issue arose as to the possible application of paragraph 9 of schedule 8 to the BSA, which had come into force on 28 June 2022.
11. The appeal came before Edwin Johnson J (“the Judge”), the Chamber President. In a decision dated 13 November 2023 (“the Decision”), he concluded that the FTT’s imposition of the costs condition could not be upheld. He also, however, concluded that paragraph 9 of schedule 8 to the BSA applied, with the result that Adriatic could not recover any of the costs of its dispensation application from tenants with “qualifying leases” within the meaning of section 119 of the BSA. The Judge summarised his conclusions as follows in paragraph 180 of the Decision:

“(1) The decision of the FTT to impose the Costs Condition was wrong in law, both as a matter of procedure and as a matter of substance. For the reasons which I have set

out, the decision cannot be upheld as lying within the legitimate scope of the discretion which the FTT were exercising.

- (2) By virtue of Paragraph 9, and for the reasons which I have given, the Costs are not recoverable, by the Service Charge, from those of the Respondents who hold qualifying leases within the meaning of Section 119. The Reviewed Decision was, for this reason, incomplete. The Costs were not recoverable in any event from those of the Respondents who hold qualifying leases. In this context I should also repeat that it does not seem to me that it would be fair to criticise the FTT for this omission.”

12. In the meantime, Adriatic had been informed in June 2023 that Land Securities, as the original developer of Hippersley Point, had agreed to manage and fund all “life-critical fire safety works necessary for your building” pursuant to the “Developer Remediation Contract” (as to which, see paragraph 36 below).

The Building Safety Act 2022

13. The BSA’s long title identifies one of the purposes of the Act as “to make provision about the safety of people in or about buildings and the standard of buildings”. Part 5 of the BSA, comprising sections 116-160, contains, as its heading states, “Other provision about safety, standards etc”. Section 116(1) explains that sections 117-124 and schedule 8 “make provision in connection with the remediation of relevant defects in relevant buildings”.
14. Schedule 8 to the BSA is introduced in section 122. As section 122 states, 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).”

Subject to certain exceptions, a “relevant building” is “a self-contained building, or self-contained part of a building, in England that contains at least two dwellings and (a) is at least 11 metres high, or (b) has at least 5 storeys”: see section 117(2). “Relevant defect” is defined by section 120(2) to refer to “a defect ... 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”. By respectively section 120(5) and section 120(3), “building safety risk” is “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” and “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” is specified as the period of 30 years preceding the coming into force of section 120: see section 120(3).

15. Paragraph 2 of schedule 8 to the BSA provides that no service charge “is payable” under a lease of premises in a relevant building in respect of a “relevant measure” (i.e. a measure taken to remedy a defect or a “relevant step” taken in relation to a defect) relating to a relevant defect if the landlord or any superior landlord at the beginning of 14 February 2022 “(a) is responsible for the relevant defect, or (b) is associated with a person responsible for a relevant defect”. For the purposes of paragraph 2, a person is “responsible for” a 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.”

16. Unlike paragraph 2, paragraphs 3-9 of schedule 8 to the BSA apply only in relation to “qualifying leases”. By section 119(2), a lease is a “qualifying lease” if:

- “(a) it is a long lease of a single dwelling in a relevant building,
- (b) the tenant under the lease is liable to pay a service charge,
- (c) the lease was granted before 14 February 2022, and
- (d) at the beginning of 14 February 2022 ... —
 - (i) the dwelling was a relevant tenant’s only or principal home,
 - (ii) a relevant tenant did not own any other dwelling in the United Kingdom, or
 - (iii) a relevant tenant owned no more than two dwellings in the United Kingdom apart from their interest under the lease.”

A “relevant tenant” is a person who was a tenant under such a lease at the beginning of 14 February 2022: see section 119(4)(c). Where, however, a dwelling was at that point let under two or more leases to which subsection (2)(a) and (b) apply, “any of those leases which is superior to any of the other leases is not a ‘qualifying lease’”: see section 119(3). (For completeness, I should mention that a new section, section 119A, was added by the Levelling-up and Regeneration Act 2023 to extend the protection for leaseholders where a “qualifying lease” has been extended, varied or replaced by a new lease.)

17. Paragraphs 3-9 of schedule 8 to the BSA all serve to relieve tenants with “qualifying leases” from liability for service charges. By paragraph 3, no service charge “is payable” under a qualifying lease in respect of a relevant measure relating to a relevant defect if the net worth of the landlord’s group at the beginning of 14 February 2022 was more than a specified multiple of £2 million (the “contribution condition”). By paragraph 4, no service charge “is payable” under a qualifying lease in respect of a relevant measure relating to a relevant defect if the value of the qualifying lease at the beginning of 14 February 2022 was less than either £325,000 (in the case of property in London) or £175,000 (elsewhere). By paragraph 5, a service charge which would otherwise be payable under a qualifying lease in respect of a relevant measure relating to a relevant defect “is payable” only in so far as service charges over a period extending back five years have not exceeded the “permitted maximum” set by paragraph 6. By paragraph 7, a service charge which would otherwise be payable under a qualifying lease “is payable” only in so far as service charges over the previous 12 months have not exceeded the “permitted maximum”. By paragraph 8, no service charge “is payable” under a qualifying lease in respect of the removal or replacement of any part of a cladding system that forms the outer wall of an external wall system, and is unsafe.
18. Finally, paragraph 9 of schedule 8 to the BSA provides:
 - “(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”

19. At the times relevant to this appeal, however, paragraph 9 of schedule 8 to the BSA did not include paragraph 9(1A). That was inserted later, by the Leasehold and Freehold Reform Act 2024.

20. Paragraphs 2-4, 8 and 9 of schedule 8 to the BSA are supplemented by paragraph 10. Paragraph 10(2) states:

“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).”

21. Returning to the body of the BSA, the following are noteworthy at this stage:

i) Section 123 empowers the Secretary of State to provide by regulations for the FTT to make “remediation orders” requiring relevant landlords to remedy defects;

ii) Section 124 empowers the FTT, if “it considers it just and equitable to do so”, to make “remediation contribution orders” requiring specified bodies corporate or partnerships to make payments for the purpose of meeting costs “incurred or to be incurred” in remedying defects. By section 124(3), a body corporate or partnership may be specified 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)”;

iii) Section 130 empowers the High Court, “if it considers it just and equitable to do so”, to make an order providing for a body corporate which has been

associated with another body corporate to share a liability which the latter has incurred under the Defective Premises Act 1972 (“the DPA 1972”) or section 38 of the Building Act 1984 (“the BA 1984”) or as a result of a building safety risk;

- iv) Section 135 extended the limitation period for claims under section 1 or 2A of the DPA 1972 or section 38 of the BA 1984; and
 - v) Section 149 introduced a new liability in respect of cladding products which have rendered buildings or dwellings in them unfit for human habitation.
22. Section 121 of the BSA explains when a partnership or body corporate is “associated” with another person for the purposes of sections 122-124 and schedule 8.

The Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022

23. The Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 (SI 2022/859) (“the 2022 Regulations”) were made in July 2022 in the exercise of powers conferred by the BSA. While regulation 2 makes provision in relation to remediation orders, regulations 3, 4 and 5 enable landlords who are unable to recover service charges from their tenants as a result of schedule 8 to the BSA to pass on costs to other landlords.
24. Regulation 3 of the 2022 Regulations allows a landlord who has paid or is liable to pay the cost of a relevant measure relating to a relevant defect which, but for paragraph 2 of schedule 8 to the BSA, would have been payable as a service charge by a tenant under the lease to recover the cost from the “responsible” landlord(s). By regulation 3(8), the “responsible” landlord is:
- “(a) the person who, at the beginning of 14th February 2022, was the landlord of the tenant referred to in paragraph (1) or any superior landlord and was on that date—
 - (i) responsible for the particular relevant defect to which the relevant measure relates; or
 - (ii) associated with a person responsible for that relevant defect; or
 - (b) the person who, on or after 14th February 2022, became the owner of that landlord’s, or superior landlord’s, interest.”
25. Regulation 4 of the 2022 Regulations allows a landlord who has paid or is liable to pay the cost of a relevant measure relating to a relevant defect which, but for paragraph 3 of schedule 8 to the BSA, would have been payable as a service charge by a tenant under the lease to recover the cost from the “contributing” landlord. By regulation 4(7), the “contributing” landlord is the person who is “the landlord under the qualifying lease referred to in paragraph (1) provided that they met the

contribution condition in paragraph 3 of Schedule 8 to the Act on 14th February 2022” or “after 14th February 2022 became the owner of that landlord’s interest”.

26. Regulation 5 of the 2022 Regulations applies where a landlord has paid or is liable to pay the cost of a relevant measure relating to a relevant defect which, but for paragraphs 4-9 and 11 of schedule 8 to the BSA, would have been payable as a service charge by a tenant under the lease. In such a case, each landlord under any lease in the building is liable to pay a share of the cost.

The origins and development of the BSA

27. The BSA has its origins in the fire which tragically engulfed Grenfell Tower in west London on 14 June 2017. The fire spread rapidly because aluminium composite material had been used in external cladding. Following the fire, it came to be appreciated that many other buildings had the same type of cladding or other cladding that was flammable. Further fire safety issues were also identified, as were certain structural safety defects. Early last year, the Ministry of Housing, Communities & Local Government (“the Department”) estimated the total cost of remedying unsafe cladding on buildings in England over 11 metres in height at £16.6 billion. In January 2022, it had estimated that the mean cost of cladding remediation was £59,000 per flat in the case of a building of more than 18 metres and £27,000 with a building of 11 to 18 metres. It was further estimated that additional costs of £60,000 would result in 21% of leaseholders having negative equity and 34% being in financial stress. To make matters worse, as has been explained by Mr Jonny Murphy of the Department in a witness statement:

“The increased risk associated with these buildings and the potential for significant liability to sit with leaseholders – in some cases exceeding the amount paid for the property – also caused the lending market to freeze, meaning that leaseholders could not sell their properties and were in effect trapped. This was because leaseholders in impacted buildings could not sell to those who needed a mortgage, as mortgage lenders (banks and building societies) would not lend until after a building had been remediated.”

28. The Bill which became the BSA was introduced to Parliament on 5 July 2021. At that stage, the principal purpose of the Bill was to give legal effect to recommendations which had been made in a 2018 report by Dame Judith Hackitt on building regulations and fire safety. The Bill also included (to quote Mr Murphy):

“some measures to protect leaseholders and improve redress in respect of historical building safety defects, namely by retrospectively extending the limitation period under section 1 of the Defective Premises Act 1972 claims from six to 15 years (so that leaseholders would be better able to recover the costs of putting work right from those who caused the problem) and by requiring landlords to explore alternative cost recovery before passing costs on to leaseholders.”

29. On 10 January 2022, the Government announced that it had “reset its approach to building safety with a bold new plan to protect leaseholders and make wealthy developers and companies pay to fix the cladding crisis”. Soon afterwards, on 13 January, the Government tabled amendments to the Building Safety Bill. A further and more substantial set of amendments followed on 14 February (when the Bill was at the Committee stage in the House of Lords) and some additional amendments were put forward on 22 March (at the House of Lords Report stage). The amendments introduced for the first time what became sections 116-125 of the BSA and schedule 8 to it. (Section 125 has since been repealed by the Leasehold and Freehold Reform Act 2024.)
30. The Building Safety Bill received Royal Assent on 28 April 2022 and most of the provisions in Part 5 came into force automatically two months later, on 28 June 2022, by virtue of section 170(3).

Explanatory notes

31. In, it seems, July 2022 (or possibly August 2022), the Government published explanatory notes in respect of the BSA, as by then enacted. The notes in respect of section 122 of the BSA include this:

“984 Schedule 8 makes provision for service charge payments in respect of relevant defects not to be payable by leaseholders in certain circumstances. By limiting or preventing altogether the amounts that are payable in respect of these defects from being passed on to the leaseholders through the service charge, leaseholders are protected from the costs associated with their remediation.

985 Schedule 8 removes the existing legal presumption under most leases that leaseholders are liable in full for the costs associated with remediating relevant defects. The Schedule and powers contained within it make provision for liability to sit in the first instance with landlords who are deemed to be responsible for the creation of those defects, and then with landlords that can afford to meet the costs in full. Where neither of these circumstances applies in respect of any relevant landlord, the Schedule provides for an equitable spread of costs, commensurate with a party’s likely ability to contribute to costs, by allowing for capped leaseholder contributions to be recovered (up to ‘the permitted maximum’) in certain circumstances; and for relevant landlords to be liable for any amounts that are not recoverable from leaseholders.

986 The Schedule sets out that, in relation to historical building safety defects, ‘no service [charge] is payable’ in certain circumstances, and in other circumstances that the service charge is only payable if it ‘does not

exceed the permitted maximum' The protections apply equally irrespective of when any service charge demands were issued by landlords or managing agents. This means that, even if a valid service charge demand was issued prior to commencement, provided that the service charge had not already been paid by the leaseholder, the demand is no longer valid after commencement insofar as it does not comply with the provisions set out in the Schedule. In practice, this means that managing agents and landlords will need to rescind service charge demands issued prior to commencement where they relate to historical building safety defects. Where landlords are entitled to recover some costs from leaseholders according to the Schedule, they will need to issue new service charge demands which comply with the provisions set out in the Schedule."

32. In relation to paragraph 9 of schedule 8 to the BSA, the explanatory notes say:

"1758 The terms of many leases will allow for landlords to pass legal and other professional costs through the service charge. The purpose of Schedule 8 is to protect leaseholders from costs associated with historical building safety defects. Where landlords incur costs in connection with their new liabilities under the Act, this paragraph prevents these costs incurred by landlords from being passed to leaseholders. Without these protections, it would be possible for landlords to pursue spurious or unrealistic legal claims and charge these costs to leaseholders; this paragraph mitigates against that and ensures incentives are aligned by requiring building owners and landlords to absorb the costs of their own legal and other professional advice.

1759 Costs already incurred by leaseholders prior to commencement under this paragraph do not count against the 'permitted maximum' totals set out in paragraph 6 (unless those costs are also classified as a 'relevant measure' under paragraph 1). However, any costs not yet incurred by leaseholders under this paragraph are not payable from the date of commencement onward, even if those costs were incurred by the landlord prior to commencement."

33. The passages from the explanatory notes which I have quoted were not, however, available during the passage of the Bill. What have become sections 116-125 and schedule 8 were not, of course, to be found in the Bill in its original form. Explanatory notes published in April 2022 in connection with the amendments to the Bill which had recently been made included the following:

- i) In respect of what became section 116 of the BSA:

“Lords Amendment 93 introduces provisions about the remediation of relevant defects in relevant buildings”;
 - ii) In respect of what became section 122 of the BSA:

“Lords Amendment 99 inserts a new clause which inserts the Schedule (Remediation costs under qualifying leases) which provides that certain service charge amounts relating to relevant defects in a relevant building are not payable and makes provision for the recovery of those amounts from landlords under leases of a building”;
 - iii) In respect of what became schedule 8 to the BSA:

“Lords Amendment 184 inserts a new schedule which outlines the conditions under which the service charge is not payable in respect of relevant defects. No service charge is payable under a qualifying lease in relation to relevant defects for which landlord or associate is responsible or if a landlord meets the contribution condition. No service charge is payable for cladding remediation. Paragraph 6 provides that the permitted maximum leaseholder contribution is zero, which was introduced through a non-government amendment.”
34. In paragraph 105 of their judgment in *URS*, Lords Hamblen and Burrows (with whom Lords Lloyd-Jones, Briggs, Sales and Richards agreed) quoted from the explanatory notes in respect of the BSA. Lords Hamblen and Burrows said in paragraph 105 that they had been “provided with the Explanatory Notes to the Bill and to the BSA which were in materially the same terms” and, in the next paragraph, that the passages they had set out “show that ensuring that those directly responsible for building safety defects are held to account was central to the BSA and various of its provisions, including specifically section 135”. It is evident, however, that the Supreme Court was under a misapprehension. The explanatory notes to the BSA were by no means in the same terms as those in respect of the Bill. In fact, the explanatory notes to the Bill did not include any of the paragraphs quoted by Lords Hamblen and Burrows. They featured for the first time in the explanatory notes which the Government published after the BSA had already been enacted.

Financial contributions from the Government and developers

- 35. Significant remediation costs are being borne by the Government, including through the establishment of the “Building Safety Fund”. Mr Murphy has explained that the total taxpayer contribution is expected to be £5.1 billion.
- 36. Developers have been called on to sign the “Developer Remediation Contract” pursuant to which they take responsibility for work necessary to address life-critical fire-safety defects from the design and construction of buildings at least 11 metres in height. They will also be subject to the “building safety levy” which is to be charged on new housebuilding pursuant to regulations made under section 58 of the BSA. The

largest developers have since 2022 further been required to pay the “residential property developer tax” on profits from residential property development.

Matters relating to service charges

37. In common with most other modern leases, the leases of the flats at Hippersley Point contain provision for the tenants to make advance payments in respect of service charges. The evidence includes a sample lease of such a flat. This provides for the tenant to make payments on account by reference to an estimate of the total cost of building services for the relevant service charge period and for him subsequently to make balancing payments should his share of the cost, as certified in due course, prove to exceed the sums paid on account. If, on the other hand, it transpires that the tenant has paid more than his share of the certified total, “there shall be allowed by the Landlord to the Tenant a sum equal to the difference between the amount of that Building Service Charge and the aggregate of the said sums paid on account”.
38. In *Burr v OM Property Management Ltd* [2013] EWCA Civ 479, [2013] 1 WLR 3071 (“*Burr*”), the Court of Appeal held that “costs” are “incurred” for the purposes of sections 18, 19 and 20B of the L&TA 1985, which are concerned with service charges, when the landlord either is invoiced or pays. “[A] liability must crystallise before it becomes a cost”: “costs are not ‘incurred’ within the meaning of section 18, 19 and 20B on the mere provision of services or supplies to the landlord or management company”: see *Burr*, at paragraphs 11 and 15, per Lord Dyson MR.
39. Section 27A of the L&TA 1985 allows both landlords and tenants to apply to the FTT for a determination as to whether a service charge is payable or would be if certain costs were incurred. Section 27A(5) states that “the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment”.

The present appeal

40. By its appeal, Adriatic challenges the Judge’s conclusion that paragraph 9 of schedule 8 to the BSA serves to bar it from recovering costs of its dispensation application from tenants with “qualifying leases” within the meaning of section 119. The issues to which the appeal gives rise can be summarised as follows:
 - i) Are costs of the dispensation application within the scope of paragraph 9? [“The Scope Issue”]
 - ii) To what extent, if any, does paragraph 9, correctly construed, apply in relation to costs which were incurred before it came into force? [“The Retrospective Construction Issue”]
 - iii) If and in so far as paragraph 9 would otherwise have retrospective effect, should words be “read into” it in order to render it compatible with Article 1 of Protocol 1 to the European Convention on Human Rights (“A1P1”)? [“The A1P1 Issue”]

The Scope Issue

41. Paragraph 9(1) of schedule 8 to the BSA states that 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”. Paragraph 9(2) explains that the services in question can include services provided in connection with, among other things, “any proceedings before a ... tribunal”.

42. It is Adriatic’s case that paragraph 9 has no application to the costs of a dispensation application under section 20ZA of the L&TA 1985. The Judge disagreed. He considered that “any person”, as used in paragraph 9(1), “mean[s] what it says” and so can include anyone who is liable or potentially liable to remedy the relevant defect, adding that “[t]he most obvious example of such a person is a landlord who is obliged to remedy a relevant defect”: see paragraph 105 of the Decision. The Judge further took the view that the words “relating to” are “very wide” and require no more than “a relationship between the services and the liability or potential liability of the relevant person incurred as a result of the relevant defect”: see paragraph 112. In the present case, Adriatic will have had a liability or potential liability to remedy relevant defects under the terms of both the leases of the flats and the BSA (specifically, section 123): see paragraph 113. That being so, the costs of a dispensation application (and, in particular, of the application which Adriatic made) are capable of falling within the terms of paragraph 9: see paragraph 118.
43. Taking issue with this analysis, Mr Simon Allison KC, who appeared for Adriatic with Mr Malcolm Birdling and Ms Mattie Green, argued that the Judge had construed “relating to”, as the words appear in paragraph 9(1), too widely. A dispensation application, Mr Allison submitted, does not “relat[e] to” liability at all and, anyway, “any person” means “any *other* person”, in other words someone other than the person who has incurred the costs which are the subject of the restriction which paragraph 9 imposes. Paragraph 9 will have been aimed at preventing landlords from passing on to tenants costs of pursuing third parties with responsibility for defects or remedying them (developers, say). Treating paragraph 9 as extending to costs of dispensation applications would deter landlords from making them and so delay remediation works, contrary to the evident purposes of the BSA.
44. In my view, however, the Judge was correct. In the first place, having regard both to its repairing obligations under the Hippersley Point leases and section 123 (as supplemented by regulation 2 of the 2022 Regulations), Adriatic will have become liable, or potentially so, to remedy a “relevant defect”. It follows, as it seems to me, that Adriatic has incurred a “liability (or potential liability) ... as a result of a relevant defect” within the meaning of paragraph 9 and, the reference in that paragraph to “any person” not being otherwise circumscribed, Adriatic will have been such a person. While paragraph 9 must extend to costs incurred in pursuing a developer or other third party, I do not see why the words “any person” should not also extend to the person incurring the costs. To the contrary, read naturally, I think they do so.
45. Further, it appears to me that the legal and other professional services which Adriatic obtained for the purposes of its dispensation application “relat[ed] to” the “liability (or potential liability)” which Adriatic had “incurred as a result of a relevant defect”. As the Judge noted, the words “relating to” are wide. In the present case, Adriatic was seeking dispensation from consultation requirements as regards works which were to fulfil obligations it had by reason of a “relevant defect”. In the circumstances, the application can, in my view, fairly be said to have “related to” “the liability (or potential liability) of [Adriatic] incurred as a result of a relevant defect”, and the costs of the application will also have so related. The Judge said in paragraph 112 of the

Decision that he found it difficult to see how the requisite relationship could be “said not to exist between the costs of a dispensation application made by a landlord, in relation to works required to remedy a relevant defect, and the liability of that landlord to remedy the relevant defect”. I agree that the necessary relationship between the costs of Adriatic’s dispensation application and “the liability (or potential liability) of [the company] incurred as a result of a relevant defect” existed.

46. The evident purpose of schedule 8 reinforces that conclusion. It is obvious from the terms of the schedule that it is seeking to relieve tenants (and especially “qualifying tenants”) from liabilities to pay service charges arising from “relevant defects” and, in particular, “cladding remediation”. It would, I think, be anomalous if a tenant could nevertheless be required to pay service charges stemming from expenditure on an application to dispense with consultation as regards works addressing such defects. Mr Mark Loveday, who appeared for the respondents (“the Leaseholders”) with Mr Hugh Rowan, posed the question, “Why would [Parliament] contemplate that a ‘person’ who incurred the costs of s.20ZA LTA 1985 related to BSA remediation works *should* still be able to add those costs to the lessees’ service charges?” I agree that Parliament is unlikely to have intended that.
47. The conclusion that costs of the dispensation application are within the scope of paragraph 9 can also be reached by a different (and perhaps simpler) route. The costs in question, in respect of which service charge is claimed, can, I think, fairly be seen as relating to a liability (or potential liability) which *the Leaseholders* had incurred as a result of relevant defects. After all, the “legal or professional services” whose costs are at issue arose from an application designed to enable Adriatic to recover from the Leaseholders costs of remedial work for which they were liable under the terms of their leases. There is, of course, no question of the Leaseholders having become liable to carry out the necessary work themselves, but that cannot matter. It is plain, as it seems to me, that it can suffice for the purposes of paragraph 9 that a person has “incurred as a result of a relevant defect” a *financial* liability (or potential liability).

The Retrospective Construction Issue

The Judge’s analysis

48. The Judge concluded in paragraph 170 of the Decision that “[t]he effect of Paragraph 9 [of schedule 8 to the BSA] is that, as from 28th June 2022, no service charge is payable in respect of Qualifying Services, regardless of when the costs of those Qualifying Services were incurred, and regardless of when the relevant service charge actually became due for payment” and, hence, that the paragraph “is capable of applying to the Costs [i.e. the costs of the dispensation application], notwithstanding the date when Paragraph 9 was brought into force”. In arriving at those conclusions, the Judge said the following:

- i) In paragraph 151:

“Looking at the wording of Paragraph 9, I find it difficult to see how Paragraph 9 can be said not to apply where the costs of the relevant services were incurred prior to 28th June 2022. This is not how Paragraph 9(1) is drafted. Paragraph 9(1) is drafted on the basis that no service charge is payable under a qualifying

lease in respect of Qualifying Services If the relevant services qualify as services ‘relating to’ the relevant liability or potential liability of any person incurred as a result of a relevant defect, that is to say (using my definition) if the relevant services qualify as Qualifying Services, I find it difficult to see why it matters when the costs of the relevant services were incurred. Paragraph 9 is not framed by reference to the incurring of the costs of the relevant services”;

ii) In paragraph 153:

“It seems to me that Paragraph 10 contains the mechanism by which the result is achieved that no service charge is payable. I do not think that it actually changes or affects the opening words of Paragraph 9(1), which are that no service charge is payable”;

iii) In paragraphs 157 and 158:

“157. ... The legislative intention which emerges from these provisions [i.e. sections 116 to 125 of, and schedule 8 to, the BSA], and specifically from Schedule 8, is that certain categories of expenditure, in relation to relevant defects, are no longer recoverable by a service charge, including the costs of Qualifying Services. In terms of the passing on of liabilities for expenditure caught by Schedule 8, there is Section 124 and the ability to apply for remediation contribution orders. Whether an application under Section 124 will produce an equitable distribution of a liability to meet expenditure which is caught by Schedule 8 will depend upon the circumstances of each particular case. What is clear is that Parliament has decided that the specified categories of costs in Schedule 8 are not to be payable by the service charge.

158. Viewed in this light it does not seem to me to be surprising that Paragraph 9, or for that matter other Paragraphs of Schedule 8 are capable of applying to costs incurred before Schedule 8 came into force. This seems to me to be consistent with the overall scheme of Sections 116-125 and Schedule 8. What might be seen as unfair results are, it seems to me, simply a reflection of life in the new world of the 2022 Act”;

iv) In paragraph 167:

“This construction may also be said to be supported by paragraph 986 of the Explanatory Notes”.

The parties' positions

49. Mr Allison took issue with the Judge's analysis. Construed correctly, Mr Allison argued, paragraph 9 of schedule 8 to the BSA has no application to costs which were incurred before 28 June 2022, when it came into force. In the alternative, Mr Allison contended that, even if paragraph 9 is capable of applying to costs incurred before 28 June 2022, it does not do so if and in so far as service charges arising from the costs had become payable by that date. Mr Allison maintained that his submissions were supported by, among other things, presumptions against retrospectivity and interference with property rights.
50. For his part, Mr Loveday argued that, once the BSA had been enacted, tenants were not only relieved of any liability to pay service charges in the future in respect of legal or other professional fees relating to "relevant defects", but became entitled to recover, or to credit for, sums paid in respect of such service charges in the past. While focusing largely on the wording and purpose of the BSA, Mr Loveday also relied on the explanatory notes relating to it.
51. Sir James Eadie, who appeared with Mr Michael Walsh KC, Mr Jason Pobjoy KC, Ms Camilla Chorfi, Mr Will Perry and Mr Richard Miller for the Secretary of State for Housing, Communities and Local Government ("the Secretary of State"), who intervened in the proceedings, occupied an intermediate position. It was his case that a line is to be drawn as at 28 June 2022. He did not suggest that tenants can claim back money that they had already paid by that date. However, he submitted that, since then, no tenant has had any liability to pay any service charge in respect of services such as are described in paragraph 9. This interpretation of paragraph 9 appears to me to accord with the Judge's conclusions. Like Mr Loveday, Sir James sought support in, among other things, the explanatory notes.
52. There was general recognition that the interpretation of paragraph 9 has implications for other paragraphs of schedule 8, which depend on similar language.

The presumption against retrospectivity

53. As Lord Rodger noted in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816 ("*Wilson*"), at paragraph 186, "[a]t common law there is a presumption that a statute does not have 'retrospective' effect". Lord Rodger went on to observe in paragraph 187 that, "[s]o far as matters of substance are concerned, the essence of the common law rule is conveniently stated by Sir Owen Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261, 267:

"The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

54. Lord Nicholls said in *Wilson*, at paragraph 19, that the underlying rationale of the principle had been well identified by Staughton LJ in the following passage from his

judgment in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712 (“*Tunncliffe*”), at 724:

“the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree—the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.”

55. In *L’Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 (“*L’Office Cherifien*”), Lord Mustill, with whom Lords Goff, Jauncey and Browne-Wilkinson agreed, said at 524-525 that “it would be impossible now to doubt that the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect”, but that he had “reservations about the reliability of generalised presumptions and maxims when engaged in the task of finding out what Parliament intended by a particular form of words, for they too readily confine the court to a perspective which treats all statutes, and all situations to which they apply, as if they were the same”. That, Lord Mustill commented at 525, “is misleading, for the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule”. Having quoted the passage from *Tunncliffe* which I have already set out, Lord Mustill said at 525:

“Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.”

56. In *URS*, Lord Leggatt noted that there is a “principle that a statute, even though clearly intended to have retrospective effect, should not be construed as having any greater retrospective operation than is clearly necessary”: see paragraph 301. Earlier in his judgment, in paragraph 272, Lord Leggatt had quoted a passage from *Lauri v Renad* [1893] 3 Ch 402 in which Lindley LJ had said at 421:

“It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.”

In paragraph 273 of his own judgment, Lord Leggatt said:

“What Lindley LJ in this passage referred to as a ‘subordinate rule’ is important. The presumption against retrospective operation of a statute does not cease to apply just because the statute is plainly intended to have some retrospective effect. A statute can be retrospective in some respects but not others. Retrospective effect can be a matter of degree. The basic principle requires a court ‘in a case where some retrospective operation was clearly intended, equally to presume that the retrospective operation of the statute extends no further than is necessary to give effect either to its clear language or to its manifest purpose’: *Arnold v Central Electricity Generating Board* [1988] AC 228, 275B (Lord Bridge). See also the statement of Bowen LJ in *Reid v Reid* (1886) 31 Ch D 402, 409, that ‘you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant’.”

57. As Lord Reed pointed out in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 (“*AXA*”), at paragraph 121, a “distinction might ... be drawn between laws which alter prospectively the rights and obligations arising from pre-existing legal relationships, and laws which alter such rights and obligations retrospectively”. Such a distinction was drawn by Buckley LJ in *West v Gwynne* [1911] 2 Ch 1. He said at 12:

“Suppose that by contract between A. and B. there is in an event to arise a debt from B. to A., and suppose that an Act is passed which provides that in respect of such a contract no debt shall arise. As an illustration take the case of a contract to pay money upon the event of a wager, or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed, so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective But if at the date of the passing of the Act the event has not happened, then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A.’s right in an event to become a creditor of B. As matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so

to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights.”

58. Such a distinction can be seen, too, in *Wilson*. Lord Hope said in paragraph 98 that “[t]he concepts of fairness and legal certainty carry much greater weight when it is being suggested that rights or obligations which were acquired or entered into before 2 October 2000 [i.e. the date on which the legislation at issue came into force] should be altered retrospectively”. In paragraph 161, Lord Scott made this comparison:

“If a lease is granted for, say, 99 years, there might well be intervening legislation capable of affecting the ability of the landlord to forfeit the lease, to operate a rent review clause, to claim damages for dilapidations or to recover possession on the expiry of the term. But it would be unusual for the legislation to alter the rights and obligations of the parties resulting from events that had already taken place, such as a forfeiture notice already served, a damages claim already instituted, rent review machinery already in train, and so on.”

For his part, Lord Rodger, in paragraphs 187-189, referred to the need to have regard to the distinction between provisions which “alter existing rights and duties—only prospectively, with effect from the date of commencement” and provisions which “change the substantive law in relation to events in the past” and so are truly “retrospective”.

59. The Court of Appeal recognised the existence of a distinction along these lines in *Granada UK Rental & Retail Ltd v Pensions Regulator* [2019] EWCA Civ 1032, [2020] ICR 747 (“*Granada*”). Giving the judgment of the Court, Patten LJ observed in paragraph 56:

“No one can expect the law to stand still: it must react to changing circumstances and problems as they unfold. Clearly, legislation which removes or alters already-accrued rights is likely to be more objectionable, and therefore unfair, than legislation which imposes a new liability based on past conduct.”

At paragraph 66, Patten LJ said:

“Legislation which creates a present or prospective liability based on a current state of affairs will often not be classifiable as retrospective even though the present condition of most things is the consequence of past events. Many of the cases use taxation as an obvious example of this. A proposal to levy an annual tax on houses worth over £2m could be said to be unfair because it penalises owners who have lived there for many years and may have purchased the property when it was worth a fraction of its current value. They have had no control over, or responsibility for, house price inflation and could not have

anticipated either the rise in value or the possibility of the levy at the time when they bought it. Even those who purchased houses which were worth over £2m at the time may be able to say that, had the tax been anticipated, they would have purchased a cheaper property. But in neither case would the imposition of the tax be retrospective. It would impose a liability on present ownership by reference to present value. Although the circumstances which have led to the taxpayer owning a house of that value will vary, in neither of the cases mentioned above would the tax legislation depend for its operation on anything but the current value of the property.”

The presumption against interference with property rights

60. *Bennion, Bailey and Norbury on Statutory Interpretation* (8th. ed.) (“*Bennion*”) explains that “[i]t is a principle of legal policy that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law”; that “[e]ven in cases where some degree of interference with a person’s proprietary rights is clearly intended, legislation will be construed as interfering with those rights no more than the statutory language and purpose require”; and that “[t]he principle against expropriation or other interference with the enjoyment of property rights is likely to carry particular weight in cases where no compensation is available”: see section 27.6.

61. The earliest of the authorities cited by *Bennion* to which we were referred was *Attorney General v Horner* (1884) 14 QBD 245. In that case, Brett MR said at 257:

“it seems to me that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons’ rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so.”

62. Other cases illustrating the principles include *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508 (“*Westminster Bank*”), *Methuen-Campbell v Walters* [1979] 1 QB 525 (“*Methuen-Campbell*”) and *S Franes Ltd v Cavendish Hotel (London) Ltd* [2018] UKSC 62, [2019] AC 29 (“*S Franes*”). In *Westminster Bank*, Lord Reid (with whom Lords Morris and Guest agreed) said at 529:

“The appellants’ argument is really founded on the principle that

‘a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms’ (*per* Lord Warrington in *Colonial Sugar Refining Co. Ltd. v.*

Melbourne Harbour Trust Commissioners [1927] A.C. 343, 359).

I entirely accept the principle. It flows from the fact that Parliament seldom intends to do that and therefore before attributing such an intention to Parliament we should be sure that that was really intended. I would only query the last words of the quotation. When we are seeking the intention of Parliament that may appear from express words but it may also appear by irresistible inference from the statute read as a whole. But I would agree that, if there is reasonable doubt, the subject should be given the benefit of the doubt.”

63. In *Methuen-Campbell*, Buckley LJ said at 542 that he agreed with “the view expressed by Goff L.J. that in an Act such as the Leasehold Reform Act 1967, which, although it is not a confiscatory Act is certainly a dispropriatory Act, if there is any doubt as to the way in which language should be construed, it should be construed in favour of the party who is to be dispropriated rather than otherwise”.
64. In *S Franses*, Lord Sumption (with whom Baroness Hale, Lady Black and Lord Kitchin agreed) accepted at paragraph 16 that “as a statutory interference with the landlord’s proprietary rights, the protection conferred by the [Landlord and Tenant Act 1954] should be carried no further than the statutory language and purpose require”.

The significance of explanatory notes

65. In *R (O) v Home Secretary* [2022] UKSC 3, [2023] AC 255, Lord Hodge explained that the “primary source” from which the meaning of a statute is ascertained is “the words which Parliament has chosen to enact as an expression of the purpose of the legislation” and that “[e]xternal aids to interpretation therefore must play a secondary role”: see paragraph 30. He nevertheless acknowledged in paragraph 30 that “Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions”.
66. A distinction is, however, to be drawn between explanatory notes which were available when the legislation was being enacted and those which have come into existence subsequently. A passage from the judgment of Lord Sales (with whom Lords Reed, Leggatt and Stephens agreed) in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594 (“*PACCAR*”) is relevant in this context. Lord Sales said in paragraph 42:

“It is legitimate to refer to Explanatory Notes which accompanied a Bill in its passage through Parliament and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be

ascertained Reference to the Explanatory Notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen” (emphasis added).

67. Where explanatory notes have “accompanied a Bill in its passage through Parliament”, there is sense in regarding them as capable of shedding light on what Parliament intended. Where, on the other hand, explanatory notes in respect of a statute did not exist when it was being passed, there is less reason to see them as a guide to Parliament’s intentions. They may, of course, show what the Department which promoted the Act understands it to mean, and possibly what it wished it to mean, but the materials plainly cannot have informed Parliamentary decision-making.
68. It is to be remembered in this context that, as Lord Reed said in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 (“SC”), at paragraph 166, “the Government is separate from Parliament, notwithstanding the many connections between the two institutions”. Thus, “[t]he reasons which the Government gives for promoting legislation cannot ... be treated as necessarily explaining why Parliament chose to enact it”: see *SC*, at paragraph 166, per Lord Reed.
69. In *Chief Constable of Cumbria v Wright* [2006] EWHC 3574 (Admin), [2007] 1 WLR 1407, Lloyd Jones J, with whom Keene LJ agreed, said in paragraph 17:
- “It is, of course, for the courts and not the executive to interpret legislation. However, in general, official statements by government departments administering an Act, or by any other authority concerned with an Act, may be taken into account as persuasive authority on the legal meaning of its provisions In the present case we are concerned with guidance published by the Home Office, which is the government department which had responsibility for the enactment and operation of the legislation in question. In any given case, it may be helpful for a court to refer to the guidance in the interpretation of the legislation. It may be of some persuasive authority. However, to my mind that is the limit of its influence. It does not differ in that regard from a statement by an academic author in a textbook or an article. It does not enjoy any particular legal status. There seems to me to be no satisfactory basis for the submission that it gives rise to a presumption that the views it contains are correct and should be rejected only for good reason.”
70. In my view, the position is similar where explanatory notes have been published only after a statute has already been enacted. The notes may be of persuasive authority, but they do not enjoy any particular legal status and can be compared with academic writings.

71. *Bennion* says this in section 24.14 about explanatory notes:

“The rationale for using explanatory notes in the way discussed above appears to be that they form part of the background material available to the legislature at the time at which legislation is passed and may therefore help to inform its interpretation in the same way as other pre-enactment materials. It seems to follow that only the explanatory notes published during the Bill’s passage through the legislature can be used in this way.

The explanatory notes for the Act itself post-date its enactment and therefore cannot be viewed as part of the context against which it is enacted. Those notes should be given no more weight than other post-enactment expressions of opinion by the government as to the meaning of legislation In other words, the weight to be given to them should depend on the cogency of any reasoning contained in them.

... It should be acknowledged that, in practice, it will not always make a difference since changes between different versions of the notes are often relatively minor”

72. I agree with those observations.

Discussion

73. As was stressed by both Mr Loveday and Sir James Eadie, paragraph 9 of schedule 8 to the BSA is not expressed to be subject to any temporal limitation. It simply states that no service charge of the relevant kind “is payable”. Parliament could have said that the provision should not apply in relation to service charges which had become payable, or costs which had been incurred, before it came into force, but nothing to that effect is to be found in paragraph 9.
74. That paragraph 9 should apply in relation to prior costs can also be argued to accord with the aims of the BSA. Paragraph 9 was introduced into what became the BSA as part of what was avowedly “a bold new plan to protect leaseholders and make wealthy developers and companies pay to fix the cladding crisis”. The legislation was plainly intended to have implications in relation to cladding and other defects which had arisen before it was enacted. Parliament evidently took the view that the historic problems which had come to light following the Grenfell Tower fire called for backward-looking measures. Mr Allison himself accepted that paragraph 9 would bite on costs incurred after its coming into force notwithstanding the fact that the defect giving rise to them had already existed. In *Triathlon*, we have concluded that section 124 allows remediation contribution orders to be made in relation to costs and defects pre-dating the BSA.
75. A specific aim of the BSA was clearly to relieve tenants (and, in particular, those with “qualifying leases”) to a great extent from service charge liabilities arising from defects causing safety risks. On *Adriatic’s* case, however, tenants would remain liable for such charges in relation to costs which had been incurred and/or sums which had

become payable before 28 June 2022. While, moreover, the present appeal involves paragraph 9, the same point arises in relation to other paragraphs of schedule 8. Even those with “qualifying leases” could still, therefore, be called on to pay service charges in respect of work to remove or replace unsafe cladding which had been carried out earlier than 28 June 2022.

76. Mr Loveday and Sir James Eadie also sought support for their submissions in the explanatory notes relating to the BSA. In my view, however, the explanatory notes take matters no further. Those which were available during the passage of what became the BSA said nothing bearing on what is at issue in the present appeal. In contrast, the explanatory notes published in July 2022 contain passages which chime with Sir James’ case. For example, paragraph 986 states that “[t]he protections apply equally irrespective of when any service charge demands were issued by landlords or managing agents” and that, “even if a valid service charge demand was issued prior to commencement, provided that the service charge had not already been paid by the leaseholder, the demand is no longer valid after commencement insofar as it does not comply with the provisions set out in the Schedule”. However, this version of the explanatory notes (and, in particular, paragraph 986) was not before Parliament when it was enacting the BSA and the parts on which Mr Loveday and Sir James relied purported to state the position rather than providing cogent reasoning for it. While, therefore, the explanatory notes may show what the Department understood paragraph 9 to mean, they cannot be taken to provide a reliable guide to Parliament’s intentions.
77. That remains my view notwithstanding the Supreme Court’s decision in *URS*. As I have mentioned in paragraph 34 above, the Supreme Court attached significance to the July 2022 explanatory notes. It did so, however, on the basis of a misconception. It understood the July 2022 explanatory notes to be in “materially the same terms” as those to the Bill when they were in fact very different.
78. Mr Loveday and Mr Allison each placed reliance on paragraph 10 of schedule 8. Mr Loveday suggested that paragraph 10’s reference to costs “incurred or to be incurred” tended to confirm that paragraph 9 extended to costs which had been incurred before it came into force. However, there is no need to read paragraph 10 in that way: the words “incurred or to be incurred” are apt to refer to costs which are to be incurred in the future or have been incurred by a date subsequent to paragraph 9’s coming into force. As Mr Allison put it, paragraph 10 captures expenditure in the relevant year and budgeted sums. Mr Allison further argued that paragraph 10 must have been intended to add something to paragraph 9 and that, were Mr Loveday or Sir James right about paragraph 9, there would have been no need for paragraph 10(2)(a) or, probably, paragraph 10(2)(b). The fact, Mr Allison said, that paragraph 10 focuses on costs being *incurred* points to Parliament having intended that paragraph 9 should have no application to costs incurred before it was in force. In my view, however, no such inference can be drawn. The Judge observed that paragraph 10 “contains the mechanism by which the result is achieved that no service charge is payable”. I agree. I do not myself think that it adds anything important to Mr Allison’s case.
79. The constructions of paragraph 9 espoused by Mr Allison and Sir James Eadie might both be said to produce arbitrary results. On Mr Allison’s case, a landlord who had remedied a defect before 28 June 2022 could potentially be entitled to service charges, but no service charges would be payable in respect of any work undertaken after that date. On Sir James’ case, a tenant who had not paid a service charge invoiced before

28 June 2022 would be protected, but he would not be able to recover any payment he had already made.

80. The interpretation favoured by Mr Loveday might be said to be less arbitrary. He argued that paragraphs 9 and 10 mean that a tenant can apply for a determination under section 27A of the L&TA 1985 that no service charge is payable for any professional costs which the landlord may have incurred in relation to a person's liability for a "relevant defect" (and, hence, that the tenant is entitled to recover, or credit for, whatever he may have paid in respect of such costs). Similar reasoning would apply in relation to other paragraphs of schedule 8. On this basis, a tenant who had paid by 28 June 2022 would be treated in a comparable way to one who had not. Since, though, a "relevant defect", as defined in section 120, could arise from works up to 30 years before the provision came into force, a tenant could potentially challenge a service charge which had been invoiced and paid many years ago (say, in connection with fire doors provided the best part of two decades ago in compliance with the Regulatory Reform (Fire Safety) Order 2005). Mr Loveday did not shy away from this implication of his contentions. In my view, however, Parliament is unlikely to have intended such consequences.
81. Another argument advanced by Mr Loveday was to the effect that paragraph 9 is not to be regarded as retrospective even if it relieved those with "qualifying leases" of liability to pay service charges which had already been invoiced. In this connection, he pointed out that changes in the law can properly affect legal relationships established before the law was altered.
82. It seems to me, however, that paragraph 9 would plainly operate retrospectively on both Mr Loveday's interpretation of it and Sir James Eadie's. Either would mean that a landlord who had not merely incurred costs before paragraph 9 was enacted or even foreshadowed but had rendered a service charge invoice covering those costs would have lost any entitlement to the service charge. On that basis, paragraph 9 would not merely "alter prospectively the rights and obligations arising from pre-existing legal relationships" (to use the words of Lord Reed in *AXA*), but would serve to deprive landlords of "already-accrued rights" such as Patten LJ mentioned in *Granada*. Paragraph 9 would not be comparable to the "legislation capable of affecting the ability of the landlord to forfeit the lease, to operate a rent review clause, to claim damages for dilapidations or to recover possession on the expiry of the term" which Lord Scott postulated in *Wilson*. It would rather "alter the rights and obligations of the parties resulting from events that had already taken place" and, as Lord Scott observed, it would be "unusual" for legislation to do that.
83. In the circumstances, the presumptions against retrospectivity and interference with property rights must both be in point. That suggests that we should be slow to accept either Mr Loveday's interpretation of paragraph 9 or Sir James Eadie's. As I have mentioned, in *Wilson* Lord Rodger endorsed Sir Owen Dixon CJ's observation that "a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events", and the presumption against interference with property rights operates in a similar way. The fact that paragraph 9 is expressed in general terms thus counts in favour of Adriatic rather than the Leaseholders or the Secretary of State. There is nothing in the language of paragraph

9 itself to displace the presumptions or, in other words, to show “with reasonable certainty” that paragraph 9 should have retrospective effect. Nor is such language to be found in other paragraphs of schedule 8.

84. As I have mentioned, in *L’Office Cherifien* Lord Mustill, while noting that it could not be doubted that “the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect”, drew attention to the significance of fairness. In that connection, the following matters may be said to weigh in favour of regarding schedule 8 as having retrospective effect:

- i) Adriatic’s interpretation of schedule 8 would result in tenants facing bills which they could not have anticipated and which they might not be able to afford. The sums at stake are large. Mr Andresen has explained that Adriatic and two similar companies associated with it had alone demanded nearly £87 million from tenants before the BSA’s enactment in respect of work and services which are now deemed to be “relevant measures” to address “relevant defects” and in excess of £70 million remained unpaid as at June 2024;
- ii) Landlords will often be better able to bear the costs than tenants;
- iii) The extent to which giving retrospective effect to schedule 8 would prejudice landlords is mitigated by the financial contributions which the Government and developers have made and are making (notably, through the “Building Safety Fund” and the “Developer Remediation Contract”);
- iv) The prejudice to landlords is mitigated, too, by their ability to pass on liability to developers, other past and present landlords and their associates through claims under, for example, the DPA 1972 and, perhaps more importantly, the mechanisms for which the BSA and the 2022 Regulations provide (including remediation contribution orders);
- v) By no means all service charges relating to pre-BSA remediation would be irrecoverable. Only those with “qualifying leases” would benefit from schedule 8 except in so far as paragraph 2 applied and, if it did, that would be because the landlord was “responsible for the relevant defect” or associated with a person who was. Further, provided that a service charge did not relate to “cladding remediation” within paragraph 8 or professional services within paragraph 9, a tenant would be relieved of liability only if the landlord belonged to a group whose net worth exceeded the figure for which paragraph 3 provides, if the value of the “qualifying lease” was less than the relevant maximum given in paragraph 4 or if the relevant service charge took the total above one of the caps imposed by paragraphs 5-7; and
- vi) On the Secretary of State’s case (though not the Leaseholders’), landlords could retain all sums which they had received by way of service charges before 28 June 2022.

85. On the other hand:

- i) The constructions of schedule 8 for which Mr Loveday and Sir James Eadie contend would both result in landlords being deprived of accrued contractual rights without any compensation;
- ii) Just as tenants would be relieved of large liabilities, landlords would lose large sums;
- iii) The losses to landlords might be out of all proportion to the extent of their financial interests in the relevant buildings. The present case illustrates the point. As I have mentioned, Adriatic is entitled to ground rents totalling £9,250 per year and has been estimated to have a financial interest of 2.52% in Hippersley Point. The tenants have a far greater stake in the building;
- iv) While tenants will not have been responsible for the defects which have been remedied, nor will a landlord such as Adriatic;
- v) As a result of buying their leases, the tenants will have both stood to gain from any increase in value and assumed risks in respect of such problems as might emerge. Landlords such as Adriatic took on no comparable responsibility;
- vi) Tenants will enjoy very substantial protection from service charges for which they would otherwise have been liable under their leases whether or not schedule 8 has retrospective effect;
- vii) Our decision in *Triathlon* has the consequence that tenants who have to pay service charges in respect of costs incurred in connection with work to remedy relevant defects can apply for remediation contribution orders. Such an order could be made against, among others, the landlord to whom the service charges had been paid if that were considered “just and equitable”;
- viii) The scope for landlords to pass on liability is limited in a number of ways. In the vast majority of cases, as at Hippersley Point, there will be no other landlord. Moreover, the developer and any associates may no longer exist or be financially able to meet any claim;
- ix) Mr Loveday’s approach to schedule 8 would be especially prejudicial to landlords since it could result in tenants being entitled to reopen payments made in respect of service charges many years ago;
- x) Sir James Eadie’s interpretation of schedule 8 would leave a tenant who had paid by 28 June 2022 without a remedy. If Parliament deemed that fair, it is not obvious why it should have considered it unfair that tenants should remain liable for *some* service charges after that date;
- xi) A retrospective interpretation of schedule 8 would be particularly harsh on a landlord who had not insisted on tenants paying service charges in the hope that some or all of the relevant costs would instead be borne by, say, the developer or the “Building Safety Fund”. Mr Allison postulated this situation in his skeleton argument:

“a landlord that incurred legal and professional costs prior to 28 June 2022, but did not demand them from leaseholders because

they hoped to recover them from third parties and wanted to minimise the distress caused to leaseholders, so instead protected recoverability of such costs by the service of a notice pursuant to s.20B(2), [L&TA 1985], will now be unable to recover those costs as a service charge from leaseholders with qualifying leases [if paragraph 9 has retrospective operation]”; and

- xii) The language which Parliament has used does not provide any “clarity” (to use a word from Lord Mustill’s speech in *L’Office Cherifien*) that retrospectivity was intended.
86. I refer later in this judgment to the difficulties which Courts can face in assessing proportionality. Determining whether it is “fair” for a provision to have retrospective effect may be no easier. On balance, however, the factors relevant to fairness seem to me to come down against retrospectivity and do not, in my view, displace the presumptions.
87. In her supplementary written submissions on *URS*, it was argued on behalf of the Secretary of State that the decision in that case is strongly supportive of her contentions in this appeal. While recognising the differences in wording between section 135 of the BSA on the one hand and section 122 and schedule 8 on the other, Mr Loveday also suggested that *URS* is of assistance to him.
88. In *URS*, Lords Hamblen and Burrows observed that the BSA is “part of the Government’s response to the need to identify and remediate historic building safety defects as quickly as possible, to protect leaseholders from physical and financial risk and to ensure that those responsible are held to account”, that it is “both forward and backward-looking” and that the “backward-looking provisions are set out in Part 5”: see paragraphs 84-86. Lords Hamblen and Burrows proceeded to explain that “Part 5 makes a number of changes to the law in order to address the problem of historical building safety defects”, identifying the “main changes” as follows:

“(1) Section 135 which provides for a new 30-year limitation period for accrued claims under section 1 of the DPA [1972].

(2) Section 124 which provides persons with a legal or equitable interest (such as leaseholders) in medium and high-rise buildings, the Secretary of State, and other bodies, with a new right to seek remediation contribution orders from the First-tier Tribunal against the building’s developer, landlord, or associate. Such an order requires a respondent to contribute to the costs of remedying historical building safety defects if this is considered ‘just and equitable’ (see section 124(1)). Section 124 sits within a broader suite of ‘leaseholder protections’ at sections 116 to 124 of, and Schedule 8 to, the BSA, which provides for a range of new safeguards that ensure owners of ‘qualifying leases’ in medium and high-rise buildings are protected as far as possible from the costs of remediating historical building safety defects that they played no part in creating.

(3) Section 130 which provides the High Court with a power to grant ‘building liability orders’. Section 130(2) and (4) provide that a building liability order will extend a ‘relevant liability’ of a body corporate to another ‘associated’ body corporate, so that both bodies are jointly and severally liable for the relevant liability.

(4) Sections 147 to 151 which introduce various new causes of action to hold the manufacturers and sellers of unsafe construction products to account.”

In paragraph 87, Lords Hamblen and Burrows said that “[a]ll four sets of provisions have retrospective effect”, adding in paragraph 102 that “the importance of retrospectivity to Part 5” was “reflected not only in section 135 but in all the main changes to the law made by Part 5”.

89. These remarks were all made in the context of the question whether section 135 of the BSA was applicable to the facts of that case. In paragraph 124, Lords Hamblen and Burrows explained that, “in order to achieve its purpose of holding those responsible for building safety defects to account, it is necessary to interpret the general wording used in section 135(3) as being applicable to claims such as those made in the present case”. In the following paragraph, Lords Hamblen and Burrows concluded:

“When the meaning of the words used in section 135(3) is considered in the light of their context and the purpose of the statutory provision, they should be interpreted as applying in the circumstances of this case. More specifically, they apply where, as in this case, there is a claim for damages for repair costs in the tort of negligence, or there is a claim for contribution in respect of those repair costs, and it is contended that there is a rule of law that the repair costs are irrecoverable as voluntarily incurred, or that there was no liability for the same damage, because the DPA claim was time-barred. The effect of the retrospective limitation period extends to such claims, which are dependent on the limitation period in section 1 of the DPA but are not actions brought under that section, with the consequence that there was no relevant time bar at the time that the repair costs were incurred. Section 135 does not, however, retrospectively affect any issue at trial as to the reasonableness of BDW’s actions in carrying out the remedial works as a matter of legal causation or mitigation.”

In a similar vein, Lord Leggatt said in paragraph 304:

“Section 135 of the BSA makes it possible for BDW to bring claims in these proceedings against URS for damages for breach of a duty owed to BDW under section 1 of the DPA and for contribution. But in relation to its claim for damages in the tort of negligence (which BDW had already begun before the BSA came into force) and the DPA claim, section 135 does not retrospectively affect the answer to the questions of causation,

mitigation and remoteness which determine whether BDW can recover compensation from URS for the cost of remedial work carried out before section 135 of the BSA came into force.”

90. The Supreme Court thus saw retrospectivity as important to “all the main changes to the law made by Part 5”, including section 124 of the BSA as it “sits within a broader suite of ‘leaseholder protections’ at sections 116 to 124 of, and Schedule 8 to, the BSA”. However:
- i) The point which the Supreme Court had to decide in *URS* related to section 135. As Lords Hamblen and Burrows noted in paragraph 124, “[t]here is no question that section 135 does apply retrospectively”. That is made plain by its terms. In fact, section 135(5) specifically provides for a claim brought in reliance on the section to be dismissed should that be “necessary to do so to avoid a breach of that defendant’s Convention rights”;
 - ii) There was no issue before the Supreme Court as to the extent to which schedule 8 should be understood to have retrospective effect or, in particular, as to “the granular effect of Paragraph 9 in the context of costs incurred in respect of a dispensation application” (to use words of Mr Allison). Nowhere in schedule 8, of course, is anything comparable to section 135(5) to be found;
 - iii) Adriatic does not dispute that schedule 8 has retrospective effect in the sense that, from the date of the BSA coming into force, it affects the liability of leaseholders to contribute to the costs of remedying *historic* building defects; and
 - iv) The Supreme Court was mistaken in thinking that the explanatory notes which it quoted were “in materially the same terms” as those available during the passage of the Bill. In any event, taken together, section 124 (as we have construed it in *Triathlon*) and Adriatic’s interpretation of schedule 8 can be said to achieve Parliament’s purposes in both affording protection to leaseholders and holding those responsible for defects to account.
91. In all the circumstances, I have concluded that the presumptions against retrospectivity and interference with property rights should prevail.
92. Is, then, schedule 8 to be understood as having no application to costs *incurred* by 28 June 2022? Or does it apply to all service charges which had not become *payable* by that date?
93. In my view, the former interpretation is the correct one. Once a landlord had incurred a relevant cost, it had acquired a contractual entitlement to payment of a service charge in respect of it even if the service charge had not yet been demanded. That being so, the presumptions against retrospectivity and interference with property rights appear to me to imply that schedule 8 should not be taken to be applicable. An analogy might be drawn with the “rent review machinery already in train” of which Lord Scott spoke in *Wilson*.
94. In effect, paragraph 9 should, as it seems to me, be understood to mean that 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 *after 28 June 2022* as a result of a relevant defect. That is not, though, to say that words such as I have italicised in the previous sentence fall to be *implied*. It is simply an application of the presumptions which operate in relation to *construction*.

95. I would add that it appears to me that “incurred” must bear the same meaning in this context as that given to the word in *Burr*, in relation to sections 18, 19 and 20B of the L&TA 1985 (as to which, see paragraph 38 above).

The A1P1 Issue

96. It is Adriatic’s case that, by virtue of section 3 of the Human Rights Act 1998 (“the HRA”), paragraph 9 of schedule 8 to the BSA should not be understood as having any retrospective effect even if, applying ordinary principles of statutory construction, it would be. On the basis of my conclusions thus far, the point is academic. I shall nevertheless address it in case the views I have expressed on the Retrospective Construction Issue are wrong.

97. Section 3 of the HRA requires the Court, so far as it is possible to do so, to read and give effect to legislation in a way which is compatible with “the Convention rights”, which include “the rights and fundamental freedoms set out in ... Articles 1 to 3 of the First Protocol”. It is Adriatic’s case that construing schedule 8 to the BSA (and, in particular, paragraph 9 of that schedule) as retrospective would violate A1P1 and, hence, that it should not be so construed even if that would be the result of applying ordinary common law principles.

98. A1P1 reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

99. In *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 (“*Sporrong*”), the European Court of Human Rights (“the ECtHR”) noted in paragraph 61 that A1P1 comprises three distinct rules:

“The first rule, which is of a general nature, [enunciates] the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the

general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.”

100. As the ECtHR (Grand Chamber) explained in *Hutten-Czapska v Poland* (2007) 45 EHRR 4 (“*Hutten-Czapska*”), at paragraphs 164 and 167, any interference with the right of property must both pursue a “legitimate aim” in the “general interest” and strike a “fair balance” between “the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”. There must, in particular, be “a reasonable relationship of proportionality between the means employed and the aim sought to be realised”: *James v United Kingdom* (1986) 8 EHRR 123 (“*James*”), at paragraph 50; see also e.g. *Jahn v Germany* (2006) 42 EHRR 49 (“*Jahn*”), at paragraph 93.

101. In this jurisdiction, the Courts have adopted a four-stage approach to assessing proportionality. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 (“*Bank Mellat*”), at paragraph 74, Lord Reed explained that this involves asking the following questions:

“(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter”.

102. Various ECtHR decisions refer to national authorities enjoying a “margin of appreciation”. In *James*, the ECtHR said in paragraph 46 that “[t]he Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment be manifestly without reasonable foundation”. In *Jahn*, having noted in paragraph 93 that “there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions”, the ECtHR went on:

“In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.”

In *Friend v United Kingdom* (2010) 50 EHRR SE6 (“*Friend*”), which involved a challenge to bans on hunting with dogs, the ECtHR said in paragraph 57:

“the Court accepts that a ban on an activity which is introduced by legislation will inevitably have an adverse financial impact

on those whose businesses or jobs are dependent on the prohibited activity. Nevertheless, the domestic authorities must enjoy a wide margin of appreciation in determining the types of loss resulting from the measure for which compensation will be made. As stated in *CEM Firearms Ltd v United Kingdom* ‘the legislature’s judgment in this connection will in principle be respected unless it is manifestly arbitrary or unreasonable’.”

103. While the concept of “margin of appreciation” is “specific to the European court”, domestic Courts “allow a correspondingly wide margin or ‘discretionary area of judgment’”: see *SC*, at paragraph 143, per Lord Reed. That is in part because the Courts “have to respect the separation of powers between the judiciary and the elected branches of government” and so “have to accord appropriate respect to the choices made in the field of social and economic policy by the Government and Parliament, while at the same time providing a safeguard against unjustifiable discrimination”: see *SC*, at paragraph 281.
104. In *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016 (“*Recovery of Medical Costs*”), Lord Mance (with whom Lords Neuberger and Hodge agreed) concluded that a distinction is to be drawn in this context between the fourth of the *Bank Mellat* stages and the other three. With the first three, Lord Mance said, the Court will ask itself whether Parliament’s assessment was “manifestly without reasonable foundation” (or “MWRF”), but the position is different as regards the fourth. Lord Mance said in paragraph 52:

“I conclude that there is Strasbourg authority testing the aim and the public interest by asking whether it was manifestly unreasonable, but the approach in Strasbourg to at least the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature’s decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of ‘manifest unreasonableness’. In this connection, it is important that, at the fourth stage of the Convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker.”

Lord Mance added in paragraph 54:

“The fact that a measure is within a national legislature’s margin of appreciation is not conclusive of proportionality when a national court is examining a measure at the national level: *In re G (Adoption: Unmarried Couple)* [2009] AC 173

and *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2015] AC 657, per Lord Neuberger of Abbotsbury PSC at p 781, para 71, per Lord Mance JSC at p 805, para 163 and per Lord Sumption JSC at pp 833-834, para 230. However, domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis: see the *AXA* case [2012] 1 AC 868, para 131, per Lord Reed and *R (Huitson) v Revenue and Customs Comrs* [2012] QB 489, para 85. But again, and in particular at the fourth stage, when all relevant interests fall to be evaluated, the domestic court may have an especially significant role.”

105. Sir James Eadie argued that the Supreme Court has subsequently changed tack and that MWRF now applies in relation to all four of the *Bank Mellat* stages. In this respect, he referred us to *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 (“DA”), *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, [2021] 1 WLR 1151 (“JCWP”) and *SC*.

106. In *DA*, in which there was said to be discrimination against women and children contrary to article 14 read with article 8 of the European Convention on Human Rights (“the ECHR”) and/or A1P1, Lord Wilson explained in paragraph 64 that in *R (A) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492, where it was alleged that there had been discrimination against women in the enjoyment of their rights under article 8 of the ECHR, he had “cited the judgment of Lord Mance JSC in [*Recovery of Medical Costs*] and asserted it to have become clear that, of the four aspects of an inquiry into justification under the Convention of the effect of a measure of economic or social policy, the fourth, relating to a fair balance, fell to be answered by the court for itself and not by reference to whether it was manifestly without reasonable foundation”. Lord Wilson said in paragraph 65 that he had “reached too quickly” for Lord Mance’s observations:

“For by then there was—and there still remains—clear authority both in [*Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545] and in [*R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550] for the proposition that, at any rate in relation to the Government’s need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation.”

“Let there be no future doubt about it”, Lord Wilson added.

107. In the same case, Lord Carnwath, with whom Lords Reed and Hughes agreed, said in paragraph 112 that he thought it “clear ... that the MWRF test remains the appropriate test in the present context”. He observed in paragraph 117 that, “in spite of the presence of Lord Mance JSC, and although [*Recovery of Medical Costs*] was included in the list of authorities cited [in *R (MA) v Secretary of State for Work and Pensions*]

[2016] UKSC 58, [2016] 1 WLR 4550], neither he nor anyone else seems to have regarded it as relevant in that context”. He went on:

“That may well have been because the context in which the issue was considered was quite different from *MA* (and from the present case): not social security benefits, but compensation for asbestos-related disease; and not article 14 discrimination, but interference with property rights under A1P1.”

108. *JCWI*, too, was a discrimination case. Hickinbottom LJ, with whom Henderson LJ agreed, said in paragraph 134 that, “if [he] were required to determine the matter, [he] would say that the manifestly without reasonable foundation criterion applies to the issue of justification in this case”. It had been argued that the MWRF test applied only in the field of welfare benefits, but Hickinbottom LJ was not persuaded of that. He said in paragraph 133(iv):

“Welfare benefits, of course, comprise an area of policy in which both economic and social considerations feature very large. However, there is no apparent logic or rationale for restricting the socio-economic policy areas in which Parliament and the executive, as democratically-responsible bodies, are uniquely qualified to assess the public interest as against other interests, to those of welfare benefits. There are other sensitive areas, such as social housing and immigration, in which it may equally be said that they are the most appropriate assessors of what is in the public interest and whether the adverse impacts of any proposed or actual measure are proportionate to the benefits in the public interest.”

109. *SC* was also a discrimination case. As Lord Reed, with whom Lord Hodge, Lord Lloyd-Jones, Lord Kitchin, Lord Sales, Lord Stephens and Lady Black agreed, explained in paragraph 2(7)(iii), one of the questions was “whether the approach to proportionality under article 14 set out by this court in *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545, and followed in several later cases, to the effect that the court will respect the policy choice of the executive or the legislature in relation to general measures of economic or social strategy unless it is ‘manifestly without reasonable foundation’, accurately reflects the approach of the European Court of Human Rights ... and should continue to be followed”. Lord Reed’s answer was that, “put shortly, ... the case law of the European court supports a nuanced approach which is not fully captured by a ‘manifestly without reasonable foundation’ standard of review, and which in some circumstances calls for much stricter scrutiny”: see paragraph 2(7)(iii).
110. Lord Reed said in paragraph 158 that, in the light of the jurisprudence of the ECtHR, “it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation”, but that “the intensity of the court’s scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case”. Lord Reed therefore considered it “important to avoid a mechanical approach to these matters,

based simply on the categorisation of the ground of the difference in treatment”: see paragraph 159.

111. Lord Reed explained that the focus should be on “the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case” rather than the “precise definition of the ‘manifestly without reasonable foundation’ formulation”. He said:

“160. It may also be helpful to observe that the phrase ‘manifestly without reasonable foundation’, as used by the European court, is merely a way of describing a wide margin of appreciation. A wide margin has also been recognised by the European court in numerous other areas where that phrase has not been used, such as national security, penal policy and matters raising sensitive moral or ethical issues.

161. It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the ‘manifestly without reasonable foundation’ formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. It follows, as the Court of Appeal noted in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2021] 1 WLR 1151 and *R (Delve) v Secretary of State for Work and Pensions* [2021] ICR 236, that the ordinary approach to proportionality will accord the same margin to the decision-maker as the ‘manifestly without reasonable foundation’ formulation in circumstances where a particularly wide margin is appropriate.”

112. As he arrived at his overall conclusion on the case before him, Lord Reed said this in paragraph 208:

“The assessment of proportionality, therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning. There are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of

children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies.”

113. Mr Birdling, who argued this part of the appeal for Adriatic, pointed out that *DA*, *JCWI* and *SC* all involved discrimination claims and submitted that it is not appropriate to look to this line of cases in relation to a case such as the present one, where A1P1 is at issue. In that context, Mr Birdling said, Lord Mance’s remarks in *Recovery of Medical Expenses* remain apposite. The MWRF test should not, therefore, be applied in relation to the fourth of the *Bank Mellat* stages.
114. Having regard, however, to *SC*, it seems to me that the correct question to ask is what margin of discretion (or “judgment”) should be afforded given the nature of the legislation, not as such whether the MWRF test is applicable as regards the fourth *Bank Mellat* stage. What matters is “whether a wide margin of judgment is appropriate in the light of the circumstances of the case”. Where a particularly wide margin is appropriate (because perhaps a measure relates to economic and social policy, national security or penal policy, or raises sensitive moral or ethical issues), “the ordinary approach to proportionality will accord the same margin to the decision-maker as the ‘manifestly without reasonable foundation’ formulation”. In cases of that kind, indeed, there may be “no legal standards by which a court can decide where the balance should be struck” and democratically elected institutions may be “in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies”.
115. Returning to the three rules which the ECtHR derived from A1P1 in *Sporrong*, as set out in paragraph 99 above, the second of them applies to “deprivation of possessions” while the third relates to “control [of] the use of property”. In *R (Mott) v Environment Agency* [2018] UKSC 10, [2018] 1 WLR 1022, Lord Carnwath said in paragraph 32 that “[t]he Strasbourg cases show that the distinction between expropriation and control is neither clear-cut, nor crucial to the analysis”. However, it is apparent from the authorities that the distinction can matter. What is of particular significance in the present context is that compensation will normally be necessary where there is deprivation but may not be where what is at issue is merely control of use. Thus, in *Scordino v Italy (No.1)* (2007) 45 EHRR 7 the ECtHR (Grand Chamber) said in paragraph 95:

“Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. In this connection the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Art.1 of Protocol No.1 only in exceptional circumstances. Article 1

of Protocol No.1 does not, however, guarantee a right to full compensation in all circumstances.”

In *Friend*, the ECtHR observed in paragraph 57 that “[t]here is normally an inherent right to compensation in respect of [deprivation of possessions] but not [control of the use of property]”. In *Depalle v France* (2012) 54 EHRR 17, the ECtHR said in paragraph 91 that “where a measure controlling the use of property is in issue, the lack of compensation is a factor to be taken into consideration in determining whether a fair balance has been achieved but is not of itself sufficient to constitute a violation of art.1 of Protocol No.1”. In *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2016] EWCA Civ 1182, [2018] QB 149 (“*British American Tobacco*”), Lewison LJ, giving the judgment of the Court, said at paragraph 113:

“We accept that even if an interference amounts to a control of use rather than a deprivation, it is possible in principle for compensation to be required if the control is sufficiently severe In practice, however, a requirement for compensation is rare in a case of control of use. The question in each case is one of proportionality: is compensation required in order to achieve a ‘fair balance’ between the public interest pursued and the private property interests affected?”

116. In the present case, the parties differ as to whether paragraph 9 of schedule 8 to the BSA effected deprivation or merely control of use. Adriatic’s case is that, were paragraph 9 of schedule 8 to the BSA to be construed as Mr Loveday or Sir James Eadie proposes, the provision would have deprived it of possessions. Mr Birdling submitted that Adriatic had accrued and enforceable contractual rights to service charges which were “possessions” for the purposes of A1P1 and that, if the submissions of either Mr Loveday or Sir James were accepted, those rights would be wholly extinguished. Mr Birdling referred in support of the contention that the contractual rights were “possessions” to *Wilson and Solaria Energy UK Ltd v Department for Business, Energy and Industrial Strategy* [2020] EWCA Civ 1625, [2021] 1 WLR 2349 (“*Solaria*”). In *Wilson*, Lord Nicholls observed in paragraph 39 that “‘Possessions’ in [A1P1] is apt to embrace contractual rights as much as personal rights”, adding that “contractual rights may be more valuable and enduring than proprietary rights”. In *Solaria*, Coulson LJ said in paragraph 34 that, “[w]hilst not all contracts are possessions within the meaning of A1P1, the starting point must be that a signed and part-performed commercial contract is, prima facie, a possession”.
117. Sir James Eadie did not dispute that accrued contractual rights are protected by A1P1, but he nevertheless maintained that paragraph 9 of schedule 8 to the BSA involved control of use rather than deprivation. He cited in support of his submissions *Mellacher v Austria* (1989) 12 EHRR 391 (“*Mellacher*”), *Hutten-Czapska, Lindheim v Norway* (2015) 61 EHRR 29 (“*Lindheim*”) and *British American Tobacco*.
118. In *Mellacher*, property owners complained that legislation had reduced the rent due to them under tenancy agreements. The applicants claimed that the effect of the reductions was such that they could be regarded as equivalent to a deprivation of possessions, but the ECtHR decided otherwise. It said in paragraph 44:

“The Court finds that the measures taken did not amount either to a formal or to a *de facto* expropriation. There was no transfer of the applicants’ property nor were they deprived of their right to use, let or sell it. The contested measures which, admittedly, deprived them of part of their income from the property amounted in the circumstances merely to a control of the use of property. Accordingly, the second paragraph of Article 1 applies in this instance.”

119. In *Hutten-Czapska*, a landlord complained that a restrictive system of rent controls infringed A1P1. Once again, the ECtHR approached matters on the basis that there was a control of use rather than a deprivation. The Grand Chamber said this:

“160 The Chamber shared the Government’s point of view.

It noted that, while it was true that the applicant could not exercise her right of use in terms of physical possession as the house had been occupied by the tenants and that her rights in respect of letting the flats, including her right to receive rent and to terminate leases, had been subject to a number of statutory limitations, she had never lost her right to sell her property. Nor had the authorities applied any measures resulting in the transfer of her ownership. In the Chamber’s opinion, those issues concerned the degree of the State’s interference, and not its nature. All the measures taken, whose aim was to subject the applicant’s house to continued tenancy and not to take it away from her permanently, could not be considered a formal or even *de facto* expropriation but constituted a means of state control of the use of her property.

The Chamber therefore concluded that the case should be examined under the second paragraph of Art.1 of Protocol No.1.

161 The Grand Chamber fully agrees with the Chamber’s assessment.”

120. *Lindheim* concerned legislation which gave lessees the right to extend their leases for an indefinite period on the same conditions as had applied previously. The lessors argued that this amounted to expropriation or *de facto* expropriation. However, the ECtHR disagreed. It said:

“75. The Court observes that the case under consideration concerns limitations imposed by law on the level of rent that the applicant property owners could demand from the ground lease holder and the indefinite extension of the ground lease contract on the same terms. The applicants continued to receive rent on the same terms they had freely agreed to when signing the

ground lease contract, and, being at all times owners, were free to sell their plots of land, albeit subject to the lease attaching to the land.

...

77. The Court shares the applicants' view that the low level of annual rents in their case (less than 0.25 per cent of the plots' alleged market value) and the indefinite duration of the impugned rent limitation interfered to a very significant degree with their enjoyment of their possessions. However, ... the Court is not persuaded by their arguments that the application of s.33 of the Ground Lease Act to them amounted to expropriation or de facto expropriation, or that it meant that 'all meaningful use' had been taken away."

121. In *British American Tobacco*, the claimants complained that restrictions on packaging imposed by the Standardised Packaging of Tobacco Products Regulations 2015 deprived them of trade mark and other intellectual property rights. The Court of Appeal concluded in paragraph 113 that "the question of whether the interference with the marks and designs requires the payment of compensation in order to avoid a breach of A1P1 falls to be determined on the basis that the Regulations amount to a control of use, not a deprivation". The Court had said in paragraph 96:

"One part of the test for deprivation as opposed to control of use is whether, following the interference, the complainant has retained any meaningful use of the possession in question. If the answer to that question is 'yes' then the interference is unlikely to amount to a de facto deprivation or expropriation: *Pine Valley Developments Ltd v Ireland* (1991) 14 EHHR 319, para 56, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para 19. The rights may lose some of their substance, but provided that they do not disappear it is unlikely that the interference will be treated as a de facto expropriation: *Elia Srl v Italy* (2001) 36 EHRR 9, para 56."

On the facts, the claimants' rights had not lost all utility or value. As regards national trade marks, the Court of Appeal said in paragraph 106:

"The Tobacco Appellants argue, no doubt rightly, that the Regulations make these rights far less valuable than they were before. They also argue, again no doubt rightly, that in cases involving smuggling or counterfeiting other agencies (such as HM Revenue and Customs or the police) may take the lead in enforcement. But the fact that there is a residual utility in these negative rights coupled with the retention of legal title means, in our judgment, that it cannot be said that the Tobacco Appellants have been *deprived* of their national marks."

122. Mr Birdling argued that these cases do not assist the Secretary of State. The relevant possession in the present case, he said, is not Adriatic's freehold interest in Hippersley Point but its contractual entitlement to service charges in respect of past costs, and that would be lost entirely on the Secretary of State's construction of paragraph 9 of schedule 8 to the BSA. None of the cases on which Sir James Eadie relied, Mr Birdling submitted, dealt with a comparable situation. As regards *Mellacher*, Mr Birdling pointed out that the applicants' complaint was that they had been deprived of "a substantial proportion of their *future* rental income" (emphasis added), not rent which had already become payable: see paragraph 40 of the judgment.
123. On the other hand, there is no question of schedule 8 as a whole, let alone paragraph 9 in particular, having served to deprive Adriatic of its ownership of Hippersley Point even if interpreted as suggested by Sir James Eadie or Mr Loveday. More specifically, Adriatic would not have lost the benefit of any of the provisions in the leases entitling it to service charges; to the contrary, those provisions would plainly still have a "meaningful use". Nor is it even certain that Adriatic would be wholly unable to insist on *any* payment in respect of any specific service charge invoice. An invoice relating to costs within the scope of schedule 8 may well take account of other costs as well, and Adriatic would still be entitled to that element of the invoice.
124. On balance, therefore, I agree with Sir James Eadie that schedule 8, including paragraph 9, if construed as he or Mr Loveday contends, is to be seen as effecting control of use rather than deprivation for A1P1 purposes.
125. Two other points can be made at this stage. First, "[i]f it can be inferred that Parliament formed a judgment that the legislation was appropriate notwithstanding its potential impact upon interests protected by Convention rights, then that may be a relevant factor in the court's assessment, because of the respect which the court will accord to the view of the legislature": *SC*, at paragraph 182, per Lord Reed. On the other hand, "the courts must not treat the absence or poverty of debate in Parliament as a reason supporting a finding of incompatibility": *SC*, at paragraph 184, per Lord Reed.
126. Secondly, the need for legislation to lay down general rules which may not achieve justice in every individual case has been recognised. In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312, Lord Bingham said in paragraph 33:

"[L]egislation cannot be framed so as to address particular cases. It must lay down general rules A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial."

See also *Animal Defenders International v United Kingdom* (2013) 57 EHRR 607, at paragraph 108; *R (Z) v London Borough of Hackney* [2020] UKSC 40, [2020] 1 WLR 4327, at paragraph 85; and *In re JR123* [2025] UKSC 8, [2025] 2 WLR 435, at paragraph 56.

127. Turning to the facts of the present case, Mr Murphy addressed a number of options which could have been pursued in relation to what became paragraph 9 of schedule 8 to the BSA. One of these was “includ[ing] paragraph 9 within the leaseholder protections” but on the basis that it would “apply prospectively only” so that “legal costs already incurred or demanded by landlords could have been recovered through the service charge, but there could have been a bar on recovery of costs not yet incurred or demanded at the time of commencement”: see paragraph 151 of Mr Murphy’s statement. Mr Murphy said as to this possibility:

“152. One problem with this approach would have been that landlords could have sought to circumvent the legislative measures by incurring costs or issuing service charge demands before the protections came into force (i.e. in the intervening period between the introduction of the measures to Parliament and commencement, in this case between 14 February and 28 June 2022).

153. This risk could in theory have been addressed by limiting the retrospective effect of the provision through an anti-forestalling measure, such that the scheme was retrospectively backdated to the date the measures were introduced to Parliament (i.e. from 14 February 2022 onwards) and only caught service charges incurred or demanded from this date onwards. However, even with such an anti-forestalling measure in place, there would still have been clear shortcomings with this approach.

154. In particular, such an approach would not have met the policy objective of providing comprehensive protection to leaseholders. Building safety-related legal costs would already have been incurred in response to the building safety crisis, including (but not limited to) litigation. As I have described above, the crisis unfolded from 2017, almost five years before the leaseholder protections were introduced into Parliament. In many cases prior to February 2022, landlords had already incurred costs to carry out remediation and some were now recharging remediation and related costs to leaseholders through the service charge. This would have applied equally in respect of legal costs. Indeed, it was this situation that resulted in the protections being conceived and judged to be necessary.

155. Applying paragraph 9 prospectively only, or limiting its retrospective scope through an anti-forestalling measure would have been inconsistent with the retrospectivity of the rest of the Schedule 8 and would therefore have introduced further complexity. The

protections were already a multifaceted intervention that would take leaseholders and the sector considerable time to get to grips with. Introducing further complexity by making some provisions apply retrospectively and others prospectively only would have made them even more complex and challenging to implement. This approach could have introduced additional complexity due to the difficulty of working out whether costs were incurred before or after the date the measures were introduced to Parliament. Relatedly, this would have risked undermining the Department's objective of providing leaseholders certainty and security and restoring stability to the lending market."

128. Mr Birdling did not accept that these matters could justify paragraph 9 having retrospective effect. He did not dispute that the BSA pursued a legitimate aim in the "public" or "general" interest or that paragraph 9, as it applies prospectively, is rationally connected to that aim. However, he denied that a retrospective application to paragraph 9, or schedule 8 more generally, would strike a fair balance or be proportionate.
129. Amongst the points which Mr Birdling made were these:
- i) Schedule 8 makes no provision for landlords to receive any compensation and the absence of compensation is a significant factor to be taken into account even in a "control of use" case;
 - ii) Paragraph 9 would, if given retrospective effect, serve to throw an excessive burden (in fact, the entire burden of achieving the policy objectives underlying retrospectivity) onto landlords;
 - iii) There is no provision in the legislation for individualised consideration of the circumstances of landlords and tenants even though it cannot be assumed that landlords will have broader shoulders than tenants;
 - iv) A retrospective construction of paragraph 9 was not the result of a properly informed and reasoned legislative process, considering the competing interests of landlords, tenants and wider society;
 - v) A retrospective construction would produce manifestly absurd results such as are referred to in paragraph 85(x) and (xi) above; and
 - vi) Any danger of circumvention such as Mr Murphy mentioned in paragraph 152 of his witness statement could have been simply addressed by an anti-forestalling measure along the lines described in paragraph 153 of the statement.
130. On the other hand:
- i) The BSA was directed at a very real crisis. As Mr Murphy said in his witness statement:

“Without intervention, leaseholders would have continued to face unaffordable bills, building safety defects would have gone unremedied, the lending market would have remained frozen, and leaseholders would have been forced to continue living in unsafe buildings, worried that they might be the victims of a catastrophic fire”;

- ii) It is not inapt to speak, as Mr Murphy has, of the leaseholder protections for which the BSA provides as “an exceptional intervention, strictly targeted to address the unique circumstances surrounding the building safety crisis”;
 - iii) Schedule 8 is one part of a wider scheme;
 - iv) Landlords are not left to bear the burden of remediation alone. Aside from the contributions which the Government and developers have made and are making as mentioned in paragraph 84(iii) above, the BSA and the 2022 Regulations provide mechanisms by which landlords can seek to pass on liability to developers, other past and present landlords and their associates. In broad terms, the legislation seeks to allocate responsibility by reference to likely degree of culpability and likely ability to contribute. A “bright lines” approach has been adopted, but that can be legitimate: see paragraph 126 above;
 - v) While lack of compensation is a factor to be taken into account in a “control of use” case, it “is not of itself sufficient to constitute a violation of [A1P1]”: see *Depalle v France*, as quoted in paragraph 115 above. “In practice, ... a requirement for compensation is rare in a case of control of use”: see *British American Tobacco*, as quoted in paragraph 115 above;
 - vi) The framing of the BSA, including schedule 8 and, specifically, paragraph 9, involved considerations of economic and social policy in respect of which, as it seems to me, a wide margin of judgment is applicable. Parliament was better placed than the Courts “to reflect a collective sense of what is fair and affordable” and “of where the balance of fairness lies” (to use the words of Lord Reed in *SC*, at paragraph 208) in addressing the building safety crisis. The choices implicit in the legislation are not readily susceptible to the application of legal standards; and
 - vii) The fact that there may not have been Parliamentary debate as to whether schedule 8 should operate retrospectively cannot be treated as a reason supporting a finding of incompatibility: see paragraph 125 above.
131. In all the circumstances, I would answer the A1P1 Issue in favour of the Leaseholders and the Secretary of State. Supposing, contrary to my view, that paragraph 9 of schedule 8 to the BSA would otherwise have retrospective effect, section 3 of the HRA would not require the Court to “read in” words negating that. Retrospectivity would not violate A1P1.

Conclusion

132. While I have not been persuaded by Adriatic’s submissions on the Scope Issue or the A1P1 Issue, I would determine the Retrospective Construction Issue in its favour and so allow the appeal.

Lord Justice Nugee:

133. I am very grateful to Newey LJ for his clear exposition of the facts and issues in this appeal. I agree with him on Ground 1 (the Scope Issue) and Ground 3 (the A1P1 Issue) and do not wish to add anything to his analysis of either point. But I have come to a different conclusion on Ground 2 (the Retrospective Construction Issue) and I would dismiss the appeal accordingly.

The presumption against retrospectivity

134. Newey LJ has set out the relevant principles at paragraphs 53ff above. They are relatively well settled, and it is not necessary for me to go over them again. I will simply draw attention to certain points. (In doing so, I would like to pay tribute to a very helpful joint “Note on Retrospectivity of Legislation”, in fact prepared by counsel instructed in the *Triathlon* appeal although nothing in it is intended to be controversial).
135. First, the exercise we are engaged in is ultimately one of statutory construction: what is the legal effect of the words used by Parliament in the statute under consideration? The presumption against retrospectivity is a tool which assists the Court to arrive at the right construction. It is “not some sort of substantive or even procedural legal right”; it is “a rule of construction, or, perhaps more accurately, a factor to be taken [i]nto account when interpreting a statute or rule”: *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230 (“*Odelola*”) at paragraph 55 per Lord Neuberger.
136. Second, it has long been recognised that the question is not a simple one of asking whether a statute is retrospective or not; there are degrees of retrospectivity, and the greater the degree of retrospection and the more unfairness involved, the more potent the presumption becomes: see the passage cited by Newey LJ at paragraph 54 above from the judgment of Staughton LJ in *Tunncliffe*. (The actual decision in *Tunncliffe* was later overruled in *Plewa v Chief Adjudication Officer* [1995] 1 AC 249, but Staughton LJ’s statement of principle has been cited with approval several times in the House of Lords: see *L’Office Cherifien* at 525D per Lord Mustill, *Wilson* at paragraph 19 per Lord Nicholls and at paragraph 200 per Lord Rodger, and *Odelola* at paragraph 57 per Lord Neuberger.)
137. Similarly Patten LJ referred in *Granada* to a “spectrum” of retrospective effect at paragraph 57 as follows:

“In approaching this issue, the courts have avoided adopting a rigid or mechanistic rule for determining whether the legislation in question is to be treated as retrospective. Instead, they have recognised the various forms and degrees of retrospective effect which can be incorporated into legislation as a spectrum, and have approached the issues of

construction by reference to the degree of unfairness which the particular measure may produce. This is necessarily an objective question which falls to be determined by looking at the legislation and its potential effects in general terms.”

138. Third, the presumption “may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it”: *Sunshine Porcelain Potteries Pty Ltd v Nash* [1961] AC 927 at 938 per Lord Reid.
139. Fourth, there is, as Newey LJ has referred to, a well-recognised distinction between laws which alter for the future rights and obligations arising from existing legal relationships and laws which affect existing rights and obligations: see paragraphs 57 to 59 above. Lord Reed referred to this distinction in *Axa* (at paragraph 121), but he went on to say:

“To the extent that laws of the latter kind may undermine legal certainty more severely, they may be more difficult to justify, but there can be no doubt that justification for such laws sometimes exists. It may exist, in particular, when the legislation has a remedial purpose. As Fuller remarked, at p 53:

“It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces.” ”

The presumption against interference with property rights

140. So far as the presumption against interference with property rights is concerned, I agree with what Newey LJ has said about the principle (paragraphs 60 to 64 above). In practical terms the rights concerned in the present case are the rights of landlords to pursue their lessees for service charges and I do not think that in the present case the presumption against interference with these rights adds anything significant to the analysis over and above the presumption against retrospectivity. Both presumptions are concerned with the question whether Parliament intended to take away the landlords’ existing rights; both presumptions act in tandem to make that unlikely; both however may yield to a sufficient Parliamentary intention to the contrary.

The significance of explanatory notes

141. I agree with the analysis and conclusion of Newey LJ at paragraphs 65 to 72 above.

Approach to construction

142. As I have said the exercise we are engaged in is one of statutory construction. The general principles applicable to such an exercise have been authoritatively laid down in a series of cases in the House of Lords and Supreme Court and I think can be considered as well settled.
143. A convenient recent summary can be found in the judgment of Lord Sales in *PACCAR* at paragraphs 40-41. At paragraph 40 he said (by reference to *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd*

[2001] 2 AC 349 (*“Spath Holme”*) at 396 per Lord Nicholls) that the basic task was clear: the Court was required to identify the meaning borne by the words in question in the particular context.

144. At paragraph 41 he referred to the numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose, referring to *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at paragraph 8 per Lord Bingham (“the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment”) and *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] UKSC 25, [2011] 1 WLR 1546 at paragraph 10 per Lord Mance (“in matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance”). Lord Sales summarised the position as follows:

“The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it.”

So I find it helpful to approach the question of construction before us by first orientating ourselves by reference to the legislative purpose and scheme of the BSA.

Legislative purpose

145. The BSA was Parliament’s main legislative response to the Grenfell Tower tragedy. Much of it was designed to implement the recommendations of the Independent Review of Building Regulations and Fire Safety led by Dame Judith Hackitt whose final report had been published in 2018 and whose recommendations had been accepted by the Government. This is true of Part 2 (sections 2 to 30), which is headed “The regulator and its functions” and which establishes the Health and Safety Executive as the new building safety regulator; of Part 3 (sections 31 to 60), which is headed “Building Act 1984”, and which creates a new regulatory regime for the design and construction of higher-risk buildings under which the building safety regulator (rather than local authorities) is the sole building control authority in relation to them; and of Part 4 (sections 61 to 115), which is headed “Higher-risk buildings” and which provides a new regulatory regime for the ongoing management of occupied higher-risk buildings. These Parts can all be characterised as forward-looking: they are designed to establish a new regulatory regime for high-rise buildings, improving the focus on safety both at the design and construction stage and at the stage when buildings are occupied.
146. Part 5 (sections 116 to 160), which is headed “Other provisions about safety, standards etc”, contains provisions dealing with a variety of matters. Some of these are also forward-looking. But others, including those with which we are concerned, are intended to address the historic problems associated with existing safety defects in buildings. This was not something included in the review led by Dame Judith, as that had not been tasked with considering how remedial work on existing stock should be carried out or how it should be paid for.
147. The first group of sections in Part 5 (originally sections 116 to 125, although section 125 has now been repealed) are grouped together under the heading “Remediation of

certain defects”. As explained in section 116(1), they (together with schedule 8) make provision in connection with remediation of relevant defects in relevant buildings. I will refer to these sections and schedule 8 together as “the remediation provisions”; by section 170(3)(a) of the BSA, they all came into force together two months after the BSA was passed, that is on 28 June 2022.

148. There was no dispute between the parties as to the general purpose of the remediation provisions. Mr Allison himself identified the broad purposes as fourfold:

- i) To ensure that historic safety defects were remediated.
- ii) To protect leaseholders.
- iii) To ensure that those responsible for the defects were held liable.
- iv) To restore stability to the lending market.

149. Mr Murphy’s witness statement goes into these matters in very considerable detail. It was adduced for the purposes of the A1P1 argument, Lewison LJ having permitted the Secretary of State to adduce evidence on the question whether the statute was compatible with Convention rights, for the reasons given by him in a judgment delivered on 20 September 2024 at [2024] EWCA Civ 1381. But Sir James Eadie said that Mr Murphy’s statement was also admissible on the question of construction, not for anything he said about the meaning of the BSA or Parliament’s intention in passing the legislation, but for the legislative background and history, which in turn helps to inform the Court of the context and purpose of the BSA. He relied on the statement of Singh LJ (with whom Bean and Andrews LJ agreed) in *R (DK) v Revenue and Customs Commissioners* [2022] EWCA Civ 120, [2022] 4 WLR 23 (“DK”) at paragraph 44 as follows:

“She [counsel for the Commissioners] observes that the modern approach to statutory interpretation is to give the words used in legislation their true meaning in the light of their context and their purpose: see eg *R (Kaitey) v Secretary of State for the Home Department* [2021] EWCA Civ 1875, at para 119 (Singh LJ). As I explained there, by reference to authority from the House of Lords and Supreme Court, the purpose of legislation is nevertheless objective and not subjective. Evidence by the maker of the legislation or anyone else is therefore irrelevant. Nevertheless, I agree with the fundamental submission on behalf of the appellants that it is often useful for the court to be assisted by a witness statement on behalf of the Government, which sets out the legislative background and history. This helps the court to ascertain the context and purpose of legislation. This is not the same thing as the subjective policy intentions of any individual minister or Government department. In the end, I did not understand Mr Cox to take any issue with this approach as a matter of principle. Accordingly, I would grant the application to adduce the witness statement of Mr Naim but only insofar as it contains objective matters and not subjective expressions of opinion.”

150. We did not hear any substantial argument opposing the admissibility of Mr Murphy's statement for this purpose, and where it is properly before the Court in any event on the A1P1 issue, it is somewhat artificial to ignore what he says about the background to, and impetus for, the BSA. I am therefore content to follow the guidance of Singh LJ in *DK*. But I admit to having some reservations about the practice in general, at any rate if the evidence adduced goes beyond simply collating in a convenient fashion what is already in the public domain. Acts of Parliament are addressed to the public, and, as Lord Nicholls said in *Spath Holme* at 397F, citizens are intended to be able, with the assistance of their advisers, to understand them. For that purpose they (or more realistically their skilled advisers) may have recourse not only to what assistance can be obtained from other provisions in the statute and the statute as a whole, which may provide the relevant context, but also to external aids such as Law Commission reports, reports of Royal Commissions and advisory committees, Government White Papers and (subject to the caveats expressed above) Explanatory Notes: see *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at paragraph 30 per Lord Hodge. Such external aids, as he there says:

“may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty”.

But what is noticeable is that all these external aids are in principle available to the public, and hence to their advisers when advising on the effect of a statutory provision. Evidence that is adduced in the form of a witness statement on behalf of Government in a particular case is obviously not available in the same way to those seeking to understand a statute, and if it goes beyond what is already in the public domain there would seem to me to be a risk of the Court being asked to interpret a statutory provision with the benefit of material that could never be available to the ordinary citizen, however well advised. That might be thought questionable, or even to give Government a privileged position in litigation that was not in practice available to other litigants. In those circumstances I think the appropriateness of this practice might require further argument in a future case – it is noticeable that in *DK* counsel for the respondent did not argue against it in principle.

151. In the present case however there is no mystery about the background to the BSA, nor was it suggested that there was anything contentious in what Mr Murphy says about it, the majority of which is evidenced by official documents of one form or another that are publicly available, and much of which is notorious common knowledge. In those circumstances Mr Murphy's evidence does seem to me to provide a convenient and valuable summary of the position, and I am as I have already said content to follow the guidance of Singh LJ in *DK* in having regard to it.
152. The background to the remediation provisions in Part 5 of the BSA has been referred to by Newey LJ at paragraphs 27 to 29 above. I think it is helpful to expand a little on this, with the help of Mr Murphy's evidence, as follows. The Grenfell Tower tragedy exposed a fundamental flaw in the assumptions behind the design of blocks of flats. Most had been designed on the assumption that in the case of fire each flat would operate as a self-contained unit and hence the occupants of other flats would not be

affected (and so could safely stay put). The Grenfell Tower fire demonstrated that this assumption was disastrously and tragically wrong if the building was clad in flammable cladding such as the aluminium composite material (“ACM”) cladding in that case. Any such building was therefore unsafe and the occupants at serious risk.

153. That led to a need to identify and remedy buildings with unsafe cladding, in the first instance those with ACM cladding, although subsequently other types of unsafe non-ACM cladding were also identified. In due course other fire safety defects (such as lack of compartmentation between flats, flammable balconies, and ineffective fire safety doors) were identified; and buildings were also found to suffer from various structural defects.
154. Over time the scale of the crisis expanded, and very large numbers of flats were found to be affected. In September 2024 the Department estimated that there were 260,000 dwellings in the occupied private and social sector in residential buildings over 11m tall with unsafe cladding that it was monitoring, of which an estimated 116,000 dwellings were in buildings that had not started remediation.
155. Most flats in affected blocks are owned by leaseholders on long leases. Where work is needed to such a block, the questions which arise are: (i) who is to be responsible for doing the work and (ii) who is to pay for it? These questions are normally resolved contractually, without the need for significant legislative intervention, by the terms of the leases under which the flats are held. Leaseholders are usually each responsible for the internal maintenance of their own flat. But it makes no sense for repairs to the structure and exterior of the block to be carried out directly by individual leaseholders, so the leases will allocate responsibility to carry out such repairs to someone else, typically the landlord (or one of the landlords where there is a chain of superior interests) or to a management company. But the costs will usually be borne by the leaseholders through the service charge provisions in their leases. This is a very familiar arrangement. It has the obvious advantages that a single person is responsible for carrying out structural and exterior repairs to the block as a whole, but that the costs are borne by the leaseholders who have the greatest practical and financial interest in the repairs being carried out.
156. This contractual allocation of costs is subject to limited legislative intervention in the shape of sections 18 to 30 of the Landlord and Tenant Act 1985 which (broadly) prevent recovery of service charges unless reasonable. The fact that Parliament regarded it as necessary to intervene (and that the provisions have had to be amended and expanded several times since) no doubt shows that the division between responsibility for doing the work and responsibility for paying for it, and the divergent interests of landlords and leaseholders that this causes, can lead to real practical difficulties. Nevertheless in principle such an arrangement is a well understood and well tested contractual scheme. And although in particular cases it can lead to leaseholders having to meet unexpected costs, that might in the general run of things be thought not unfair: they have bought their flats and like owners of other property, the risk of unanticipated expenditure on maintaining their property might be thought naturally to fall on them – they after all usually live in them as well as benefiting directly from maintaining or increasing the value of their flats. Landlords who own a freehold reversion on a block of flats where the flats are all let on long leases often have a quite limited economic interest in the block, consisting largely if not wholly of the right to ground rents, the ability to charge other fees during the lifetime of the

leases, and the value of the reversion when the leases expire, the present value of which is likely to be minimal if, as is often the case, the leases have many years to run. As Newey LJ has referred to (see paragraph 5 above) Adriatic's evidence in the present case estimated its financial interest in Hippersley Point at a mere 2.52%.

157. The difficulty with the cladding crisis however was that this typical and familiar contractual scheme had the effect of imposing very large, unexpected, and wholly disproportionate costs on leaseholders. As Newey LJ has referred to (see paragraph 27 above), an analysis by the Department in January 2022 estimated the mean cladding remediation costs per leaseholder at £59,000 in a building over 18m tall, and £27,000 in a building between 11m and 18m tall; roughly 40% of leaseholders had no savings and around 2/3 had less than £16,000; and if leaseholders were required to meet £60,000 of extra costs, it was estimated that 21% of them would be in negative equity and 34% in financial stress (defined as a loan-to-income ratio of 4.5 or more).
158. The Department does not have the same data with respect to the other (non-cladding) fire safety issues or structural defects, where it is not known how many flats are affected, or the likely costs. But these can only add to the problem.
159. In short the very high costs of remediation resulted in unanticipated and abnormally high service charge demands. These put significant financial strain on leaseholders who were very often unable to meet them, or were only able to do so with great difficulty. That in turn led to a reluctance by landlords to carry out the required works. Many such cases were raised by MPs in Parliament or with Ministers, or were the subject of correspondence with the Department; there was also extensive press coverage giving examples of ruinously high bills faced by leaseholders.
160. There were other adverse knock-on effects. One was that even before defects were remediated there could be significant costs imposed on leaseholders for interim measures such as "waking watches" or the installation of fire alarms. Another was the impact on leaseholders' mental health, both of living with their families in properties that they knew or feared were dangerously unsafe, and of facing very significant financial strain, including the risk of having their leases forfeited for non-payment of the service charge; a third consequence (referred to by Newey LJ at paragraph 27 above) was that the lending market froze as mortgagees declined to lend until defects were remedied, with the result that leaseholders could not sell to anyone in need of a mortgage (as most flat-buyers are), and were in effect trapped in unsafe homes, facing potential financial ruin and with no way out.
161. That was the context in which Government decided that significant intervention was needed, both to ensure that the defects were actually remedied, and to ensure that leaseholders were protected from unaffordable costs. As Newey LJ has referred to (see paragraph 29 above), on 10 January 2022 Government announced a "reset in its approach." The Secretary of State, the Rt Hon Michael Gove MP, who had taken office in September 2021, announced the reset in a Press Release in which he said:

"More than 4 years after the Grenfell Tower tragedy, the system is broken.

Leaseholders are trapped, unable to sell their homes and facing vast bills.

But the developers and cladding companies who caused the problem are dodging accountability and have made vast profits during the pandemic whilst hard working families have struggled.

From today, we are bringing this scandal to an end – protecting leaseholders and making industry pay.

We will scrap proposals for loans and long-term debt for leaseholders in medium-rise buildings and give a guarantee that no leaseholder living in their own flat will pay a penny to fix dangerous cladding.

Working with members of both Houses, we will look to bring a raft of leaseholder protections into law through our Building Safety bill.”

162. The Building Safety Bill was already then before Parliament, having been introduced on 5 July 2021. An initial set of amendments was tabled by the Government on 13 January 2022, and a more substantial set on 14 February 2022 at which point the Bill was at Committee stage in the House of Lords. These amendments (with later refinements) became the remediation provisions in sections 116 to 125 of and schedule 8 to the BSA.

The legislative scheme

163. The remediation provisions consist of a series of provisions, summarised by Newey LJ at paragraphs 14 to 22 above, supplemented by some other provisions in Part 5 of the BSA, and by regulations such as the 2022 Regulations referred to by Newey LJ at paragraphs 23 to 26 above. Taken together these provisions amount to a very significant intervention by Parliament in what I have referred to as the typical and familiar contractual scheme applicable to a block of flats. By protecting leaseholders from the significant costs that they would otherwise have to bear, the remediation provisions undoubtedly cause very substantial disruption to the contractual allocation of risk. That inevitably means that costs that would otherwise have fallen on the leaseholders have to be borne by someone else, such as in the present case Adriatic (since Government did not propose that they should all be borne by the taxpayer). That might indeed be thought very unfair to landlords such as Adriatic who are as blameless for the original defects as the leaseholders; but it is a necessary consequence of Parliament’s decision to relieve leaseholders of such costs. In circumstances where the driving consideration was that many leaseholders could not afford to pay the costs of remediation, the protection of leaseholders was bound to push costs onto others.
164. That led to what is a complex series of provisions with a number of different features. The following can be discerned from the remediation provisions taken as a whole.
165. First, if the person responsible for the defect (the developer in the case of an initial defect, or the person who commissioned the works in the case of other defects), or someone associated with them, retained an interest in the building in question, they have to bear the costs of dealing with the defect. This is the effect of paragraph 2 of schedule 8 which provides that if a relevant landlord (that is the landlord in respect of a lease of any premises in a relevant building, or any superior landlord) is responsible for the defect, “no service charge is payable under the lease in respect of a relevant

measure” relating to that defect: see paragraph 15 of Newey LJ’s judgment above. Unlike the other provisions in schedule 8, this paragraph applies whether or not the lease in question is a qualifying lease (for which see paragraph 16 above). Thus in the *Triathlon* appeal, it was common ground that paragraph 2 applies, with the result that no service charges are payable by the respondent Triathlon Homes LLP despite the fact that its leases cover multiple properties and are not qualifying leases. Like other provisions in schedule 8, the application of this paragraph depends on the position at “the qualifying time” which is 14 February 2022 (see section 119(2)(d)). This is no doubt an anti-avoidance measure, designed to stop developer-landlords from altering their position after the proposals were first introduced into the Bill.

166. The premise behind paragraph 2 is self-evidently that if the landlord (whether the immediate landlord or a superior landlord) is the developer, they are responsible for the defects and should not be able to push the costs of remedying the defects onto anyone else. This takes priority over any other consideration and hence applies however large and well off the leaseholders are.
167. The remaining protections for leaseholders however – those in paragraphs 3 to 9 of schedule 8 – only apply to those with qualifying leases, namely those living in their own homes or with small property portfolios (owning no more than two other properties): see section 119, summarised in paragraph 16 above. The focus of the protections is therefore squarely on individual leaseholders living in their flats (although extended to those with very small portfolios). Leaseholders with larger portfolios (except, I think, in respect of the flat they live in) are left to bear all the costs (other than those covered by paragraph 2) as per the contractual provisions for service charges in their leases.
168. Conversely, if the landlord is part of a corporate group whose net worth is at least £2m per relevant building, they meet the contribution condition and cannot pass on any of the costs to the protected leaseholders. This is the effect of paragraph 3 of schedule 8 which provides that “no service charge is payable” under a qualifying lease in respect of relevant defects if the landlord at the qualifying time met the contribution condition.
169. These two provisions together show that a second feature of the legislative scheme is that where the developer (or an associated company) is not the landlord the costs are borne by those more likely to be in a position to pay – firstly leaseholders with portfolios of more than two properties, and secondly landlords who are part of well-resourced corporate groups.
170. Next, leaseholders with qualifying leases do not have to pay any service charges in respect of cladding remediation. This is the effect of paragraph 8 of schedule 8, which provides that “No service charge is payable” under a qualifying lease in respect of cladding remediation (as defined). It applies even if the landlord does not meet the contribution condition. This can be seen to have implemented the Secretary of State’s announcement that no leaseholder living in their own flat “would pay a penny to fix dangerous cladding”.
171. Similarly the effect of paragraph 9 of schedule 8 is that “No service charge is payable” under a qualifying lease in respect of certain legal or other professional

services. This is of course the provision with which we are directly concerned. Again it applies even if the landlord does not meet the contribution condition.

172. Taken together paragraphs 8 and 9 show that a third feature of the legislative scheme is that there are certain categories of costs that Parliament decided should not be claimable at all from leaseholders with qualifying leases – namely cladding remediation costs, and relevant legal and professional costs.
173. The fourth feature of the legislative scheme is that in other cases remediation costs can in principle be passed on to leaseholders with qualifying leases but subject to a cap on their liability depending on the value of their flats. If the value at 14 February 2022 was less than £325,000 (in Greater London) or £175,000 (elsewhere), then “no service charge is payable” for relevant defects (paragraph 4 of schedule 8). If the value was over those figures but less than £1m, the leaseholder’s liability is capped at £15,000 (in Greater London) or £10,000 (elsewhere); if the value was between £1m and £2m, the cap is £50,000; and if the value was over £2m, the cap is £100,000 (paragraph 5 of schedule 8). For this purpose there is a limited “look-back” over the 5 years before commencement (paragraph 6 of schedule 8). Again this can be seen to reflect a broad principle that those who are more likely to be able to afford to do so should contribute more, whereas those who are less likely to be able to do so should contribute less, or nothing at all.
174. These are the principal features of the leaseholder protections. But they are supplemented by other provisions in the BSA. As I have already referred to, the inevitable corollary of providing protection for leaseholders was (unless Government was proposing, which it was not, that the taxpayer should pick up all the costs) that costs will be incurred (by whoever is responsible for carrying out the work, whether that be a landlord or a management company) which would otherwise have been recoverable from leaseholders through the service charge provisions in the leases, but will now not be. The BSA therefore contains provisions enabling those costs to be passed on to others. This includes section 124 under which the FTT can make remediation contribution orders where it is just and equitable to do so (see paragraph 21 ii) above), and regulations 3, 4 and 5 of the 2022 Regulations (see paragraphs 23 to 26 above).
175. Whoever ends up bearing the costs is given new rights against those ultimately responsible, namely (i) by an extended limitation period under the DPA 1972 (section 135 of the BSA) and (ii) by a new cause of action against those manufacturing or mis-selling cladding products (section 149). In addition the High Court is given power to make associated companies liable for breaches of the DPA 1972 (section 130): see paragraphs 21 iii) to v) above.
176. As can be seen this statutory scheme all flows from the decision to intervene in the contractual scheme of obligations by protecting leaseholders from the full extent of their contractual service charge liabilities. Once this decision had been made, it was necessary not only to define who could benefit from the leaseholder protections, but also to make provision for the level of protection they would receive; for who would pick up the costs that were no longer to be met through the service charges; and for what rights the latter would have to make claims over against others, including those ultimately responsible.

The rival constructions

177. That being the legislative purpose and scheme of the BSA I can now consider the question of construction. We are of course concerned with the construction and effect of paragraph 9 in schedule 8. But it was recognised on all sides that whatever we decide in relation to paragraph 9 is likely to apply to the other provisions in schedule 8, namely paragraph 2 (developer-landlord), paragraph 3 (landlord who meets contribution condition), paragraph 4 (leases worth less than £325,000 / £175,000), paragraph 5 (cap on leaseholder contributions) and paragraph 8 (cladding remediation costs). In each case the relevant paragraph provides either that no service charge is payable, or a capped amount is payable, in the circumstances in which it applies.
178. By the end of the oral argument, it had become clear that four different constructions of paragraph 9 were being advanced (see paragraphs 49 to 51 above). I find it helpful to see how these rival constructions would read if spelt out.
179. The text of paragraph 9 is given by Newey LJ at paragraph 18 above, and I repeat paragraph 9(1) here for convenience:

“(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.”

As stated above, this provision came into force on 28 June 2022.

180. Mr Loveday’s construction is the most far-reaching. It is that once paragraph 9 had come into force, the effect was that service charges in respect of the legal or other professional services in question were to be regarded for all purposes as not “payable” and hence as never having been payable, with the result that if unpaid they need not be paid, and if already paid they could be recovered. That, it seems to me, involves reading paragraph 9(1) as if it said:

“(1) *From 28 June 2022, no service charge is payable and no service charge is to be regarded as ever having been 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.”

181. Sir James Eadie’s construction is much more limited in effect. He submitted that once paragraph 9 was in force it prevented any service charge of the relevant type being payable – whether the underlying costs had been incurred, or a service charge had been demanded, or had fallen due – but that it had no effect on payments that had already been made. This construction can be spelt out as follows:

“(1) *From 28 June 2022, 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 whether such services have been provided and billed for, or any service*

charge demanded or fallen due, before or after 28 June 2022.”

182. Mr Allison had two alternative constructions. His primary submission was that paragraph 9 did not apply where the person claiming the service charge (usually, as here, the landlord, although it could be a management company) had incurred costs in respect of legal or professional services before 28 June 2022; his secondary submission was that it did not apply where a service charge had become due before that date.
183. These can be spelt out respectively as follows:

“(1) *From 28 June 2022, 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 where the liability to pay for the legal or other professional services was incurred on or after 28 June 2022.”*

And:

“(1) *From 28 June 2022, 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 where the service charge falls due on or after 28 June 2022.”*

Mr Loveday’s construction

184. I consider first Mr Loveday’s construction. As he accepted, the practical effect of this would be very far-reaching. It would potentially re-open transactions that had taken place decades ago, and had long since been thought to be settled. The effect of the definition of “relevant defect” in section 120 is to include defects arising from work carried out in the 30 years prior to 28 June 2022, so long as the defect is one which gave rise to a building safety risk as defined (that is, a risk to the safety of people in or about the building from the spread of fire or collapse of the building or part): see paragraph 14 above. So work carried out to replace defective fire doors 20 years ago would on this view be within the scope of the protections in schedule 8. The cost to the landlord of carrying out such work might have been duly consulted on, reasonably incurred and of a reasonable amount, so that the cost was quite properly included in service charge demands; and such service charge demands could therefore have been lawfully payable (and paid) at the time. But on Mr Loveday’s construction, schedule 8 might have the effect that any such service charge would now be treated as not payable after all. Suppose for example a leaseholder with a qualifying lease of a flat in London worth less than £325,000 on 14 February 2022: by paragraph 4 of schedule 8 no service charge is payable under such a lease in respect of a relevant measure relating to any relevant defect. If Mr Loveday is right as to the construction of paragraph 9 of schedule 8, the same would no doubt apply to paragraph 4, and all service charges in respect of relevant defects arising from work carried out in the previous 30 years paid by the leaseholder would now be treated as not having been payable. Mr Loveday suggested that that meant that the leaseholders would be able to

apply to the appropriate tribunal under section 27A of the Landlord and Tenant Act 1985 and seek repayment or an adjustment of accounts accordingly, there being, he said, no limitation period applicable to such a claim. We were not asked to decide if that was right, and I do not propose to do so, but it can be seen that on this view the potential effect of schedule 8 is to re-open transactions from many years past.

185. That would put the potential retrospective effect of schedule 8 at the far end of the spectrum. Such an interpretation is only to be adopted if one can be satisfied that this is what Parliament intended. But I think there are two reasons why it is impossible to be satisfied that this is what Parliament intended. First, there is no textual support for it. One may contrast section 135 where section 135(1) extends the limitation period under the DPA 1972, and section 135(3) provides that the amendment made by section 135(1) in relation to an action under section 1 of the DPA 1972 “is to be treated as always having been in force”. Second, and more significantly, there is nothing to suggest that such a re-opening of the position was something that Parliament had in mind or that was required to address the problems that the remediation provisions were designed to address. As the background to the legislation clearly shows, the context for schedule 8 was a one-off crisis arising from the safety risks uncovered by the Grenfell Tower tragedy which was leading to many leaseholders facing unprecedented and unaffordable service charges. There is nothing in this to suggest that another concern was to intervene in the contractual scheme of service charges more generally, or to re-open up to 30 years’ worth of past service charges. There was an undoubted problem in the inability of leaseholders to pay now; there is no reason to think that another problem was the historic impact of service charges demanded and paid long ago.
186. Moreover when one examines the practical working of schedule 8 in more detail, the effects of Mr Loveday’s construction seem so outlandish that it is impossible to believe that Parliament intended the protections for leaseholders in schedule 8 to lead to a re-opening of past transactions in this way. Thus for example the availability of almost all the protections (that is, other than that in paragraph 2) is limited to those with qualifying leases. Whether a lease is a qualifying lease depends on a one-off snapshot of the position at the beginning of 14 February 2022. Unless the then lessee, or one of the then lessees, (a “relevant tenant”) was either occupying the dwelling as his only or principal home, or owned no more than 2 other dwellings in the UK, at that date, the lease is not a qualifying lease: see section 119 as summarised at paragraph 16 above. If the test is met on that day, the lease is a qualifying lease; conversely if the test is not met, the lease is not (and never will have been) a qualifying lease and none of the protections for qualifying leases apply. That makes sense if the intention of schedule 8 is to provide protection going forwards. It divides existing leases as at 14 February 2022 into those that are qualifying (and whose lessees will benefit from the protections) and those that are not (and whose lessees will not). But it makes much less sense if the intention was also to provide retrospective protection for up to 30 years before. One would expect the availability of such protection to depend on whether the tenant was occupying the flat as his home (or had no more than 2 other properties) at the time of payment, not on what the position was on 14 February 2022.
187. Thus to take a simple example, suppose a lease under which a leaseholder paid service charges for relevant defects in the period up to the end of 2021, but whose

lease had come to an end before 14 February 2022. That lease would not be a qualifying lease and the leaseholder would therefore not benefit from the protections in schedule 8 whereas others whose leases continued past that date would. That might admittedly be thought an unlikely scenario (as most leases are granted for 99 years or more and high-rise blocks of flats are unlikely to be that old), but one can envisage much more probable scenarios. Suppose for example two neighbours in the same block, A and B, who bought their flats at the same time, occupied them as their respective homes, and paid the same service charges from 1992 onwards, including some based on the cost of remedying fire safety defects. On 14 February 2022 A is still living in his flat as his only home and has a qualifying lease. On Mr Loveday's construction, A would be able to re-open payments he had made for service charges in respect of relevant defects back to 1992. B however has sold his flat before that date. Whether B's lease is a qualifying lease depends not on whether it was his only home when he lived there, but on the happenstance of who he sold it to. If he sold it to C who on 14 February 2022 was living in it as *his* only home, then it would be a qualifying lease, and it would appear that on Mr Loveday's construction B could take advantage of the provisions under which service charges under his lease were retrospectively to be treated as not having been payable. But if he happened to sell it to D, an investor with a portfolio of buy-to-let properties, so that on 14 February 2022 D was the leaseholder and owned more than 2 other properties, then the lease would not be a qualifying lease. That would appear to mean that B would not benefit from the protections available to the holders of qualifying leases. Some anomalies are probably unavoidable whatever interpretation is adopted, but if the Parliamentary intention had really been to enable certain leaseholders to re-open certain transactions over the last 30 years, it would seem absurd to make the availability of this dependent not on the position (and presumed ability to pay) of the lessee himself but on that of his successor who happened to be the leaseholder in February 2022.

188. A similar point can be made on paragraph 3 of schedule 8. This is the provision which provides that no service charge is payable under qualifying leases if the landlord meets the contribution condition, namely that it is a member of a corporate group whose net worth exceeded £2m per relevant building: see paragraph 168 above. This test is again dependent on the position at the qualifying time, that is 14 February 2022. Suppose a case in which the landlord from 1992 was a small landlord that did not meet the contribution condition. If that landlord was still the landlord on 14 February 2022, or had sold to another small landlord which did not meet the contribution condition on that date, then paragraph 3 would have no application. But suppose the landlord had before February 2022 sold the reversion to a successor which was part of a wealthy corporate group such that the contribution condition was met on 14 February 2022. That would mean that paragraph 3 would apply, and the leaseholders with qualifying leases would not pay anything towards relevant defects. On Mr Loveday's construction, it would appear that past service charges would also be treated as not having been payable, thereby entitling the leaseholders to re-open transactions back to 1992 even though the landlord at the time was not itself a wealthy landlord who met the contribution condition. Again it would seem bizarre that the ability of the leaseholders to re-open past transactions would depend not on the wealth (and presumed ability to pay) of the landlord at the time that the service charges were demanded and paid, but on the wealth of a successor landlord at 14 February 2022.

189. Another example can be found in the provisions of paragraphs 5 and 6 which concern the maximum that leaseholders of qualifying leases can be required to pay. Paragraph 6 gives the various amounts of the permitted maximum, ranging from £10,000 to £100,000 depending on the value of the qualifying lease and whether the premises are in Greater London or not. Paragraph 5 provides:

“5(1) A service charge which would otherwise be payable under a qualifying lease in respect of a relevant measure relating to any relevant defect is payable only if (and so far as) the sum of—

- (a) the amount of the service charge, and
- (b) the total amount of relevant service charges which fell due before the service charge fell due,

does not exceed the permitted maximum.

(2) In this paragraph “relevant service charge” means a service charge under the lease in respect of a relevant measure relating to any relevant defect that—

- (a) fell due in the pre-commencement period, or
- (b) falls due after commencement.

(3) In sub-paragraph (2) “the pre-commencement period” means the period—

- (a) beginning 5 years before commencement or, if later, on the day the relevant person became the tenant under the qualifying lease, and
- (b) ending with commencement.

“The relevant person” means the person who was the tenant under the qualifying lease at commencement.

(4) In this paragraph—

“commencement” means the time this paragraph comes into force;

“the permitted maximum”: see paragraph 6.”

190. The effect of this is to require a limited “look-back” over the 5 years before 28 June 2022 when calculating how much a leaseholder of a qualifying lease can be required to pay. If for example a leaseholder had a lease of a flat in Greater London worth more than £325,000 and less than £1m on 14 February 2022, the permitted maximum for the lease would be £15,000 (this is the combined effect of paragraphs 4(1)(a), 6(2)(a) and 6(3)). If the leaseholder had already paid £10,000 in service charges for the

remedying of relevant defects in the 5 years before 28 June 2022, the effect of paragraph 5 is that he could only be charged another £5,000.

191. Two things are noticeable about this. First the look-back is limited to 5 years before commencement. So the fact that the leaseholder might have also spent a further £1,000 on the replacement of fire doors in 2000 is to be ignored. This would seem to sit oddly with Mr Loveday's construction which would enable other service charges impacted by schedule 8 to be re-opened over a much longer period, of up to 30 years. So a leaseholder of a London flat worth £300,000 on 14 February 2022, who by paragraph 4(1)(a) is not liable to pay any service charges in respect of relevant defects, would on his construction be able to re-open past transactions back to 1992, whereas a leaseholder of a slightly more valuable flat worth £350,000 would not be able to look back beyond 2017. That would seem unlikely to be what Parliament intended.
192. Second, there is no express mechanism laid down in paragraphs 5 and 6 for recovery of past amounts even if they exceed the permitted maximum. Suppose for example the leaseholder whose permitted maximum is £15,000 had spent not £10,000 but £20,000 in the 5 years before 28 June 2022. Since paragraph 5 is expressly dealing with a look-back over those 5 years, one would expect the legislation to have made express provision for recovery of payments over the permitted maximum if that had been the intention. It must have been obvious when making provision for the look-back period that leaseholders might have already paid more than the permitted maximum. But there is no hint in the legislation that Parliament intended that leaseholders would have a right to recover the excess. That seems to me to make it unlikely that Parliament intended that the provision in paragraph 5 that a service charge is payable only if it exceeds the permitted maximum should be understood as meaning that service charges in excess of the permitted maximum should be treated as if they had never been payable. But this is the implication of Mr Loveday's construction.
193. In these circumstances I am not persuaded by Mr Loveday's submission. It would give a very significant retrospective effect to the legislation; it would go much further than required to meet the problem which the remediation provisions were evidently designed to address; and it would cause a number of difficulties in implementation. In those circumstances it cannot be supposed that Parliament intended the legislation to have this effect.

Sir James Eadie's construction

194. The practical effect of Sir James Eadie's construction is that a line is drawn on 28 June 2022. Any service charges paid before that date are unaffected by the legislation; but from that date no further service charges of the relevant type are payable, whether the underlying costs have been incurred, or service charges have been demanded or fallen due. I agree with Newey LJ (see paragraph 51 above) that this construction is in line with the Judge's conclusions.
195. I also agree with Newey LJ that this construction engages the principles that legislation is not normally to be construed as altering the rights and obligations of the parties resulting from events that had already taken place; and that legislation is not normally to be understood as interfering with proprietary rights. Construing the

remediation provisions of the BSA as relieving a leaseholder from paying a service charge based on costs that a landlord has already incurred interferes with the landlord's existing proprietary rights arising from events that had already taken place; and even more so if the landlord has not only incurred costs but demanded a service charge which has fallen due. Mr Allison submitted with justification that this would be unfair on landlords who had incurred costs in the bona fide belief that they would be able to pass them on to leaseholders.

196. On the other hand, schedule 8 undoubtedly puts in place very substantial protections for leaseholders, preventing them from being liable to pay service charges that would otherwise be due. On any view this is a very significant statutory intervention in the contractual scheme that would otherwise apply. Once Parliament had decided that an intervention on such a scale was necessary to address the problem, it was bound in any event to cause very significant unfairness to landlords (and others contractually entitled to service charges). The process that elapses between a landlord deciding that expenditure is required and successfully collecting service charges from the leaseholders usually takes a considerable time. Suppose a landlord concludes that work is required to remedy a defect. Unless it applies for dispensation, it first has to consult the leaseholders in accordance with the requirements of the Landlord and Tenant Act 1985. Once that process is complete, it will then enter into a contract for the works. Payments will become due under the contract from time to time in accordance with its terms. The landlord may well, depending on the service charge provisions in the leases, be able to obtain payments on account from leaseholders in advance of the payments becoming due; but will usually only be able to claim the final amount once payments have been made and a reconciliation carried out between payments on account and the final service charges. Leaseholders may or may not then pay; they may or may not challenge the service charges as unreasonable. This whole process may take a number of years.
197. Wherever the line is drawn in this process between service charges that the leaseholders do have to pay and those that under the provisions of schedule 8 they do not, it will cause serious disruption to the orderly collection of service charges. On Mr Allison's primary construction – namely that the protections of schedule 8 do not apply to costs that have been *incurred* before 28 June 2022 – there will nevertheless be landlords who have committed themselves to contracts in the belief they would be able to pass on costs to leaseholders but who find that they are unable to do so as costs are not incurred when the contract is signed but only when invoices are rendered or payments made (see the decision in *Burr*, referred to by Newey LJ at paragraph 38 above). On his secondary construction – namely that the protections do not apply to service charges that fell due before 28 June 2022 – there will be many landlords who have not only committed themselves to contracts but also actually incurred costs in the expectation that they will be able to pass on the costs to the leaseholders, who find that they cannot recover, or that they can only recover payments on account that have already been demanded, but not balancing payments which have not. And whatever construction is adopted, there will be many landlords who as at 28 June 2022 had not started the remediation process at all; they on any view will be unable to recover the relevant service charges but will still have very significant repairing obligations that they cannot avoid and that they would have expected to be able to pass on the cost of.

198. In these circumstances I do not think that any sharp distinction can be drawn between the unfairness to landlords who have committed themselves to contracts, or to those who have incurred liabilities, or to those who have demanded service charges, or indeed to those who have not yet started on the process of repair. Wherever the line is drawn the impact of the legislation will be to impose significant costs on landlords that they were not expecting to bear, and I do not think the impact is significantly more unfair to a landlord who has not only signed a contract but made a payment under it, or has demanded a service charge which has fallen due. The effect of bringing into force the protections in schedule 8 on 28 June 2022 was bound to cause significant unfairness to all affected landlords regardless of where in the process they happened to be on that date. It was also bound to introduce somewhat arbitrary distinctions, whether that be between those landlords who had been billed and those that had not; or those that had demanded service charges which had fallen due and those that had demanded service charges that had not yet fallen due or those just about to issue a demand; or those whose leaseholders had paid and those whose leaseholders had not.
199. It is of course a matter for Parliament where it chooses to draw the line. So the first consideration is whether there is any assistance in the text of the legislation to indicate where it chose to do so. Here I think, in agreement with the Judge, that the language favours the line being drawn where Sir James said it was rather than where either of Mr Allison's constructions would draw it. The various paragraphs of schedule 8 provide simply that "no service charge is payable" (paragraphs 2, 3, 4, 8 and 9), or "a service charge ... is payable only if" it does not take the total over the permitted maximum (paragraph 5) for the various matters referred to. Since these provisions came into force on 28 June 2022, and I have rejected Mr Loveday's construction, this means "on and from 28 June 2022 no service charge is payable". On Sir James' construction this is exactly what the legislation provides; from 28 June 2022 no service charge will thereafter be payable (regardless of whether costs have already been incurred or service charges already been demanded, or indeed fallen due). On either of Mr Allison's constructions, this will not be the case. Many leaseholders will find that they still have to pay some service charges after that date in respect of the matters referred to. In the present case the sums are relatively modest, but the sums could be vast. A landlord could have entered into contracts for remedying fire safety defects under which it had already incurred millions of pounds of costs; it could have already billed leaseholders, or be in a position to bill them, for £100,000 each. There is nothing on the face of the legislation providing that the protections in schedule 8 are to be deferred until all the costs that had already been incurred, or all the costs that had already been demanded, or fallen due, should have been paid. If that had been Parliament's intention, one might have expected the legislation to specify with more precision when the protection was to take effect. But there are, as is common ground, no transitional provisions at all.
200. Moreover I think that paragraph 5 of schedule 8 lends some support to Sir James' interpretation. As set out above (see paragraphs 179-180) this contains a look-back over the 5 years before 28 June 2022 to see if the leaseholder in question has already reached the permitted maximum. Suppose a case in which the leaseholder has a London flat worth over £325,000 but under £1m, and hence has a permitted maximum of £15,000, and has by 28 June 2022 already paid £20,000 in that 5 year period. The natural interpretation of paragraph 5 is that, having already paid more than the

permitted maximum, the leaseholder cannot be required to pay more. But on Mr Allison's interpretation I think that would only apply to service charges based on costs which had not yet been incurred (or service charges not yet due) with the result that the leaseholder could continue to be required to pay service charges well over the permitted maximum. That seems contrary to the plain language of paragraph 5.

201. So far as it goes therefore I think the text of the Act militates against Mr Allison's interpretations and in favour of Sir James'. But I acknowledge that that by itself would be a slender basis on which to decide that Parliament had intended to deprive landlords of their accrued rights. Far more significant to my mind is whether one or other interpretation can be seen to be more consonant with the purpose and scheme of the remediation provisions which "provide the basic frame of orientation for the use of the language employed in it" (see paragraph 144 above).
202. Once this is taken into account I think that Sir James's construction is indeed to be preferred to those of Mr Allison. As set out above, the scheme of schedule 8 is to provide a raft of protections for leaseholders, in the case of paragraph 2 for all leaseholders, and in the case of the other paragraphs for leaseholders with qualifying leases. The evident purpose of doing so is, in the case of paragraph 2, to ensure that costs are met by those responsible for the defects rather than anyone else; and, in the case of the other paragraphs, to provide relief for leaseholders facing unprecedentedly large and very often unaffordable service charges. But on either of Mr Allison's interpretations this would not happen for many leaseholders for a wholly unpredictable time. Leaseholders whose landlords were, or were connected with, the original developers would still have to pay for remediation, and leaseholders with qualifying leases would still face, and still have to meet, bills for remediation, so long as in each case costs had been incurred, or service charges had fallen due, before 28 June 2022. Such bills could be very large. That would to my mind cut across the evident legislative purpose of relieving leaseholders from their immediate predicament of facing large and often unaffordable bills; it would also I think tend to prevent the market from being freed up as intended. It would mean that far from leaseholders not having to pay a penny for cladding remediation, they might still have to pay many thousands of pounds. It would not put an end to questions being raised by MPs with ministers, or stories in the press about leaseholders facing ruin. In short I do not think it would achieve what can be seen to be the legislative purpose of addressing the immediate crisis of leaseholders trapped in their flats facing ruinously expensive bills.
203. In those circumstances I consider that Parliament cannot have intended that leaseholders should still continue to face the uncertainties and difficulties of the large and unaffordable bills that the legislation was designed to address. The only way to give effect to the Parliamentary intention of breaking the logjam and protecting leaseholders is to my mind to interpret the provisions that "no service charge is payable" as meaning what they appear to say, namely that from the date of such provisions coming into force no such service charge is indeed payable. I accept as I have said that that causes unfairness to landlords, but the real unfairness is the decision to deprive landlords of their contractual right to pass certain costs on to leaseholders at all. Once that decision had been made, I do not think that the unfairness of depriving landlords of accrued rights adds very much; and I do not think this additional unfairness is sufficient to justify reading the legislation in such a way

as to cut across the legislative purpose of providing protection to leaseholders against unaffordable bills in the way that Parliament obviously intended.

204. I have therefore concluded that Sir James Eadie's construction is to be preferred to those of Mr Allison and I would dismiss the appeal accordingly.
205. I add that I had drafted the substance of this judgment before the Supreme Court handed down their decision in *URS*. As Newey LJ has referred to, we have received further submissions from the parties in relation to the implications of their judgments for this appeal. I mean no disrespect to counsel by saying that nothing in them has caused me to change or reconsider my views, which I believe to be in line with the guidance from the Supreme Court; and I have not thought it necessary to lengthen this judgment by setting out the reasons why I have so concluded.

Lord Justice Holgate:

206. I agree with Newey LJ on grounds 1 and 3 for the reasons he gives. I agree with Nugee LJ on ground 2 for the reasons he gives. Accordingly, I would dismiss the appeal.

Neutral Citation Number: **[2025] EWHC 2182 (Admin)**

Case No: AC-2024-LON-0001595

**IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 August 2025

Before:

THE HONOURABLE MR JUSTICE CHOUDHURY

Between

**The King (on the application of RYDON GROUP
HOLDINGS LIMITED)**

Claimant

- and -

**SECRETARY OF STATE FOR LEVELLING UP,
HOUSING AND COMMUNITIES**

Defendant

**(1) ARTA RESIDENTS' MANAGEMENT
COMPANY LIMITED**

**Interested
Parties**

**(2) IKON RESIDENTS' MANAGEMENT
COMPANY LIMITED**

**(3) STYLUS RESIDENTS' MANAGEMENT
COMPANY LIMITED**

(4) KDG PROPERTY LIMITED

John Litton KC, James Neill & Barney McCay (instructed by Stephenson Harwood
LLP) for the **Claimant**

Sir James Eadie KC, Jack Holborn, Tom Cleaver & Alexander Burrell (instructed by
Government Legal Department) for the **Defendant**

Hearing dates: 24 & 25 June 2025

JUDGMENT

MR JUSTICE CHOUDHURY :**Introduction**

1. The Claimant, Rydon Group Holdings Limited (“**Rydon**”), is the parent company of Rydon Maintenance Limited (“**Rydon Maintenance**”), which was the principal contractor for the refurbishment of Grenfell Tower before the tragic fire in 2017 and was a Core Participant in the subsequent Grenfell Tower Inquiry (“**the Inquiry**”). On 28 February 2024, the Secretary of State for Levelling Up, Housing and Communities (“**the SoS**”) made three decisions relating to the remediation of unsafe cladding on three high-rise residential buildings for which Rydon was the developer (“**the Cable Street Buildings**”). Those decisions were: (a) to determine that Rydon is a Designated Participant Developer (“**Designated PD**”) and therefore “unfit” to carry out the remediation works (“**the Designation Decision**”); (b) to direct that remediation should take place through the Building Safety Fund (“**BSF**”) pursuant to Clause 7.7(B) of the Self-Remediation Terms (“**SRTs**”) of the contract between Rydon and the SoS (“**the Clause 7.7(B) Decision**”); and (c) pursuant to Clause 13.2 of the SRTs that the Cable Street Buildings should remain within the BSF and should not be transferred to Rydon for remediation in any event even if Rydon was not a Designated PD (“**the Clause 13.2 Decision**”).
2. Rydon challenges these decisions on various public law grounds; leave having been granted by Lang J at a permission / interim relief hearing on 10 December 2024. The first three Interested Parties are the Resident Management Companies (“**RMCs**”) responsible for each of the Cable Street Buildings. The Fourth Interested Party (“**KDG**”) is the managing agent for the RMCs.

Background

Grenfell Tower Fire and Inquiry

3. On 14 June 2017, a fire destroyed Grenfell Tower. Seventy-Two people lost their lives in the fire. The first report of the Inquiry, published on 30 October 2019 (“**Phase 1 report**”), concluded that the defining factor in the rapid and all-consuming spread of the fire was the presence of combustible materials in the cladding installed during the refurbishment of Grenfell Tower in 2014 to 2016. The Phase 1 report also considered a host of other defects which accelerated the rate of spread.
4. Several current and former employees of Rydon Maintenance gave oral evidence during Modules 1 and 2 of Phase 2 of the Inquiry. That evidence raised concerns as to, amongst other things, Rydon Maintenance’s approach to building safety. The eventual findings in the second report of the Inquiry, published on 4 September 2024 (“**Phase 2 report**”), included the following:

“We consider that the principal contractor, Rydon, also bears considerable responsibility for the fire. It gave inadequate thought to fire safety, to which it displayed a casual attitude throughout the project and its systems for managing the design work did not ensure that its sub-contractors and consultants properly understood their different responsibilities. Rydon itself did not understand where responsibility for individual decisions lay and as a result it failed to co-ordinate the design work properly.”

Background to the contract between Rydon and the SoS (“the Contract”)

5. In the aftermath of the Grenfell Tower tragedy, it became apparent that many high-rise residential buildings around the country posed a danger as a result of deficiencies in their design and construction. As an emergency interim step to ensure that remediation of the most critically at-risk buildings was achieved swiftly, the Government made funding available for replacement of unsafe cladding on certain residential buildings via the BSF and similar schemes (“**Funds**”). However, it was considered not practicable to remediate all unsafe buildings in this way.

6. In light of these matters, the SoS wrote an open letter in January 2022, calling on developers to agree to fund or undertake at their own cost the remediation of unsafe buildings (referred to here as “**self-remediation**”). In March 2022, the SoS published a voluntary pledge letter (“**Pledge**”) by which developers could publicly commit to the principle of self-remediation. The Pledge was drafted with the input of the Home Builders Federation (“**HBF**”). Approximately 50 major developers were approached, including Rydon. Rydon did not respond to this invitation as it regarded the Pledge as directed at Britain’s “*largest housebuilders*” and, as a SME, it did not consider itself to be a large or major developer. Rydon is not a member of the HBF.
7. Between July 2022 and January 2023, the SoS engaged in negotiations with developers in the industry with a view to settling contractual terms to give binding effect to the Pledge principles. The SoS considered it desirable that a single set of terms be adopted. The negotiations were open to the developers at whom the Pledge was aimed and were largely mediated through HBF, which represented all developers’ interests and acted as a conduit for individual comments on the draft SRTs. Developers could also provide comments to the Department for Levelling Up, Housing and Communities (“**the Department**”) directly. Whilst Rydon was contacted on a number of occasions, it considered the Department’s emails as little more than a “general distribution” from a government department and did not respond. The emails to Rydon included an invitation on 19 August 2022 to sign the Pledge, and an email dated 5 September 2022, inviting comments on the draft terms to be sent directly to the Department or via HBF, which was coordinating comments on behalf of Pledge signatories and other developers including those who were not members of HBF.

8. Negotiations about the SRTs concluded in January 2023 and the SRTs were opened for signature on 30 January 2023. The SoS made it clear that he expected developers to “*sign the contract as soon as possible, and no later than Monday 13 March 2023...*”
9. By an email dated 2 March 2023, the SoS sent developers (including Rydon) the final version of the Contract and the SRTs inviting them to submit mark-ups of the Contract setting out corporate details and buildings information. Rydon wrote to the Department on 10 March 2023 pointing out that Rydon Homes was a “*small SME housebuilder*”, and that it had understood that the Department would be focussing on large housebuilders / developers first and then rolling out its proposals to SME housebuilders at a later stage.
10. On 23 March 2023, Rydon wrote to the Department stating that:

“Rydon Homes had no involvement in [the Grenfell] refurbishment project, nor is it subject to the public inquiry or the police investigation. As such, Rydon Homes directors cannot approve a contract which includes provisions which may impact upon the company, for events not within its control. The provisions of Clause 7 and the definition of ‘Designated PD’ would need to be amended in that regard.” (Emphasis added)
11. By a response dated 28 March 2023, the SoS confirmed that the SRTs were in final form and would be identical for all signatories.
12. At a subsequent meeting between the Department and Rydon on 24 April 2023, Rydon expressed concern that it could “*in theory already be deemed to be caught by the definition of Designated Participant Developer*”. Ben Llewellyn for the Department confirmed that the terms could not be varied, and that the purpose of Clause 7 of the SRTs “*was that if Rydon was deemed to be unfit to carry out remedial works following the outcome of the inquiry or a police investigation, then Ministers*

could not be seen to be allowing Rydon to carry out remedial works on resident buildings in these scenarios”: Rydon’s note of meeting. Rydon proposed a side-letter containing an agreement that would provide comfort around what was termed “the Grenfell clause” so that it was able to sign the Contract in its current form. Proposals for any such amendment or side-letter were rejected by the Department.

Building Safety Act 2022 and RAS Regulations

13. Meanwhile, the *Building Safety Bill* was introduced to Parliament on 5 July 2021, and the *Building Safety Act 2022* (“**BSA 2022**”) received Royal Assent on 28 April 2022. The BSA 2022 makes provision for the remediation of certain defects in buildings with two or more dwellings that are at least 11m high or have at least 5 storeys.
14. Section 126-127 of the BSA 2022 provide for the making of regulations to establish building industry schemes to secure the safety of people and improve building standards, including the remedying of defects in existing buildings or contributing to the costs associated with remedying those defects. Sections 128-129 make further provision for the making of regulations to prohibit prescribed persons from carrying out development of land in England. Section 168, BSA 2022 makes general provisions relating to the regulations made under BSA 2022.
15. The regulations made pursuant to the enabling power in the BSA 2022 are the *Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023* (“**RAS Regulations**”) which came into force on 4 July 2023. Regulation 5 establishes a scheme known as the Responsible Actors Scheme (“**the Scheme**”). The purpose of the Scheme is to secure the safety of people in or about buildings and to improve the standard of buildings by securing that those in the building industry remedy defects in

buildings relating to fire safety and contribute to costs associated with remedying such defects.

16. Regulations 6 – 8 of the RAS Regulations set out the eligibility criteria to be a member of the Scheme, with Regulation 7 making it clear that a company is to be treated as responsible for the development or refurbishment of a building if another company in the same group is so responsible. Regulations 13 and 14 make provision for the SoS to “invite” eligible persons to apply for membership of the Scheme.
17. Regulation 14(2) provides that where a person is “invited” to become a member of the Scheme, he must within 60 days either enter into a Self-Remediation Contract (if he has not already done so) or give notice to the SoS, supported by evidence, that neither he nor any body corporate in the same group is eligible to join the Scheme.
18. If the person “invited” to join the Scheme does not comply with regs. 14(2)(a) or (b) then, after the expiration of 60 days, he will be treated as a person who is eligible to join the Scheme but has not joined and will have his name published on the prohibitions list (“**the Prohibitions List**”) – i.e. a list prepared, maintained and published by the SoS and to which reg. 28 applies.
19. Where reg. 28 applies, the applicable person is prohibited under reg. 29 from: (1) carrying out major development of land in England (i.e. development of 10 houses or more); and (2) under reg. 33, is subject to a range of building control prohibitions. These prohibitions in respect of building control would affect future and current or ongoing developments.
20. Regulation 21 provides:

“Self Remediation Terms

21.—(1) Subject to paragraph (3), a member of the scheme must enter into a contract with the Secretary of State (“a Self Remediation Contract”) which contains terms that apply to contracts between a developer and the Secretary of State providing for the developer to undertake the remediation of the buildings for which they are responsible, as published by the Secretary of State on 16th March 2023 and referred to as the developer remediation contract (“the Self Remediation Terms”).

...

(3) A member of the scheme who has entered into a contract with the Secretary of State on the same or substantially the same terms as the Self Remediation Terms before the date on which these Regulations come into force is to be treated as satisfying the scheme condition in paragraph (1), and references to Self Remediation Contract in these Regulations are to be treated as including references to the terms of such a contract.”

21. The SRTs referred to in reg. 21 as having been published by the SoS on 16 March 2023 were those that had been the subject of negotiations as described above.

Relevant contractual provisions

22. The Contract is in two parts: a deed of contract and a Schedule containing the SRTs. By Clause 2 of the Contract, the SRTs “*are part of and will be deemed incorporated into this Contract*”.
23. The SRTs make clear that Participant Developers’ (“PDs”) obligations extend not only to buildings they developed, but also to buildings developed by other companies in their group. Clause 20.4 of the SRTs, for example, provides:

“To the extent that a PD Group Company [as defined] that is not the Participant Developer played a relevant role in the Original Works, any obligation on the Participant Developer in respect such Building under these Self-Remediation Terms and/or the Contract and any reference to the Participant Developer doing or being obliged to do any act in respect of such Building under these Self-Remediation Terms and/or

the Contract, will also comprise an equivalent obligation on the relevant PD Group Company and accordingly an undertaking by the Participant Developer to procure that the relevant PD Group Company undertakes such obligation or carries out such act.”

24. As regards buildings for which applications have been made to the Funds, the basic scheme of the SRTs is that PDs agree to repay monies that have been paid towards remediation projects for their buildings, but buildings may be ‘transferred’ out of the relevant Fund for the PD to carry out remediation work themselves.
25. Whether and in what circumstances a building may be transferred depends on what stage of the application process it has reached. For these purposes buildings within the Funds are divided into four stages, A to D. For the purposes of these proceedings, Stages C and D are the most relevant (Annex 1, SRTs):

“**‘Stage C Fund Building’** means a Building for which [at the date of the Contract]:

(A) DLUHC has communicated an award of funding...; and

(B) DLUHC has not signed a funding agreement with the applicant Responsible Entity ...

‘Stage D Fund Building’ means a Building for which [at the date of the Contract]:

(A) DLUHC has communicated an award of funding...; and

(B) DLUHC has signed a funding agreement with the applicant Responsible Entity ...”

26. Stage C Fund Buildings, where an award of full funding has been communicated but a grant funding agreement (“**GFA**”) has not yet been signed, by default remain within the Funds. Clause 13.1 requires PDs to reimburse all monies paid or agreed to be paid by the Fund, subject to Clause 13.2:

“... a PD will not be required to make a payment in accordance with Clause 13.1 if it requests in writing to DLUHC (and DLUHC, acting reasonably, accepts such request) that the relevant Stage C Fund

Building is transferred out of the relevant Fund to the PD, for the PD to carry out and complete the Works in respect of it.”

27. In order to request a transfer under Clause 13.2, the PD must “[confirm] in writing that the target dates for completing the Works are not later than the corresponding dates that would apply to that Building should it not be transferred from the relevant Fund to the PD (or unless DLUHC otherwise consents to such transfer)” (Clause 13.3, SRTs). Beyond this, the factors which the SoS may take into account are not prescribed by the Contract, nor is there a specific procedure to be applied in so doing.
28. To assist in considering whether or not to transfer Stage A, B and C Fund Buildings under the terms of the Contract, the SoS has adopted non-binding internal guidance in the form of a policy document – the “*Revised criteria for developer transfer: Policy for requests for BSF transfers*” (“**Policy Document**”) which provides “8 non-exhaustive circumstances of when this discretion can be reasonably exercised. In practise the discretion will be used in a minority of transfers.” These include: (i) whether the SoS has confidence in the PD’s stated timescales for carrying out the works; (vii) whether the PD’s financial standing is in doubt; and (viii) whether they are a Designated PD.
29. Where a building has reached Stage D (i.e. a GFA has been signed) it must remain within the relevant Fund.
30. Where a building is transferred, the PD is obliged to: (i) reimburse any costs incurred by the relevant Fund up to the point of transfer; and (ii) carry out or procure suitable remediation works or fund the Responsible Entity (“**RE**”) to do so (Clauses 12.4-12.5, 12.12-12.13, 13.5-13.6, SRTs). Where a building is not transferred, the obligation is to reimburse any expenditure incurred by the BSF (Clauses 12.7, 12.15, 13.1, 13.8, SRTs), subject to a process of challenge: Clauses 13.17-13.25 of the SRTs.

31. Where a PD is a ‘Designated PD’, the foregoing provisions are supplemented by Clause 7.7 of the SRTs. Annex 1 of the SRTs defines a ‘Designated PD’ as, broadly speaking, any PD that the SoS considers “unfit” to carry out remediation works by reason of: (A) the PD being subject to a criminal prosecution for an offence relating to building safety; (B) the PD being subject to an investigation for a criminal offence; (C) the PD’s conduct being under consideration by a public inquiry; and (D) the PD being repeatedly in material breach of its obligations under the Contract. For present purposes (C) of the definition is the most relevant. In full, it provides that a Designated PD is a PD that:

“...has been the subject of significant criticism in the findings of a public inquiry, or is currently a person whose conduct is under consideration by a public inquiry, regarding their performance or behaviour in connection with building safety matters such that the PD is reasonably considered by DLUHC to be unfit to carry out or procure the carrying out of Works in accordance with these Self-Remediation Terms and/or the Contract...”

32. Where the SoS considers a PD meets this definition, she may make a direction under Clause 7.7, whereby the Department may:

“... either in relation to all relevant Buildings Requiring Work or such Buildings Requiring Work as it may determine, elect in its sole discretion (but acting reasonably) to:

(A) require the PD to fund the Responsible Entity... to undertake or procure the Works in accordance with Clause 6.1(iii), and not to undertake or procure the Works at its own cost in accordance with Clauses 6.1(i) and/or 6.1(ii) ...

(B) require the PD not to undertake or procure the Works at its own cost..., and to designate the PD’s Buildings as Stage D Fund Buildings, such that the PD will reimburse the relevant Fund in accordance with Clause 13.”

33. Annex 1 to the SRTs also specifies that the “Standard” to be achieved in respect of external wall construction is the *Publicly Available Standard PAS 9980* (“PAS

9980”). This is a code of practice which sets out the current methodology for carrying out a Fire Risk Appraisal of External Walls (“**FRAEW**”).

34. Previous guidance issued by the Department as to the standard to be achieved in respect of a building’s external walls was set out in a Consolidated Advice Note (“**the CAN**”). The CAN was withdrawn on 10 January 2022 and replaced by PAS 9980 because of concerns that in some cases the CAN standard was being wrongly interpreted and used to justify an excessively risk-averse approach to building safety.

Rydon enters into Contract and joins RAS

35. On 21 July 2023 Rydon was invited to apply to join the RAS. To join the Scheme, eligible developers had to sign the SRTs. Failure to do so would, as set out above, lead to the developer being added to the Prohibitions List. On the same date, Rydon was informed by KDG that the RMCs had applied to the BSF in respect of remediation works to the Cable Street Buildings. Rydon had not been aware before this date that such applications had been made. In fact, that application process had commenced in 2021.
36. Approval for full funding was communicated to the RMCs on 21 August 2023 (for Arta House and Ikon House) and 24 August 2023 (for Stylus House), at which point the buildings reached ‘Stage C’ under the Contract. The SoS then worked with the RMCs and the Greater London Authority (“**GLA**”) to draw up the GFAs, with planned start dates for the works being 30 October 2023 (Ikon House), 15 December 2023 (Arta House) and 15 January 2024 (Stylus House). The terms of the GFAs were not disclosed to Rydon until much later in June 2024.

37. On 15 September 2023, Rydon entered into the Contract. As at that date, the Cable Street Buildings were at Stage C in that grant funding had been approved although the SoS had not signed an agreement to that effect. On the same date, pursuant to Clause 13.2 of the Contract, Rydon applied to the Department to request the transfer of the Cable Street Buildings from the Funds to Rydon (“**the Transfer Request**”) to allow Rydon to undertake the remediation works. In its letter of the same date, Rydon stated that it would be able to commence the remediation works within 28 days of confirmation that the Transfer Request had been accepted.
38. On 18 September 2023 Rydon formally applied to join the RAS and was registered as a member.

The process leading to the Decisions

39. Following receipt of the Transfer Request the SoS received a letter from the Deputy Mayor of London dated 21 September 2023, and from the RMCs dated 25 September 2023, setting out objections to the transfer of the buildings to Rydon for remediation works. These letters were not provided to Rydon for comment at the time. On 27 September 2023, officials met with the RMCs and KDG.
40. The SoS sought further information from Rydon, to evaluate the Transfer Request and the feasibility of the works proposed. Rydon provided various responses in early October 2023, and officials from the Department discussed those responses with representatives of Rydon by videoconference on 9 October 2023. Rydon’s proposed works were to the PAS 9980 standard.
41. The SoS commissioned a third party (Jacobs Engineering UK Ltd) to review and advise on a desk-top assessment submitted by Rydon identifying the scope of works.

Jacobs' conclusion was that Rydon's proposed approach to the remediation was "*a reasonable alternative*" and that Jacobs would support the Transfer to Rydon if that was the approach the Department chose to take.

42. The Department collated information relevant to the Transfer Request and produced a detailed decision dossier ("**Dossier**") considering all relevant matters then before the Department. The Dossier, which is described by the SoS as "*a working document which evolved over time*", was used to inform submissions developed for consideration by the SoS. The Dossier sets out various considerations deemed to be relevant to the Designation Decision (and the Clause 7.7(B) Decision and Clause 13.2 Decision).
43. A Ministerial Submission ("the **First Submission**") was prepared and put to the SoS on 14 December 2023 for a decision as to both designation and transfer. The version of the First Submission before the Court is partially redacted for reasons of Legal Professional Privilege. Whilst this is queried by the Claimant, no issue arises before me on the question of privilege. The First Submission summarised the issues as:
- “(1) Whether to ‘designate’ Rydon Group Holdings Limited (‘Rydon’) as a developer that is unfit to carry out or procure remediation for which it is responsible under the Developer Remediation Contract and – if you decide not to designate Rydon – (2) whether to accept a request by Rydon, a signatory of the Contract, to take responsibility for remediating [the Cable Street Buildings] that are in the Building Safety Fund (BSF)”.
44. The First Submission contained the ‘Recommendation’ that the SoS: (i) notes that the case is being brought to his attention because "*it carries a higher than usual legal and reputational risk, and may involve a clause in the Contract that has not been material to previous transfer decisions*"; (ii) decides whether to designate Rydon under Clause 7.7 of the Contract; (iii) if he decides to so designate Rydon, decide the route by

which the Cable Street Buildings should be remediated choosing between Option 1A (which would require Rydon to fund the RE to carry out remediation to a scope set against PAS 9980) or Option 1B (which would leave the buildings in the BSF with the effect that they would be remediated to the now withdrawn CAN standard with Rydon being expected to reimburse the Department); and (iv) if he decides not to designate Rydon, decide whether to agree or to reject the request to transfer the responsibility for remediating the Cable Street Buildings to Rydon. The First Submission did not recommend rejecting the Transfer Request due in part to the fact that Rydon was already involved in carrying out remediation works elsewhere. It was estimated that under Option 1A, the scope of works would be around £0.6m whereas under Option 1B, it would be £10.7m.

45. The First Submission had four annexes, A to D. Annex A was the letter from the Deputy Mayor of London dated 21 September 2023. Annex B was Rydon's letter requesting the Transfer.
46. Annex C to the First Submission sets out an "*Analysis of evidence on whether to designate Rydon*" and highlights certain matters arising out of the fact that Rydon's conduct and performance in connection with building safety has been under consideration by the Inquiry, and which the SoS may consider potentially relevant to his decision. These included the evidence that Rydon's failings reflected the "*prevailing culture and practice in parts of the industry*", that there will likely be other developers guilty of similar practice whose BSF transfer requests have been met; that Rydon may be able to evidence changes in its practice and management since the impugned refurbishment of Grenfell Tower in 2014/15; and that such refurbishment was carried out by Rydon Maintenance rather than Rydon Group.

47. Annex D to the First Submission sets out an “*Analysis of Rydon’s transfer request using standard criteria*”. Of the eight criteria (a) to (h) set out in the Policy Document, Annex D identifies the following as being the most pertinent:
- a) – whether the Department has confidence that the developer will meet the target timelines under the Contract;
 - b) – whether the BSF applicant has a legitimate expectation that works would continue in the BSF;
 - h)- whether the developer is deemed to be a Designated PD.
48. The First Submission advised that there was insufficient evidence in relation to (a) and (b), and that (h) was dependent on the Designation Decision.
49. The SoS indicated his initial decision by way of a readout on 4 January 2024. That initial decision was to designate Rydon under Clause 7.7 of the Contract, for the Cable Street Buildings to be remediated to the CAN standard, and for Rydon’s designation to apply in respect of all buildings where works were ongoing. A draft decision letter to that effect was produced and put to the SoS on 8 February 2024.
50. A second ministerial submission (“the **Second Submission**”) was sent to SoS on 8 February 2024. This recommended that SoS designate Rydon in respect of the Cable Street Buildings but recommended that he should not make a decision about the status of the buildings where work is not confirmed, complete or at an advanced stage “*in order to avoid unnecessary delay to remediation*”. The Second Submission went on to recommend that the SoS send a letter to Rydon in the form of a draft provided to inform Rydon of the decisions made. In a readout to the Second Submission, the SoS confirmed that whilst he had decided to designate Rydon in respect of the Cable Street Buildings, he would not issue a direction in respect of those other buildings.

51. The SoS's reasons for his decisions are set out in the final approved Decision Letter of 28 February 2024.

Since the decisions

52. The SoS signed the GFAs relating to the Cable Street Buildings on 1 March 2024 and the remediation work began thereafter, on 18 March 2024.
53. The Claimant's letter before claim was sent on 5 April 2024 and its claim was issued on 9 May 2024.
54. As set out above, the Phase 2 Report was published on 4 September 2024.
55. On 10 December 2024, permission to apply for judicial review was granted by Lang J in respect of all grounds save for those comprising allegations of bad faith.

Agreed List of Issues

56. The parties have helpfully agreed a list of issues to be determined. Re-ordering these issues slightly to correlate with the Grounds as set out in the Claimant's Skeleton Argument and its oral submissions, the issues are as follows:
57. *Amenability / Scope of Judicial Review:*
- i) Are the decisions under challenge amenable to judicial review on any or all of the grounds pleaded by the Claimant?
 - ii) In light of the decision as to amenability, does the Claimant have an alternative remedy such that the application for judicial review should be dismissed?
58. Subject to these points:

- i) *Ground 1 – Breach of Natural Justice:*
 - a) Was there unlawful procedural unfairness by a failure to provide the Claimant with an opportunity, prior to the decisions, to respond to representations by third parties: (i) in respect of the Designation Decision; and (ii) in respect of the Clause 7.7(B) Decision?
- ii) *Ground 2 – Tameside duty:*
 - a) In respect of the *Tameside* (duty of inquiry) challenge to the Designation Decision:
 - i) is the ground as now pursued in the skeleton argument properly pleaded and, if not, should the ground be excluded from consideration (subject to any application for permission to amend)?
 - ii) Subject to the above, was there a breach of the *Tameside* duty by failing to request that Rydon provide further documents?
- iii) *Ground 3 – Failure to take into account material considerations:*
 - a) Was there an unlawful failure to take into account material considerations:
 - i) in respect of the Designation Decision; and
 - ii) in respect of the Clause 7.7(B) Decision?
 - b) Was it irrational to take into account the risk of delay in respect of the Clause 7.7(B) Decision so as to render that Decision unlawful?

iv) *Ground 4 – Predetermination:*

a) Would a fair-minded and informed observer conclude that the Defendant had ‘predetermined’ either:

i) the Designation Decision;

ii) the Clause 7.7(B) Decision; or

iii) the Clause 13.2 Decision (transfer)?

v) *Ground 5 – Improper Motive:*

a) In respect of the ‘improper motive’ challenge to the three decisions:

i) is the ground as now pursued in in [99(1)] of the Claimant’s Skeleton Argument (improper motive as being contrary to the RAS Regulations) properly pleaded and, if not, should the point be excluded from consideration (subject to any application for permission to amend)?

ii) Subject to the above, did the Defendant make any of the three decisions under challenge for an ‘improper motive’?

vi) *Ground 6 – Wednesbury Irrationality / failure to provide reasons:*

a) Were any of the three decisions under challenge irrational so as to render them unlawful?

b) Were adequate reasons given for the Designation Decision (Ground 1(c))?

59. *Section 31(2A) of the Supreme Court Act 1981:*

- i) But for any public law error found by the Court, is it highly likely that the same decisions would have been made?

60. I shall deal with each of these issues / grounds in turn.

Amenability to and Scope of Judicial Review

Amenability - Submissions

61. Mr Litton KC for the Claimant submits that the BSA and the RAS Regulations provide the statutory architecture for the Scheme. The Scheme is given effect by the Contract and the SRTs which are expressly identified in the legislation, and Rydon was effectively compelled to enter into the Contract and the SRTs in order to avoid being placed on the Prohibitions List. This element of effective compulsion arising from the absence of any commercial choice but to accept the SRTs meant that the Contract is plainly not a freely negotiated contract entered into at arm's length, and acceptance of the SRTs was a condition of being able to continue in business. Mr Litton submits that the Contract was, in these circumstances, not a commercial agreement but rather a means of enforcing statutory objectives in the public interest. The consequence of that is that the policy reasons that led the Courts in other cases involving a contractual context to limit the scope of judicial review are absent here, such that the full panoply of public law remedies ought to be available, notwithstanding the contractual context.

62. Sir James Eadie KC for the Defendant, submits that the established principle is that in deciding whether or not to enter into a contract, a public authority is not subject to judicial review save where there is an allegation of fraud, corruption or bad faith: see

Mercury Ltd v Electricity Corporation of New Zealand Ltd [1994] 1 WLR 521 at 529

B. That principle applies here where the impugned decisions were all made pursuant to contractual powers. Sir James submits that it is not accurate to describe the situation as one of ‘compulsion’ in circumstances where the SRTs were the product of detailed negotiations in which Rydon chose not to participate. In short, whilst the SoS is subject to judicial review, the potential grounds are limited to those set out in *Mercury*, none of which applies here.

Amenability - Discussion

63. The issue under this part is not whether the SoS’s decisions are amenable to judicial review – it is agreed that they are – but as to scope of such review and in particular whether, as the Claimant contends, the full range of judicial review grounds are available, or, as the Defendant contends, only those arising out of allegations of fraud, corruption or bad faith.
64. The more limited scope of judicial review as set out in *Mercury* was considered more recently by the Privy Council in *State of Mauritius v CT Power Ltd* [2019] UKPC 27, a case concerning the negotiation of a commercial contract between the State and a private company for the construction of a new electricity generating plant. At [63] ff, Lord Sales considered the breadth of the State’s discretion in undertaking negotiations:

“63. The power of the Minister of Energy to undertake negotiations with CT Power as part of the conduct of the business of the Government is a wide one, conferring on the Minister a very wide discretion as to how best to proceed. The implication is that the Minister is permitted to participate in the commercial market in the usual way, ie through the exercise of the full bargaining power available to the Government in order to secure the best commercial deal possible and thereby promote the public interest. With that end in view, a court should be astute to ensure that application of public law

standards in relation to the Minister does not cut down or undermine that bargaining power. Nor should public law standards be applied in such a way as to give a potential contracting counterparty a negotiating advantage which has not been bargained for.

64. In negotiating a commercial contract on behalf of the Government, the Minister, as a public authority, is not entirely free from constraints arising under public law. He is obliged to comply with basic public law standards which ensure that he properly seeks to promote the public interest. Accordingly, his decision-making as to how to conduct negotiations before a contract is entered into might be brought into question if, by way of purely hypothetical example, he acted out of personal spite or because he had been bribed. As a result, the potential counterparty is not exposed to what, if they were negotiating with another private party, might be the pure capriciousness of that private party in deciding whether to enter into the contract and on what terms.

65. However, when conducting negotiations, the Minister is entitled to have regard to a wide range of considerations, including political considerations, which would not typically play a role in negotiations between two private commercial parties. In the present case, for example, entering into the Implementation Agreement would involve a commitment potentially requiring substantial payments of public money. There is inevitably a possible political dimension to such questions which it would be legitimate to take into account. In the present case it appears that the incoming government after the general election in December 2014 may have been less convinced than the former government that the project was a good idea and that the commitment to be given in the Implementation Agreement was justified.

66. For these reasons, in the present context the Board takes the opportunity to reaffirm the guidance given by it in the Mercury Energy case, at [1994] 1 WLR 521, 529A-B:

“It does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.”

The limited scope for a judicial review challenge as indicated in this passage reflects the width of the relevant discretion enjoyed by a state enterprise (or, in the present case, the Minister of Energy) when exercising its powers to negotiate a commercial contract or how to use its rights under such a contract.” (Emphasis added)

65. It is clear from this that the contractual context need not be purely commercial for the limited scope of judicial review to apply, as political and other considerations may be at play and rightly taken into account by the authority. In *Hampshire County Council*

v Supportways Community Services Ltd [2006] EWCA Civ 1035, the council had entered into a service agreement with Supportways for the provision of housing related support services pursuant to a scheme established by the *Local Government Act 2000*. The council exercised a contractual right to review the services and concluded that the cost was too high and that the agreement should be determined. Rejecting Supportways' claim for judicial review and an order quashing the result of the review, Neuberger LJ (as he then was) said as follows:

"35 In my judgment, the basis of the Company's case was not in public law, but only in private law. The Company's complaint was that the Council had failed to comply with the Agreement, and the Company accordingly was seeking to enforce the Council's compliance. Subject to being contradicted by a closer analysis of the principles or by binding authority, such a complaint and such enforcement would appear to me respectively to involve a private law claim and a private law remedy, both of which are contractually based, albeit with common law and equitable aspects.

36 In answer to this, Mr Knafler first relied on the fact that the Council's obligations under clause 11.3 were, in reality, public law duties in that they can be traced directly to section 93 and to paragraph 71 of the 2003 Guidance. The fact that a contractual obligation is framed by reference to a statutory duty does not, in my view, render that obligation a public law duty. Of course, where the statutory duty is owed to a contracting party independently of the contractual obligation, he can normally expect to be able to seek a public law remedy by reference to the duty, as well as, or instead of, a private law remedy by reference to the obligation. However, in the present case, the Council's public law duty, namely that arising under section 93, was owed to the Secretary of State in relation to the provision of grants. There was, as it seems to me, no question of that duty being owed to providers such as the Company.

37 Mr Knafler next relied on the fact that the nature of the Agreement, involving as it did the Council performing public administrative functions, was such that a claim brought under it would be a public law claim. That cannot, I think, be right. Virtually any contract entered into by a local authority, almost by definition, will involve it acting in such a way, as otherwise it would be acting ultra vires. Yet, it is clear that, as Mr Knafler rightly accepts, in the case of alleged breaches of many such contracts, a private law claim is the only type of claim which can be brought.

38 Thus, the mere fact that the party alleged to be in breach of contract is a public body plainly cannot, on its own, transform what would otherwise be a private law claim into a public law claim. There are, of course, circumstances where, in a contractual context, a public body is susceptible to public law remedies. However, where the claim is fundamentally contractual in nature, and involves no allegation of fraud or improper motive or the like against the public body, it would, at least in the absence of very unusual circumstances, be right, as a matter of principle, to limit a claimant to private law remedies.” (Emphasis added)

66. In the same judgment, at [55] to [56], Mummery LJ held that:

“55...a public authority could, in principle, both be subject to claims in private law for breach of contract and to judicial review for breach of public law duties or abuse of public law powers in connection with a contract made by it.

56. [However], in order to attract public law remedies, it would be necessary for the applicant for judicial review to establish, at the very least, a relevant and sufficient nexus between the aspect of the contractual situation of which complaint is made and an alleged unlawful exercise of relevant public law powers.” (Emphasis added)

67. What the *Hampshire CC* case makes clear is that the mere fact that a contracting party is a public body or that the contractual obligation in question is “*framed by reference to a statutory duty*” is not sufficient to render that obligation a public law duty. More would be required in the form of “*at the very least, a relevant and sufficient nexus*” between the contractual obligation in question and a relevant public law power. I was also referred to the judgments of Holgate J (as he then was) in *R (Annington Property Ltd) v Secretary of State for Defence* [2024] 1 WLR 365 at [465] and the Court of Appeal in *R (Dudley Muslim Association) v Dudley MBC* [2015] EWCA Civ 1123 at [22] to [26], both of which make similar points.

68. In the present case, the impugned decisions are ones that were taken pursuant to the terms of the Contract and the SRTs. The context is therefore contractual. Moreover, the SRTs (including the terms in question) were ones that were agreed after a process of negotiation between the SoS and the construction industry (or at least those

members of that industry who chose to take part). The fact that the SoS's underlying objectives in that negotiation went beyond the purely commercial and included the desire to achieve an appropriately funded and effective scheme of self-remediation in respect of necessary works in the interests of public safety does not of itself diminish or render insignificant that contractual context. As held in the *Mauritius* case, such objectives are part and parcel of what a public authority may take into account in conducting such negotiations both as to the terms of a contract and as to how those will be applied.

69. Mr Litton's submission as to the statutory architecture behind the Scheme does not, in my view, advance his argument as to the scope of judicial review very far. The existence of that architecture or statutory context is very far from determinative of the question whether the full range of judicial review grounds is available even taking account of the fact that the Contract is specifically referenced in reg. 21 of the RAS Regulations. That reference does no more than confirm the statutory background to the terms; it does not render public the contractual obligations arising out of those terms.
70. It is significant in this case that none of the impugned decisions are said to have been made in the exercise of any statutory or prerogative power, the implication being that it is accepted that these were made in the exercise of contractual powers. What then are the factors, apart from the statutory context, which the Claimant says points to the full range of public law standards being applicable to the exercise of such powers? The Claimant relies on three factors: the first is that the Contract plays a key part of the regulatory mechanism to achieve the statutory purposes of the BSA 2022. However, in the absence of the terms being dictated by statute (which they are not) it

is difficult to see how the exercise of a broad statutory power to establish the Scheme can be said to impose public law obligations in respect of contractual provisions giving effect to that scheme. The enabling provisions of the BSA 2022 and the prescribed requirements under the RSA Regulations are in broad terms and do not descend to the level of stipulating what particular terms should be contained in the Contract or the SRTs. The Claimant suggests in its Skeleton Argument (at [77]) that “*The source of the Decisions is ss. 126 – 129 BSA 2022 and the RAS Regs under which the Scheme was established*”. However, there is nothing in those provisions which can be said to contain any statutory power pursuant to which the impugned decisions were made. Those decisions were made pursuant to contractual provisions which are not directly reflective of any particular statutory provisions. There was therefore no “nexus” between the contractual provisions pursuant to which these decisions were made and any statutory power so as to attract public law remedies: see *Hampshire CC* at [57] per Mummery LJ. The position here is to be contrasted with that in *R (Elliot Associates) v London Metal Exchange* [2024] EWCA Civ 1168 at [79] (on which the Claimant places some reliance), as in that case, the decision was made in the exercise of a regulatory rule that had been expressly incorporated into the relevant contract by reference. That passage in Males LJ’s judgment in *Elliot* was *obiter* in any event and does not assist the Claimant.

71. The second factor relied upon by the Claimant is that Rydon was compelled to enter into the Contract and the SRTs, and the Contract cannot be said to be a ‘normal’ commercial contract freely negotiated between the parties and freely entered into by Rydon. Particular emphasis is placed on the regulatory consequences – including being placed on the Prohibitions List – of failing to sign up to these terms.

72. It is right to say that the consequences of not signing up were severe: as set out above, they include being prevented from undertaking large developments (defined as those of more than 10 homes) and being subject to building control restrictions that would restrict current and future projects. Whilst there was no compulsion as such, in that Rydon could have opted not to sign up, the commercial reality was that any affected entity not willing to substantially downscale its business activity would have to sign up. The question is whether that commercial reality changed the character of the Contract such that it is appropriate to overlay contractual obligations with those arising under public law. I am not persuaded that it does. It is not unusual for a private entity to have to enter into a contract with a particular provider (e.g. with an insurer) as a condition of participating in a given market. Moreover, the terms of the Contract in this case were not imposed ‘from on high’ but were the subject of extensive negotiations with the HBF, the representative of the building industry. That Rydon chose not to participate (in the apparent belief that as a SME provider, the negotiations were not relevant to it) does not undermine the significance of such negotiation. The industry therefore had a substantial say in the terms, which, as a matter of commercial reality, its members would have to sign up to. Of course, one cannot ignore the fact that these negotiations may have been somewhat lop-sided given the Government’s stated intent that the building industry pay a fair share towards the necessary remediation work. However, that seems to me an aspect of the public interest which the SoS was entitled to take into account and to take steps towards securing. It is notable that it is no part of the present claim that there was anything unlawful about that process of negotiation or as to any of the terms of the Contract or the SRTs that were agreed.

73. The Claimant also prays in aid the fact that the Department was unwilling to enter into any further negotiation with Rydon or a side letter. It is said that this is further evidence of the absence of free negotiations. However, Rydon had the opportunity at an earlier stage to participate in the negotiations. It chose not to take that opportunity up. It cannot now complain, after the terms have been agreed with the bulk of the industry, that the Department was unwilling to reopen negotiations especially on its account.
74. The final factor relied upon is that the SoS, in exercising his discretion, was not operating in any sort of commercial market. This point is not understood. The context was no less commercial than that of many contracts between a government department and a private entity, save that in this case the Government, not being the owner of any of the affected buildings, was not a direct beneficiary of the agreed services. However, that does not detract from the fact that there is a contract the terms of which were agreed after a process of negotiation.
75. For these reasons, the Claimant's arguments as to the scope of judicial review in this contractual context do not succeed. Decisions made pursuant to the Contract and the SRTs are amenable to judicial review only on the limited grounds of fraud, corruption or bad faith, none of which is alleged or is extant here. The Claimant has available alternative contractual remedies but complains that such remedies would not provide the relief sought by way of judicial review. However, even if that were so, that is not reason enough to permit public law remedies to be pursued. As held by Mummery LJ in the *Hampshire CC* case at [61]:

“...it cannot be right in principle for a party to a contract with a public authority to have recourse to public law remedies simply on the ground the private law remedies, such as specific performance, are not

available after the relevant contractual obligations have expired, or because they are too vague and uncertain to be specifically enforceable by the court, or because alternative private law remedies, such as damages for breach of contract, are inadequate. The relevant remedies are those available in private law for breach of contract.”

76. That is sufficient to dispose of the claim for judicial review in its entirety. In the event that I am wrong about the scope of judicial review, and for completeness, I go on to consider each of the grounds of judicial review on their merits. In doing so, I bear in mind the need to consider each such ground in the particular contractual context in which it arises. As stated in the *Mauritius* case (at [63]), the Court should be astute not to allow the application of public law standards to cut across or undermine the SoS’s contractual position and confer on the contracting counterparty some advantage which goes beyond that which was agreed.

Ground 1 – Breach of Natural Justice

Ground 1 - Submissions

77. This ground is based on the failure by the SoS to give Rydon an opportunity to respond to evidence submitted by the Interested Parties and the Deputy Mayor of London as to their reservations about appointing Rydon to do the remediation works. Mr Litton submits that in the context of this case, the SoS should at the very least have provided Rydon with the “*gist of the case which [it] has to answer*”: see *R v SSHD ex parte Doody* [1994] 1 AC 531 at 560D to G. Mr Litton also referred me to:

- i) *R (Miller) v Health Service Commissioner for England* [2018] EWCA Civ 144 at [43]:

“The use of the phrase “gist of the allegations” should not be seen to obscure a fundamental right accorded to the person affected by the common law rules of natural justice, namely “to have afforded to him a

reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it””;

- ii) *R (Anglian Water Services Limited) v Environment Agency* [2004] EWHC 1506 (Admin) at [26]:

“Anglian submits that there was a breach of the rules of natural justice in that copies of the letters from Mr Drinkwater and Mr Thomas dated June 17 and July 3, were not sent to Anglian so as to enable them to respond to their contents before the decision was made. The Agency acknowledge that it should have done so and expresses regret at the omission; but submits that it was a lapse that did not have adverse consequences so far as Anglian was concerned as the letters did not contain any new information. I do not agree. The letters set out detailed reasons why the residents considered that a private treatment plant was impracticable, evidence that had not been advanced before the first determination. Anglian should have been given the opportunity to comment on their contents. In my judgment the failure to give Anglian the opportunity to do so was a procedural flaw that rendered the decision-making process unfair.”;

- iii) *Kanda v Government of Malaya* [1962] AC 332 at 337 (Inspector of Police dismissed “without being given a reasonable opportunity of being heard”);
- iv) *R v Secretary of State for the Home Department ex p Sittampalam Thirukumar* [1989] Imm AR at 414 (Asylum seeker unlawfully denied opportunity to see previous answers and reasons for Home Office’s decision).

78. Mr Litton submits that the Deputy Mayor and the RMCs had referred to certain matters, such as a water leak incident in 2010 and the lack of trust in Rydon, which it had no opportunity to answer, and which were taken into account in reaching decisions with very significant financial consequences for Rydon. It is said that this amounts to a breach of natural justice vitiating the decisions.

79. Sir James submits that none of the authorities relied upon by the Claimant established a general right to the provision of information. The contractual context here is important: there is no contractual right to such information and such a right could not

be contractually implied. In any event, Rydon did have the opportunity to make whatever representations it wished, and it ought to have been obvious to Rydon that there were deep concerns on the part of RMCs (and others) as to its fitness (within the meaning of the Contract and the SRTs) to carry out the remediation work.

Ground 1 – Discussion

80. The general principles as to fairness in the administrative context were summarised by Lord Mustill in *Doody* at p560D-G as follows:

“What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest’s fairness will very often require that he is informed of the gist of the case which he has to answer.” (Emphasis added)

81. The present case is concerned not with a statutory discretion but a contractual one, and it is clear that there is no universal right to the provision of information prior to a relevant decision being made. The requirements of fairness may in a particular context be satisfied by simply providing the affected party with the decision and an opportunity to challenge it thereafter: see e.g. *R (FB(Afghanistan)) v SSHD* [2020] QB

185 at [81]. Not only is the context here contractual, but it is also far removed from cases such as *Kanda*, *Miller* or *Sittampalam* which concern disciplinary or adjudicative measures or the fundamental rights of asylum seekers. Whilst the *Anglian Water* case (also cited by the Claimant) did hold that third party representations ought to have been made available to the company before a decision was made, that was in the context of an obligation under s.101A of the *Water Industry Act 1991* which imposed on sewerage undertakers a duty to provide a public sewer in a particular locality if certain detailed statutory conditions are satisfied and where an earlier determination had been reached without reference to such representations. That case is not authority for any general proposition that there is a right to be informed of third-party representations in all cases (and Mr Litton did not suggest it was).

82. The Contract and the SRTs do not provide for any information to be made available, or for a developer to make any representations, prior to the relevant decisions being made. In fact, no procedural requirements are stipulated at all, and it has not been suggested that that is in itself unlawful. This contrasts with other parts of the SRTs where there is such a right, e.g. under Clause 13.18, PDs may query any amount required to be reimbursed on specified grounds. It would be contrary to that contractual scheme if public law rights were to cut across it so as to create rights for Rydon that are not otherwise catered for: see *Mauritius* at [63]. In any case, Rydon has available to it contractual remedies that could be pursued by way of Part 7 proceedings. These could include for example, if Rydon were so minded, a claim that the SoS did not act “reasonably” in reaching the Designation Decision as he was contractually obliged by the definition of “*Designated Participant Developer*” within Annex 1.

83. It is also relevant to note in considering the overall fairness of the process followed that, notwithstanding the absence of any contractual right to make representations, Rydon was afforded the opportunity to do just that. Rydon complains that it could not respond specifically to certain matters raised by third parties including as to the lack of trust. However, given the history of the matter, including the evidence and submissions of the Department during Phase 1 of the Inquiry, the sorts of issues raised by the Deputy Mayor and the RMCs ought to have been obvious. The Deputy Mayor, for instance, highlights Rydon's exclusion from the Help to Buy Scheme - an exclusion that Rydon did not consider commercially worthwhile challenging at the time - and that *"until the Grenfell Tower Inquiry publishes its findings and recommendations, serious concerns remain around the integrity and competence of this developer"*. Similar concerns were expressed by the RMCs albeit by reference to certain dealings with Rydon both before and since the need for remediation arose. This included Rydon's failure to respond substantively to a letter from KDG dated 18 January 2021 enclosing a fire safety report and seeking confirmation from Rydon as to the financial support it would be offering given its role as the developer of the Cable Street Buildings responsible for the defects noted in that report. Realistically, it cannot have gone unnoticed by Rydon that there were such concerns, even without being shown the September 2023 letters, and it could have sought to address them in general terms in its representations, although it is difficult to discern what could have been meaningfully said other than to express disagreement with them. It is also relevant to note that the Department, in testing some of Rydon's claims, asked Rydon about the failure to respond to the 18 January 2021 letter mentioned by the RMCs, thereby expressly affording Rydon the opportunity to address that issue.

84. For these reasons, there was, in my judgment, no breach of natural justice. Ground 1 therefore fails and is dismissed.

Ground 2 – Breach of *Tameside* duty

Pleading issue

85. The first issue under this ground is whether it has been properly pleaded. Paragraph [87] of the Re-Amended Statement of Facts and Grounds (“**RASFG**”) provides that “*The Secretary of State failed in his Tameside duty to investigate adequately or at all whether Rydon is a fit person to carry out or procure the remediation works to the Buildings*”. The Detailed Grounds of Defence (“**DGD**”) complain that this amounts to a bare assertion without adequate particularisation as to what Rydon says the duty requires in this context. The Claimant’s Reply did not elaborate, but the Claimant’s Skeleton Argument does so by explaining that the SoS ought to have asked Rydon to provide documentary evidence as to lessons learned as suggested by officials in Annex C to the First Submission.
86. The question is whether the pleaded *Tameside* ground is deficient and if it is, whether the Claimant is entitled to make good that deficiency through its Skeleton Argument.
87. Mr Litton submits that the *Tameside* ground was always part of the pleaded case and that the Skeleton Argument has merely provided further elaboration. Sir James submits that that will not do and cites the cases of *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 at [67] to [69] (cited in *Keep Bourne End Green v Buckinghamshire District Council* [2020] EWHC 1984 (Admin) at [38]) in which Singh LJ emphasised the need for “*procedural rigour*” in public law litigation and deprecated the practice of grounds of challenge “... “*evolving*” during

the course of proceedings, for example when a final skeleton argument comes to be drafted"; and *R (AB) v Chief Constable of Hampshire Constabulary & Ors* [2019] EWHC 3461 (Admin) at [113] (skeleton argument not to be used as a means of amending grounds relied upon).

88. In my judgment, whilst Ground 2 (originally Ground 1D) of the RASFG is somewhat lacking in detail, it contains sufficient information for the Defendant to understand the case against it. The Defendant would understand from the brief pleaded passage that there was an alleged failure to investigate the question of Rydon's fitness to undertake the remediation works. The precise manner in which that failure arose is not specified, but the RASFG taken as a whole does set out at least part of the factual basis for the allegation in that there is reference to officials highlighting the fact that Rydon may be able to produce documentary evidence to demonstrate that it has changed: see RASFG at [37]. I bear in mind that the claim more generally has been pleaded in considerable detail across almost 40 pages; this is not therefore a case where a Claimant has given the barest possible detail of its case only to start elaborating on the claims at the stage of skeleton arguments.

89. I proceed therefore on the basis that the issue has, in the context of this otherwise very detailed claim, been adequately (albeit not fully) pleaded.

90. I turn then to the substance of Ground 2.

Ground 2 - Submissions

91. Mr Litton submits that it was irrational not to investigate whether Rydon was fit to undertake the works, and, in particular, not to inquire as to evidence that might have demonstrated that Rydon had changed since the time of the initial refurbishment of

Grenfell Tower. Essentially, submits Mr Litton, the Defendant's approach has led to a situation whereby the "sins of Rydon Maintenance" are being visited on other Rydon group companies despite those having a positive track record of remediation in respect of other buildings.

92. Sir James submits that the test is one of rationality, and that, in this contractual context, there was no obligation to investigate unless not doing so would amount to not acting reasonably, in which case the Claimant would have a contractual remedy in any event. Furthermore, given the statutory approach to group companies in this context and Rydon's corporate structure, it was not unreasonable not to dissociate Rydon from Rydon Maintenance entirely, and to consider the question of fitness accordingly.

Ground 2 - Discussion

93. The relevant principles were helpfully summarised in *R (Balajigari) v SSHD* [2019] 1 WLR 4647 at [70]:

"70 The general principles on the Tameside duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261, paras 99—100. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since *Tameside* itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge (*Associated Provincial Picture Houses Ltd v Wednesbury Corp*n [1948] 1 KB 223), it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see *R (Khatun) v Newham London Borough Council* [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material

could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

94. Applying those principles to the present context, it seems to me to be quite clear that there was no failure to undertake sufficient inquiry.
95. Whilst the SoS could have made further inquiries as alleged, he was under no obligation, statutory or contractual, to do so. It is difficult in those circumstances to gain traction with an argument that no reasonable SoS could have proceeded without making such inquiry.
96. The particular area which the Claimant says ought to have been further investigated is whether Rydon had "learned lessons" and changed its practices etc. The first point of note in that regard is that although the Rydon group companies are separate corporate entities, the approach of the RAS Regulations is not to dissociate one group entity from another for the purposes of determining responsibility for the development or refurbishment of a particular building: see e.g., regs. 7(2), 13(3) and 14(2)(b) of the RAS Regulations and the definition of Designated PD in Annex 1 to the SRTs. In the case of Rydon in particular, the evidence of its Group Legal Director, Ms Ivanec as to how the various group entities interrelate is instructive:

"Each of the 3 main operating companies (Rydon Construction, Rydon Homes, Rydon Maintenance) has its own operational and management teams, its own board of directors and a managing director. Each company holds its own board meetings. The managing directors of each operating company are also members of the more senior boards of the Rydon Group. Reporting between companies in the Rydon Group

occurs via monthly meetings of the Rydon Group Board.” (Emphasis added)

97. That evidence suggests that the group companies operated and continue to operate in an integrated way. Furthermore, the concerns raised during Phase 2 of the Inquiry were not confined to one or two rogue individuals within Rydon but appeared to be more systemic in nature. The potential existence of systemic flaws within an integrated group structure means that it is not necessarily unreasonable not to dissociate Rydon in 2023 from Rydon Maintenance in 2014-17 for the purposes of the Designation Decision. In any event, the Minister was made aware of the fact that designation would be in respect of a different corporate entity. As set out in Annex C to the First Submission:

“It was Rydon Maintenance - rather than Rydon Group - that carried out the refurbishment of Grenfell Tower. We note however that when banning Rydon Housing from Help to Buy, the Department has considered that the two entities were sufficiently closely related that it was reasonable to attribute failings by Rydon Maintenance to Rydon Group.”

98. The Help to Buy decision, which also conflated the two group entities, was not challenged by Rydon. It is very difficult, if not impossible, to sustain an irrationality argument against the SoS, when the group companies themselves have effectively allowed a similar failure to dissociate to go unchallenged.
99. In terms of whether Rydon can be said to have changed, there was no obligation to inquire further as to that either. The question under consideration was whether to designate Rydon by reason of it being “unfit” to carry out remediation works. The concept of “unfitness” is not confined to competence alone. It can include other matters relevant to the public interest including, for example, trust and confidence in that PD in relation, in particular, to matters relating to building safety, which may not be a matter that is easily re-established once lost. Such matters could, in this context,

legitimately be viewed on a group basis and there is no irrationality in not seeking documentary evidence from Rydon as to possible changes. It was open to the SoS to proceed with what he had. For the same reasons, the fact that Rydon was successfully remediating other buildings is not decisive. The decision was multi-faceted and involved a lot more than mere competence in remediation.

100. The SoS could have obtained more information, but the fact that he did not do so does not render his decision to proceed without it irrational: see third principle in *Balajigari*.

101. The Claimant seeks to draw a comparison with the SoS's approach to the way in which the RMCs were treated. The comparison is, in my view, wholly inapt. The RMCs were not potentially subject to designation and were in an entirely different position. What information was sought from the RMCs provides no guidance as to whether the SoS acted irrationally with regard to Rydon.

102. It is my view, for the reasons set out, that the SoS did not act irrationally in terms of the scope of inquiry and there was no breach of the *Tameside* duty. Ground 2 therefore fails and is dismissed.

Ground 3 – Failure to take account of Material Considerations

Ground 3 - Submissions

103. Mr Litton's submission under this ground is that there were certain matters that were so obviously material to the decisions that it was irrational to leave them out of account. The matters left out of account (which overlap to some extent with those said to have been inadequately investigated under Ground 2) are said to include the fact that Rydon was not Rydon Maintenance, that Rydon had successfully remediated

numerous buildings, that the evidence as to Rydon Maintenance given to the inquiry was outdated and in respect of a different company, and that the view of Senior Civil Servants that the Cable Street Buildings “*should be transferred*” (as set out in the Dossier) was not included in the Ministerial Submissions.

104. Sir James submits that the first three of these matters were not left out of account and that in respect of the fourth, there was nothing irrational about presenting a balanced summary of the evidence in the Ministerial Submission and leaving the decision to the SoS.

Ground 3 - Discussion

105. In the absence of any express or implied statutory prescription of matters to be taken into account (as is the case here) the question is whether there are some matters that are “*so obviously material to a decision ... that anything short of direct consideration of them by [the public authority] ... would not be in accordance with the Act*”: per Cooke J in *CREEDNZ Inc v Governor General* [1981] NZLR 172, 183 (cited in *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 190 at [117]). It was confirmed in *Friends of the Earth* (at [119]) that “*the test whether a consideration is “so obviously material” that it must be taken into account is the familiar Wednesbury irrationality test ...*”.
106. Applying that test to the matters relied upon by the Claimant, it is plain, in my judgment, that to the extent that any of them were not considered by the SoS, it was not irrational to take that approach.
107. The first matter relied upon, namely that the remediation works would be undertaken by a company other than Rydon Maintenance, *was* taken into account: that fact is

expressly mentioned at [3(g)] of Annex C to the First Submission. The same applies to the second matter, namely the fact that Rydon had remediated or was in the process of remediating other buildings: see [16] to [19] of the First Submission, where the SoS is provided with details as to the precise number of buildings for which Rydon had responsibility and as to the stage remediation had reached for them. There was, however, a difficulty as at the date of the First Submission in assessing whether such remediation works met the required standard, as the relevant information in that regard was not provided to the Department until 30 May 2024.

108. Mr Litton's point appears to be not so much that these matters were not included in the First Submission (since they clearly were), but more that Rydon's successful remediation of other buildings could not possibly have been taken into account because if it had been then the SoS could not rationally have considered Rydon unfit. This was a recurring theme in Mr Litton's submissions under various of the Grounds. In my judgment, the point lacks merit for the simple reason that it is based on a very narrow reading of "unfitness" within the meaning of the SRTs. Clearly, the fact that Rydon had successfully remediated other buildings was a relevant consideration, but it was far from the only one and might arguably even be said not to be the principal one for the purposes of the Designation Decision. The question was whether Rydon (or any of its group companies) *"is currently a person whose conduct is under consideration by a public inquiry regarding their performance or behaviour in connection with building safety matters such that the PD is reasonably considered by DLUHC to be unfit to carry out or procure ..."* the remediation works. The question of 'unfitness' here clearly connotes factors over and above competence and could include things such as trust and confidence in Rydon, the wider public interest or other matters relating to conduct arising in the course of the Inquiry. Rydon may well

have successfully remediated other buildings but that would not necessarily mean that, in light of the evidence presented to the Inquiry (which could, for example, have had the effect of badly eroding trust and confidence), it would be considered ‘fit’ to remediate the Cable Street Buildings having regard to all relevant considerations.

109. There is no contradiction in designating Rydon in respect of some buildings and not others. That is consistent with fitness not being a binary matter based on competence alone and is an outcome contemplated by Clause 7.7 of the SRTs: (“...*either in relation to all relevant Buildings Requiring Work or such Buildings Requiring Work as it may determine...*”). There may be a host of reasons – including timing, locality and local sensitivities or the history associated with particular buildings – why it might be appropriate to designate only in respect of specific buildings.
110. The final matter relied upon under Ground 3 is what Mr Litton described as a “*very significant disconnect*” between the views of two senior civil servants as set out in the Dossier and the information which was included in the First Submission. The point, in short, is that their view that the “*buildings should be transferred*” and that they had “*no specific concerns about Rydon taking over the buildings*” ought to have been made known to the SoS by way of inclusion in the First Submission.
111. Whilst senior civil servants might in some cases make a recommendation to the relevant Minister (as was the case here in respect of some of the matters to be decided) or express a view for the Minister to consider, they will not invariably do so. There will be circumstances where it will be considered appropriate merely to set out the evidence and the options and leave the decision to the Minister. It cannot be said that the views of senior civil servants, who do not have the responsibility for making the decision, were so obviously material that it would be irrational to leave them out

of account. These were not for example the views of expert witnesses on a technical or specialist matter on which the SoS would need assistance; they were views on an issue that would require the SoS to make a value judgment in due course. The Claimant does not suggest that the evidence presented to the SoS in the First Submission is otherwise biased or unfairly summarised. As such, it can be said the SoS had all the information required to make the relevant decisions and nothing obviously material was left out of account. The SoS could have sought the views of the senior civil servants in making his decision, but whether or not he did so was a matter that fell within the “*margin of appreciation within which [he] may decide just what considerations should play a part in his reasoning process*”: *Friends of the Earth* at [116] citing from *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, at 1049.

112. Accordingly, Ground 3 fails and is dismissed.

Grounds 4 & 5 – Predetermination / Improper Motive

113. The Claimant contends that the evidence points to the decisions having been predetermined and/or made with the improper motive of punishing Rydon or making an example of it. Once again, there is a considerable overlap between the points relied upon in support of these grounds and those in support of the grounds considered above.

114. The relevant test to be applied here is “...*whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [decision-making] was biased by predetermination*”: see *Miller* at [57]. In my judgment, there is no evidence in support of the claims of predetermination or improper motive. Dealing first with the allegation of

predetermination and each of the matters set out at [94] of the Claimant's Skeleton Argument, my views are as follows:

- i) It is said that the only factor in favour of the designation is the "*concerns about the oral evidence given by some Rydon employees and former employees*" to the Inquiry. This appears to be based on a somewhat incomplete reading of Annex C to the First Submission from where this quote is taken. On a fair reading of [3] of Annex C, it is clear that several of the sub-paragraphs [3(a) to (h)] either did or could relate to Rydon specifically and which may be relevant to a decision to designate. There is reference, at [3(a)] for example, to the findings of the Phase 1 Report which suggested that the Inquiry did not agree with parts of Rydon's testimony. Furthermore, the concerns about the oral evidence were developed at [3(c)] by citing the evidence that "*Rydon relied entirely on others to secure compliance and lacked the expertise to spot potential non-compliance*". Whilst other criticisms were not directed at Rydon alone, they bolstered the overall picture of concern about Rydon.
- ii) It is said that the Department did not raise these concerns with Rydon. This must be a reference to them not being specifically raised in the process leading to the Designation Decision (and the related decisions), since it is clear that these concerns were raised in the context of the Inquiry in the course of submissions. Indeed, [3(c)] of Annex C identifies the specific passages of the Department's closing submissions for Phase 2 of the Inquiry where these concerns were set out. There can be no reasonable complaint that these concerns were not identified again in the course of the Designation Decision, given the absence of any statutory or contractual requirement to do so and

given that Rydon could not reasonably claim not to be aware that these concerns existed.

- iii) The third point is that the official's view that there was insufficient evidence to reject the Transfer Request was not included in the First Submission. I have already dealt with this "disconnect" point above. There is no substance to it. More importantly, it is difficult to discern how a decision taken by those preparing the First Submission could possibly support the contention that the SoS had predetermined the issue that he had to decide.
- iv) The Claimant complains that the Department continued to have dialogue with the RMCs despite not seeking the Claimant's further views. This is also addressed above under Ground 2. It provides no assistance to the Claimant.
- v) It is contended that the First Submission failed to refer to the other remediation work carried out by Rydon. This contention is mistaken, for the reasons already explained under Ground 3 above.

115. The Claimant submits that these matters taken together with the fact that the SoS took a different view to that of his officials as set out in the Dossier, point to predetermination. I disagree. The fair-minded informed observer would note that there is nothing in any of the points above (whether taken individually or together) that indicate that the SoS had already made his mind up. The inference that the Claimant seeks to draw is based largely on its incredulity that it could be designated as unfit when it was actively remediating other buildings. For reasons already explained, the Claimant's assessment of that issue is based on an unduly narrow understanding of the notion of fitness. It provides no support for the allegation of predetermination.

116. Considerable reliance is placed on the SoS's response to an email querying whether Rydon could start remediation work on some other buildings. The response was as follows:

"Thanks very much for this. SoS was clear that he is designating Rydon, period - but would choose not to issue a direction in respect of those seven buildings referenced.

He has approved the attached letter, which just had minor amends. Can you confirm you're happy for me to e-sign and send, and I will do so on Monday morning." (Emphasis added)

117. It is suggested that the words, *"SoS was clear that he is designating Rydon, period"* indicate a closed mind-approach. There might have been some extremely limited substance to this point if the SoS had used such language long before the date of the decision. However, the fair-minded and informed observer would note that the SoS's view here was being expressed in the course of finalising the terms of the actual Decision Letter itself, the SoS having already expressed his initial decision on 4 January 2024 and could hardly support an inference that there had been predetermination before those decisions were made.

118. The Claimant's case on improper motive is, in my view, equally lacking in substance. (There is a pleading issue which I dismiss for reasons similar to those set out in respect of the previous pleading point). That case relies to some extent on the same points as for predetermination. To the extent that it does, the same reasoning as above applies to those points, which also do not support the claim of improper motive.

119. The additional factors relied upon here are: (i) the SoS's decision that the Cable Street Buildings be remediated to the CAN standard as opposed to the less exacting PAS 9980 standard, which entailed adverse financial consequences for Rydon, amounting in effect to a "fine"; (ii) the SoS's decision was contrary to the Ministerial "steer" that

a Transfer Request should be granted by officials if the deadline for remediation was within 3 months; and (iii) there is no explanation for the SoS's conclusion that there was a material risk of delay to the remediation works given that Rydon had already indicated that it was in a position to commence those works within 28 days of transfer.

120. As to (i), remediating to the CAN standard was a legitimate option, the costs consequences of which were fully set out in the First Submission. The Claimant does not contend otherwise. In those circumstances, it is difficult to see how a decision to take a lawful option could be evidence of the serious charge of acting with an improper motive.
121. As to (ii), the Ministerial Steer referred to was given at a considerably earlier stage in the process prior to the Designation Decision and was not directed at a particular developer. The refusal of Rydon's Transfer Request was pursuant to the Contract and SRTs following the Designation Decision. That process does not suggest any improper motive.
122. Finally, as to (iii), it was not irrational to consider that there was some risk of delay in circumstances where, on the one hand there were GFAs ready to be signed with REs and works (on the information at that time) apparently ready to start, and on the other, there was an assurance from Rydon as to a promised start time. It is right to say that the position was not such that it could definitively be said that the former route would be substantially quicker. However, it was a question of judgment at that stage which cannot be impugned as being irrational or indicative of some ulterior or improper motive.
123. For these reasons, Grounds 4 & 5 fail and are dismissed.

Ground 6 – Wednesbury irrationality / Failure to provide reasons.

124. Mr Litton’s oral submissions on Ground 6 focused on two matters: first, it was submitted that there was no rational explanation for considering that the “*troubling evidence*” about Rydon Maintenance meant that Rydon was unfit, particularly as the latter had already successfully remediated 15 buildings; and second, that it was irrational to rely in the Decision Letter on the counterfactual of having reached Stage D when that was not in fact the case, particularly when Rydon had given a reliable assurance that it could start remediation work within 28 days.
125. The first of these has already been considered under Grounds 1 to 5: see, in particular, [108] above. It does not establish irrationality.
126. The ‘counterfactual’ argument also fails to demonstrate irrationality. The passage of the Decision Letter relied upon by the Claimant (highlighted below) must be considered in context:

“Each of these buildings suffers from life-critical fire safety defects. By default, they are classified by the SRTs as Stage C Fund Buildings, because at the time Rydon entered into the Contract as the Participant Developer for its group (15 September 2023), awards of full funding had been communicated to the Responsible Entities but the Grant Funding Agreements (“GFAs”) had not yet been signed by all parties, DLUHC not yet having provided its countersignature.

Had the GFAs been countersigned by DLUHC by 15 September 2023, the buildings would have been automatically classified as Stage D Fund Buildings and the planned works programmes would have commenced on or around 30 October 2023.

Stage C and D Fund Buildings are to be contrasted with Stage A and B Fund Buildings (where no award of full funding has been communicated as at the date of the Contract). Whereas the default position is that Stage A and B Fund Buildings will be transferred to the relevant Participant Developer (see generally clause 12 of the SRTs), a Stage C Fund Building may only be transferred to a Participant Developer where it requests this in writing and “DLUHC, acting reasonably, accepts such request” (clause 13.2). Stage D Fund

Buildings may not be transferred to Participant Developers to carry out remediation works themselves (see clause 13.8)...” (Emphasis added)

127. It is apparent, when read as a whole, that this passage, which comes under a section of the Decision Letter headed “The buildings”, is setting out the background to the decisions and does not purport to form part of the rationale for them. Moreover, the SoS acknowledges in unambiguously clear terms that the Cable Street Buildings are presently at Stage C, the Department “*not yet having provided its countersignature*”. In referring in the next sentence to what would have transpired had the countersignature been applied by 15 September 2023, the SoS was doing no more than highlighting the advanced stage that the process had already reached within Stage C. There is, to my mind, nothing remotely irrational or unreasonable in his doing so, and it cannot reasonably be suggested that the SoS was thereby proceeding on the basis of the counterfactual rather than the position as it actually stood at the time.
128. The final substantive point under this ground concerns the SoS’s reliance upon the risk of delay to remediation as part of the justification for the Clause 7.7(B) Decision. This is said to be irrational because Rydon had indicated that it would have been in a position to commence works within 28 days, and the officers’ assessment had been that there was credible evidence that Rydon could meet the start dates.
129. The relevant passage of the Decision Letter is as follows:

“In reaching this decision, DLUHC has carefully considered whether to require Rydon to fund directly the Responsible Entities to enable them to arrange the necessary remediation works (i.e. in accordance with clause 7.7(A) of the SRTs), instead of the Responsible Entities receiving the funding approved by the BSF. In this regard, DLUHC acknowledges evidence you have provided to the effect that the scope and cost of works may be reduced if the buildings are not retained within the BSF. However, DLUHC considers that there is a material risk that this course of action could lead to delays in the

commencement of the works and has therefore decided to exercise its right under clause 7.7(B) to designate the three buildings as Stage D Fund Buildings instead. As noted above, the GFAs between the BSF and the Responsible Entities for the three buildings have already been prepared and the planned works programmes can therefore commence with minimum further delay.”

130. The delay to which the SoS refers is that which would arise had there been a direction pursuant to Clause 7.7(A), which would require Rydon to fund works undertaken *by the REs*; whether or not Rydon was in a position to start works within 28 days was irrelevant to that direction as it would have been the REs doing the works in any event.
131. Even if that had not been the case, it would not have been irrational to take account of the risk of some delay for the reasons considered above at [122].
132. The final point arising in the Agreed List of Issues under this Ground is whether adequate reasons were given for the Designation Decision. This ground is not explained or developed in the Claimant’s Skeleton Argument and was only mentioned briefly by Mr Litton by way of Reply. I can deal with it similarly briefly by stating that I can see no basis whatsoever for the suggestion that the reasons are inadequate.
133. Accordingly, Ground 6 fails and is dismissed.

Conclusion

134. The contractual context of this claim means that judicial review is limited to a claim on the grounds of fraud, corruption or bad faith, none of which applies here. Even if that is wrong, the claim fails on the merits as none of the grounds for seeking judicial review are made out for the reasons set out above.
135. The claim for judicial review is dismissed.

136. In the circumstances, it is unnecessary to go on to consider the final issue in the agreed List of Issues which is whether s.31(2A) of the *Supreme Court Act 1981* applies.
137. I am grateful to all Counsel and their legal teams for the helpful and concise way in which this matter was presented. I am particularly grateful to junior Counsel on both sides for their assistance in finalising the judgment for handing down.



Neutral Citation Number: [2025] UKUT 298 (LC)

Case No: LC-2024-352

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

Ref: LON/00AG/LSC/2023/0012

Rolls Building, Fetter Lane, London, EC4A 1NL

16 September 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

CATCHWORDS – BUILDING SAFETY – LEASEHOLDER PROTECTION – Sch 8, paragraph 8, Building Safety Act 2022 – relevant defect – cladding and cladding system – meaning of unsafe – qualifying lease – appeal dismissed

BETWEEN:

**ALMACANTAR CENTRE POINT NOMINEE NO.1 LTD (1)
ALMACANTAR CENTRE POINT NOMINEE NO.2 LTD (2)**

Appellants

and-

**PENELOPE DE VALK AND 12 OTHERS
(LISTED IN ANNEX 1)**

Respondents

**Centre Point House,
15A St Giles
High Street,
London,
WC2H 8LW**

**Judge Siobhan McGrath and Mrs D Martin TD MRICS FAAV
15-17 July 2025**

Martin Hutchings KC and Harriet Holmes for the appellant, instructed by Bryan Cave Leighton Paisner LLP

Justin Bates KC and Mattie Green for respondents 1 – 10, instructed by Howard Kennedy LLP

Samir Amin for respondents 11 and 12, instructed by direct access

Simon Allison KC for respondent 13, instructed by Forsters LLP

The following cases are referred to in this decision:

Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point [2025] EWCA Civ 856
BDW Trading Ltd v URS Corporation Ltd [2025] UKSC 21
Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586
Irvine's Estate v Moran (1992) 24 H.L.R. 1
Lehner v Lant Street Management Co Ltd [2024] UKUT 0135
McNutt v Transport for London [2019] EWHC 365
R (on the application of Maugham v Senior Coroner for Oxfordshire) [2020] UKSC 46
R (on the application of N) v Walsall Metropolitan Borough Council [2014] EWHC 1918
R (The Good Law Project) v Electoral Commission [2018] EWHC 414 (Admin)
Rhine Shipping DMCC v Vitol SA [2024] EWCA 580
Triathlon Homes LLP v Stratford Village Development Partnership [2025] EWCA Civ 846

Introduction

1. This is an appeal against the decision of the First-tier Tribunal (the FTT) dated 25 March 2024 where it determined on an application under section 27A(3) of the Landlord and Tenant Act 1985 that no service charges would be payable by a number of respondent lessees in respect of proposed works to the façade of the subject property known as Centre Point House (CPH). The issue for the Tribunal concerns the provisions of the Building Safety Act 2022.
2. The Building Safety Act (BSA) has recently been considered by both the Supreme Court and the Court of Appeal, and further reference will be made to those cases during the course of this judgement. In each of the cases the context of the BSA was considered. In *BDW Trading Ltd v URS Corporation Ltd* [2025] UKSC 21 Lord Hamblen described the origin of the BSA as follows:

“1. On 14 June 2017 a fire broke out at Grenfell Tower in London leading to the tragic death of 72 residents of the 24-storey tower block. It later transpired that the main reason why the fire engulfed Grenfell Tower so quickly was the use of unsafe cladding around the outside of the building, which did not comply with relevant building regulations.

2. Investigations carried out following the fire led to the discovery that a number of high-rise residential buildings across the country were subject to serious safety defects. Aside from unsafe cladding, other issues were identified, including other fire safety concerns, such as lack of compartmentation and flammable balconies, and serious structural defects that gave rise to risks of buildings (or parts of buildings) collapsing.

3. The Government encouraged developers to investigate medium or high-rise developments for which they were responsible and to carry out any necessary remedial work for safety defects discovered. In 2022 this encouragement was reinforced by legal responsibilities imposed on developers and contractors under the Building Safety Act (the “BSA”).”
3. The points in issue in this appeal have not been specifically considered previously. The case is therefore of importance.
4. The appeal was heard over three days, having been adjourned from December 2024 on an application to amend the grounds of appeal. On the first day of the hearing, the Tribunal inspected CPH. The appellants are Almacantar Centre Point Nominees (Almacantar) who are the freeholders of CPH. At the hearing of the appeal Almacantar was represented by Martin Hutchings KC and Harriet Holmes of counsel. Although there is a total of 36 flats at CPH only those who own the leases of 18 of the flats are respondents to the appeal. A number of flats are owned by Almacantar, and others are not owned by “qualifying” leaseholders. The respondent lessees are specified at the end of this decision. At the hearing R13 was represented by Simon Allison KC, Rs 11 & 12 were represented by Samir Amin of counsel and the remaining respondents were represented by Justin Bates KC and Mattie Green of counsel.

5. On 8 May 2024 the FTT gave Almacantar permission to appeal on Grounds 1-4 of their application but refused permission on Ground 5. We deal with Ground 5 at the end of this decision. On 27 January 2025, this Tribunal gave the appellants permission to appeal a new Ground 1A. The following are the Grounds on which permission has been granted:

Ground 1 - the FTT erred in concluding that paragraph 8 of schedule 8 to the BSA applies to the Proposed Scheme of remediation.

Ground 1A - for the avoidance of doubt, the FTT erred in concluding that paragraph 8 of schedule 8 to the BSA applies to the Proposed Scheme of remediation not only by misconstruing the requirements of paragraph 8 itself, but also by concluding that, the fact that the Proposed Scheme did not involve remediating a “relevant defect” did not matter and that, despite this, paragraph 8 of Schedule 8 was still in principle engaged.

Ground 2 – the FTT was wrong to conclude that each and every part of the Proposed Scheme was caught by paragraph 8 of schedule 8 to the BSA.

Ground 3 – The FTT erred in concluding (in light of the approach it took in relation to grounds 1 and 2) that the façade at CPH comprised a “cladding system” that “forms the outer wall of an external wall system” and which “is unsafe” within the meaning of and for the purposes of paragraph 8 of schedule 8 to the BSA.

Ground 4 – In the result, the FTT erred in concluding that the façade at CPH “comprises an unsafe cladding system to which paragraph 8 of schedule 8 [to the BSA] applies” and accordingly, that no service charge or reserve fund is recoverable in respect of the Proposed Scheme or under the QLTA from any lessee who holds a “qualifying lease”.

Centre Point House

6. We adopt the description of CPH from the decision of the FTT:

“1. Centre Point Tower, sitting at the intersection of New Oxford Street, Charing Cross Road and St Giles High Street in WC2H and at the crossroads of Oxford Street and Tottenham Court Road, was commissioned by millionaire property tycoon Harry Hyams during the commercial rents boom of the early 1960s. It was one of the first London skyscrapers to be developed. It was a controversial development. Many questioned how permission was granted by the local authority for the 34-storey Tower in the then-relatively low-rise London skyline on a busy traffic junction. It was designed by Richard Seifert and Partners, engineered by Pell Frischmann, and constructed by Wimpey during 1963 – 1966.

2. Mr Hyams was determined that it would be occupied by a single commercial tenant, and it remained empty until 1975. In 1974, it was unlawfully occupied for a

short period by housing activists, including Jim Radford, Ron Bailey, and the late Mr John Eugene Joseph Dromey (known as Jack; later to become an MP who continued in the campaign for housing), in protest over the vast space remaining unoccupied while a housing crisis deepened, and people slept rough at its doorstep. The charity Centrepont, set up by Reverend Ken Leech in the basement of St Anne's church in Soho in the shadow of the Tower, took its name from the building, calling it an "affront to homelessness". In 1995 it, and its neighbouring buildings in the estate, were given Grade II listing status.

3. This case is about its humbler but no less experimental neighbour, Centre Point House, 15A St Giles High Street, London WC2H 8LW ('CPH'). Little is known about why it was constructed or Mr Hyams' intentions in respect of it. It is thought by the experts in this case that perhaps CPH was intended also to be leased by whichever single wealthy commercial occupant Mr Hyams had in mind, possibly to offer on-site overnight accommodation for its employees. It too appears to have lain empty for a very substantial period. It is believed that in or around 1987 the substantial part of CPH was finally converted to residential leasehold flats.

.....

5. CPH is connected with Centre Point Tower by a 'link' building, which is also commercial/retail/restaurant space. Within the six residential storeys are situated 36 duplex flats, which interlock with each other 'Tetris'-like in a stepped-L pattern. There is no number 13, and so the numbers run from 1 at the lowest storey to 37 at the upper. Entrance corridors are on the 3rd, 5th and 7th floors only, onto north and south stair cores (which form no part of this application). We understand that 10 flats are retained in the ownership of Almacantar Group Limited. The remainder are in residential occupation by their owners or sub-tenants.

6. Each of the flats has a projecting balcony. The east and west elevations comprise timber framed glazing and a spandrel glazing 'wrap' around the projecting balconies (accessed by a timber sliding door set into the glazed screen), formed by an internal timber ladder frame, with external aluminium pressure plates, glazing panels, and window lights."

7. The hardwood timber-framed window façade has deteriorated over a number of years. To understand that deterioration it is necessary to know a little more about CPH's construction. The FTT found that:

" 7. The framing system is unusual, in that the dominant structural element is at the horizontal instead of the vertical... The upper horizontal frame sits on a metal bracket... Mortise and tenon joints join the vertical members into the structure. The horizontal members are only fixed back to the building at the ends, by metal restraint fixings designed to take wind load.

8.Where the glazed façade passes between party walls or floor slabs, glazed back-painted annealed glass spandrel panels have been inserted. Behind each of the spandrel panels is a thin layer of polystyrene insulation, and then a gap before the dwarf blockwork or concrete wall, behind and onto which the window lights are fixed.

.....

10. The glazing was constructed by pressing glazing tape against the timber frames, pressing the glass panels onto the tape, and then applying two layers of glazing tape to aluminium clamp strips which are aligned with the frame and pressed to the outside of the glass. Fixing screws are then driven in and tightened to ensure that the clamp strip is fixed tight against the nosing of timber at the front edge of the frame. Joints are then sealed with mastic.”

8. In consequence the FTT said that:

“11. The difficulty with this construction is that small gaps between the pressure plates to allow for movement between adjunct frames will result in water ingress, as do any screw holes in respect of which the sealant has failed. Once water is in the system, there is limited ability for it to evaporate off (as it would in a normal timber system), as it is sealed in by the impervious aluminium clamp strip, glass and glazing tape. It therefore remains in the timber, forming interstitial condensation which in turn leads to degradation and (eventually) rot of the timber members. Further over-sealing the system will only keep such water as has made its way past the gaps in the system, exacerbating the problem and promoting further decay.”

9. As a result the FTT found at paragraph 138 that “... *The façade at CPH is not in good and substantial repair and condition, has been inherently defective from the date it was completed and its physical condition has deteriorated over time as a consequence.*”

10. The scheme to address the deterioration is referred to as “the Proposed Scheme” which was described by the FTT as follows:

“13. It is proposed by the Applicants that in order to resolve this problem a steel stick curtain wall system including bespoke steel hollow section frames with integrated double glazed vision panels and opaque insulated spandrel panels be superimposed on the existing timbers and fixed to the concrete structural frame, rendering those timbers non-structural (‘the Proposed Scheme’).”

11. The FTT’s decision is based on its findings about the state of repair of the façade to the building and its construction of the occupational lease terms. The application before the FTT was made by Almacantar under section 27A(3) of the Landlord and Tenant Act 1985 (the 1985 Act). In the proceedings Almacantar sought a determination of the payability of the cost of proposed works to remedy the defective façade. The FTT determination dealt with a number of issues which are not relevant to the appeal. The FTT’s decision is comprehensive, clear and carefully reasoned.

12. At first instance, a key issue for determination was the assertion by a number of the lessees at CPH that Almacantar had no right under their leases to carry out the proposed work to the defective façade and accordingly that no service charges would be payable for the work. The FTT’s decision was that the works did fall within the landlord’s repairing obligations and that the lessees would be liable under the service charge provisions to contribute to the cost. However, the FTT also found that a number of lessees were entitled to rely on Part 5 of the BSA and by reason of the “leaseholder protections” afforded by the

legislation were not required to pay any part of the service charge attributable to “cladding remediation.” The question of whether the FTT were correct in reaching this conclusion is the subject of this appeal.

The Building Safety Act 2022

13. The purpose of the BSA is “to make provision about the safety of people in or about buildings and the standard of buildings...” The BSA is substantial and wide ranging. It is in 6 Parts which *inter alia* establish a building safety regulator (Part 2), amend the Building Act 1984 (Part 3), make specific provision in respect of the management and maintenance of “higher risk buildings” (Part 4). Part 5 includes provisions about remediation and redress, a new homes ombudsman, construction products, fire safety, the regulation of architects and about housing complaints.
14. We are concerned with the earlier provisions of Part 5, namely sections 116 – 124 and Schedule 8. An overview of this part of BSA was given by the Court of Appeal in *Triathlon Homes LLP v Stratford Village Development Partnership* [2025] EWCA Civ 846 and *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point* [2025] EWCA Civ 856 where Lord Justice Newey said as follows:

“13. The BSA’s long title identifies one of the purposes of BSA as “to make provision about the safety of people in or about buildings and the standard of buildings”. Part 5 of the BSA, comprising sections 116-160, contains, as its heading states, “Other provision about safety, standards etc”. Section 116(1) explains that sections 117-124 and schedule 8 “make provision in connection with the remediation of relevant defects in relevant buildings”.

14. Schedule 8 to the BSA is introduced by section 122 . As section 122 states, 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).”

Subject to certain exceptions, a “relevant building” is “a self-contained building, or self-contained part of a building, in England that contains at least two dwellings and (a) is at least 11 metres high, or (b) has at least 5 storeys”: see section 117(2) .

“Relevant defect” is defined by section 120(2) to refer to “a defect ... 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”. By respectively section 120(5) and section 120(3) , “building safety risk” is “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” and “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” is specified as the period of 30 years preceding the coming into force of section 120: see section 120(3).

15. Paragraph 2 of schedule 8 to the BSA provides that no service charge “is payable” under a lease of premises in a relevant building in respect of a “relevant measure” (i.e. a measure taken to remedy a defect or a “relevant step” taken in relation to a defect) relating to a relevant defect if the landlord or any superior landlord at the beginning of 14 February 2022 “(a) is responsible for the relevant defect, or (b) is associated with a person responsible for a relevant defect”. For the purposes of paragraph 2, a person is “responsible for” a 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.”

16. Unlike paragraph 2, paragraphs 3-9 of schedule 8 to the BSA apply only in relation to “qualifying leases”. By section 119(2), a lease is a “qualifying lease” if:

(a) it is a long lease of a single dwelling in a relevant building,

(b) the tenant under the lease is liable to pay a service charge,

(c) the lease was granted before 14 February 2022, and

(d) at the beginning of 14 February 2022 ... —

(i) the dwelling was a relevant tenant’s only or principal home,

(ii) a relevant tenant did not own any other dwelling in the United Kingdom, or

(iii) a relevant tenant owned no more than two dwellings in the United Kingdom apart from their interest under the lease.’

A “relevant tenant” is a person who was a tenant under such a lease at the beginning of 14 February 2022: see section 119(4)(c). Where, however, a dwelling was at that point let under two or more leases to which subsection (2)(a) and (b) apply, “any of those leases which is superior to any of the other leases is not a ‘qualifying lease’”: see section 119(3). (For completeness, I should mention that a new section, section 119A, was added by the Levelling-up and Regeneration Act 2023 to extend the protection for leaseholders where a “qualifying lease” has been extended, varied or replaced by a new lease.)

17. Paragraphs 3-9 of schedule 8 to the BSA all serve to relieve tenants with “qualifying leases” from liability for service charges. By paragraph 3 , no service charge “is payable” under a qualifying lease in respect of a relevant measure relating to a relevant defect if the net worth of the landlord’s group at the beginning of 14 February 2022 was more than a specified multiple of £2 million (the “contribution condition”). By paragraph 4 , no service charge “is payable” under a qualifying lease in respect of a relevant measure relating to a relevant defect if the value of the qualifying lease at the beginning of 14 February 2022 was less than either £325,000 (in the case of property in London) or £175,000 (elsewhere). By paragraph 5 , a service charge which would otherwise be payable under a qualifying lease in respect of a relevant measure relating to a relevant defect “is payable” only in so far as service charges over a period extending back five years have not exceeded the “permitted maximum” set by paragraph 6 . By paragraph 7 , a service charge which would otherwise be payable under a qualifying lease “is payable” only in so far as service charges over the previous 12 months have not exceeded the “permitted maximum”. By paragraph 8 , no service charge “is payable” under a qualifying lease in respect of the removal or replacement of any part of a cladding system that forms the outer wall of an external wall system, and is unsafe.”

15. Thus, section 122 and schedule 8 to the BSA provide a scheme where lessees are protected from the burden of paying service charge costs to a greater or lesser extent depending on which of the various protections in schedule 8 they are entitled to rely upon.
16. Paragraphs 2, 3 and 4 of schedule 8 are all stated to be intended to mitigate the costs of remediation by the taking of “relevant measures” to address “relevant defects.” The cap in paragraph 5 only applies to such measures.
17. Paragraph 8 is also confined to qualifying leaseholders but makes no mention of “relevant measures” or “relevant defect.” It states:

“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.”

18. Against that background the primary issue in this case can be more easily understood. Put simply the question is whether paragraph 8 of schedule 8 applies to defective cladding which is not also a “relevant defect” and if so, are the works that are proposed to the façade of CPH “cladding remediation” within the meaning of paragraph 8?
19. As already noted, the FTT had found that the defects to the façade of CPH originated in its original design and construction which took place between 1963 and 1966. By section 120 a “relevant defect” is a defect that, as a result of “relevant works,” causes a building safety risk. By section 120(3) relevant works must have been carried out within the “relevant period” being 30 years ending with the date the section came into effect which was 28th

June 2022. The works proposed to CPH cannot therefore be “relevant measures” to address “relevant defects.”

20. In respect of the first question, namely whether the ambit of paragraph 8 extends to cladding works which are not necessarily “relevant defects” the FTT found that: “220. *We are satisfied that the ordinary and clear meaning to be given to the words of paragraph 8 is that cladding remediation is to be treated as a distinct protection outside of the waterfall, not contingent on there being a ‘relevant defect’ and therefore not incorporating the requirement that the cladding in question needs to have been put on the building within the relevant period - the 30 years preceding 14 February 2022 - as section 120 is not engaged.....*”

And observed that as a result: “*Primarily..... no qualifying leaseholder will ever have to pay for unsafe cladding remediation. That is neither unclear or ambiguous and does not lead to absurdity. It accords with the schema of the 2022 Act.*”

21. The background to sections 116-124 of the BSA is described in *Adriatic* as follows:

“28. The Bill which became the BSA was introduced to Parliament on 5 July 2021. At that stage, the principal purpose of the Bill was to give legal effect to recommendations which had been made in a 2018 report by Dame Judith Hackitt on building regulations and fire safety. The Bill also included (to quote Mr Murphy):

“some measures to protect leaseholders and improve redress in respect of historical building safety defects, namely by retrospectively extending the limitation period under section 1 of the Defective Premises Act 1972 claims from six to 15 years (so that leaseholders would be better able to recover the costs of putting work right from those who caused the problem) and by requiring landlords to explore alternative cost recovery before passing costs on to leaseholders.”

29. On 10 January 2022, the Government announced that it had “reset its approach to building safety with a bold new plan to protect leaseholders and make wealthy developers and companies pay to fix the cladding crisis”. Soon afterwards, on 13 January, the Government tabled amendments to the Building Safety Bill. A further and more substantial set of amendments followed on 14 February (when the Bill was at the Committee stage in the House of Lords) and some additional amendments were put forward on 22 March (at the House of Lords Report stage). The amendments introduced for the first time what became sections 116-125 of the BSA and schedule 8 to it”

Statutory Construction

22. It is the appellants’ case that paragraph 8 must be read in the context of the whole of schedule 8 and that “relevant works” and therefore “relevant defects” are key to its construction and must be taken to apply to paragraph 8 as to all other paragraphs. To do otherwise, it is contended, would lead to extraordinary and significant consequences for landlords.

23. On behalf of the respondents, it is said that the words of paragraph 8 are clear and unambiguous and that the difference between that paragraph and the other material provisions of Part 5 is deliberate and accords with the legislative purpose of the BSA.
24. On behalf of Almacantar, Mr Hutchings submitted that the plain intention of the legislation was to prevent qualifying leaseholders from having to pay for remediating “unsafe cladding” in buildings constructed or worked on after 1992. In particular, he said there was no intention to prevent landlords from recovering the costs of anything else. On behalf of the respondents, Mr Bates disagreed asserting that the BSA represented a radical intervention by Parliament in response to a number of overlapping crises including Grenfell, the wider building safety crisis culture of building, construction and management industries and the likelihood of leaseholders facing ruinous costs and that Parliament had decided that leaseholders should be protected against the costs of remediating historical building safety defects that they had no part in creating.
25. All parties agreed that broadly the primary source for statutory construction must be the precise words of the statute in question read in context and that the role of external aids is secondary, see for example *R (The Good Law Project) v Electoral Commission* [2018] EWHC 414 (Admin) and in construing an enactment, the court should aim to give effect to the legislative purpose: *Bennion, Bailey & Norbury on Statutory Interpretation* (Eighth edition) at 12.2] (*Bennion*).
26. The court can only have regard to ministerial statements about the purpose or meaning of legislation if three conditions are satisfied:
 - a. the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity;
 - b. the material must be or include one or more statements by a minister or promoter of the Bill; and
 - c. the statement must be clear and unequivocal on the point of interpretation that the court is considering.
27. The status of explanatory notes was considered by the Court of Appeal in *Adriatic* where it was decided that where explanatory notes in respect of a statute did not exist when it was being passed, they may show what the Department which promoted the BSA understands it to mean, and possibly what it wished it to mean, although they cannot have informed Parliamentary decision-making and accordingly, where explanatory notes have been published only after a statute has already been enacted, the notes may be of persuasive authority, but they do not enjoy any particular legal status and can be compared with academic writings.
28. The court’s duty is to arrive at the legal meaning of the enactment. The legal meaning of an enactment is the meaning that conveys the legislative intention. However, “the search for legislative intention is not a search for the actual subjective intention of a particular group of politicians, but an objective search for the intention that must be imputed to the legislature by reference to the meaning of the words used and the context in which they

are used”: *McNutt v Transport for London* [2019] EWHC 365 per Knowles J at [27].

29. Mr Bates additionally made reference to *R (on the application of N) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 at [65] in support of the following proposition: “When courts identify the intention of Parliament, they do so assuming Parliament to be a rational and informed body pursuing the identifiable purposes of the legislation it enacts in a coherent and principled manner. ... In essence, the courts interpret the language of a statute or statutory instrument as having the meaning which best explains why a rational and informed legislature would have acted as Parliament has. Attributing to Parliament an error or oversight is therefore an interpretation to be adopted only as a last resort.”
30. If it is maintained that Parliament has made an error, he said, the court must be mindful of its proper constitutional role. As Lord Nicholls explained in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 (p.592):

“A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words that Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation ...”

Relevant Defect - Argument

31. The words of paragraph 8 are indeed clear: “No service charge is payable under a qualifying lease in respect of cladding remediation.” And cladding remediation means the removal or replacement of any part of a cladding system that forms the outer wall of an external wall system and is “unsafe.” No reference is made to “relevant defect.” However, Mr Hutchings contends that the context of and the remaining parts of schedule 8 and sections 116-124 undermine that clarity.
32. Firstly, he referred to section 116(1) which provides that sections 117 to 124 and schedule 8 “make provision in connection with the remediation of *relevant defects* in relevant buildings.” Secondly, he referred to section 122 which introduces schedule 8 as follows:

“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)”

The clear import of both sections and the purpose of schedule 8 is, he said, to deal with relevant defects and nothing else. Whilst the key words of paragraph 8(1) do not refer specifically to relevant defects they do not need to as, he argued, it is obvious from sections 116 and 122 as well as each of the other paragraphs of schedule 8, that its scope is confined to relevant measures in relation to relevant defects. He contended that a section providing an overview of what is intended to be covered by the BSA or part of an Act is admissible and relevant as regards interpreting particular, succeeding sections (or schedules) even if it contains no substantive content (*Bennion* p.451) He submitted that what paragraph 8 is dealing with is a specific *type* of relevant defect.

33. In support of that submission he said that whilst schedules to Acts should be read as far as possible consistently with their ‘introducing’ sections they are nevertheless subsidiary to sections of Acts: ‘It is desirable to include in a schedule matters of detail; it is improper to put in a schedule matters of principle. The drawing [of] the proper line of demarcation between the two classes of matters is often difficult. All that can be said is that nothing should be placed in a schedule to which the attention of Parliament should be particularly directed....’ (Lord Thring, *Practical Legislation* (1877), approved in *R (on the application of Maugham v Senior Coroner for Oxfordshire* [2020] UKSC 46 at [44] per Lady Arden).
34. Furthermore, he contended, that interpretation sits with the overall policy underlying the leaseholder protections as expressed in the Explanatory Notes which, although published after the commencement of the BSA still provide supportive commentary. Paragraph 957 is as follows:

957. The leaseholder protections deal only with historical building safety defects; they are backward-looking only. They are a one-off intervention designed to deal with the current serious problems with historical building safety defects in medium- and high-rise buildings. The protections afforded only apply to defects created in the 30-year period prior to commencement of the provision, so in practice between mid-1992 and mid-2022. A 30-year period has been chosen as evidence shows that this period captures all buildings affected by the relevant safety issues. It aligns with changes this Act makes to the limitation period under section 1 of the Defective Premises Act 1972 (to which see section 135) and the relevant limitation period under the new cause of action relating to cladding products (sections 150 and 151). The Government has also agreed with major residential property developers that they will remediate buildings they had a role in developing or refurbishing in the past 30 years.”

Paragraphs 984 and 985 state:

“984. Schedule 8 makes provision for service charge payments in respect of relevant defects not to be payable by leaseholders in certain circumstances. By limiting or preventing altogether the amounts that are payable in respect of these defects from being passed on to the leaseholders through the service charge, leaseholders are protected from the costs associated with their remediation.

985. *Schedule 8 removes the existing legal presumption under most leases that leaseholders are liable in full for the costs associated with remediating relevant defects. The Schedule and powers contained within it make provision for liability to sit in the first instance with landlords who are deemed to be responsible for the creation of those defects, and then with landlords that can afford to meet the costs in full. Where neither of these circumstances applies in respect of any relevant landlord, the Schedule provides for an equitable spread of costs, commensurate with a party's likely ability to contribute to costs....*"

35. Mr Hutchings argued that paragraphs other than 2 to 7 in Schedule 8 were also indicative of Parliament's intention to provide a coherent structure to deal with relevant defects. He drew our attention to paragraph 9 which provides that "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*" He said that it cannot have been the intention of Parliament not to afford this protection against legal costs to cladding litigation that did not also qualify as costs to remediate relevant defects.
36. He also cited paragraph 12 which allows the Secretary of State to make provision for the recovery by relevant landlords of a contribution towards costs from other prescribed landlords. That power was exercised in *The Building Safety (Leaseholder Protections) (Information etc.)(England) Regulations 2023* but only in respect of relevant defects. Again, Mr Hutchings submitted that Parliament could not have intended landlords to be excluded from the ability to seek a contribution to costs from others for paragraph 8 cladding costs that did not also qualify as costs to remediate relevant defects.
37. He pointed out that the structure of sections 116-124 had a coherence which was underpinned by the concept of relevant measures to address relevant defects. He placed particular reliance on sections 123 and 124 of the BSA which give interested persons, including leaseholders, the right to apply to the FTT for Remediation Orders requiring relevant landlords to remediate relevant defects and Remediation Contribution Orders requiring contributions to the costs of remediating relevant defects to be made by specified companies and partnerships. Neither remedy would be available to lessees or indeed landlords in respect of non-relevant defect costs under paragraph 8. He submitted that the overall structure of the BSA and the way that the material is divided up in the BSA, is relevant as an indication of legislative intention: *Bennion* 455-456.
38. Finally on structure, Mr Hutchings referred to the position of paragraph 8 within the schedule pointing out that it comes after a series of paragraphs specifically dealing with relevant defects and before paragraph 9 which is also confined to relevant defects.
39. Overall, Mr Hutchings submitted that it would be illogical given the Explanatory Notes and the other provisions of schedule 8 and the background to the BSA, if paragraph 8 were to operate as a wholly "time-unlimited" provision, in circumstances where all the other paragraphs of schedule 8 are timeframe limited by reference to a "relevant defect." In his submission had this alteration to the common law position been intended Parliament would have been bound to make any such alteration clear in the statutory wording and in truth, only "historical" defects which fall within the 30 year window were intended to be caught by the remediation provisions.

40. Finally, Mr Hutchings placed reliance on the decision of the Upper Tribunal in *Lehner v Lant Street Management Co Ltd* [2024] UKUT 0135 (which was decided after permission to appeal had been granted in this case). In an appendix to the decision a series of eight “steps” are suggested as a helpful future guide for those grappling with the complexities of the leaseholder protections. The steps propose a series of questions, the answers to which are intended to be a guide to the applicability of the various protections afforded by schedule 8. The question in relation to paragraph 8 is:

“14. Do the relevant measures in respect of which the service charge is claimed comprise the removal or replacement of any part of a cladding system?”

As has already been seen “relevant measures” directly relate to “relevant defects.” Additionally, Mr Hutchings said that *Lant Street* is clear as regards the scope of schedule 8 and supports the case that there must be a “relevant defect” in order for paragraph 8 to be engaged. He contended that we ought not to depart from *Lant Street* and that accordingly the protections afforded by schedule 8 are inapplicable to the works at CPH.

41. On behalf of the respondents, Mr Bates submitted that the words of paragraph 8 are clear and unambiguous and the difference between paragraph 8 and paragraphs 2 to 4 should be taken to be intentional. Parliament could easily have chosen to use the words “relevant defect” and/or “relevant measure” but did not do so.
42. He argued that this interpretation accords with the legislative purpose of the BSA, to secure the safety of those in and around buildings and to give radical protection to the leaseholders specifically in respect of cladding remediation. He said that the distinction between “cladding” and “relevant defects” had been recognised by the Court of Appeal in *Adriatic* and *Triathlon* where reference was made to the Explanatory Notes published in April 2022 in connection with the amendments to the Bill which had recently been made. At paragraph 33(iii) of *Adriatic* Lord Justice Newey referred to the following extract from those notes:

“In respect of what became schedule 8 to the BSA:

‘Lords Amendment 184 inserts a new schedule which outlines the conditions under which the service charge is not payable in respect of relevant defects. No service charge is payable under a qualifying lease in relation to relevant defects for which landlord or associate is responsible or if a landlord meets the contribution condition. No service charge is payable for cladding remediation.’

43. And in paragraphs 170 to 172 of *Adriatic*, Lord Justice Newey noted the differences between paragraphs 8 and 9 of schedule 8 when compared with earlier provisions as follows:

“170. Next, leaseholders with qualifying leases do not have to pay any service charges in respect of cladding remediation. This is the effect of paragraph 8 of schedule 8, which provides that “No service charge is payable” under a qualifying lease in respect of cladding remediation (as defined). It applies even if the landlord does not meet the contribution condition. This can be seen to have implemented the Secretary of State’s announcement that no leaseholder living in their own flat

“would pay a penny to fix dangerous cladding”.

171. Similarly the effect of paragraph 9 of schedule 8 is that “No service charge is payable” under a qualifying lease in respect of certain legal or other professional services. This is of course the provision with which we are directly concerned. Again, it applies even if the landlord does not meet the contribution condition.

172. Taken together paragraphs 8 and 9 show that a third feature of the legislative scheme is that there are certain categories of costs that Parliament decided should not be claimable at all from leaseholders with qualifying leases – namely cladding remediation costs, and relevant legal and professional costs.”

44. So far as section 122 is concerned, Mr Bates contended that since the substance of the leaseholder protections is set out entirely in the schedule, section 122 must be read as subject to the schedule rather than the other way round (*Bennion* at 16.9) and the wording of paragraph 8 of schedule 8 should be afforded more weight than the wording in section 122.
45. Mr Bates said that any suggestion by Almacantar that unless paragraph 8 is limited to “relevant defects”, the decision might open the floodgates in preventing landlords from recovering service charges in respect of buildings like CPH, of significant age, where the exterior is simply life-expired and in need of repair or replacement, ignores the requirement in paragraph 8 that the cladding system is “unsafe.”
46. Finally, Mr Bates contended that reliance should not be placed on *Lant Street* as support for the proposition that paragraph 8 is only engaged if there is a relevant defect since the point was not at issue in the case and there was simply no argument on the matter and as a result, this is not a binding decision on the point.
47. Both Mr Allison and Mr Amin endorsed the submissions made by Mr Bates. Mr Allison also made a number of additional points. Firstly, that the wording of paragraph 8 differs in important respects from paragraphs 2-4 and if it had been intended that the protection should be limited to cladding which was in a condition amounting to a “relevant defect” there would have been no need to include the limiting condition “unsafe.”
48. He contended that the even if the cladding remediation in question did not engage the remediation order provisions of section 123, this did not mean that the leaseholders would be without remedy. They would still be entitled to seek specific performance of repairing covenants. And further that a broad interpretation of paragraph 8 did not mean that a landlord of an older building with (as in CPH) deteriorating components would necessarily be in a worse position than previously as older leases were less likely than modern leases to give landlords the right to recover rebuilding or substantial refurbishment costs in any event.
49. Finally, Mr Allison submitted that although the policy generally underlying the leaseholder protections in sections 116-124 and schedule 8 contain “bright lines” between those leaseholders who benefit and those who do not, that was not sufficient to displace the clear words and policy underpinning paragraph 8 which provided a limited exception

from those “bright lines.”

Consideration

50. For the following reasons, in our view, the benefit of paragraph 8 is not limited by reference to “relevant defect” and no qualification is to be imported to that effect.
51. The words of paragraph 8 are clear and unambiguous, and accord with the underlying policy of the BSA and reflect the clear ministerial statement that “*no leaseholder living in their own flat ‘would pay a penny to fix dangerous cladding.’*”
52. We reject the submission that such a conclusion is anomalous, and that the interpretation is out of kilter with the structure of sections 116-124 and the remainder of schedule 8. Paragraph 8 provides a different protection for a limited group of qualifying leaseholders where the relevant building has “unsafe cladding.” There is no reason for imposing a restriction on the right to resist payment of the cost of remediation of unsafe cladding.
53. We agree that overall, the leaseholder protections provide a package of coherent measures both to achieve remediation and to absolve leaseholders from any responsibility for the cost of that remediation. We acknowledge that largely the package is limited to the 30 years referred to in the explanatory notes as follows:

“A 30-year period has been chosen as evidence shows that this period captures all buildings affected by the relevant safety issues. It aligns with changes this Act makes to the limitation period under section 1 of the Defective Premises Act 1972 (to which see section 135) and the relevant limitation period under the new cause of action relating to cladding products (sections 150 and 151). The Government has also agreed with major residential property developers that they will remediate buildings they had a role in developing or refurbishing in the past 30 years.”

54. This part of the notes discloses twin reasons for the choice of that 30-year limit: firstly, the evidence that the period captures the majority of buildings affected and secondly, the agreement with the major residential property developers that they would carry out remediation in respect of that 30 year period.
55. Paragraph 8 does not fall within that package of remediation. It is concerned only with who will pay the cost of making unsafe cladding safe. The bright line for the cut-off of the leaseholder protections means that those whose properties were built or refurbished before 28th June 1992 are deprived of those benefits even if those works were completed just a week before the cut-off date. Paragraph 8 mitigates that impact in respect of unsafe cladding in accordance with the ministerial statement.
56. Looked at in this way, the consequence that landlords are prevented from seeking a Remediation Contribution Order or from serving a landlords notice under *The Building Safety (Leaseholder Protections)(Information etc.)(England) Regulations 2023* is explicable. Where a building has unsafe cladding which is not also a relevant defect both leaseholders and landlords are impacted. Leaseholders cannot seek a Remediation Order

and landlords cannot seek a Remediation Contribution Order since work to remediate unsafe cladding is simply outside of the main leaseholder protection scheme.

57. In our view the wording of paragraph 8 requires no addition or substitution of other words. Lord Nicholls' test in *Inco Europe Ltd v First Choice Distribution* has not been met. Paragraph 8 has its own integrity and in our view cannot be criticised as being the result of inadvertence or careless drafting. The paragraph specifies that it applies only to a service charge under a "qualifying lease," which indicates that its ambit was deliberately intended to be restricted. It also only applies to a part of a cladding system that is "unsafe" which is a further restriction. That word "unsafe" is not used in relation to "relevant defect" and must be taken to have a meaning.
58. The definition of "relevant defect" has more than one component: firstly, it must arise as a result of anything done (or not done) or anything used (or not used) in connection with relevant works (as defined), and secondly it must cause a "building safety risk" (as defined). This is very different from the criterion of "unsafe."
59. We do not consider that the descriptive words in either section 116 or 120 assist in our interpretation of paragraph 8. We do not consider that they restrict the way in which schedule 8 should be read as a whole or in respect of paragraph 8. They are general and not definitive. Nor do we consider that the position of paragraph 8 within the schedule detracts from our conclusion. That position is equally explicable by reference to Lord Justice Newey's analysis that paragraphs 8 and 9 "show that a third feature of the legislative scheme is that there are certain categories of costs that Parliament decided should not be claimable at all from leaseholders with qualifying leases – namely cladding remediation costs, and relevant legal and professional costs".
60. Finally, we are not persuaded that the guidance in *Lant Street* (which we say more about later) was intended to be binding and we are clear that it is not. That guidance was helpfully given to assist FTTs and others in navigating the complexities of schedule 8 in respect of difficult legislation and developing jurisprudence. The question was not in issue in the case and no argument was directed to the point.
61. Accordingly, we dismiss Ground 1A of the appeal.

Cladding and Cladding System – Argument

62. It is therefore necessary for us to go on to consider whether or not the FTT was correct to decide that the service charges in question were in respect of "cladding remediation" within paragraph 8.
63. The first point made on behalf of Almacantar is that there is no "cladding" at CPH which could form part of any "cladding system" which is something either attached to an external wall or forms part of it but is not the external wall itself. In the appellants' submission the façade at CPH is not an outer skin, instead it forms the exterior of the building itself.

64. No definition of “cladding” is provided in the BSA. The FTT dealt with this point at paragraphs 255 to 257 of their decision:

“255. Insofar as there is a starting point for a definition, the Oxford Dictionary of Construction, Surveying and Civil Engineering’s definition of cladding (‘the ODC’), on which the Applicants rely, is that cladding is *“the non-load-bearing external envelope or skin of a building that provides shelter from the elements. It is designed to carry its own weight plus the loads imposed on it by snow, wind and during maintenance. It is most commonly used in conjunction with a structural framework.”*

256. In their Skeleton Argument, the Applicants contended that cladding *“refers to the outer skin, applied to a high-rise building, to increase thermal efficiency or improve aesthetics, while not adversely affecting weather resistance. The cladding element is not load-bearing, which means it is not structurally integral to the building itself”*. That is said to derive from the RICS Advice and Guidance Article dated 21 June 2022 contained in the Applicants’ authorities bundle.

257. The RICS Guidance appears at [AAB 516]. The remainder of the quotation that follows is:

“Cladding can be either retrofitted to an existing building or incorporated into the design of a new building.....

There are many different types of cladding systems available, ranging from traditional looking brickwork or rendered systems to more modern looking metallic rainscreen systems or curtain walls made from glass. Cladding systems can be complicated constructions with voids, breather membranes, cavity barriers etc but the two main cladding materials are the thermal insulation and front facade panel...

Facade panels can be made from a wide variety of materials including wood, metal, brick or vinyl, and are often made from composite materials. Two types of composite which have been highlighted in the news are ACM and HPL.”

65. The FTT concluded that CPH meets those definitions. They said:

“259.....There is an underlying structural framework – the concrete building. Onto that framework have been fixed the timber ladders, in preassembled blocks one storey x 3 metres into which the glazing has been inserted. The facade has then been built up, by inserting a wall or blockwork that has taken some of the weight of the fenestration (whether by accident or design). After that blockwork is a gap, an insulation panel, and spandrel inserts. Onto the glazing have been screwed aluminium clamp strips, which have been over-sealed. The ladder frame system is tied back to the concrete frame with metal ties. That makes up the building ‘envelope’ at the east and west elevations. The function served by the whole is to keep the elements out. The design is to transfer wind load to the concrete structure, not to support that concrete structure. The dwarf walls do not provide structural support to the building as a whole, though may provide some support to the

envelope. The metal ties tying back the timber ladders to the concrete are also not providing structural support, but do help to transfer wind-load. That design, it seems to us, is apt to meet the description of cladding.”

66. On behalf of Almacantar, Mr Hutchings contended that the FTT was wrong to find that there is cladding at CPH that could form part of a “cladding system”. In making his submissions he acknowledged that it was not open to the appellants to challenge the underlying findings of fact made by the FTT.
67. Firstly, he said that we should have regard to other provisions of the BSA and in particular section 149 which deals with past defaults relating to cladding products which he says underline the fact that “cladding” is recognised as being something which is either attached to an external wall or perhaps forms part of it but is not the external wall itself. Secondly, he relied on the OED definition of cladding as being “*A coating or covering applied to the surface of an object, a building etc; the application of such a coating.*” This, he said shows that cladding connotes something which is applied to the outside of a building as a covering or coating rather than forming the structure of the building. For the same point, Mr Hutchings relied on PAS9980:2022 (the British Standard Institution code of practice) and commentary within the UT decision in *Lant Street* which referred to a note to the code as follows:

“NOTE: Such systems are normally attached to the primary structure of a building to form non-structural, non-loadbearing external surfaces and can comprise a range of facing materials/cladding panels, including metal composite panels or non-loadbearing masonry, along with insulating materials, rendered insulation systems...and insulated core sandwich panels, which are attached to the substrate. Combinations of, for example, cladding panels and insulation foam cladding systems, and such systems might include cavities, which can be ventilated or non-ventilated. The cladding system also encompasses the supporting rails and bracketry, as applicable to attach the cladding to the building and cavity barriers where applicable. Systems that constitute the entire thickness of the external wall, by definition, cease to be cladding systems and are the external wall, e.g. curtain walling.”

68. In Mr Hutchings’ submission it is inapt to describe the make-up of CPH’s façade as incorporating cladding. He contended that the façade forms the exterior of the building consisting of vision and opaque glass and conventional timber window frames, set into the timber ladder frame. He referred us to *Irvine’s Estate v Moran* (1992) 24 H.L.R. 1 at first instance where it was held for the purposes of section 11 of the 1985 Act, that the structure and exterior could extend to windows and found that the structure did not need to be limited to load-bearing elements.
69. It is our view that the question of whether a building includes cladding is one of fact. In this case, the FTT had regard to the technical definitions of cladding and had heard evidence over a period of five days, including evidence from experts, and had carried out a site view. The FTT’s clear conclusion was that the façade at CPH was “cladding” for the purposes of the BSA. We do not consider that *Irvine v Moran* takes the matter any further. It was concerned with different legislation and was not intended to set out wide-reaching and final principles.

70. There is no justification at all for us to depart from the FTT's finding; it was clearly an assessment that it was entitled to make. It found that there was an underlying structure to which the cladding was attached. The findings are consistent with PAS9980:2022 and so far as this appeal is concerned are unassailable.

71. The next question is whether the Proposed Scheme involves "cladding remediation" for the purposes of paragraph 8. Paragraph 8(2) provides that 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."

72. On behalf of Almacantar it is said that the legislation clearly contemplates that there are two systems: the cladding system and the external wall system and that there is a distinction between them. It is pointed out that PAS9980:2022 states:

"External cladding systems involve the combination of several different components, including cladding panels, ventilated cavities, thermal insulation, breather membranes, cavity/fire barriers and support systems."

73. Mr Hutchings says that what is specifically not regarded as cladding, or components which form a cladding system, is the entire external wall itself. Furthermore, he says, if there is no inner wall then there cannot be an outer wall. In summary it is said that the façade at CPH is not a separate system but one composite system. It constitutes the entire thickness of the entire wall and there is no outer wall in what might be regarded as an "external wall system."

74. On behalf of the respondents it is said that the meaning of "cladding system" within paragraph 8 was considered by the UT in *Lant Street* where the meaning of "outer wall" of an external wall system was described at paragraph 144 as follows:

"The other requirement of paragraph 8 is that the cladding system must form the "outer wall" of the external wall system. Paragraph 8 is not concerned with a cladding system which forms the inner wall of an external wall system. If an external wall comprised an outer wall and an inner wall, with a cavity between them, only a cladding system which formed the outer wall would be covered by paragraph 8."

It is submitted that this makes it clear that paragraph 8 does not require two systems. Rather, if an external wall system contains an inner wall and an outer wall within an external wall system, only the outer wall could be within the definition.

75. We adopt that analysis and consider that the FTT was correct in finding that the façade at CPH comprises "the outer wall of an external wall system." We reiterate that the finding is a finding of fact. There is no justification for limiting the applicability of paragraph 8 to structures with two separate systems and the clear words in paragraph 8 do not require there to be two separate systems. We agree that if there had been only one composite wall,

the requirement would not be met but that is not what the FTT found.

Meaning of Unsafe - Argument

76. Mr Hutchings argued that the term “unsafe” in paragraph 8 should be narrowly construed to mean inherently unsafe cladding posing a fire risk, not general degradation or structural decay over time. He said that it was quite obvious that “unsafe” in this context means “posing a fire risk” or something which is inherently unsafe due to “historic problems which came to light following the Grenfell Tower fire”.
77. In the appellants’ submission the use of the word “unsafe” is intended to impute a more narrow interpretation than the wider “building safety risk”. Furthermore it was said that “unsafe cladding” within the context of the BSA is concerned with safety for those in occupation and is primarily if not exclusively cladding which is inherently defective upon installation because it creates a fire risk. In context, it was argued, “unsafe” is not directed towards a generic concept of “unsafeness”, or even a “building safety risk” and in particular it should not be taken to include something which may become unsafe by reason of slow degradation.
78. The appellants submit that the consequences of a wider reading would be extraordinary and that it cannot have been Parliament’s intention to encompass any “cladding” on older buildings that would be caught by the paragraph.
79. In response, Mr Bates pointed to section 1(1) of the BSA which states that the provisions of the BSA are “*intended to secure the safety of people in or about buildings and to improve the standard of buildings*”. He pointed out that nowhere in schedule 8 are the words “fire safety issue” used and that there is no rational basis for reading such a limitation. He pointed out that the FTT found that the façade at CPH poses a risk of fatality to passers-by and was evidently correct to find that the cladding system was unsafe.
80. The FTT decided that ‘unsafe’ means something more than simply out of repair and that “It is sufficiently wide a term to encompass a range of threats to the safety of the building or to its residents or nearby members of the public. That is a plain and straightforward interpretation of the language used and no external sources are needed for it. It is consistent with the wide drafting of the 2022 Act and its stated purposes.” In respect of CPH it found that:

“300. On the basis of the very clear evidence from Dr Harris as to the serious degradation of the condition of the façade including the serious risk to the health and safety of the residents and the public if more of the windows detached because of the detachment of the clamp strip and failure of screws (or indeed one of the annealed (i.e. not safety) glass spandrel panels was to be sucked out by wind force) due to degradation in the timbers or failure of external seals due to the water being let and kept in, we are satisfied that the cladding system at CPH is unsafe.”

Consideration

81. In our view the FTT was correct in its construction of the word “unsafe.” There is no justification for limiting the ambit of paragraph 8. The words used are clear and unambiguous and no limitation is included relating to “fire risk”. As we have already observed, the definition of “relevant defect” includes a number of conditions which relate to works done or not done and which result in a “building safety risk” as defined. Those restrictions have not been applied to paragraph 8 and we consider that the word “unsafe” must be given its ordinary and natural meaning.
82. So far as the suggestion that the resulting impact on landlords would be extraordinary we adopt Mr Bates’ submission that this simply accords with the policy of the BSA and as observed in *Adriatic* in the Upper Tribunal “what might be seen as unfair results are... simply a reflection of life in the new world of the 2022 Act.”
83. Accordingly we dismiss Grounds 1 to 4 of the appeal.

Ground 5

84. We turn now to Ground 5 where permission to appeal was refused by the FTT and this Tribunal directed that permission should be decided as part of the substantive hearing and if granted, the Ground considered and decided.
85. This ground concerns the term “qualifying lease” as defined in section 119 of the BSA and a presumption found in paragraph 13 of Schedule 8. As we have seen section 119(2) provides that:

“(2) A lease is a qualifying lease if:

- (a) it is a long lease of a single dwelling in a relevant building,
- (b) the tenant under the lease is liable to pay a service charge,
- (c) the lease was granted before 14 February 2022, and
- (d) at the beginning of 14 February 2022 ... —
 - (i) the dwelling was a relevant tenant’s only or principal home,
 - (ii) a relevant tenant did not own any other dwelling in the United Kingdom, or
 - (iii) a relevant tenant owned no more than two dwellings in the United Kingdom apart from their interest under the lease.”

86. So far as is relevant, paragraph 13 of Schedule 8 provides:

“13 (1) This paragraph applies in relation to a lease that meets the conditions in paragraphs (a) to (c) of section 119(2)

(2) The lease is to be treated for the purposes of this Schedule as a qualifying lease unless –

- (a) the landlord under the lease has taken all reasonable steps (and any prescribed

steps) to obtain a qualifying lease certificate from a tenant under the lease, and
(b) no such certificate has been provided to the landlord.

(3) In this paragraph “qualifying lease certificate” means a certificate, complying with any prescribed requirements, that the condition in section 119(2)(d) was met in relation to the lease at the qualifying time.”

87. In the FTT the issue of whether the paragraph 13 presumption applied to a number of leaseholders fell for consideration. The FTT found that:

“(3)(b) The presumption in paragraph 13(2) of schedule 8 applies to flat numbers 5, 15, 17, 18, 19, 22, 28, 29, 31, 33, 34 and 35 (‘those flats’) that they are held under qualifying leases”

The appellant contends that the FTT was wrong to find and/or conclude that the effect of the presumption is that no service charge or reserve fund is recoverable from those lessees in respect of the Proposed Scheme of works and associated costs under the qualifying long term agreement (under section 20 of the 1985 Act).

88. The basis of the contention is not that the FTT was wrong or had no jurisdiction to determine which of the respondents were, as at the date of its determination, presumed to hold a “qualifying lease” pending the landlord obtaining any qualifying lease certificate which rebutted the presumption. The point taken is that it is said they appeared to have made an unqualified finding of fact as to who holds a qualifying lease and thus, from whom services charges would (and would not) be recoverable.
89. The question of whether any finding on the presumption was final for all purposes was not raised by the appellants or the respondents before the FTT. However on receipt of the decision, Almacantar sought clarification of the import of the decision and asked the FTT to review its decision which it declined to do stating:

“15. Paragraph 4 of the ‘Summary of Reasons’ [for appeal] is the first time this argument was properly put before the Tribunal (it should be noted that the first time this argument was raised was in a letter purporting to seek clerical corrections to the Tribunal’s determination dated 26 March 2024). The Applicants did not make this argument in their pleadings, at the hearing, or by their Skeleton Argument.

16. In light of that, in order to review its decision, the Tribunal would need to reopen submissions from all sides. We do not consider it proportionate or fair to do so.

17. Contrary to paragraph 4(3) of the Applicants’ reasons, the relevant question is not when (or indeed whether) the Respondents provided a list of their asserted qualifying status. That complaint places the burden on the wrong party. As paragraph 13(2) makes amply clear, it is for the Landlord to take positive steps, failing which the presumption applies.

18. The requirement for the Applicants to take all reasonable steps to obtain a qualifying lease certificate in order to rebut the presumption was raised by the

Tribunal itself both at the Pre-Trial Review in November 2023, and the emergency CMH a week before the hearing.

19. It cannot be a correct proposition of law that a landlord who chooses to fail to engage with the positive steps required of him to rebut a presumption, in a case in which the question is clearly in issue, thereby deprives the Tribunal of the ability to make a finding that the presumption applies to particular qualifying leases. What otherwise is the point of a presumption?

.....

21. The opportunity to rebut the presumption is and always was the Applicants' burden, of which it ought to have been aware and actively taking steps from the date that the paragraph 8 argument was notified by the Respondents' statement of case, i.e. 28 April 2023. Having taken no steps, the presumption applies. That is the effect of the legislation.

22. That is not to say that in the future, the question whether or not one of the flats holds a qualifying lease could change, whether by a change of use or portfolio. The Applicants go too far when they interpret our finding as a 'finding forever'; our finding is a finding 'for now'. We have made it clear in paragraph 193 of the Decision that our finding is on the basis of no steps having been taken to rebut the presumption. It remains the Applicants' burden to rebut the presumption if, at a later date, it asserts a change in circumstances."

90. At the substantive hearing of this appeal we gave permission to Almacantar to pursue Ground 5. The reason that we did so was that although the meaning of the FTT's decision was tolerably clear, we were concerned by the FTT's observation in paragraph 22 of the refusal of the permission to appeal to the effect that the question whether or not one of the flats is subject to a qualifying lease "could change, whether by a change of use or portfolio." That statement cannot be correct as the status of "qualifying lease" is fixed as at 14th February 2022. Any change following that date would be immaterial. That concern was sufficient to persuade us that there was a reasonable prospect of the Ground being successful.
91. However, having heard further argument made by Ms Holmes on behalf of Almacantar we decided that the Ground of appeal should not succeed.
92. Ms Holmes contended that where the FTT went wrong was to seemingly make an unqualified determination that particular leaseholders hold a "qualifying lease". In oral submissions she went further and said that the FTT must have gone beyond the paragraph 13 presumption and made findings of fact about the lease status.
93. Although Ms Holmes said that the appellants merely seek clarification that such a determination only applies unless or until the presumption is rebutted, her difficulty is that the point was not argued either way at first instance. She said that the finding had already caused difficulties in enforcement proceedings.
94. The main argument on behalf of the respondents was led by Mr Amin. He contended that Ground 5 ought to be refused. He said that the respondent leaseholders were entitled to know where they stood in the proceedings and that Almacantar had avoided the question

of whether a lease was a qualifying lease (other than under the presumption) throughout the proceedings. He contended they should be able to rely on the FTT's finding as the final word.

95. It is certainly the case that no reasonable steps had been taken to obtain a certificate and in questioning from the Tribunal Ms Holmes seemed unable to provide an answer to the question whether Almacantar was seeking to avoid a FTT determination on the issue. However, the fact remains that no evidence or argument was led on the issue before the FTT.
96. Mr Amin referred us to the case of *Rhine Shipping DMCC v Vitol SA* [2024] EWCA 580, in support of the proposition that we should not allow the point to be taken. In particular he said that had the point been raised prior to trial, the respondents would have conducted their case differently and would have provided witness and documentary evidence and also that the FTT would have made findings of fact which it did not need to make given the deeming effect of paragraph 13. He submitted that this Tribunal should endorse the FTT's finding.
97. In our view it would be inappropriate for us to decide whether or not the finding of the FTT is binding or whether it may be rebutted. The issue was not raised and was not decided. We are satisfied that the FTT did not make any determination on evidence, it simply applied the presumption.
98. Ground 5 is dismissed on the basis that it is a new point which we will not admit on this appeal. Although we were initially swayed by the wording of the FTT's refusal of permission to appeal, that does not form part of its decision and is not under appeal. It also does not influence our determination.
99. Accordingly Ground 5 is dismissed.

Judge Siobhan McGrath

Mrs D Martin TD MRICS FAAV

16 September 2025

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an

application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

LIST OF RESPONDENTS

1. Penelope Claire Devalk (Flat 5)
2. Laura Stedman (Flat 11)
3. Chia Yen Huang (Flat 15)
4. Innes Gordon Catto (Flat 17)
5. Caroline Mary Weeks (Flat 18)
6. Derek Savage (Flats 2,7,8,9,16 and 28)
7. Edward Charles Alexander Laws (Flat 31)
8. Stella Meadows (Flat 33)
9. Ingeborg Annie Woolf (Flat 34)
10. Taeg Hee Oh (Flat 35)
11. Ginger Global (UK) 2021 Limited (Flat 19)
12. Xavier Property Management (UK) 2021 Limited (Flat 22)
13. Sean Michael Doran (Flat 29)



Neutral citation number: [2025] UKUT 320 (LC)

LC-2025-21

**IN THE UPPER TRIBUNAL (LANDS CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL, PROPERTY CHAMBER**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – COSTS – unreasonable conduct – whether landlord should pay costs of appeal against case management decision – rule 10(3)(b), Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 – order made

BETWEEN:

CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED & ORS

Appellants

-and-

**J ABRAHART AND OTHER LEASEHOLDERS REPRESENTED BY THE
RESIDENTS' ASSOCIATION OF CANARY RIVERSIDE (1)
CIRCUS APARTMENTS LIMITED (2)
SOLOMON UNSDORFER (3)**

Respondents

**Canary Riverside Estate,
Westferry Circus, London E14**

**Martin Rodger KC,
Deputy Chamber President**

Decision on written representations

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Introduction

1. On 15 and 16 April 2025 I heard and dismissed an appeal by the appellants from a case management decision of the First Tier Tribunal (Property Chamber) dated 9 December 2024. Permission to appeal had been given by the FTT itself and the appeal had been heard expeditiously because it concerned proceedings which had been listed for final determination in the FTT.
2. I gave my decision orally at the conclusion of the hearing and issued a decision notice the same day recording that the appeal had been dismissed. A transcript of the decision was subsequently produced and published with corrections on 3 September, bearing the neutral citation number [2025] UKUT 246 (LC).
3. I received applications on 9 May from all three respondents for orders under rule 10(3) (b) of the Tribunal's Rules that the appellants pay their respective costs of the appeal on the grounds that they had behaved unreasonably in bringing or conducting the appeal. The second respondent had not participated in hearing but had made submissions in writing and sought to recover the cost of these.
4. In response to the application for costs the appellants contended that no order should be made because: (a) the applications had been made out of time; or, (b) the substantive requirements of rule 10(3)(b) are not met.
5. The parties have exchanged submissions and counter-submissions on the applications, and I have been provided with schedules of costs by the respondents and comments on them by the appellants.
6. The following sums (including VAT) are claimed by the respondents:

R1 – the leaseholders' association	£17,760
R2 – Circus Apartments Ltd	£10,173
R3 – Mr Unsdorfer, the tribunal appointed manager	£40,867

7. I will determine the applications in accordance with the guidance in *Willow Court Management Co (1985) Ltd v Alexander* [2016] L. & T.R. 34 which has recently been approved by the Court of Appeal in *Lea v Ilfracombe Management Co Ltd* [2025] 1 WLR 371. The issues which I must consider are therefore these:
 1. Were the applications made out of time?
 2. If the applications were made out of time, can time be extended, and if so, should it be?
 3. Did the appellants behave unreasonably in bringing or conducting the appeal?

4. If so, should they be ordered to pay the respondents' costs?
5. If so, how much should the appellants be ordered to pay each respondent?

Issue 1: Were the applications made out of time?

8. Rule 10(10) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (the Rules) provides as follows:

“(10) An application for an order for costs may be made at any time during the proceedings but may not be made later than 14 days after the date on which—

- (a) the Tribunal sends a decision notice recording the decision which finally disposes of all issues in the proceedings;
- (b) the Tribunal sends notice under rule 20 (withdrawal) that a withdrawal which ends the proceedings has taken effect; or
- (c) notice of withdrawal is sent to the Tribunal with the consent of all parties.”

9. The reference in rule 10(10)(a) to a “decision notice” is to a decision notice given under rule 51. Rule 51(1) provides that the Tribunal may give a decision orally at a hearing, as occurred in this case. Rule 51(2) provides that the Tribunal must supply to each party as soon as reasonably practicable after making a decision which finally disposes of all issues in the proceedings a decision notice stating the Tribunal’s decision and informing them of rights of appeal. Rule 51(3) requires the Tribunal to provide written reasons for the decision with the decision notice unless the decision was made by consent or the parties have agreed to dispense with reasons.
10. In this case my decision notice was sent to the parties without my reasons on 16 April (the day the decision was delivered orally). A transcript of my oral decision was requested by Dr Steel, on behalf of the leaseholders, on 17 June. A complete transcript was received from the transcribers on 21 July and returned approved on 23 July. The perfected transcript was not published until the transcribers confirmed that their fee for preparing the transcript had been paid by the parties on 3 September.
11. On behalf of the appellants Mr Bates KC submitted that, on any view, the applications for costs received on 9 May were made outside the 14-day window allowed by rule 10(10), after which an application for an order for costs “may not be made”.
12. It was submitted in response by Mr Dovar, on behalf of the manager, that the time limit in rule 10(10) was not engaged as this was an appeal against a case management decision, which was an interim decision, and was not therefore a ‘decision which finally disposes of all issues in the proceedings.’ I do not accept that submission. The “proceedings” referred to in rule 10(10) are the proceedings in this Tribunal. That is clear from rule 1(2) which explains that the Rules “apply to proceedings before the Lands Chamber of the Upper Tribunal”. The fact that the proceedings are an appeal

against a decision of the FTT which did not finally dispose of the proceedings in the FTT does not affect the date by which an application for costs may be made under rule 10(10).

13. The first and second respondents adopted the submissions of Mr Dovar. Through its solicitors, the second respondent also made some additional points. It explained that it had submitted its original application on the understanding that it had 1 month to do so pursuant to the analogous rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008, which also accords with rule 13 of the FTT Rules. It apologised for its error in having regard to the wrong rules and that no prejudice had resulted. In any event, the reference to the date on which the Tribunal sends a decision notice recording the decision which “finally disposes of all issues in the proceedings” in rule 10(10)(a) of 2010 rules was ambiguous and might properly be interpreted in a number of ways. It was suggested that the reference to the “proceedings” may be either to the substantive proceedings in the FTT, or to the interim application in those proceedings from which the appeal has arisen. I do not accept either of those interpretations for the reasons I have given.
14. Alternatively, it was submitted that if “the proceedings” meant just the appeal to this Tribunal, the date on which those proceedings were finally disposed of should be taken to be the date at which the time for appealing the final decision of the Tribunal had elapsed. I do not accept that submission. The relevant date is the date on which the Tribunal “sends the decision notice recording the decision which finally disposes of the proceedings”. The date of sending the decision notice is a fixed date which does not change depending on whether a party pursues an appeal (although if an appeal was pursued, it might be the case that the decision notice recording the Tribunal’s main decision does not finally dispose of the proceedings and that time would run instead from the date on which the Tribunal determined the application for permission to appeal). In this case there has been no application for permission to appeal and the decision which finally disposed of the proceedings was my decision of 16 April. I do not think section 64(1)(c) of the Landlord and Tenant Act 1954 (which uses different language and does not refer to the sending of the decision but was nevertheless relied on as providing an analogy) assists in interpreting the different provision in the Tribunal’s Rules.
15. It was not submitted, as it might perhaps have been, that the decision notice sent on 16 April was incomplete, and that time did not begin to run until the Tribunal’s reasons were provided to the parties in writing on 3 September. I say no more about that possibility and conclude, on the submissions made, that the applications for costs were indeed made out of time for the reasons advanced by the appellants.

Issue 2: Can time be extended, and if so, should it be?

16. The respondents requested an extension of time to enable them to proceed with their applications for costs. The appellants submitted lengthy and detailed submissions why no extension should be allowed. These included, on the one hand, a complaint that the applications themselves were being conducted in a piecemeal and disproportionate manner, and on the other, a complaint that formal applications for an extension of time had not been filed supported by witness statements and application fees and the

respondents, many of whom act in person, had not sufficiently engaged with the criteria applicable to proceedings governed by the CPR (which these are not). The contradictory arguments on which the appellant relied did not include any submission that the Tribunal lacked power to extend time.

17. As Mr Dovar pointed out, the 14 days permitted in rule 10(10), is not a period provided for by primary legislation), nor is it the same period as is provided for costs applications to the rest of the Upper Tribunal (but not the Lands Chamber) by the Tribunal Procedure (Upper Tribunal) Rule 2008, where a month is allowed, or by rule 13(5) of the FTT Rules, where the relevant period is 28 days.
18. Rule 5 (3) of the Rules provides that the Tribunal may extend time for complying with any rule or practice direction, including after the time limit has expired. By rule 7, a failure to comply with a rule does not of itself render the step taken void and the Tribunal may take such action as it considers just, including waiving the requirement. It is clear, therefore, that the Tribunal has power to extend time for the making of an application under rule 10(10). In exercising that power the substantive merits of the application are irrelevant.
19. Time expired on 1 May, and the applications were made on 9 May. An extension of eight days is therefore required.
20. I reject the appellants' submission that a breach of any deadline is "obviously serious". The relevant procedural rules are the Tribunal's own Rules, not the CPR by reference to which the appellants made their submissions. The Tribunal's overriding objective of dealing with cases fairly and justly includes avoiding unnecessary formality (rule 2(2)(b)). The Tribunal's Rules do not require any particular formality in the making of procedural applications, and do not require that applications be supported by witness statements (rule 6(2)).
21. I am satisfied that the delay in this case was trivial. It has caused no prejudice to the appellants or to the progression of the appeal, which is already at an end.
22. The need for a convincing or meritorious explanation of the delay is proportionate to its seriousness. I have no reason to doubt that the delay occurred in the case of the second respondent for the reason given by its solicitors, namely, that it was assumed that the time limit was longer, as it would have been in the FTT or in other Upper Tribunal Chambers. That was an easy enough mistake to make with an application rarely made in this Tribunal. The third respondent's solicitors have said only that the delay was caused by "an oversight"; they may have shared the assumption made by the second respondent's solicitors. No explanation for the delay has been offered by the first respondents, who are unrepresented (although they brief counsel directly for tribunal hearings); it is possible that they did not know that there was any time limit, or what it might be, which would have been understandable as the Tribunal does not notify parties of it. In any event, the eight-day period of delay was short. Six of the fourteen days after the decision was sent were either bank holidays or fell on weekends. A further bank holiday and a weekend fell in the eight days ending on the date of the application and for which the extension is required.

23. There is nothing in the general circumstances of the proceedings which discourages me from granting the required extension of time, which I now do.

Issue 3: Did the appellants behave unreasonably in bringing or conducting the appeal?

24. In *Lea v GP Ilfracombe Management*, at [15], Coulson LJ suggested that a good practical rule when a tribunal is considering whether a party or its representative has acted unreasonably in bringing, defending or conducting proceedings is to ask:

“...would a reasonable person acting reasonably have acted this way? Is there a reasonable explanation for the conduct in issue?”

25. The following conduct by the appellants and their representatives was relied on by the respondents as having been unreasonable:
1. The appellants had been unable to explain to the Tribunal why their application of 25 October 2024 to the FTT (in which they asked for a determination that the manager should step aside from involvement in the remediation of the cladding on the Estate and leave the appellants to get on with it) was brought in the first place, when that was one of the options which the manager himself had already identified in his own application.
 2. They had brought an appeal against a case management decision complaining that the FTT should have determined their application summarily, when no party had requested that the FTT do so and the appellants themselves sought instead to list the application for a hearing with evidence.
 3. They had brought the appeal on grounds that had not been raised before the FTT.
 4. They had brought the appeal in order to challenge points made in the Tribunal’s previous decision, which was characterized as “an abuse in trying to have a second bite at the cherry”.
 5. They had brought the appeal on a ground which was not then relied on at the hearing.
26. The second respondent’s submissions echoed the manager’s complaints that the appellants should never have issued their application as the issues raised by it would inevitably have to be dealt with within the context of the existing proceedings. It had been inappropriate and unreasonable for the appellants then to “hijack” the FTT case management hearing on 25 November 2024 and to seek to have their unnecessary application heard urgently in advance of the final hearing. There was no urgency because the Landlords never intended to proceed with cladding works before the determination of the long and slow running claim brought against them by the Secretary of State for a remediation or remediation contribution order. The misconceived and unreasonable appeal against what was obviously an appropriate case management decision by the FTT further exacerbated the appellants’ unreasonable conduct. In the

light of the manager's own prior application and the clear lack of urgency, the attempt to have the appellants' application expedited and the unsuccessful appeal were designed to harass the other parties and the manager rather than advance the resolution of the issues in an orderly way.

27. The appellants denied that they had behaved unreasonably. The appeal had been brought because the appellants are the accountable persons at Canary Riverside but are finding it exceptionally difficult to fulfil all their functions as a result of the interaction of the management order and the Building Safety Act 2022. The "temporary and uncomfortable overlap" between the 2022 Act and the management order identified by the Tribunal is proving to be anything but temporary. It is not clear who is responsible for what and that is said to be intolerable. The appellants are being criticised, in correspondence and in evidence and pleadings, by the Secretary of State, the local authority and by the respondents for not making progress with fire safety measures. A reasonable person in the position of the appellants, having statutory duties, backed by criminal sanction, would do all that they could to ensure that there was no impediment to the discharge of their functions. In this case, that included launching the appeal.
28. I am not concerned with the way in which the appellants conducted themselves before the FTT. The only conduct which is relevant at this stage is the appellants' conduct in bringing and pursuing the appeal. It is true that Mr Morshead KC expressed some puzzlement when first asked by me what the purpose of the original application had been, but I took his perplexity to be forensic rather than genuine as it suited his purpose to put as much distance as possible between his own approach to the case and that of his predecessor. Having achieved that aim he later provided the explanation I have recorded in the previous paragraph. I therefore disregard the first of the respondents' criticisms.
29. Nor do I regard the fifth ground of complaint as evidence of unreasonable conduct. Parties should not pursue grounds of appeal in which they no longer have confidence, and it is not unreasonable to do so.
30. The remaining grounds are of greater substance.
31. The appellants are expertly represented by counsel and solicitors who will have been fully aware of the restraints which apply to any appellate court or tribunal when it is asked to review a case management decision of a lower tribunal. The FTT's decision to hear all of the outstanding applications together, and not to separate and prioritise the hearing of the appellants' application, was a pure case management decision. The prospect of the appeal against that decision succeeding were further fatally compromised by the fact that the appellants had not invited the FTT to proceed in the way they asserted on the appeal it should have done, by determining it "peremptorily" at the case management hearing. In effect, the appellants were inviting this Tribunal to take over case management from the FTT because, following a change of counsel, they now wished to present their case on a different basis. Taking these two factors together, I am satisfied that there was never any realistic prospect of this Tribunal upsetting the FTT's decision not to list the appellants' application for separate hearing on an expedited basis.

32. Additionally, the appellants' attempt to use their appeal against the FTT's case management decision as a route to challenge my own March 2024 decision, *Unsdorfer v Octagon Overseas Ltd* [2024] UKUT 59 (LC), following the discontinuance by the leaseholders of their appeal to the Court of Appeal, was manifestly inappropriate. The FTT is bound by that decision, which the appellants relied on at the case management stage. An appeal against the FTT's routine case management simply did not engage the arguments which Mr Morshead KC advanced before me. That the appellants were deprived of the opportunity of a cross-appeal by the leaseholders' discontinuance of their appeal did not make the basis on which the appeal was pursued any more sustainable.
33. I am not persuaded that the appellants have offered any credible explanation for pursuing the appeal. The difficulties in which they may now find themselves (and which I accept raise a genuine issue) may have justified a request to the FTT for a speedy decision on how the manager should proceed in relation to building safety. But having failed to persuade the FTT to deal with that issue separately, for perfectly understandable case management reasons, those difficulties could not justify pursuing a hopeless appeal on a premise the FTT failure was not asked to consider. The appellants and their advisers must have appreciated that there was nothing to be gained by the appeal, which was bound to fail, and I do not accept that they can reasonably have expected to ameliorate the uncertainty of their position by pursuing it.
34. Nor do I consider the fact that the FTT was persuaded to grant permission justifies the subsequent pursuit of the appeal. The FTT gave no weight to the fact that the decision to be challenged was a case management decision and was apparently unconcerned that the challenge was to be based on new arguments which had not been advanced to it. It took a different view from the one I formed, after argument, of the viability of the appeal. That does not alter the fact that the appellants appreciated, or should have appreciated, that the exercise was pointless and bound to fail.
35. I am therefore satisfied that the appellants behaved unreasonably in bringing and pursuing the appeal.

Issue 4: Should an order for costs be made against the appellants?

36. During the lengthy progress of the FTT proceedings, including repeated appeals to this Tribunal, it has been apparent that the appellants have the resources and the will to take every conceivable opportunity open to them to fight out their disagreements with their leaseholders and the manager in formal legal proceedings, conducted as intensively as any complex commercial litigation. It has not previously been suggested that they have crossed the line into unreasonable conduct, but they have certainly approached the FTT proceedings in a no holds barred and no expense spared spirit, and in doing so have caused the other parties, including private individuals and the tribunal appointed manager (whose costs are met by the leaseholders), to incur huge expense. That is not to say there are not genuine and important issues between the parties, but genuine disputes can be resolved by litigating in a moderate and proportionate manner and need not give rise to the mountain of expense which these proceedings have been generating for years.

37. In deciding whether it is appropriate to order the appellants to pay the respondents' costs I therefore bear in mind their approach to the proceedings as a factor in favour of making an order. I bear in mind also that the bulk of the expense on the respondents' side has fallen on the private individuals, who contribute to the manager's costs through the service charge as well as bearing their own (where they are members of the leaseholders' association).
38. The general rule in tribunals is that costs are not awarded. That rule is designed with typical tribunal proceedings in mind, often involving modest sums and capable of being managed without professional representation. These proceedings are anything but typical and to the extent that the respondents have been put to unnecessary expense by the unreasonable conduct of the appellants in pursuing them, it is fair and just in my judgment that the appellants should bear the expense.
39. I will therefore make orders in favour of all respondents.

Issue 5: What should the appellants be ordered to pay?

40. The appellants submitted that, in principle, it would be wrong to award costs in favour of three respondents who took a materially common position on the appeal, yet who put in three separate statements of case, without attempting to isolate those points (if any) which are unique to any particular respondent. That was said to be a repetitive and disproportionate approach.
41. I bear in mind that Mr Unsorfer, the third respondent, is a tribunal appointed office holder, who is independent of the parties. He is not the leaseholders' manager. He has always taken his own advice and acted with separate representation. There is nothing inappropriate about that and it would not have been straightforward for him to join forces with the leaseholders for the purpose of the appeal; negotiating the boundaries of such an arrangement would also have come at a cost. The manager has incurred the bulk of the costs of the appeal on the respondents' side and any trimming on the grounds of duplication would appropriately fall on the other respondents; but I am satisfied they have taken a proportionate approach, the leaseholders in representing themselves, with direct access counsel's assistance, and Circus Apartments in limiting their participation to written submissions.
42. On behalf of the members of the residents' association Dr Steel has asked for an order for payment of their counsel's fees for acting in connection with the appeal (they otherwise act without legal representation). These total £17,760 inclusive of VAT and reflect a capped rate for the preparation of written material. The appellants complain that this was too high for "junior" counsel and suggest the leaseholders should recover no more than half the fee appropriate for leading counsel. They have not, as far as I can see, disclosed how much their own leading counsel charged, but all counsel in this matter are senior specialist practitioners. I see nothing unfair or unjust in the appellants paying the professional costs incurred by the residents' association in full and I will so order.

43. Circus Apartments did not attend the hearing of the appeal but seeks to recover the costs of its solicitors in considering the appellants' application to the Tribunal for permission to appeal, preparing and serving its respondent's notice and statement of case, considering the parties' skeleton arguments and corresponding with the parties and the Tribunal about logistics for the appeal. It also seeks to recover the costs incurred in this application for costs. These total £10,173, a sum described by the appellants' solicitors as "eye-watering". I bear in mind the limited role taken by the second respondents and that they have a purely commercial interest in Canary Riverside. Having considered the material supplied in support of the claim I will order that the appellants pay the second respondent £5,000 in respect of its costs.
44. The Manager seeks all his costs of the appeal totalling £40,867.80, including VAT, of which £19,200 is referable to counsel's fees. The appellants complain that the manager had described his stance on their application to the FTT as neutral, and that he should not be entitled to his costs. I disagree. The manager may have been neutral before the FTT, as at that stage the relief sought by the appellants was not inconsistent with the relief he sought. Success for the appellants in the appeal, however, would have been very disruptive and would have derailed the parties' preparations for the final hearing in the FTT. The manager was perfectly entitled to resist the appeal. There is more substance in the appellants' observation that 90% of the solicitors' time charged for was incurred by Grade A solicitors, on top of counsel, which was disproportionate. Proportionality has only a limited part to play in determining the costs payable on an application under rule 10(3)(b), but I give some weight to that criticism. Having considered the material supplied in support of the application I will order that the appellants pay the manager £30,000 in respect of his costs.
45. In summary, therefore, the appellants shall pay £17,760 to the first respondent, £5,000 to the second respondent, and £30,000 to the third respondent. All such sums are payable within 14 days.

Martin Rodger KC
Deputy Chamber President

30 September 2025

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be

made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.



Neutral Citation Number: [2025] EWHC 2581 (TCC)

Case No: HT-2021-000348

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

The Rolls Building
Fetter Lane
London EC4A 1NL

Date: 09 October 2025

Before :

MR ALAN BATES
(sitting as a Deputy Judge of the High Court)

Between :

MR IOANNIS MALLAS

Claimant

- and -

PERSIMMON HOMES LIMITED

Defendant

- and -

**SIMPSON ASSOCIATES CONSULTING
ENGINEERS LLP**

Third Party

Mr Andrew Skelly (instructed by **Edwin Coe LLP**) for the **Claimant**
Mr Robert Stokell (instructed by **Clyde & Co LLP**) for the **Defendant**
The Third Party did not participate in the trial.

Hearing dates: 7, 8, 12, 13, 14, 19 May 2025
Judgment released: 9 October 2025

Judgment

Deputy Judge Alan Bates:

Introduction, factual background and summary

1. This case is about a family home, a smart two-storey, double-fronted, four-bedroom detached house with a front porch, detached garage and various external features (“the Property”). Those features include a macadam path which is a right of way, and a dwarf retaining masonry wall at the end of the garden.
2. The address of the Property is 6 Westcroft Close, Earley, Reading, Berkshire. It is one of 89 dwellings within a residential estate called Sibley Park which was developed by the Defendant, a well-known housing developer, in the 2010s on land formerly occupied by the University of Reading. During the development, the Property was referred to as ‘Plot 13’.
3. The Claimant bought the Property from the Defendant by way of a contract (the “Contract”) into which the parties entered in September 2015. At that time, the Property was newly built. The Property was to be the home for the Claimant and his family. The purchase price was £649,495, an amount which was funded partly by way of part-exchange of the home from which the family would be moving, which was also in the Reading area.
4. The house comprised within the Property is a timber-framed building with masonry walls. The timber frame is part of the loadbearing elements of the superstructure. The masonry walls are not part of the loadbearing structure. The house was constructed by building trench strip foundations and then transporting a prefabricated timber frame to the site and placing it onto the foundations. The superstructure of the house was then completed by building the masonry walls, floors and other features onto the timber frame.
5. The superstructure comprises loadbearing and non-loadbearing timber stud walls, with loadbearing timber stud perimeter cavity walls (inner leaf) supporting factory-made trusses of timber and gang nail plate joints lifted in whole sections into place on site. The floor of the upper storey is of timber joists spanning between loadbearing timber stud walls. The outer cavity leaf to the perimeter walls is of facing brickwork at low level and then concrete blocks above, to which a self-coloured render has been applied to finish each building elevation.
6. Very soon after the purchase transaction completed, the Claimant became concerned about the amount of cracking in the plaster and other materials forming part of the fabric of the house. In any new house, some cracks and gaps (such as gaps between walls and skirting boards) are to be expected as plaster and other materials dry out and the house ‘settles’. Such cracks and gaps are typically made good by the developer by carrying out minor repairs and redecoration between 6 and 12 months after completion of the building works.
7. Unfortunately, in the case of the Property, however, it has become clear that the cracks and gaps are more extensive than, and have developed over a period longer than, the kinds of cracks, etc., that are likely to be attributable to settlement alone. It is common ground that the house has been (and might still be being) affected by differential movement. That differential movement is likely to account for the extent

of cracking and gaps, and of doors binding, within the house. Such differential movement is occurring because the house has been built on foundations that are inappropriate having regard to the ground conditions. The trench strip foundations are themselves being affected by movement in the ground around or beneath them. Those foundations are therefore not serving to isolate the superstructure of the house from being affected by such movement.

8. The reason why the trench strip foundations are inappropriate is essentially that they are too shallow, having regard to features of the ground conditions giving rise to a risk of ground heave. The soil type is essentially a layer of topsoil, over a layer of sand, gravel and other river terrace deposits, all resting atop London clay. Prior to the development project, the land contained a significant building (a halls of residence) surrounded by extensive wooded areas including many oak, ash and other trees. Historical Google Earth satellite imagery shows that some of those trees were removed by the University before the site was acquired by the Defendant. The available evidence shows that some of the trees that were removed prior to the site being acquired by the Defendant were within the zone of influence of the Property. As large trees draw water down to their roots, the removal of such trees can lead to changes in the hydrological characteristics of the soil between the surface level and the depth of the roots. Clay soils are particularly prone to consequential desiccation and shrinkage, given their relative impermeability to moisture transfer. This can lead to ground heave.
9. Given those features of the site of the Property, the appropriate foundations would have been piled foundations, with the piles being secured at a depth below the level of potential movement. In other words, the foundations should have included piles extending down to below the level of the roots of the removed trees.
10. The claim was issued on 14 September 2021. By his claim, the Claimant seeks *inter alia* damages in respect of the costs of curing, and of remedying damage caused by, various alleged defects in the Property. The claim seeks such damages on the basis of various causes of action, including breach of express and implied terms of the Contract, negligence, misrepresentation, and under the Defective Premises Act 1977 (the “DPA 1977”).
11. The Defendant subsequently brought into the proceedings the Third Party (“Simpson”), the structural engineers it had appointed to design the foundations for the residential properties (including the Property) developed at the Sibley Park site. The evidence I have seen suggests that Simpson designed the foundations to account for the proximity of trees retained on the site, but not for trees that had previously been removed. The Defendant contended, *inter alia*, that Simpson was at fault for designing the Property’s foundations without taking into consideration the removal of trees within the Property’s zone of influence. In response, Simpson contended, *inter alia*, that it had relied on a ground investigation report that had been produced by another contractor commissioned by the Defendant, and that an updated report from that contractor had not been passed on to Simpson. I do not, however, need to determine any issues between the Defendant and Simpson. That is because, prior to the trial before me, those parties reached a confidential settlement with one another, and Simpson has subsequently played no part in the proceedings.

12. Accordingly, the issues for me to determine are limited to those between the Claimant and the Defendant. At least by the conclusion of the trial before me, those issues had narrowed considerably. For example, the Claimant was no longer seeking a finding that his entry into the contract for the purchase of the Property had been induced by misrepresentations, or that the Defendant has breached certain alleged implied (rather than express) terms of the Contract, or that the Defendant was negligent. It was common ground between the parties that: (a) by reason of the Property lacking the appropriate foundations, the Defendant has breached clause 1 of its contract with the Claimant and is liable in damages; and (b) the appropriate measure of damages is 'cost of cure', plus an additional amount to compensate the Claimant for stress and inconvenience and for certain expenses (such as the cost of renting alternative accommodation whilst the remediation works are being carried out).
13. The main disputed issue for me to determine is as to the scope and extent of the works required for effecting the 'cure', i.e. the remediation works required for providing the Claimant with substantively that which he was entitled, under the Contract, to expect. What he paid for was a property that *inter alia* complies with relevant building standards, is supported by appropriate foundations, and is fit for purpose. There is broad agreement between the parties as to any appropriate remediation scheme for the house in terms of the *substructure*: it is common ground that any scheme must involve the building of a new loadbearing piled substructure. The Defendant proposes that this be done by underpinning the house with a raft supported by deep piles. This approach would leave the existing trench strip foundations in place, but those foundations would be rendered redundant, no longer being part of the loadbearing structure. But the parties differ as to whether the *superstructure* of the house should be preserved:
 - i) The Claimant's primary case is that the superstructure should be demolished and a new house built on new foundations. The Claimant also puts forward, as its alternative option, that the superstructure be demolished save for retaining and reusing the structural timber frame. Under that alternative option, the new superstructure would be constructed by positioning the retained timber frame over the new foundations and then building a new superstructure (including new masonry walls, floors, interior fittings, etc.) onto that frame using new materials.
 - ii) The Defendant, in contrast, argues that there is no need to demolish the existing superstructure, which can be left in place during and after completion of underpinning works consisting in the building of a piled raft. The carrying out of those works would require removal of the existing suspended ground level floor. After the underpinning works have been completed, the superstructure would then be made good and repaired by the installation of a new floor at ground level, filling in cracks and gaps throughout the house, and redecorating. As the Defendant observes, underpinning is the usual approach for remediating buildings that have been built on inadequate foundations and/or have been affected by ground heave.
14. The Claimant has presented essentially three reasons in support of his position that demolition of the superstructure is required:

- i) His first reason is that the degree of movement that has already occurred in the house may have been such as to damage the timber frame or other structural elements of the superstructure (the “**Latent Incurred Damage Reason**”). He relies on expert evidence from his structural engineering expert that such damage *may* have occurred; however, the Claimant has not provided any direct evidence that it has done. Such damage, if it occurred, could have been directly evidenced only by carrying out opening-up works, which would cause damage to the fabric of the house, as well as inconvenience to the Claimant and his family (they are living in the house). The Claimant contends that the *risk* that such damage has occurred is such that a demolition approach is necessary for ensuring that the Claimant receives, at the conclusion of the remedial works, that which he was contractually entitled to expect, namely a house unaffected by significant defects.
 - ii) The Claimant’s second reason is that the Defendant has not been able to provide ‘as built’ drawings and other detailed information about the construction of the house and which the Claimant’s structural engineering expert says ought to be available (the “**Information Deficit Reason**”). The Claimant says that, given the absence of such drawings and information, he cannot have adequate confidence that what was built, in terms of the superstructure, was appropriate. He also asserts that such information would be needed for: (a) assisting, and ensuring the safety of, workers carrying out remedial or other works in the house; and (b) being satisfied that, following the completion of the remediation scheme, the house would be stable and sound.
 - iii) The Claimant’s third reason is that the construction of the house is of generally poor quality, and that the house may therefore be subject to latent deficiencies due to errors or omissions made during construction (the “**Construction Quality / Defects Reason**”). He relies, in support of his assertion of poor quality construction, on indicators that the house may lack certain fire safety features that should be present, such as cavity barriers in the roof.
15. I have considerable sympathy for the Claimant. He invested in a newly built property in the expectation that this would free him from the burden of having to deal with significant property maintenance issues. The Property is one of his principal assets and was intended to be a place of peace and rest for him and his family. The discovery that the Property was beset by ground heave problems has no doubt caused him a great deal of stress and worry. He has, at times, faced difficulties in obtaining relevant reports and other documentation from the Defendant, which has contributed to his loss of trust in the Defendant and his refusal to countenance allowing the Defendant to design and implement a remediation works project. It is, in a sense, understandable that he perceives the construction of a new superstructure, in addition to new foundations, under the supervision of a structural engineer commissioned by him, as the route for enabling him to ‘get what he paid for’ as he sees it, i.e. a new house that he feels confident is free from latent defects and can, in future, be sold without needing to disclose a complex history to prospective purchasers.
16. In my judgment, however, it would be legally wrong for me to award the Claimant damages based on the cost of demolishing the superstructure and effectively building a new house. It is, in the circumstances of this case, incumbent on the Claimant to

prove, on the balance of probabilities, that demolition and rebuilding of the superstructure is required for remedying defects in, or other breaches of contract relating to, the existing superstructure. In my assessment, he has not done so. In that regard:

- i) The visible cracks and gaps that have appeared in the superstructure are likely to be attributable to differential movement that is occurring only because the substructure was not appropriately specified. The inappropriateness of the substructure for the ground conditions is admitted by the Defendant and the differential movement problem would be cured by the underpinning works involving construction of a piled raft. Subject to the differential movement ceasing, the existing cracks and gaps would be essentially cosmetic issues addressable by minor repairs, and could not reasonably justify demolition and replacement of the superstructure.
- ii) Even if and insofar as it is theoretically *possible* that the differential movement that has occurred *might* have caused damage to the timber frame or other structural elements of the superstructure of the house, there is no evidence that such damage has occurred. The Claimant's structural engineering expert could have established whether there was any such damage by carrying out opening-up works. But such works have not been carried out, even though there is no evidence that this was prevented by cost or to avoid serious disruption to the ability of the Claimant and his family to continue living in the house. In circumstances where a claimant controls access to a premises and has been practically able to carry out exploratory investigations for establishing whether a particular kind or extent of alleged damage has occurred, it will generally be reasonable to expect him to prove such damage. Where he has not done so, it is unlikely to be fair to assess the compensatory damages due to him on the basis that such damage *might* have occurred.
- iii) I am not persuaded that any lack of 'as built' drawings or other information about what has been built either constitutes a breach of contract by the Defendant or fails to comply with any regulatory requirement. If and insofar as any contractors carrying out remedial works to, or within, the existing superstructure have any concerns that what has been built may differ from the drawings provided by the Defendant, then this can be addressed by carrying out opening-up works to see what has been built. There is no evidence that, without being provided with drawings or information going beyond what is available for the Property, remediation contractors would be unable or unwilling to carry out a remediation scheme not involving demolition of the house. In these circumstances, to demolish the superstructure because of a concern about such 'gaps' in the information available about what has been built would be disproportionate and unreasonable.
- iv) There is no basis for the assertions by the Claimant and his structural engineering expert that the construction of the superstructure is of generally poor quality or that the superstructure is likely to be subject to significant latent defects or deficiencies. The only significant deficiency that has been proved relates to the substructure, i.e. the inadequate foundations. Moreover, even if and insofar as any issues with the superstructure are identified whilst repairs are being made to it, such issues (such as an absence of required cavity

barriers in the roof) are likely to be addressable by discrete repairs. Accordingly, the *risk* that the house is affected by such issues does not justify demolishing and replacing the superstructure: that would be an extreme and disproportionate approach for mitigating the perceived risk.

17. I also need to determine certain other disagreements between the parties as to the precise scope of an appropriate remedial scheme, albeit those disagreements are relatively minor in financial value terms. Those disagreements are as to:
 - i) whether underpinning works are required for supporting the detached garage (I have found that such works are required); and
 - ii) whether the garden path and dwarf retaining wall should be rebuilt onto piled foundations (I have found that such works would be disproportionate and that the path and the retaining wall can be adequately remediated by effecting minor repairs).
18. After determining the scope of the appropriate remediation scheme to use as the basis for awarding damages, I determine certain issues relating to the quantification of the costs of that scheme.
19. Finally, I determine issues as to the quantum of damages which do not relate to the costs of remediation works but are for compensating the Claimant for inconvenience and for the costs of temporary alternative accommodation.

The law

Clause 1 of the Contract

20. By Clause 1 of the Contract, the Defendant “*warrants that it has built or will build the Home on the Property in a good and workmanlike manner in accordance with the terms of the relevant planning permission and building regulation consent to the standard of the New Home Warranty Provider*”. The Defendant has admitted that it breached Clause 1 by reason of the house being built on foundations that were inappropriate for the ground conditions. The Defendant has not admitted any other breaches of Clause 1. I note, however, that other defects alleged by the Claimant – such as, for example, a failure to install fire safety features – would, if proved, be likely also to constitute a breach of the warranty given in Clause 1.

DPA 1977

21. As noted above, the Claimant is no longer seeking findings that the Defendant is liable for breach of implied terms, or for negligence or misrepresentation. Accordingly, it is not necessary for me to consider the law relating to those causes of action. The Claimant’s decision not to pursue those causes of action was pragmatic and welcome, given that the remedies being sought by the Claimant are remedies available to it for breach of the express term in Clause 1 of the Contract. There was, accordingly, no substantive benefit to the Claimant in securing findings with respect to the other causes of action.
22. In my view, the same observation regarding lack of substantive benefit applies with respect to the claim under the DPA 1977. It is not apparent to me how any of the

alleged defects in the Property could amount to breaches of s.1 DPA 1977 if they did not breach Clause 1 of the Contract. The duty under s.1 DPA 1977 is in similar terms to Clause 1 and requires that the developer, in constructing a property, ensure that the works are done in a workmanlike and/or professional manner with proper materials and so that, as regards that work, the property when completed is for human habitation. As the Claimant's Opening Note for the trial stated, "*There is no distinction between the approach to damages under the Contract or [the DPA 1977].*"

23. For a dwelling to be fit for human habitation, it must, on completion, be capable of occupation for a reasonable time without risk to the occupants' health or safety, and without undue inconvenience or discomfort to them: *Vainker and another v Marbank Construction Ltd and others* [2024] EWHC 667 (TCC).
24. The Claimant contends that its claim under the DPA 1977 is not time-barred, given the insertion into the Limitation Act 1980 of s.4B by s.135 of the Building Safety Act 2022, which retroactively increased the limitation period to 30 years. The Defendant now acknowledges this as a correct statement of the current state of the law, having regard to *BDW Trading Ltd v URS Corporation Ltd* [2024] KB 827 (which, since the time of the hearing before me, has been upheld by the Supreme Court: [2025] UKSC 21, [2025] 2 W.L.R. 1095).
25. The Defendant contends, however, that the matters complained of by the Claimant do not disclose a breach of the DPA 1977, since the house, when completed, was fit for human habitation, as illustrated by the fact that the Claimant and his family have now been living there for over 9 years. I disagree, given that the porch appears to have its own shallow foundations, is unsafe and would collapse without the current supports propping it up. The fact that such collapse did not occur, and was not likely to occur, within a short time after completion of construction works does not negate the fact that the state of the porch was one of ongoing risk to safety due to inadequate construction from the outset. Given that risk to safety, the house was not fit for human habitation, within the meaning of that concept in s.1. This suffices, in my view, to constitute a breach of s.1.
26. I would not, however, have found the house to be unfit for human habitation by reason of the inadequate trench strip foundations of the house itself. The degree of movement in the house, whilst it has given rise to some cracking, etc., was not such as to give rise to a risk to safety of its occupants, or to render their occupation of the house unduly inconvenient or uncomfortable.

Measure of loss, and proving losses

27. I adopt the following statement from the Claimant's Opening Note as to what the Claimant was entitled, under the Contract, to receive in exchange for the purchase price he paid:

"[The Claimant] was entitled to receive a Property which was properly designed and constructed, with a certain future in the sense that it was not so uncertain that it still needed to be monitored and investigated many years after completion; which had a normal appearance and performance, not with cracks and other defects; which had a normal value to ordinary residential purchasers; which was safe and convenient to occupy without external peculiarities and which was ready to occupy without inconvenience, distress and loss of amenity.

The respective experts have agreed that the house should have a design life of 60 years”

28. It is, however, for the Claimant to plead and to prove each of the heads of loss and damage for which he seeks recompense. The fact that there are defects in, or has been damage to, the superstructure of the house does not necessarily mean that the appropriate remedy for the Claimant’s expectation loss is an award of damages sufficient to enable him to build a new house. Further, he cannot realistically expect the Court either: (a) to award him more than he has claimed in his Particulars of Claim; or (b) to accept his assertions as to the likely amounts of financial losses in circumstances where he has not provided supporting documentary evidence that he could reasonably be expected to have provided.
29. The Defendant’s Skeleton Argument included the following statement of the legal principles to be applied for determining the quantum of damages to be awarded to the Claimant for the breach (or breaches) of the Contract and/or the DPA 1977:

“In respect of an award of damages for defective premises:

(1) In an action against a contractor for defective work, the appropriate measure of loss is generally taken to be the cost of reinstatement/repair, because that is the foreseeable consequence of the defective work.

(2) The cost of reinstatement/repair will not be used as the measure of loss if such cost is disproportionate to the end to be attained.

(3) A claimant who carries out either the repair or reinstatement of his property must act reasonably.

(4) The court is unlikely to adopt demolition and rebuilding as the correct measure unless two conditions are satisfied: first, the cost of demolition and rebuilding is less than the cost of remediation, and secondly, that remedying the defects represents a reasonable course of action, so that “*the amount awarded is objectively fair as between the claimants and the defendants*” [Hudson, [7-006]].

(5) If there are two equally efficacious alternative remedial schemes, and one is cheaper than the other, then *prima facie* the claimant is obliged to put in hand the cheaper of the two schemes.

(6) As regards betterment, if a claimant chooses to rebuild to a higher standard than is strictly necessary, it can recover the cost of the works less a credit for betterment.”

30. I adopt that statement of the applicable legal principles. It was not contested by the Claimant’s Counsel. Further, it is supported by the authorities cited by the Defendant, including *Axa Insurance v Cunningham Lindsey* [2007] EWHC 3023 (TCC), [256]-[266]; and *McGlinn v Waltham Contractors* [2007] EWHC 149 (TCC), [787]-[794]. As stated in the latter of those cases by Coulson J (as he then was) at [814]:

“It is, on any view an extreme course: to knock down a newly completed building because it is said to be defective, particularly where the majority of the defects can fairly be described as aesthetic matters only. ... If such a course of action is to be justified at all, it will ordinarily be because the building is dangerous or structurally unsound.”

31. The Claimant's case as to the appropriate remedial scheme was pithily summarised as follows in his Counsel's Opening Note:

"For the multitude of reasons explained by Mr Dust, (including the lack of construction information), the appropriate remedial scheme will be demolition and reconstruction; this is the only certain way for [the Claimant] to receive what he contracted for – what he would have received had [the Defendant] not breached the Contract and/or had it complied with s.1, DPA [1977]. Damages should reflect this."

32. In my judgment, that summary reveals a fundamental error in the Claimant's approach. The Court, when determining the appropriate remediation scheme, is not applying a test of identifying which scheme affords a "*certain way*" for the Claimant to receive what he contracted for. The Claimant, as is common ground, did not receive what he contracted for, and the Court's task is to assess the amount of compensation that is, in consequence, due to him. The Court carries out that task in accordance with the principles summarised above at paras 29-30. The compensation amount will not include the costs of a remediation scheme involving demolition and rebuilding unless it is satisfied that this is a reasonable course of action.
33. Such a scheme is unlikely to be reasonable if there is another remediation scheme available which would be substantially less costly and which it would be reasonable to adopt. In my judgment, it is unlikely to be reasonable to demolish a house simply because there is *some* degree of risk that it may be subject to *some* defect or damage that has not yet been discovered. Likewise, it is unlikely to be reasonable to award damages based on the costs of demolition and rebuilding, simply because there is a risk of 'known unknowns' of that kind. That is especially so in circumstances where any concerns about the possible presence of relevant defects or damage could have been explored by opening-up works which the Claimant has declined to carry out.

Evidence

Witnesses of fact

34. I mean no disrespect to any of the factual witnesses by noting, as I do, that I found their evidence to be of limited assistance in relation to the issues I need to decide. In that regard:
- i) Much of their evidence related to the Claimant's allegation that his entry into the Contract was induced by misrepresentation. In support of that allegation, he contended that, by the time of his entry into the Contract, the Defendant was already aware that: (a) a spring had been observed in the direction of the Property; (b) serious cracks had appeared in a neighbouring property (No.5 Westcroft Close), leading to ground investigations being instituted; and (c) there was a large crack in the Property and upstairs interior doors were not shutting and had had to be taken off on two occasions. As noted above, however, by the end of the trial, the Claimant was no longer inviting me to determine the misrepresentation allegation.
 - ii) Mr Daniel Castle, the Defendant's Managing Director for the Thames Valley region, did not join the Defendant until March 2021. He was therefore unable to give evidence from his own knowledge regarding the construction of the

Property (which took place in 2013-15) or the circumstances in which it was sold to the Claimant. He appeared to have no knowledge of significant historical matters pertaining to the Defendant: for example, he did not know of the report produced by Stephanie Barwise KC in 2019 which identified significant quality issues relating to homes built by the Defendant and which received significant media coverage at that time.

iii) For the purposes of determining the issues I need to determine, I need to consider what remediation works are required and, in particular, whether the appropriate remediation scheme is one involving the demolition and replacement of the superstructure. I also need to consider issues as to the costs of carrying out the appropriate scheme. These are technical issues in relation to which I have been assisted by expert evidence, but on which I have, unsurprisingly, found the evidence of the witnesses of fact relatively uninformative.

35. For the sake of completeness, however, I make clear that I accept the evidence of all the witnesses of fact as being generally truthful as to all matters of fact within their own knowledge. The Claimant clearly felt a strong sense of injustice at the way he perceived himself to have been treated by the Defendant and, when giving his oral evidence, he was keen to reinforce his narrative that the Property was in a generally poor condition. The oral evidence of his adult daughter, Zoi Malla, was relatively straightforward: in my assessment, she was simply trying her best to give honest, accurate answers to the questions put to her.

Geotechnical and structural engineering experts

36. The expert evidence filed by the Claimant in respect of both geotechnical and structural engineering issues was from Mr Andrew Dust. In my assessment, Mr Dust was keen to present and support the Claimant's narrative as to the issues affecting the Property. This was perhaps to be expected, given that Mr Dust had been assisting the Claimant in relation to the Property for many years. The Claimant's views as to the appropriate remediation scheme are likely to have been based largely on Mr Dust's advice.

37. There were, however, certain aspects of Mr Dust's evidence which I found unconvincing. For example, when being challenged in cross-examination about the accuracy of his measurements of the width of cracks he found at the house, he was asked why he did not measure them with a crack gauge. His response was essentially that there were so many cracks that he did not have time to measure them all and relied on his experience to make visual estimates:

Q. We see from photograph 4 that Mr. Redmond took a photograph holding a measure against the crack so that the viewer can see the width, did he not?

A. At that point, yes.

Q. You did not do that on any of your photographs, did you?

A. No.

Q. Why not?

Q. We see from photograph 4 that Mr. Redmond took a photograph holding a measure against the crack so that the viewer can see the width, did he not?

A. At that point, yes.

Q. You did not do that on any of your photographs, did you?

A. No.

Q. Why not?

Mr Dust's explanation as to why he did not use crack gauges to measure the cracks was, in my view, unconvincing. Even if the cracks were too numerous for him to have measured all of them, he could have measured those he considered to be the widest or the most concerning. I therefore treat his estimates of the widths of cracks with caution.

38. A further aspect was Mr Dust's use of publicly available environmental data regarding a risk of *surface* water flooding as a basis for his opinions as to the risk that the presence of *groundwater* could be an issue affecting the ground under or around the Property.
39. In addition, Mr Dust could sometimes respond to questions in a way that appeared slightly 'tetchy' and did not directly answer the question. An example was when he was asked about a previous disciplinary finding against him. When the substance of that finding (essentially, that he had acted unprofessionally with the intention of increasing his own fees) was put to him and he was asked if that is what the disciplinary board found, his response was, "*If that's what it says.*"
40. Notwithstanding those points, I regard Mr Dust's evidence as being generally reliable. It is, however, important to take care to identify precisely what he is – and, equally, what he is not – saying in his reports. By way of example, he accepted, under cross-examination, that his statement in his initial report that "[p]arts of the Property are unsafe, ... these include: The front entrance porch, and the ... Public Footpath" (emphasis supplied) referred only to those specific elements of the Property, and he had not identified any elements of the house itself which were unsafe. His evidence going to why, in his view, an appropriate remediation scheme would be one involving demolition and replacement of the superstructure was essentially that there were 'known unknowns' regarding the condition of the superstructure, rather than that the timber frame or other elements of the superstructure were defective or damaged in ways that could not adequately be remedied by repairs.
41. The Defendant's geotechnical expert was Ms Erica Wilcox. She gave clear and straightforward answers to the questions put to her, and I accept her evidence as reliable. This is not, however, a case that substantially turns on geotechnical evidence, given that all of the candidate remediation schemes being proposed by the parties would involve the building of piled foundations.
42. The Defendant's structural engineering expert was Mr John Redmond. I found his written reports and oral evidence to be straightforward and fair, and I have therefore placed considerable reliance on his evidence.

Quantity surveying ("QS") experts

43. The Claimant's QS expert was Mr David Daly, and the Defendant's was Mr David Somerset. In my assessment, both of those experts provided professional, balanced and helpful reports and oral evidence. To the extent there were differences between

them on certain quantification points, the evidence of each of them has assisted me in understanding and resolving those matters by deciding whose view on that point was the more appropriate.

Adverse inferences

44. The Claimant's Counsel, as part of his oral submissions during the trial, invited me to draw inferences adverse to the Defendant from the Defendant's alleged slowness to disclose documents to the Claimant, and/or the Defendant's lack of records relating to the Property and/or failure to provide such records. I decline to draw any such inferences. In my view, the Claimant has not established that the Defendant has failed to make or keep 'as built' drawings or other records which should have been made and retained. Moreover, it is difficult to see any realistic basis for drawing from any alleged lack of records, or slowness to provide disclosure of relevant documentation, an inference as to the likelihood of latent defects within the superstructure of the house, where the presence of such defects has not been evidenced by the Claimant.

The three remedial schemes proposed by the parties

45. By the start of the trial, the parties had identified the following three candidate remedial schemes:
- i) **Scheme 1:** This scheme represents the Claimant's primary case. It would involve the full demolition and rebuilding of the house and the garage, as well as of the footpath and the dwarf retaining wall. Scheme 1 is effectively a full rebuild of the Property. That rebuild would be to a significantly higher specification than the existing Property, since Scheme 1 envisages that the garage, footpath and retaining wall would all be rebuilt on piled foundations. (Further, the Claimant has costed Scheme 1 on the basis that it would have loadbearing masonry walls, which would, as the Defendant contends, constitute betterment.)
 - ii) **Scheme 2:** This scheme represents the Claimant's alternative case. Although the Claimant has described this scheme as being for "*Underpinning and Repair*", it would involve the full demolition and rebuild of the house, save that the structural timber frame would be retained and reused. There are two options under Scheme 2, namely (i) with, and (ii) without, underpinning of the garage.
 - iii) **Scheme 3:** This is the scheme proposed by the Defendant. The superstructure of the house would be retained, and both it and the porch would be supported by a new substructure by way of a piled raft which would oversail the existing trench foundations. The suspended floor of the ground level would be removed in order to facilitate the necessary underpinning works. Following the completion of those works, a new ground floor would be installed, and repairs would be made to the cracks, gaps, binding doors, etc., in the interior and on the exterior of the superstructure. The cracks in the footpath and retaining wall would be filled in or otherwise repaired.
46. The Defendant's Skeleton Argument provided the following helpful description (taken from the Defendant's response to Further Information provided by the

Claimant as to its proposed scheme) of what would be involved in carrying out Scheme 3:

“The work for [Scheme 3] would oversail the existing trench foundations and would all be carried out by working within the existing external walls, which would remain in place. The external walls would be re-supported on a new steel bar reinforced concrete slab with fingers cut into the external wall line around the perimeter such that the new slab can be cast, and would resupport the external walls in the long term, i.e. the external walls would be ‘pinned up’ such that they are supported on the new reinforced concrete piled raft. Any connection with the existing mass concrete foundations would be removed by carefully breaking out the original concrete walling blocks beneath the piled raft slab by an amount sufficient to ensure that there are no long-term effects due to clay ‘heave’ or swelling. A gap of circa 75-100mm is all that is likely to be needed. These works could very easily be carried out in sequence, working around the building externally. Thus, the existing substructure and mass concrete foundations would remain in place for at least as long as the life of the building. The line of the load bearing walls at ground floor can then be reinstated, supported on the new piled raft slab, and the temporary support removed.”

47. For determining which of the three schemes is the appropriate one (whether in its original form or subject to certain variations), I have first considered what is the most appropriate remedial approach for the house, before then considering the appropriate remedial approach for other elements of the Property, namely the garage, footpath and retaining wall.

The appropriate remedial approach for the house

48. In order to inform my assessment of the appropriate remedial approach for the house, I have considered the available evidence as to the condition of the house superstructure.

The extent of cracks, gaps, doors binding, etc., within, or on the exterior of, the house itself (i.e. the house, not including the porch)

49. I have viewed the various video footage and photographs put into evidence by the Claimant which shows the visible condition of the house, including the presence of visible cracks and gaps, and the fact that certain doors are binding or will not close. This video footage has, however, been of little assistance to me for determining which remediation scheme is the appropriate one. It is common ground that these visible defects/damage in the house have been caused by an unacceptable degree of differential movement. But such differential movement would cease after any of the three proposed schemes was implemented. I have not seen, within the video footage or photographs, any gaps, cracks, etc., which did not appear to be capable of local repair by an appropriately skilled person. I do not have the technical knowledge to be able to myself assess whether the degree or extent of cracking, etc., shown in the video footage and photographs is so great that I can infer that there is likely also to have been significant damage to the timber frame or other non-visible structural elements of the house superstructure.
50. There has been a degree of disagreement between the parties’ respective structural engineering experts, Mr Dust and Mr Redmond, as to whether the cracks can all

properly be described as “Category 2” (or “slight”) by reference to BRE Digest 251. But the extent of this disagreement, so far as it relates to the house itself, is quite limited, given the way that Mr Dust’s initial report itself describes the cracking, etc., visible at the Property:

“[6.2.2] In general, the extent of construction distortion, damage and fracturing to the buildings and external works including construction damage and fractures is slight or moderate damage. However, there is serious and/or severe damage affecting **the main entrance front porch and the associated front porch masonry piers.** ...

[6.2.3] Parts of the Property are unsafe, and without works to make safe, are defects that in my opinion render the Property as not fit for human habitation, **these include: The front entrance porch, and the ... Public Footpath.** ...”

(Emphasis added.)

As Mr Dust accepted when being cross-examined, he has not identified any serious and/or severe damage to the house itself (i.e. excluding the porch).

51. There was a difference between Mr Dust and Mr Redmond in terms of their estimates or measurements of the width of the most significant cracks visible within the house. The *measurements* were those of Mr Redmond, who had used crack gauges which he had photographed. Mr Dust, in contrast, relied on his own *subjective estimates* made whilst viewing the cracks (see para 37 above). His reliance on such visual estimates was, in my view, suboptimal and inappropriate, given the ease with which he could have made accurate measurements using crack gauges. Whilst the number of cracks may have made it disproportionate for him to measure all of them, he should have made proper measurements of the widths of the cracks he considered to be the most significant or concerning. Given his failure to do so, where there is a difference between the evidence of Mr Dust and Mr Redmond as to the widths of the largest cracks visible in the house, I have preferred Mr Redmond’s evidence.
52. The precise categorisation or widths of cracks, gaps, etc., are (like the photographs and video footage showing such cracks, etc.) anyway of little real assistance to me in terms of showing whether structural elements of the superstructure are likely to have been damaged such as to render Scheme 3 an inadequate solution. Even Mr Dust does not give evidence that the size or other features of the cracks, etc., within the house is such that non-visible elements of the superstructure are likely to have been damaged to an extent that would make it necessary to replace the superstructure, rather than effecting local repairs.
53. Mr Dust also placed reliance on data obtained by a Murphy Geospatial scan as indicating that there might be a high degree of distortion within the house (though he accepted that further investigation would be needed before one could conclude that such distortion had occurred). I found Mr Dust’s evidence regarding his analysis of that data, and the conclusions he drew from that data, unpersuasive. In support of his assertion that the data suggested that the house might be tilting forwards, Mr Dust placed reliance on a single point (point 178) which was coloured red on the scan and which related to a specific location on a ceiling. As was apparent from the green coloured dots surrounding that single point, the ceiling height at that single point was anomalous and could be attributable to some highly localised feature at that specific place in the ceiling. Mr Dust relied on point 178 even though Murphy excluded

points 178 and 179 from their report because (as Mr Dust admitted) they did not consider those points to be representative. Tellingly, when Mr Dust was challenged as to why he had nevertheless placed reliance on those points, his response was: *“From my point of view it demonstrates what I was seeking to identify – the potential maximum displacement.”* The scan was, in any event, measuring ceilings (which may not directly reflect the level of the structure) and was a ‘snapshot view’ of the house at a particular point in time, rather than detecting the rate (if any) to which the house distorted over a period. As Mr Dust accepted under cross-examination, a building could be built with ceilings of different heights for various reasons. The scan data had also to be considered bearing in mind that the readings taken by the scan are subject to a margin of inaccuracy. In my assessment, the Murphy scan data, seen as a whole, could not realistically be interpreted as providing any support for concern that the house might be tilting forwards. The scan data does not show that the house has experienced a degree of distortion such that significant damage to the timber frame or other structural elements of the house would be expected, rendering Scheme 3 an inadequate remediation approach.

54. Nor did I find such structural movement to be persuasively evidenced by Mr Dust’s measurements of door frames and other timber features which he said he had taken using a hand spirit level. There may be various reasons why a door frame or other timber feature has not been installed in such a way that it is completely level or has subsequently moved (e.g. moisture-related expansion). Accordingly, measuring such timber features with a spirit level is of limited value as an indicator of whether, or to what extent, loadbearing structural elements of a building have been damaged as a result of structural movement.

The porch

55. The house benefits from a porch, which comprises a small canopy roof attached to the house, supported by two wooden posts on top of brick piers.
56. The porch is in a considerably worse state, in terms of cracking and instability, relative to the house. Temporary supports, in the form of acrow props, have had to be installed to avoid the porch posing a safety risk. But these facts provide no real insight into the extent to which the superstructure of the house requires replacement, given that (as is common ground) it is likely that the porch does not stand on the house’s foundations.
57. Any appropriate remedial scheme will need to involve works for reinstating the porch upon piled foundations. All three Schemes would provide for this. Under Scheme 3, for example, the porch pillars would be supported on the new piled raft, either by extension from inside the house or perhaps by one or two piles installed outside. Accordingly, the poor condition of the porch does not assist the Claimant in showing that Scheme 1 or 2, rather than Scheme 3, is required for properly remediating the Property.

The suspended floor on the ground level

58. The suspended floor of the ground level of the house is designed to be thermally efficient. It is made up of precast concrete beams onto which was installed an expanded polystyrene system (“EPS”) block floor, with fibre reinforced concrete

screed and chipboard on top. I accept the Defendant's evidence that the design of the floor is a standard and approved method, and one that is regularly used by the Defendant and other developers. It does not pose an unacceptable risk of fire, given that the EPS is below a layer of concrete.

59. In any event, whichever of the three remediation schemes is adopted, the floor would need to be removed. Under Scheme 3, removal of the floor would be required in order to facilitate the construction and installation of the piled raft. If, following the completion of the underpinning works, the Claimant wished to construct the replacement floor using a different method (e.g. without using EPS), then he could do so. Accordingly, the Claimant's criticisms of the method of construction of the floor are irrelevant for supporting his case that Scheme 3 would be inadequate for remediating the Property.

Lateral restraint / Tying action

60. I do not accept that there is evidence properly indicating that required lateral restraint ties that should form part of the superstructure are missing. The fact that such ties are not shown on a drawing produced by Space4 is, as Mr Redmond pointed out in his evidence, not a cause of concern. Space4 was a subcontractor providing a particular product and had no reason to be concerned with the lateral ties. In any event, as Mr Dust accepted, under Scheme 3, the walls will be tied to the rafts. Further, I see no reason why it would not also be possible, as part of the works comprised in Scheme 3, to: (a) make any required investigations for ensuring that the floors and walls are all appropriately secured to the timber frame structure; and, informed by the findings of those investigations, (b) carry out any required corrective repairs. Accordingly, as with the issue regarding the suspended ground floor (discussed above), the issues raised by the Claimant regarding lateral restraints and tying action are of no real assistance to him in showing that Scheme 3 would not be sufficient to properly remediate the Property.

Damage to the structural timber frame or other structural elements of the superstructure

61. The Claimant has not provided any direct evidence of damage having been incurred to the structural timber frame or other structural elements of the superstructure. Mr Dust accepted that he had not pointed to any direct evidence of such damage:

Q. ...You have not identified in your report any specific structural connections which have in fact been adversely affected and damaged by structural and ground and foundation movement, have you?

A. No, I do not believe I have.

62. If the Claimant had wished to demonstrate the existence of any such damage, then he could have instructed Mr Dust to carry out minor 'opening-up' works so as to identify the presence and extent of any such damage. But this has not been done, despite Mr Dust having visited the Property on 14 different occasions. Mr Dust, when cross-examined about this, did not provide any reasons why such investigations could not have been carried out:

Q. If there had been one particular part, for example, of the timber frame that you thought might be damaged or distorted, you could have opened up the wall

in order to find out whether there was in fact any damage or distortion, could you not?

A. Subject to obviously taking instructions, yes, with instructions, yes, absolutely.

Q. You have not carried out any such exploratory or opening up works, have you?

A. No.

Q. In your report, you do not identify any specific part of the timber frame superstructure components, panels, first floor kit, connections and fitting which is in fact damaged or distorted, do you?

A. Well, to be clear on what you have just said there, sorry, what part of the structure ----

Q. In your report you do not identify any specific part of the timber frame superstructure components, panels, first floor kit, connections and fitting which is in fact damaged or distorted?

A. No.

63. In the circumstances, I will proceed on the basis that there is no such damage which could not be adequately remedied by local repairs.

Cavity barriers/fire prevention

64. The Claimant's case that the house lacks, or may lack, intended fire prevention features has essentially three bases:

- i) The first is that the report produced by Stephanie Barwise KC in 2019 identified that cavity barriers had not been correctly installed in a significant proportion of the new homes built by or for the Defendant.
- ii) The second is that the Defendant wrote to the Claimant on 31 July 2020 indicating that cavity barriers at roof level had not been correctly installed in some houses and seeking to arrange to inspect the Property so as to determine whether the Claimant's house was one of those affected. (The Claimant has not taken up the invitation to arrange an inspection. Mr Castle's oral evidence was that, of the 68 houses at Sibley Park that were inspected, cavity barriers were found not to have been correctly installed in six of them.)
- iii) The third is Mr Dust's evidence that he has seen light coming through the roof, which he believed was indicative of the required cavity barrier not being in place. (I note that Mr Redmond disagreed that Mr Dust was right to infer that a barrier was absent. Mr Redmond's evidence was that, "*Depending on how the architect has set the ventilation up to the roof void, you do get a natural air gap around some roof parameters*", and that, as the roof had been "*designed as a cold roof, ... you would want to vent that void*".)

65. In my view, none of these matters is of any significance to my assessment as to which of the three remediation schemes is the appropriate one. Unless and until there is a proper inspection of the roof of the house for ascertaining whether the required cavity barrier is in place, it is not known whether there is any relevant 'defect' in the house. The Claimant did he invite the Defendant to make such an inspection in response to

the letter of 31 July 2020, and nor has such an inspection been made by Mr Dust. In any event, even if the required cavity barrier is not in place (as it should be), it is likely that this could be swiftly remedied by carrying out the necessary corrective works. It is neither necessary nor proportionate to address the *risk* that fire prevention measures may not be in place, by demolishing and replacing the superstructure.

The electrical installation

66. The only evidence suggesting that there might be problems with the electrical installation in the house is the Claimant's evidence that bulbs tend to stop working, and thus need replacing, after around four months. There is no evidence that the RCD is regularly 'tripping' or that there are any other indicators of electrical issues at the Property.
67. Against this background, the conclusion I reach is that there is no evidence that the electrical installation at the Property is faulty or incomplete. If there were safety issues relating to the electrical installation, then it is likely that the RCD would 'trip'. In any event, if the Claimant wished to show the presence of any issues relating to the safety or efficacy of the electrics at the Property, then he could and should have commissioned an electrician to survey and test the electrics. Given the absence of findings of any such survey indicating electrical issues at the Property, I find, on the balance of probabilities, that there is no significant fault or other problem with the electrical installation at the Property.

Drainage – foul water and surface water

68. The written and oral evidence of the Claimant's witnesses as to whether, and to what extent, toilets in the house cannot be, and/or are not being, used has not been entirely consistent. In any event, even if one or more of the toilets in the house does not flush waste material away effectively, it does not necessarily follow that there is a fault with the foul water drainage system which has been caused by deficient construction of, and/or differential movement in, the Property. The source of the problem could, for example, be the presence in the foul water system of a blockage caused by an object that has been flushed down a toilet or sink.
69. The foul water drains CCTV survey carried out by Clearview did not find any significant construction-related or other flaw in the drainage system. Clearview found the inspected foul drain pipes to be in "*an acceptable structural condition (below grade 3)*", and that best practice suggested maintenance was needed. So there is no evidence that the foul drainage requires repair or replacement.
70. The Claimant has not provided any evidence that the surface water draining system has been surveyed. In my view, if and insofar as the Claimant wished to establish the presence of any significant fault with the construction or serviceability of either the foul water or the surface water drainage systems at the Property, the Claimant should have commissioned an appropriate survey and filed a survey report supporting the Claimant's relevant allegation.
71. Although the drainage arrangements at the Property do not fully accord with the designs, this does not show that there is a defect in the drainage or that any remediation of the drainage is required. In that regard, I accept the Defendant's evidence that it is not uncommon for drains to be built in a way that constitutes a

variation to the plans (such variations often being necessary or convenient in view of site-specific issues encountered during the construction).

72. Thames Water has adopted the public drains within the Sibley Park site, presumably after carrying out the usual due diligence checks. The Claimant is not responsible for any works required to the public drains.
73. Given the absence of findings of any such survey indicating drainage issues at the Property, I find, on the balance of probabilities, that there is no significant fault or other problem with the drainage systems at the Property.

The Information Deficit Reason

74. The Defendant has provided hundreds of pages of drawings and other information relating to the design and construction of the Property. I accept the Defendant's evidence that: (a) those pages include drawings relating to how the Property was to be constructed; (b) it is reasonable to believe that the Property was built substantially in accordance with those drawings; and (c) there is no legal or regulatory requirement for a developer to create or provide 'as built' drawings showing precisely what has been built.
75. Notably, although Mr Dust asserts that the provision of 'as built' drawings and other post-construction information as to precisely what has been built should be contained in a 'health and safety file' for each relevant property, he has not referred to any legislation or regulatory conditions imposing these requirements. Accordingly, there is no basis for me to conclude that the Defendant's apparent inability to provide 'as built' drawings and other information as to precisely what was built constitutes a breach of Clause 1 of the Contract and/or section 1 of the DPA 1977.
76. Further, there is no evidence that, without being provided with drawings or information going beyond what is available for the Property, remediation contractors would be unable or unwilling to carry out Scheme 3. If and insofar as there are any concerns, arising in the context of the remedial works, regarding potential differences between the 'as built' existing superstructure and the drawings provided by the Defendant, then these can be adequately addressed by carrying out opening-up works to see what has been built. Mr Dust effectively accepted this in his oral evidence:

Q. It is not unusual for an engineer to need to assess a structure without having access to as built drawings, is it?

A. That is not unusual, no.

Q. Even if there are as built drawings, it is not unusual for them to be inaccurate in some way?

A. No, that is not unusual.

Q. So it will frequently be necessary to investigate or open up the structure in order to see whether there are any issues below the surface?

A. Yes, absolutely.

The Construction Quality / Defects Reason

77. There is, in my judgment, no evidence that the construction of the Property is of generally poor quality or that there are likely to be latent defects present in it.

Assessment of whether Scheme 1 or 2, rather than Scheme 3, is required in respect of the house

78. In view of the factual findings I have made, there is no realistic basis for the Claimant's contention that Scheme 1 or 2 must be adopted, rather than Scheme 3, for remediating the house.

The detached garage

79. Whilst there is some evidence of minor cracks in the detached garage, this is not sufficient to indicate that the garage has suffered significant differential movement. As a smaller structure than the house, it is intrinsically less likely to suffer significant differential movement.
80. Nevertheless, in my view, it would be wrong in principle to refuse to award the Claimant the costs of underpinning the garage. Ms Wilcox effectively acknowledged in her oral evidence that the garage should have been built on piled foundations:

Q. Extrapolating linearly from the NHBC charts and tables is not an adequate design, but taking it as an indication only, the foundations on the line of the northwest wall would need to have been over 3m deep. At this depth, piled foundations would present a safer and more efficient option.

That applies to the garage as well, does it not? It is in the same location. You started the paragraph by talking about the footprint of the northwest wall and the adjacent garage foundation?

A. Yes. At the time of design, the garage would probably be treated the same as the building adjacent.

81. The Claimant is, in principle, entitled to damages based on his losses relative to his contract-based expectation that he would receive a garage with foundations that were adequate to comply with Clause 1 of the Contract. In my view, such a garage would be one with the same foundations as should have been provided for the house, i.e. piled foundations extending to a depth not subject to ground heave.
82. Further, underpinning of the garage is reasonable and appropriate in view of the existence of continuing risk of ground heave causing damage to the garage, notwithstanding that there is, at present, little evidence of the garage being damaged by differential movement. That is so for two reasons. First, the evidence before me does not show conclusively that ground heave within the zone of influence of the Property has ceased. Secondly, there is a risk that trees planted in the 'ecozone', pursuant to the Planning Obligation Agreement, might cause disturbance to the ground in a way that would affect the garage if it is left on its present inadequate foundations. This was acknowledged by Ms Wilcox:

Q. In your supplemental report you say there would be no need to underpin the garage if the planting in the eco zone can be controlled. When you refer to the eco zone, is this ----

A. It is that conservation, yes.

Q. You recognise, do you, that there is a need, the new woodland planting is necessitated as a result of what we just looked at?

A. Yes.

Q. If the planting in that margin cannot be controlled, do I read your conclusion correctly that it does not need to be underpinned if ----

A. If there is a large tree or trees that are going to grow to mature species in the eco zone in the Redhatch Copse, then potentially there is an issue with the foundations to the garage. I have accepted that.

83. Scheme 3, as specified by the Defendant, does not include underpinning of the garage. Although I find Scheme 3 to be the appropriate remediation scheme to be used as the basis for assessing the damages due to the Claimant, that scheme must be modified to include the costs of underpinning the garage.

The footpath

84. I have viewed photographs of the footpath. It is a narrow macadam path navigating around the side of the Property. As a public right of way, it is used by people other than the Claimant, his family and their visitors; but there is no evidence that it is in heavy use.
85. The footpath now has a significant longitudinal crack in it which could potentially cause someone to trip.
86. In my assessment, it would be obviously disproportionate to construct piled foundations for the footpath, as the Claimant says is needed. I accept the evidence of Mr Redmond that piled foundations would be provided for a path/roadway only if it was nationally significant infrastructure. The appropriate approach for remediating the footpath at the Property would be to carry out local repairs (such as by filling in the crack) when necessary.

The dwarf retaining wall

87. I have viewed photographs of the dwarf retaining wall. Although it is technically a retaining wall: (a) it is short, consisting of around 8 rows of bricks; and (b) the only thing it 'retains' is the garden, which is at a higher level than the ground on the other side of the wall.
88. As with the footpath, it would, in my view, be disproportionate to demolish the wall and rebuild it. A reasonable person would not choose to go to the expense of constructing piled foundations for the wall. In my view, the appropriate approach to the damage incurred by the retaining wall, including the large vertical crack, would be to carry out a local repair.

Property remediation – Quantification issues

89. Given that I have identified Scheme 3 as the appropriate remediation scheme, subject to its being varied to include the underpinning of the garage, I have focused on the QS experts' costings for that scheme. There is a considerable degree of agreement between Mr Daly and Mr Somerset as to many elements of the costings for that scheme, though there are also some points of difference that are non-trivial in financial terms.

SPONS

90. A difference of approach between the QS experts was the extent to which they relied on published guideline rates, such as those set out in *Spon's Architects' and Builders' Price Book* ("SPONS"). Mr Somerset generally defaulted to applying the SPONS rates wherever available, whilst Mr Daly was more ready to apply higher rates where he regarded such rates as being consistent with his own assessments of prevailing market rates actually being charged for work of the relevant kind.
91. Mr Daly's approach was, in my view, justifiable in principle, but his execution of that approach was subject to shortcomings:
- i) It was right in principle because a QS expert should apply his or her own knowledge and experience when estimating costs, taking a 'real world' view. Further, the SPONS rates could only be a starting point, or an inexact reference point, for establishing costs for Scheme 3, given that those rates relate to new build projects with a value range of £3m-£5m. As Mr Daly pointed out, actual rates relating to Scheme 3 (a remediation project relating to a single dwelling and having a value of under £500,000) might be materially higher, given the absence of scale economies relative to a higher value project for building multiple new dwellings. A QS expert can reasonably be expected to adjust (whether upwards or downwards) the SPONS rates, or to depart entirely from those rates, having regard to the extent to which the 'real world' rate for the relevant works is likely to be higher or lower than the published rates. The expert should be able to offer cogent explanations, ideally supported by comparator rates or other supporting evidence, to justify the adjustments or departure he or she has made.
 - ii) His execution of his approach was subject to shortcomings because he relied on actual rates he claimed were being charged in the context of actual projects of which he was aware, but he has not demonstrated that those projects were relevantly comparable to the works required as part of Scheme 3. There is little utility in using supposed 'comparators' unless the expert provides sufficient information about the projects he is relying on as such, to demonstrate that they are indeed relevantly comparable. At least some of the 'comparables' he has drawn upon were clearly 'high end' projects in terms of the specification of the works. An example was painting works which involved applying four layers of Farrow & Ball paint, even though there is no evidence that the paint in the Claimant's house is Farrow & Ball paint (rather than a 'mid-market' brand of paint). Another example was his use of rates set out in a quotation for piling works involving contiguous piles (which are more labour-intensive than the CFA piles for which Mr Daly was pricing) being installed in a confined space with restricted access.
92. Given this background, the approach I have taken has been to prefer Mr Somerset's estimates where they are based on applying SPONS rates. In doing so, I acknowledge that the rates that the Claimant will pay *might* be higher, as a result of his being less able to access economies of scale, as compared with a project with a value of £3m-£5m. However, I have seen no evidence, beyond Mr Daly's views, that such scale economies are the key determinant of how SPONS rates should be adjusted for lower value projects. Further, I am conscious that cost estimation is not an exact science, and that the rates that the Claimant ultimately has to pay will be determined by a range of factors and circumstances. In my view, the appropriate way to take account

of the risk that the Claimant may, in practice, have to pay materially higher rates is to provide a reasonably generous percentage allowance for contingencies on the total project costs.

Whether the costings for the piles should include provision for pile casings or sleeves

93. Mr Daly's cost estimate for Scheme 3 includes provision for the cost of pile casings or sleeves. Pile casings or sleeves may be required in certain ground conditions, such as where groundwater is an issue.
94. In my judgment, no justification has been shown for providing for pile casings or sleeves. Although Mr Dust speculated that there might be groundwater in the vicinity of the Property, his basis for this was a GECA Flood Risk map. It was, in my view, inappropriate for him to present the GECA Flood Risk map as indicating a potential presence of groundwater. As he accepted under cross-examination (but had not made clear in his report), the map appeared on a page which made it clear that what was being indicated was the yearly chance of surface water flooding, i.e. a type of flooding that occurs when rainfall exceeds the immediate capacity of the drainage system. The same GECA Flood Risk website states that flooding from groundwater is unlikely in this area.
95. Apart from Mr Dust's inappropriate presentation of the GECA Flood Risk map, there is, in my judgment, nothing to indicate that groundwater is likely to be present in the vicinity of the Property. Although Mr Dust also referred to groundwater being found in trial pits, he accepted that this was not the case for the two trial pits closest to the Property (TP04 and TP06).

Continuous Flight Auger ("CFA") piles v. bored reinforced piles

96. A significant contributor to Mr Daly's cost estimate for Scheme 3 being higher than Mr Somerset's estimate is that Mr Daly has priced for CFA piles. A CFA pile is a relatively elaborate type of bored pile and is more expensive than a standard bored pile. It may be the more appropriate kind of pile in certain ground conditions.
97. Mr Somerset has priced for standard bored reinforced piles. He explained in his oral evidence that these standard piles could be inserted into the ground using a small piling rig which could be transported to the Property on a trailer. He also explained that the specialist piling contractor may be able to bring a small batching plant to the site so as to mix concrete on site.
98. In my judgment, Mr Daly was not justified in pricing for CFA piles, rather than standard bored reinforced piles. The Claimant's Scott Schedule did not specify CFA piles. Mr Dust had not specified that CFA piles were needed. Nor could Mr Daly point to any geotechnical or engineering evidence that standard bored reinforced piles would not be adequate.

Reinstatement works – (1) Drainage and (2) Grass / planting

99. I agree with Mr Somerset that it is inappropriate to include costs relating to drainage, as Mr Daly has done. As already set out above, the Claimant has not established that there is any significant defect in, or damage to, either the foul water drainage system or the surface water drainage system, which is attributable to defective construction or

ground heave. As the house will be left in place, the underpinning works should be capable of being done without damaging the drainage systems.

100. In relation to grass/planting, the nature of Scheme 3 is such that it is unlikely to cause very significant damage to grass/planting. I accept, however, that some damage to the garden is likely to be caused by the bringing of machinery and workmen onto the Property. I will therefore allow £1,200, adding that figure to Mr Somerset's estimate for the costs of reinstatement works.

Main contractor's OHP

101. Mr Somerset has estimated the main contractor's overhead and profit based on 10% on the value of the works. He notes that the 10% figure was agreed between the experts for the purposes of costing Schemes 1 and 2. Mr Daly, in contrast, has estimated the main contractor's OHP for Scheme 3 based on 15% on the value of the works.
102. I accept that the smaller scale of Scheme 3, relative to Scheme 1 and 2, may mean that the main contractor would seek a slightly higher OHP. I will therefore allow 13%, as representing a point between the two QS experts' respective estimates.

Allowances for contingency and inflation

103. Both Mr Daly and Mr Somerset have allowed a contingency percentage of 5%. The resulting figure is higher on Mr Daly's calculations, given that Mr Daly's estimate of the costs of Scheme 3, prior to application of the contingency percentage, is higher than Mr Somerset's estimate.
104. Mr Daly has added an additional provision for inflation, doing so on the basis that the works are unlikely to commence until after April 2026. Mr Somerset has not made equivalent provision; an approach he has taken because his instructions were to cost the schemes as at May 2025.
105. In my view, it is reasonable to anticipate that the costs of Scheme 3 will turn out to be materially higher than the amount estimated by Mr Somerset. The precise reasons why the costs will be higher are presently unknown. It is common ground that ground investigation (by way of bore holes, etc.) and other preliminary activities will need to be carried out before Scheme 3 is implemented, so as to inform the precise specification of the remedial project. I do not accept that the existence of such 'known unknowns' justifies taking a 'maximalist' approach to quantifying costs, such as by estimating costs based on assumptions that CFA piles, pile casings, etc., will be required. I do, however, think it appropriate to take account of the potential for increased costs in another way, namely by allowing a relatively generous allowance for contingencies.
106. The allowance I will make is 15% (rather than 5%). This single percentage allowance makes, in my judgment, fair and reasonable provision for a range of factors that may increase costs, including: (i) the 'known unknowns' existing because ground conditions require further investigation; (ii) the risk that latent defects or damage to the superstructure may be revealed during the works, for which repairs are needed; (iii) the risk that SPONS rates may understate the market rates that can actually be accessed in the context of this remediation project; (iv) damage to wardrobes,

furniture, etc., whilst they are being removed from the house and stored during the works; and (v) inflation occurring prior to the time when the works are undertaken.

Professional fees and surveys

107. Mr Daly has provided significantly higher estimates of the costs of professional fees and surveys. That is especially so in relation to professional fees, for which Mr Daly has estimated £49,537, whereas Mr Somerset has estimated £20,000.
108. In my assessment, Mr Daly's estimates appear to be driven largely by Mr Dust's projected fees and are unjustified. Scheme 3 is a reasonably straightforward underpinning project involving the construction of a piled raft, and the subsequent making good, local repairs and redecoration. There will need to be some preliminary investigation of the ground conditions, and some advice obtained from a structural engineer for appropriately specifying the works (such as the type and depth of piles to be used). There ought not, however, to be a need for extensive input from Mr Dust.
109. Taking a broad brush view, based on the estimates made by the QS experts and the reasons given for them, I will allow a total of £32,000 to cover professional fees and surveys.

The cost of underpinning the garage

110. Scheme 3, as specified by the Defendant, does not include any provision for underpinning the garage. As I have found such underpinning to be appropriate, it is necessary to make a consequential adjustment to the QS experts' cost projections.
111. The Defendant's Counsel suggested, in his closing submissions, that one way of doing this would be for me to assess the costs of underpinning the garage by taking the difference between the costs of the two options proposed under Scheme 2, given that the difference between those options was whether the garage would be underpinned. He suggested that, if this was the approach I took, I should rely on Mr Somerset's cost estimates for Scheme 2, given that Mr Daly's estimates included excessive sums or betterment, such as an electric garage door (the existing garage door is operated manually).
112. I agree that this is a reasonable approach. The difference between Mr Somerset's cost estimates for the two options under Scheme 2 is £33,000 (exc. VAT), which includes the provisions made by Mr Somerset for all elements, including main contractor's preliminaries, OHP and construction contingency. Given that I have allowed a higher rate of contingency and have made minor upwards adjustments to other aspects of Mr Somerset's estimates, I will allow £35,000 (exc. VAT) for the additional costs of Scheme 3 which will be driven by my decision that the garage should be underpinned.

Additional losses claimed in the Claimant's "Non-Defect Schedule of Loss"

113. The Claimant's Non-Defect Schedule of Loss lists 10 categories of loss and claims a total of £106,324.76. The Defendant has populated that Non-Defect Schedule with its comments. The Defendant, by its comments, resists the Non-Defect claim, save for the following two categories:
 - i) Costs of alternative accommodation during the remedial works.

For this category of loss, the Defendant has offered £27,700 against the Claimant's claim for £42,800. In my judgment, it would not be appropriate for me to award the Claimant a higher amount than the Defendant has offered in respect of this category, given that the Claimant has provided little in the way of evidence for justifying a higher amount. The Claimant has assumed that the works will require that he and his family live elsewhere for "*a minimum of 12 months*", but the basis on which he has arrived at that assumption is unclear. Further, the Claimant has simply asserted, in his witness evidence, that he has estimated a rental price of £3,000 per month by looking at Rightmove, but he has not exhibited examples of relevant properties, as would have been appropriate.

- ii) Aggravated damages to compensate the Claimant for the anxiety he has suffered.

The Claimant has claimed £10,000 for this category of loss and the Defendant has offered £10,000. In my judgment, it would not be appropriate for me to award the Claimant a higher amount than he has claimed in his Non-Damage Schedule.

- 114. The Defendant has rejected the other 8 categories of loss listed in the Non-Damage Schedule. In my judgment, the Defendant was entitled to reject those categories, for the reasons it has set out in its comments on that Schedule. My conclusions in respect of those 8 categories are as follows:

- i) Costs relating to Mr Dust: Costs of Mr Dust's assistance for scoping and investigating defects and damage in the Property, and the likely causes, should form part of the Claimant's litigation costs. Costs of Mr Dust's structural engineering services in relation to the specification and execution of a remedial scheme will be costs of the remediation project and thus part of the project costs estimated by the QS experts. Accordingly, there is no proper basis for claiming any of Mr Dust's fees as a category of "non-damage" loss.
- ii) Costs of the Murphy Geospatial report: Again, these costs are properly litigation costs. The Murphy Geospatial report was obtained for the purposes of, and has been deployed in, the present proceedings.
- iii) Thomas Sanderson blinds: Even if and insofar as blinds have to be removed for the purposes of carrying out Scheme 3, the blinds can be retained for subsequent re-installation. The Claimant has not evidenced that it would be impossible to remove, store and re-install the blinds.
- iv) Sharps wardrobe: Even if and insofar as wardrobes have to be removed for the purposes of carrying out Scheme 3, the wardrobes can be disassembled and retained for subsequent re-installation. The Claimant has not evidenced that it would be impossible to remove, store and re-install the wardrobes. Insofar as there is a risk of the wardrobes being damaged whilst they are being disassembled, stored, or re-installed, this risk can be provided for as part of the contingency percentage.

- v) Water softener: Even if the water softener has to be removed for the purposes of carrying out Scheme 3, it can be retained for subsequent re-installation. The Claimant has not evidenced that it would be impossible to remove, store and re-install the water softener. In his oral evidence, he agreed that the water softener could be reused.
- vi) Payments to Shaun Howard to carry out works to the Property: Mr Howard attended the Property shortly after the Claimant moved into it and performed various ‘handyman’-type tasks, such as installing shelves, and preparing the garden for a patio. I see no basis for assuming that all the works he did will be rendered useless by Scheme 3. Insofar as the Scheme 3 works damage elements such as the patio, the cost of reinstating or repairing those elements should form part of the remediation project costs estimated by the QS experts. Moreover, the Claimant and his family have, for the past 9 years, been enjoying the benefits of the facilities, repairs, etc., that were carried out by Mr Howard.
- vii) Cost of a New Build Warranty: The Claimant has not provided evidence showing that he would be able to purchase a New Build Warranty or the associated cost. Given that Scheme 3 does not involve a rebuild of the house, it seems unlikely that a New Build Warranty would be available. The quality of the remediation works will be guaranteed by the contractor(s) carrying out those works.
- viii) Stigma diminution in value: The Claimant has not specified, in the Schedule, a figure for this category of loss, but states that “*Expert evidence will address this*”. The expert evidence that has been filed by the Claimant does not, however, provide any quantification of the alleged diminution in value, whether in a scenario where Scheme 3 is the remediation scheme, or in any other scenario. As the Claimant has not particularised and evidenced its claim for loss under this category, there is no proper basis for me to award damages in respect of it. For completeness, I note that the Claimant has not provided any evidence as to whether, or to what extent, the costs to him, or a subsequent purchaser, of insuring the Property, following its remediation by Scheme 3, would be higher as compared with the costs of incurring a similar house that did not have its history.

Conclusion

- 115. For the reasons I have set out in this judgment, the Defendant has breached Clause 1 of the Contract and its duty under s.1(1) DPA 1977 and is liable to the Claimant in damages.
- 116. I set out in the table below my *provisional* quantification of the damages award, as calculated by reference to the findings and conclusions set out in my judgment. The quantification is provisional because I will make a final order awarding damages only after affording an opportunity to correct any calculation errors or omissions I may have made. I hope that the parties will be able to agree the appropriate damages award amount between themselves.

DESCRIPTION	AMOUNT (£)
<i>‘DEFECTS LOSSES’</i>	
Stage 1 – Strip out works	6,793
Stage 2 – Underpinning works	72,772
Stage 3 – Reinstatement works	86,689
Sub-total	166,254
Main contractor’s preliminaries – 20%	33,251
Main contractor’s OHP – 13%	21,613
Cumulative sub-total	221,118
Contingency – 15%	33,168
Professional fees and surveys	32,000
Addition for underpinning the garage	35,000
Total estimated project costs (exc. VAT)	321,286
VAT to client – 20%	64,257
Total estimated project costs (inc. VAT)	385,543
<i>‘NON-DEFECTS LOSSES’</i>	
Alternative accommodation	27,700
Aggravated damages	10,000
GRAND TOTAL	423,243

117. This is not a case in which costs are likely simply to 'follow the event'. The procedural history of this litigation is complex. Further, the costs of the litigation are likely to represent a high proportion of the value of the dispute, at least if that value is taken to be the difference between the parties' positions on the eve of trial, in financial terms. It is regrettable that these proceedings were not compromised prior to the costs of the trial being incurred. I will direct that a hearing be listed at which the terms of the final order awarding damages will be finalised and at which I will hear submissions on consequential matters, including costs.



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

Case references : **LON/00BG/BSA/2024/0005
LON/00BG/BSB/2024/009**

Property : **Canary Riverside Estate,
Westferry Circus, London E14
(the “Estate”)**

Applicant : **Secretary of State for Housing and
Communities and Local Government**

Represented by **Walker Morris LLP**

Respondents : **(1) Canary Riverside Estate
Management Limited
(2) Octagon Investments Limited
(3) Yianis Holdings Limited
(4) Riverside CREM 3 Limited**

Represented by **Freeths LLP**

Tribunal **(1) Judge Vance
(2) Judge Rushton, KC
(3) Mr Andrew Thomas RBI FRICS
MBA MIFireE**

Date of Hearing : **28 – 30 October 2025**

Date of Decision : **6 January 2026**

Venue : **10 Alfred Place, London WC1E 7LR**

DECISION

NB: References in square brackets and in bold below refer to pages in the core hearing bundle prepared by the Applicant (2,561 pages). Where preceded by the letter “S” they refer to pages in the Supplemental Bundle (810 pages) provided by the Applicant. Where preceded by the letter “R” they refer to pages in the second supplemental bundle (62 pages), provided by the Landlords (the first, second, third and fourth Respondents).

Decisions

1. We determine that for the reasons given below a building safety risk, constituting a relevant defect for the purposes of s.120 Building Safety Act 2022, exists in relation to the following wall types present at the subject Development:
 - (a) EWT 01 Masonry Cavity Wall;
 - (b) EWT 05 Curtain Wall and Spandrel Panels; and
 - (c) EWT 06 EPS Render on Blockwork on Balconies.
2. The parties agreed, and we concur, that the following wall types constitute relevant defects;
 - (a) EWT 02 – Zinc Cladding;
 - (b) EWT 03 – EPS Render on Concrete block; and
 - (c) EWT 04 – EPS Render on Plywood;
3. On the available evidence, we are not satisfied that a relevant defect is present in respect of EWT 07 Reconstituted Stone Cladding.

Background

4. This decision concerns two applications brought by the Secretary of State against the above-named Respondents for: (a) a Remediation Order (“RO”) and/or; (b) a Remediation Contribution Order (“RCO”). Both applications are brought under the Building Safety Act 2022 (“BSA 2022”) and concern the development known as Canary Riverside, Westferry Circus, London E14 (“the Development”).
5. Octagon Overseas Ltd (“Octagon”) is the freehold owner of the Estate. Canary Riverside Estate Management Ltd (“CREM”) is the long leaseholder of various parts of the Estate and is a party to the occupational leases of the residential flats. In 2018, CREM assigned several leasehold interests on the Estate to Riverside CREM 3 Ltd (“Riverside”) as part of a restructuring of the group of companies of which CREM, Octagon and Riverside are all members. At the rear within Eaton House, one of the towers within the Estate, are 45 serviced apartments known as Circus

Apartments, held under a long underlease by Circus Apartments Limited (“CAL”).

6. In August 2016, the Tribunal appointed a manager to manage the Estate pursuant to the provisions of s.24 Landlord and Tenant Act 1987 (“the 1987 Act”). That management order has since been extended and varied on several occasions. In September 2019, the original manager, Mr Alan Coates was replaced by Mr Sol Unsorfer, the current manager. There are currently multiple ongoing applications to vary the management order, all of which have been stayed pending the determination of an application brought by Canary Riverside RTM Company Limited seeking a determination that it had, on the relevant date, acquired the right to manage the Development. The Tribunal determined that application, in the RTM Company’s favour, on 12 December 2025.
7. In directions dated 16 June 2025 (amended 29 August 2025) **[81F]**, the Tribunal ordered the trial of a preliminary issue in both BSA 2022 applications. The preliminary issue is which, (if any) of the wall types present at the Development, as identified by the parties’ fire safety experts, constitute a “Relevant Defect” within the meaning of s.117 BSA 2022.
8. The trial of that preliminary issue took place on 28, 29 and 30 October 2025. It was immediately preceded by the hearing of the RTM application. Separate site inspections in the BSA 2022 and RTM applications took place on 21 October 2025. Fire Engineering experts for the parties attended the site inspection for the BSA 2022 applications (Mr Brown, C.Eng. F.I.Fire.E, of Fire Expert Limited for the Applicant, and Mr Cooper, BEng (Hons) CEng CMIFireE, of Virtus SC Fire Engineering Ltd for the Respondents). Both experts attended the trial of the preliminary issue, for the purposes of cross-examination, at which the Applicant was represented by Mr Dutton KC and Mr Burrell of counsel, and the Respondents by Mr Bates KC and Ms Gibson, of counsel.
9. It is common ground that each of the following residential towers on the Development is a “Relevant Building” within the meaning of s.117 BSA 2022:
 - (a) Berkley Tower 48 Westferry Circus, London E14 8RP (“Berkley”);
 - (b) Eaton House 38 Westferry Circus, London E14 8RN (“Eaton”);
 - (c) Belgrave Court, 36 Westferry Circus, London E14 8RJ/E14 8RL (“Belgrave”), and
 - (d) Hanover House 32 Westferry Circus, London, E14 8RH (“Hanover”).
10. Following an initial, non-intrusive, joint inspection on 18 July 2024, the parties’ experts set out their initial positions regarding the status of relevant defects in a Scott Schedule dated 15 November 2024 **[82-91]**. Seven wall types were identified:

- (a) EWT 01 – Masonry Cavity Wall;
 - (b) EWT 02 – Zinc Cladding;
 - (c) EWT 03 – EPS Render on Concrete block;
 - (d) EWT 04 – EPS Render on Plywood;
 - (e) EWT 05 – Curtain walls/spandrel panels;
 - (f) EWT 06 – EPS Render in and around Balconies;
 - (g) EWT 07 – Reconstituted Stone Cladding.
11. A further joint inspection on 17 and 18 December 2024 was followed by a joint statement on 27 February 2025 **[92-71]**. Mr Brown then submitted his report on 7 April 2025 **[172-380]**, with Mr Cooper's report following on 10 April 2025 **[950-1002]**. An updated joint statement from the experts was provided on 12 June 2025 **[1003-1006]**.
 12. There is considerable agreement between the parties' experts. Both agree that a building safety risk exists in relation to three of the seven wall types identified on the Estate (EWT 02, EWT 03, and EWT 04). Of the remaining four wall types the Applicant's fire engineering expert considers each is a building safety risk, but the Respondents' expert disagrees.
 13. On 19 September 2025, after the updated joint statement had been produced, the Respondents sent the Applicant three PAS 9980 Fire Risk Appraisal of External Wall assessments ("PAS Assessments") produced by Design Fire Consultants ("DFC") together with three Form EWS1s, all concerning Hanover House, Eaton House and Circus Apartments **[1409 - 1770]**. In Mr Bates' submission, the PAS assessments carried out show that the majority of identified risks are low or medium risk, the two lowest risk categories possible. He also submits that the EWS1 forms all give a rating of B1, meaning that the risk of fire is sufficiently low that no remedial works are required. Further investigations are, he said, required to complete assessments for Belgrave Court and Berkeley Tower.
 14. At the start of the hearing before us, Mr Dutton, with whom Mr Bates agreed, emphasised that when determining the preliminary issue, it was important for the Tribunal to confine itself to the *existence* of fire safety risks rather than their *severity*. This, he said, was necessary because the evidence relevant to the preliminary issue was likely to overlap with the evidence to be given at the main trial, when the Tribunal will be deciding what remedial steps are required to address the building safety risks identified. We concur with that submission and agree that any expression of our views on the size or significance of a risk should be limited to that reasonably necessary to explain why we are satisfied that a defect has causes a building safety risk.

Legal and Regulatory Framework

15. What constitutes a "relevant defect" is defined by section 120(2) BSA 2022 as "a defect ... 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".

16. Section 120(5) defines "relevant works" as 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)."
17. "The relevant period" means the period of 30 years ending with the time the section came into force.
18. Section 120(5) provides that a "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".
19. It is common ground between the parties that the defects identified in the Scott Schedule arise in connection with relevant works. The question for us to determine is, therefore, whether the defects identified by the experts in respect of the four wall types in dispute cause a building safety risk, i.e. a risk to the safety of people in or about the building arising from either the spread of fire or building collapse.
20. Both experts referred to the Building Regulations. Regulation 4 of the Building Regulations 2010 ("the Building Regulations") provides that, subject to exceptions, building work shall be carried out so that it complies with applicable requirements contained in Schedule 1 of those Regulations. Requirements B1 to B5 of that Schedule address fire safety, with B2 and B3 setting out requirements in respect of internal fire spread and B4 doing so for external fire spread.
21. Requirement B3 provides as follows (our emphasis):

" Internal fire spread (structure)

B3. (1)The building shall be designed and constructed so that, in the event of fire, its stability will be maintained for a reasonable period.

(2)A wall common to two or more buildings shall be designed and constructed so that it adequately resists the spread of fire between those buildings. For the purposes of this sub-

paragraph a house in a terrace and a semi-detached house are each to be treated as a separate building.

(3)Where reasonably necessary to inhibit the spread of fire within the building, measures shall be taken, to an extent appropriate to the size and intended use of the building, comprising either or both of the following—

- (a) sub-division of the building with fire-resisting construction;
- (b) installation of suitable automatic fire suppression systems.

(4)The building shall be designed and constructed so that the unseen spread of fire and smoke within concealed spaces in its structure and fabric is inhibited.”

22. Requirement B4 provides as follows (again, our emphasis):

“External Fire Spread

B4.(1) The external walls of the building shall adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building.

(2) The roof of the building shall adequately resist the spread of fire over the roof and from one building to another, having regard to the use and position of the building.

23. Regulation 8 provides that certain Parts of Schedule 1, including Part B, “shall not require anything to be done except for the purpose of securing reasonable standards of health and safety for persons in or about buildings (and any others who may be affected by buildings, or matters connected with buildings)”.

24. The Secretary of State has issued approved documents to give practical guidance on how to meet the requirements of the Building Regulations, with Approved Document B (“ADB”) addressing fire safety. ADB was first issued in 1992 **[613]** and has been amended several times since then. A significant number of changes were made following the Grenfell Tower Tragedy in 2017, and in response to issues raised in the Grenfell Inquiry. The most recent edition of ADB is its 2019 edition (amended in 2022 and 2025 and with forthcoming and 2026 and 2029 changes pending) **[1203]**. The Tribunal asked both experts whether it was the 1992 edition that was used for the design of the Development, but neither could not confirm the position. In their evidence, the experts switched between the 1992 version and the 2019 edition, interchanging between both. In this decision, our references below are to the 2019 edition.

25. ADB outlines a series of measures, such as the provision of cavity barriers, cavity closers, compartmentation, and firestopping, which, if followed,

may be sufficient to comply with the Building Regulations. In the introduction to ADB **[1207]** it is said that “approved documents set out what, in ordinary circumstances, may be accepted as one way to comply with the Building Regulations”, but that compliance with the approved documents does not guarantee that building work will comply with the Requirements set out in the Regulations. It states that those responsible for building work must consider whether following the guidance in the approved documents is likely to meet the Requirements in the particular circumstances of their case. It also states that there may be other ways to comply with the Requirements than those described in an approved document **[1207]**.

26. In the current ADB, Section 7 deals with compartmentation, section 8 deals with cavities in flats, and section 9 with the protection of openings and fire-stopping. Paragraph 8.1 of that section **[1313]** reads as follows:

“ Cavities in the construction of a building provide a ready route for the spread of smoke and flame, which can present a greater danger as any spread is concealed. For the purpose of this document, a cavity is considered to be any concealed space.

27. Paragraph 8.2 states that provisions concerning cavity barriers are set out in Diagram 8.1 **[1284]**. It states that to reduce the potential for fire spread, cavity barriers should be provided in several locations, including;

- (a) to divide cavities; and
- (b) to close the edges of cavities.

28. Paragraph 8.3 recommends that cavity barriers should be provided at all the following locations:

- (a) at the edges of cavities, including around openings (such as windows, doors and exit/entry points for services);
- (b) at the junction between an external cavity wall and every compartment floor and compartment wall;
- (c) at the junction between an internal cavity wall and every compartment floor, compartment wall or other wall or door assembly forming a fire resisting barrier

29. However, paragraph 8.3 also contains an exemption to that requirement, namely, where the conditions of Diagram 8.2 are met. Diagram 8.2 **[1286]** is entitled “Cavity walls excluded from provisions for cavity barriers” and specifies that in certain circumstances openings are excluded from the requirement for cavity barriers to be present. Those circumstances are that the wall must be comprised of two leaves of brick or concrete of at least 75mm thick and that: (a) any cavity openings must be closed around the opening; and (b) the cavity must be closed at the top

of the wall (unless the cavity is totally filled with insulation (which is not the case with the wall types we are considering) [4.5] [964]).

Identification of relevant defects – what test to apply?

30. We agree with Mr Bates’ submission, at para. [20] of his skeleton argument, that initial case-law from the FTT supports the following propositions:

(a) whether something is a relevant defect is to be assessed at the date of the FTT hearing: *Waite v Kedai*, LON/00AY/HYI/2022/ 0005 and 0016 (at [75]);

(b) whether or not works or construction complied with the then extant Building Regulations in force at the time is not the relevant question. Instead, the correct question is whether there is a defect that causes a building safety risk in the light of today’s knowledge (see *Waite* at [75], [80], *Vista Tower* CAM/26UH/HYI/2023/0003 at [68]);

(c) it is for an Applicant to establish a *prima facie* case that there are relevant defects which cause a building safety risk which would entitle an FTT to make an RO (*Waite* at [80]).

31. In Mr Bates’ submission, what constitutes a building safety risk under s.120 cannot mean *any* risk arising from the spread of fire or building collapse. That is because all buildings carry some degree of risk of fire spread, and so there must be some defects where the risk is so low that they cannot amount to a Relevant Defect. He argued that a PAS 9980 assessment is helpful evidence when seeking to identify the degree of risk posed by a defect concerning the external walls of a building. In his submission, a PAS 9980 assessment of “low risk” means that the defect cannot, as a matter of law, amount to a relevant defect. Instead, it would be an ordinary unavoidable risk of the sort identified in *Vista Tower* at [72] where the tribunal said:

“We think the better view is that any risk above “low” risk (understood as the ordinary unavoidable fire risks in residential buildings and/or in relation to PAS9980 as an assessment that fire spread would be within normal expectations) may be a building safety risk. Section 120(5) describes a risk to the safety of people arising from the spread of fire or collapse, not a risk reaching an intolerable or any other particular threshold. We do not think “collapse” indicates the risk must be of catastrophic fire spread, as was suggested. It need only be a risk to the safety of people arising from the spread of fire in a tall residential building.”

32. Mr Dutton disagreed. At para. [33] of his skeleton argument he said that the Tribunal’s role is not to determine whether an external wall

construction is a “tolerable” risk, but whether it is a “building safety risk”, because of risk to the safety of people in or about the building arising from the spread of fire or building collapse. He accepted that a PAS9980 assessment is likely to be relevant, but not conclusive, evidence, for a tribunal to have regard to when considering that question. He pointed out that PAS 9980 expressly states that in terms of approval under the Building Regulations, the test to be applied by a building control body as to whether a particular fire-engineered solution is acceptable is likely to be more stringent than the methodology set out in the PAS. He acknowledged [29-30] that compliance with Building Regulations is relevant to the assessment of whether there is a ‘building safety risk’ and also that compliance with the guidance in ADB is relevant, but not conclusive, as to whether there has been compliance with the Building Regulations.

33. At [28] in his skeleton argument, Mr Dutton suggested that the recent case of *Zampetti & Ors v Fairhold Athena Limited & Ors* LON/00BE/HYI/2023/0013 and LON/00BE/BSB/2024/0602 (“*Empire Square*”) contained a timely reminder of the danger of interpreting a statutorily defined term by reference to terms used in other documents. In *Empire Square*, Self-Remediation Terms (contractual terms referenced within regulation 21 of The Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023) (“SRT’s”) were contrasted with the definition of a relevant defect in s.120 BSA 2022. The FTT found that the definition of a “life-critical safety risk” in the SRTs was of little assistance when interpreting the definition of a relevant defect in s.120. It said that whilst the requirement to remediate in the SRT’s is to the standard of a ‘tolerable risk’, the purpose of BSA 2022 was for relevant defects to be cured, where possible, not simply reduced to what is tolerable.
34. At [14], Mr Dutton advances five propositions in relation to the requirement that to be a *relevant defect*, a defect must “cause a risk to the safety of people in or about the building arising from the spread of fire and/or the collapse of the building or any part of it”:
 - (a) the reference to a “risk” is to any risk however small;
 - (b) the reference to the safety of “people in or about the building” refers to anyone who is in or about the building including visitors and firefighters;
 - (c) the reference to the “spread of fire” refers to the spread of fire between parts of the building which are (or should be) separated by walls/floors/doors etc which are meant to confer fire resistance: e.g. the spread of fire from the external walls into a flat, or from one flat into another;
 - (d) the causal link between the defect and the risk is to be determined by asking the following question: is the risk one which could have been avoided (or minimised) if the building had been constructed in some different way? And;

(e) the combined effect of propositions (a)-(d) above is that the threshold for satisfying this requirement is very low.

35. At [35] Mr Dutton submitted that when the BSA 2022 refers to something which causes a risk, it must be referring to something which changes the risk in some way, by increasing the likelihood that something may go wrong and/or by increasing the harm which may ensue if something does go wrong. He argued that the task for a tribunal is to compare the risk posed by the defect in question with the risks which would have existed if the building had been constructed defect-free. In respect of fire spread, if something has been done (or not done), or something used (or not used), which increases the risk of fire spreading from one compartment to another, which is avoidable, then it would, in his submission, be a 'building safety risk.'
36. In his oral submissions he suggested that the Tribunal should adopt the following approach:
 - (a) identify the risk profile if the defect was not present (this includes the ordinary unavoidable fire risks in residential buildings referred to in *Vista*);
 - (b) identify the risk profile with the defect in situ;
 - (c) identify whether there has been a shift in the risk profile in wrong direction; and
 - (d) if the answer to (c) is yes, then it has caused this additional risk and constitutes a building safety defect.
37. We agree with Mr Dutton, that the reference to "building safety risk" in s.120 is to *any* risk, however small, to the safety of people in or about the building arising from the spread of fire, or the collapse of the building or any part of it. We disagree with Mr Bates that there is a threshold below which a risk should be considered as tolerable, or as an ordinary, unavoidable risk present in residential buildings of this type. There is no threshold test in s.120, and words such as "tolerable," "low," "medium," "high" or "ordinarily unavoidable" are noticeably absent. In our view, the adoption of such language as a threshold test is unwarranted and we therefore disagree with the view that Mr Cooper expressed in multiple places in his report that for a defect to be a building safety risk it needs to pose an *unreasonable* risk to people in and around the building (e.g. at 4.42). The statutory wording contains no such gloss.
38. Construing s.120 in the context of Part 5 as a whole, we consider our task to be a straightforward one. It is simply to identify whether, as at the date of the hearing, and in the light of current knowledge, there are defects present at the building that constitute a risk to the safety of people in or about the building arising from the spread of fire, or collapse of the building, or any part of it. When doing so, we do not consider it

appropriate to attempt to assess the degree of that risk, nor whether the risk identified is one that exceeds that ordinarily present in a building of this nature.

39. That approach does not appear to us to be inconsistent with the decision of the tribunal in *Vista Tower*. At para. 72 that tribunal expressly said that s.120(5) “describes a risk to the safety of people arising from the spread of fire or collapse, not a risk reaching an intolerable or any other particular threshold”. It suggested that a defect that caused a risk to the safety of people arising from the spread of fire in a tall residential building was sufficient to constitute a building safety risk.
40. It is true that the tribunal in *Vista Tower* said that a risk above “low” may amount to a building safety risk, but it said that in the context of rejecting a submission that a PAS9980 assessment of a ‘medium’, but ‘tolerable’, fire risk did not amount to a building safety risk.
41. If, however, our understanding is incorrect and the tribunal in *Vista Tower* found that a “low” risk assessment in a PAS9980 means that a defect is incapable of amounting to a building safety risk, then we respectfully disagree. Such an assessment is clearly relevant evidence, but it is not determinative. A tribunal will need to weigh up all the relevant evidence before it. In this case, that includes the evidence of the parties’ expert witnesses, the Building Regulations and the PAS9980 assessments obtained by the Landlords.
42. We therefore agree with Mr Dutton that the threshold for establishing the presence of a relevant defect is a low one. However, this does not necessarily mean that steps will need to be taken to remediate a defect identified as a building safety risk. It is at that point, once the risks have been identified, that an assessment of those risks, such as in a PAS9980 assessment will be relevant. As expressed in the PAS Code of practice, for example in the commentary to clause 6 **[1033]**, circumstances may exist in which, “notwithstanding the presence of combustible material in the external walls and cladding, there is no need to take remedial action as the risk is low”.
43. Whilst the identification of a relevant defect opens up the possibility of an application for a RO, the making of such an order by the tribunal is a matter of discretion. A tribunal may decide that it is inappropriate to order remediation if it considers that the level of risk posed by a relevant defect does not warrant it. Similarly, on an application for a Remediation Contribution Order, a tribunal may decide that it is not just and equitable to make such an order in respect of costs incurred in remedying a relevant defect where it considers those costs were unnecessarily incurred.
44. As the tribunal said at para. 75 of *Vista Tower*

“Disagreement about whether a risk is tolerable, alone or with other factors, seems more likely (or logically) to be

about whether or what action should be taken from time to time, not whether this is a relevant risk (*sic*) at all.”

45. Arguments as to whether the relevant defects identified in respect of the Development constitute tolerable risks are, therefore, matters to be decided at the final trial of these applications, when we will be considering whether to make a RCO and/or a RCO.
46. It follows that we reject Mr Dutton’s submission that our task, at this stage, is to assess whether the presence of a defect increases the risk profile of the building above that of a hypothetical defect-free building. To conduct such an exercise would be unnecessarily speculative when our role is to simply assess the evidence before us in order to identify whether the statutory definition in s.120(5) is met.
47. In *Vista Tower*, the tribunal approached that task by first considering whether a *defect* was present and then whether that defect constituted a *building safety risk*. We do not agree with that approach and consider it unnecessary to first identify whether a defect is present. This is because we agree with Mr Dutton that in s.120, the word “defect” refers to a thing which is defective *because* it causes a ‘building safety risk.’ To start with identifying whether a matter amounts to a defect can lead to the unnecessary distraction of how to determine what constitutes a defect. Compliance with building regulations at the time of construction cannot, for example, cannot be definitive, because regulations have changed over time.
48. The better approach, in our view, is to focus on whether an asserted defect causes a building safety risk. If something was done (or not done), or if something was used (or not used) in connection with relevant works to a building, which has caused a building safety risk, it will be a relevant defect for the purposes of s.120. Given that there is no dispute that the defects asserted by the Applicant are issues that concern relevant works, it follows that our focus should be on whether the matters complained about cause building safety risks. If they do, they will constitute relevant defects. If they do not, they will not be relevant defects.

Expert Evidence

49. In deciding whether relevant defects are present at the Development, both experts have placed particular emphasis on the extent to which there has been compliance with ADB.
50. Mr Brown states at para. 4.1.1 of his report that he has proceeded on the assumption that works that do not satisfy the provisions of ADB applicable at the time of design and construction would be amount to a fire safety defect. This could be due to defective workmanship; a failure in design or construction such as the omission of a cavity barrier; or a failure to follow the guidance in ADB in relation to a specific requirement of the Building Regulations. He suggests three different ‘approaches’ that the Tribunal

may wish to have regard to when identifying the presence of a defect that causes a building safety risk:

- (a) what he describes as the ‘ADB Approach,’ which focuses on whether there has been a failure to satisfy the provisions of ADB. He recognises, however, that there is a wide range of acceptable design and construction solutions available to a designer or developer of a building, who may be able to demonstrate, through a fire engineering assessment, that the level of risk associated with a building is acceptable or tolerable, even though the provisions of ADB have not strictly been complied with [4.4.5];
- (b) the ‘PAS 9980 Approach’ by which a PAS 9980 assessment can be used to assess the risk of fire spread in respect of external walls; and
- (c) the ‘Cautious Approach’ whereby any risk above “low” may result in the Tribunal determining that a relevant defect exists [4.7.2]. Referring to para. 72 of *Vista Tower* he suggests that this approach could mean that something assessed as low risk in a PAS 9980 assessment would nevertheless constitute a relevant defect.

- 51. Mr Cooper’s approach [2.13] **[955]** was to first consider each of the alleged defects against the relevant provisions of ADB, and whether the relevant Requirements of Part B to Schedule 1 of the Regulations had been met. Secondly, he considered whether each alleged defect was a relevant defect that resulted in a building safety risk, pursuant to s.120 of the Building Safety Act 2022. He did not, however, consider compliance with Building Regulations to be determinative as to whether a relevant defect is present.
- 52. In Mr Cooper’s view, it is appropriate to assume that the level of risk implied by s.120 equates to any risk above ‘low risk’ and this approach forms the basis for the opinions expressed in his report [3.25]. He states that if one were to take the view that *all* risk was covered, then the provisions become unworkable, as all buildings and all building work will present some residual risk to the occupants of the building [3.24]. For the reasons given above, we reject that analysis.
- 53. As Mr Bates’ points out in his skeleton argument [23] both experts agree, and we concur, that building safety risks exist in respect of the following wall types **[1005-6]**:
 - (a) **EW1 02 Zinc Cladding** - it is agreed that the omission of vertical cavity barriers from some cavities in this wall system was contrary to the provisions of ADB, and that in combination with the use of combustible thermal insulation, a building safety risk exists to the occupiers of penthouse apartments;
 - (b) **EW1 03 EPS Render of Blockwork** - both agree that horizontal cavity barriers have been omitted at floor levels, starting at second floor level, resulting in a relevant defect as there are no barriers to

prevent upwards fire spread via combustible expanded polystyrene (“EPS”) thermal insulation; and

- (c) **EWT 04 EPS Render on Plywood Substrate** - both agree that the use of combustible thermal insulation without fire barriers at floor levels (starting at second floor), which is fixed to plywood sheathing board with no cavity barriers provided between the board and the underlying building substrate results in a building safety risk.

54. That leaves four remaining wall types.

- (a) **EWT 01 Masonry Cavity Wall;**

- (b) **EWT 05 Curtain Wall and Spandrel Panels;**

- (c) **EWT 06 EPS Render on Blockwork on Balconies;** and

- (d) **EWT 07 Reconstituted Stone Cladding.**

Wall Type 1 – Masonry cavity wall

55. This wall type includes most of the external walls on the Estate. Details of its construction are shown in the diagram at [244]. Mr Brown describes it as consisting of a traditional masonry cavity wall with combustible phenolic insulation in the cavity between the inner and outer leaf [8.1.1]. He considers it to be a building safety risk under either his ADB Approach [8.8.6 b)], or his Cautious Approach [8.8.6 d)], but not if using the PAS 9980 Approach [8.8.6 c)]. In Mr Cooper’s opinion it does not constitute a relevant defect [4.19], [971].

56. Mr Brown identified four specific defects in relation to EWT 01 which, in his opinion, breached: (a) Requirement B3(4) that buildings be designed and constructed so that the unseen spread of fire and smoke within concealed spaces in its structure and fabric is inhibited; and (b) ADB 9.1 [674] which, at para. 9.1 says as follows:

“Concealed spaces or cavities in the construction of a building provide a ready route for smoke and flame spread. This is particularly so in the case of voids above other spaces in a building, eg above a suspended ceiling or in a roof space. As any spread is concealed, it presents a greater danger than would a more obvious weakness in the fabric of the building. Provisions are made to restrict this by interrupting cavities which could form a pathway around a barrier to fire, and by subdividing extensive cavities.”

57. The defects Mr Brown identified are:

- (a) missing or inadequate vertical cavity barriers;

- (b) missing or inadequate horizontal cavity barriers;

- (c) missing cavity barriers from the top of window openings and from around window openings;
 - (d) the presence of combustible insulation in the wall cavity.
58. He recognised that ADB suggests that horizontal and vertical fire barriers can be omitted from this wall type provided that the cavity wall complied with the provisions of Diagram 28. However, as explained below, in his opinion EWT 01 did not comply with Diagram 28 and, therefore, barriers were required.

Vertical and Horizontal Cavity Barriers

59. In Mr Brown's opinion, cavity barriers were absent at the junction of some of the external masonry walls and compartment walls of flats. This, he said was a breach of the requirement in Table 13 ADB **[676]**, item 4. At **[8.2] [245]**, he referred to an intrusive external wall inspection previously carried out by International Fire Consultants Limited ("IFC") on 11 February 2021 **[462A]**. IFC identified that cavity barriers were often, but not always, present in locations where EWT 01 was present. IFC said that ideally, cavity barriers would be present in all locations but as remedial works to correct this would be extremely expensive, and as the risk was low (given that brick is a very robust material and cavity barriers were present in most inspected locations), remediation was not required.
60. Mr Brown considered that vertical fire barrier installation was variable across the development **[8.76 a)]**. He observed that some were present at compartment and party wall junctions with the external wall. However, in four locations they were missing or inadequately installed **[8.76 b)]** which, in his opinion, would allow fire and smoke to spread horizontally, bypassing the compartment walls and fire resisting partitions. The four locations were:
- (a) Location 5, Circus Apartments, where the vertical cavity barrier was not fitted using sufficient compression and there was a gap between the cavity barrier and the brickwork of approximately 2-5mm **[462E]**;
 - (b) Location 1, Eaton House, where a vertical cavity barrier had inadequate compression and there was a gap of approximately 2-5mm between the cavity barrier and the brick face **[462G]**;
 - (c) Location 4, Berkely Tower, where there was no vertical fire barrier **[462J]**; and
 - (d) Location 6, Berkely Tower, where no vertical fire barrier was present **[462K]**.
61. As to horizontal fire barriers, Mr Brown identified that the wall cavities had generally well-sealed horizontal fire barriers, which would limit fire

spread vertically [8.76]. However, he considers that it is evident from the IFC report, and his own observations that in at least two locations horizontal fire barriers are missing [8.2, 8.4.6]. The locations are:

(a) Location 6, Belgrave Court, **[462F]**; and

(b) Location 4, Circus Apartments, **[462H]**.

62. Mr Cooper, however, considers that wall type EWT 01 complies fully with Diagram 28 and that this type of masonry cavity wall is inherently resistant to fire spread and fire penetration. As such, items 3 and 4 of Table 13 had no relevance because the wall type is excluded from the provisions specified in the Table regarding cavity barriers. This meant that there was no requirement, or recommendation, to provide cavity barriers in line with compartment (or fire resisting) walls or floors, or around openings or at the top and edges of the cavities in the masonry cavity walls across the Development **[101]**. As to Item 1 of Table 13, he states that the experts did not inspect any areas where two buildings on the Development were connected, so this Item is not relevant.
63. He said that despite this, as noted by the experts on their joint inspection, and referenced in the previous IFC report, mineral fibre cavity barriers have in fact been provided in most locations, despite there being no obligation to do so. He accepts that in some locations, these have not been adequately compressed within the cavity but, nonetheless opines that the existing provision exceeds the requirements of ADB **[102]**.

Openings in the cavity wall

64. Diagram 28 states that cavities should be closed at the top of openings in the wall, and at the top of the wall (unless the cavity is totally filled with insulation, which both experts agree is not the case with the buildings under consideration).
65. Mr Cooper agrees with Mr Brown that the recommendation in Diagram 28 is for wall cavities to be closed at the top of an opening, such as a window ([4.5] in Mr Cooper's report **[964]**). In Mr Brown's opinion, cavity barriers are missing from the top of window openings [8.81 b i] **[256]**. He also suggests that cavity barriers are required *around* windows, but that none are provided. Instead Thermabate cavity closers have been used which he considers to be inadequate. He also noted gaps between some of the cavity closers and the masonry wall, meaning that the closers did not completely close the cavity [8.7.4] **[254]**. He further identified that the cavity closers are combustible, meaning they would not prevent the passage of fire and smoke from either into, or out of, apartments through window openings and through the cavity wall [8.41 a)] **[247]**.
66. In Mr Brown's opinion a window in wall type EWT 01 fitted with a Thermabate closure, combined with the variable provision of horizontal and vertical fire barriers and the absence of cavity barriers at the top of window openings and around window openings is a fire safety defect

[8.8.6] **[257]**, [8.10.2] **[259]**. He considers this to be a building safety risk under his ADB and Cautious Approaches but not under his PAS9980 Approach.

67. As to the requirement in Diagram 28 that the wall cavity be closed at the top of the wall, Mr Brown's records that no investigations were carried out by the experts, but he nevertheless considers that cavity barriers needed to be installed at the top of masonry walls [5.4.15 **[221]**]
68. In Mr Cooper's opinion, the requirements of Diagram 28 for cavity closers to be fitted to the tops of windows is met by the presence of steel shelf angles at the top of windows [4.7]. He states that he observed such a shelf angle during the joint inspection of Berkley Tower (photograph 1 **[965]**). This was located at the top of the window opening in the brick masonry cavity wall. Its purpose is to support the window but Mr Cooper points out that paragraph 9.6(a) of ADB recognises that steel at least 0.5mm thick can function as a cavity barrier. He also points out that paragraph 9.7 ADB provides that a cavity barrier can be formed by any construction provided it meets the provisions for cavity barriers. He was confident that this same arrangement will be found to the tops of all windows in EWT01.
69. There is, in his opinion, no need for cavity barriers around window openings. He states that diagram 28 does not require cavity closers to be provided other than at the tops of openings, which includes window openings [4.8] **[966]**. In any event, he considers that the cavity closers present were well fitted and free from any installation defects. He agreed however, that they would provide little in terms of fire resistance.
70. Mr Cooper also agreed that Diagram 28 recommends that the top of the masonry cavity walls should be closed. However, he points out [4.6] **[964]** that when he and Mr Brown carried out their joint inspection, it did not include an examination of the top of the masonry cavity walls. In his opinion, there is no evidence to suggest that cavity closers are missing from the tops of the walls because none of the inspections carried out to date inspected the tops of the cavities. If they have, in fact, been omitted, or are inadequate, they would not, in any event, amount to a building safety risk because if fire or smoke were to enter the cavity wall, "the imperforate nature of the outer and inner leaves mean that it is extremely unlikely that the fire will re-enter the building in another location" [4.15] [4.17] **[971]**. Instead, the insulation material present would char and reduce the rate at which the insulation would burn [4.16].

Insulation in the wall cavity

71. Mr Brown considers that as Diagram 28 is not satisfied due to the absence of cavity barriers at the top of, and around window openings and, he assumes, at the top of cavities, it meant that the exclusion provided for by Diagram 28 does not apply. As such, by reason of ADB 12.7 the use of use of combustible insulation in the external wall is prohibited and the combustible (phenolic) insulation present was not permitted by ADB **[106]**.

72. In Mr Cooper’s opinion [3.21] **[961]**, it is clear from the title to Diagram 28 that masonry cavity walls are excluded from the need for cavity barriers, meaning that there is no restriction on the use of combustible thermal insulation within the wall cavity irrespective of the height of the building or its topmost floor.

Other evidence regarding EWT 01

73. Mr Bates in closing submitted that Mr Cooper’s evidence that this wall type is inherently safe is supported by other material in this bundle, namely:
- (a) A Façade Remedial Consultants (“FRC”) External Façade Report dated 7-9 January 2020/6 May 2020 **[381]** in which it was said at para. 16.3.3.3 **[453]** that the evidence it had seen suggested that it was likely that the construction would meet the requirements of regulation B4(1). FRC made no recommendation regarding remediation of the masonry construction (16.3.5.1);
 - (b) the IFC Technical Note dated 11 February 2021 **[462A]** in which the author concludes at para. 3.1 that brick is a very robust material that provides good protection and that whilst cavity barriers were often, but not always, present, this posed a low risk. IFC concluded that the masonry system did not require remediation;
 - (c) a draft desktop FRAEW dated 1 October 2022 by CHPK **[497]** in which it concluded that condition of the wall type is reasonable given that the combustible material is enclosed between 2 leaves of masonry, each at least 100mm thick; and
 - (d) the guidance in PAS 9980: 2022 in which it is stated that in many cases, including walls of traditional masonry construction, it will be manifestly obvious to a competent fire risk assessor that the risk to life from fire spread over external walls would not warrant an FRAEW; and
 - (e) a PAS 9980 FRAEW dated 12 May 2025 in respect of the Canary Riverside Development **[2098]** which records a PAS Rating in respect of this wall type (described here as EWS01) as “Low” **[2101]**. The reason for this is explained at **[2118]** namely that the inner leaf of the wall construction is concrete, and the outer leaf is 100mm brickwork. Although protection around openings was missing, suitable horizontal and vertical cavity barriers were found and this, it was considered, would prevent fire spread beyond the flat of origin.

Decision: Wall Type 1

74. Both experts agreed, and we concur, that masonry walls are inherently low risk in terms of fire spread because masonry does not burn. However, there are crucial differences between a masonry or concrete wall without openings and one with openings. The presence of openings introduces the risk of spread of both fire and smoke through gaps or voids that are inadequately closed between floors and walls, thereby enabling fire spread between compartments and via the external wall. This includes fire or smoke spread caused by burning material used to fill the cavity.
75. In addition, as Mr Cooper agreed in cross-examination, the presence of windows in the walls of residential buildings has the potential to increase airflow into a cavity that is not fully closed. Furthermore, as Mr Cooper also agreed in cross-examination, one objective of closing a cavity at the top is to prevent fire and air from getting into the cavity.
76. In determining whether this wall type currently presents a risk to the safety of people in or about the building arising from the spread of fire (and therefore a building safety risk) we have had regard to all the evidence presented to us, including the material referred to us by Mr Bates, as described in para. 73 above. However, what in our assessment carries the greatest weight, and is of the most use in assessing whether the wall types under consideration cause building safety risks, is the degree to which there has been compliance with Building Regulations B3 and B4. We recognise the clear relevance of ADB, because a failure to comply with its recommendations may also indicate non-compliance with Building Regulations. However, ADB is guidance, and as stated in its introduction, there may be other ways to demonstrate compliance with the Requirements of Building Regulations, other than those described in ADB [1207] (an example may be compliance with a full engineered fire solution report). Compliance with PAS 9980: 2022 also carries significant weight because it provides guidance regarding fire risk appraisal of external walls.

Vertical and horizontal cavity barriers

77. Both experts agreed that some cavity barriers within the wall cavity were missing and that others had not been correctly installed. Mr Cooper's evidence was that this does not matter because EWT 01 satisfies the requirements of Diagram 28, meaning that no vertical and horizontal cavity barriers are necessary, although in many places they have in fact been provided. Mr Brown's evidence is that the wall type does not comply with Diagram 28, and therefore cavity barriers are required as identified at Items 1, 3 and 4 of Table 13.
78. As described in ADB 9.1 [674], cavities provide a ready route for the spread of smoke and flame spread. In our view, unless a feature of the construction of the building suggests otherwise, the absence of horizontal and/or cavity barriers in this wall type causes a building safety risk. This is because the absence of such barriers will allow the uninhibited spread

of fire and smoke between compartments, and via the external wall, through cavity voids. An example of a feature that renders the need for a horizontal cavity barrier unnecessary is provided by Mr Brown, namely the presence of a floor slab in the middle of a duplex apartment (Location 2 [462C])

79. In our determination, missing or inadequate cavity barriers at the junction of the external cavity wall of EWT 01 and compartment floors and walls separating buildings evidences non-compliance with:
 - (a) Requirements B3(2) and B3(3) because the construction of the building will not adequately resist the spread of fire within the building and between buildings;
 - (b) Requirement B3(4) because the unseen spread of fire and smoke within concealed spaces in the structure and fabric of the building will not be adequately inhibited;
 - (c) Requirement B4(1)) because the external walls of the building will not adequately resist the spread of fire over the walls and from one building to another.
80. Although compliance with Diagram 28 is not conclusive as to whether a building safety risk is present, we do not agree with Mr Cooper that this wall type complies with Diagram 28. This is because of the presence of unclosed openings in the cavity wall on top of and around windows. We address this in more detail below.
81. We recognise that FRC, in its External Façade Report, said at para. 16.3.3.3 [453] that the evidence seen suggested that it was likely that this wall type would meet the requirements of regulation B4(1). However, we do not consider that report to carry significant weight because the author has made no attempt to explain what ‘evidence’ they considered justified reaching such a conclusion. Nor did FRC assess the impact of openings present in the cavity wall when analysing this wall type. In addition, whilst at para. 16.3.5.1 FRC made no recommendation in respect of remediation of the masonry construction, that was caveated by a recommendation that the construction needed to be reviewed “ as part of a Holistic Fire Safety review, due to the presence of combustible insulation product”.
82. Nor did CHPK assess the impact of openings in the cavity wall report when preparing its FRAEW [497] in which it concluded that EWT 01 was of “reasonable” construction. As such, we do not attach significant weight to its report.
83. Both IFC, and DFC in its PAS 9980 FRAEW, may or may not have been correct to conclude that the risk posed by missing cavity barriers was a ‘low’ risk given the robustness of brick material. Clearly, both agreed that there was some risk, albeit in their view a low one. Our task is to determine whether there is a building safety risk present, not whether the risk is a low or tolerable one, and we consider that a risk is present. Whether or

not IFC were correct to conclude that the costs of remedial works are unjustifiable in light of its low risk assessment is not relevant to the question of whether a buildings safety risk is present in the first place. It may, as we indicate above, be a relevant consideration when it comes to the determination of the current substantive applications for a RO/RCO.

84. We also note that the reason why DFC considered this wall type was low risk, despite protection around openings being missing, was because suitable horizontal and vertical cavity barriers were in place which would, in its view, prevent fire spread beyond the flat of origin [2118]. Its conclusion therefore supports our view as to the important role of such barriers in preventing fire spread.
85. Mr Cooper did not dispute Mr Brown's evidence regarding the locations where vertical and horizontal cavity barriers are missing or defective and we therefore find that relevant defects are present at those locations. For vertical barriers, these are at: Location 5, Circus Apartments; Location 1, Eaton House; Locations 4 and 6 Berkely Tower (adopting the nomenclature used by Mr Cooper in his report). For horizontal cavity barriers, these are at Location 6, Belgrave Court and Location 4, Circus Apartments.
86. In light of non-compliance with Requirements B3 and B4, as identified above, we find that the missing or defective cavity barriers in those locations, and in any other locations where EWT 01 is present, amounts to a building safety risk. This is because the lack of properly functioning cavity barriers is a risk to the safety of people in or about the building arising from inadequate resistance to the spread of fire and smoke within the building, between buildings, and over the walls from one building to another. It follows that missing or defective cavity barriers for this wall type constitutes a relevant defect.

Openings in the cavity wall

87. Both experts agreed that the top of window openings needed to be closed, as recommended in Diagram 28. Mr Cooper's evidence was that the presence of the steel shelf-angle he observed at the top of the window opening at Berkley Tower was sufficient to function as a cavity barrier. We agree with him that a cavity barrier can be formed by any construction provided it is adequate to function as an adequate cavity barrier. We accept, as suggested in para, 9.6 of ADB that a cavity barrier can properly be formed of steel that is at least 0.5mm thick.
88. We also accept Mr Cooper's evidence that the steel shelf angle he observed at Berkley Tower was at least 0.5mm thick. As such, it had the potential to function as a cavity barrier. However, in cross-examination Mr Cooper accepted that there was a 15mm gap between the back of the shelf and the inner wall, which was filled with an unknown substance with unknown fire-resistance characteristics. Given that gap and the uncertainty as to the fire resistance of the material filling it, we cannot be satisfied that the shelf in question meets the provisions for cavity barriers which, in respect of

external cavity walls, should provide at least 30 minutes fire resistance as recommended in ADB 9.6. We find that the shelf did not close the cavity, and is inadequate to function as a cavity barrier.

89. Mr Cooper did not advance any other evidence to counter Mr Brown's evidence that the top of window openings in EWT 01 were not closed. We therefore find that the absence of cavity barriers to the top of the window openings constitutes a risk to the safety of people in or about the building arising from the spread of fire because the openings may facilitate the spread of fire and smoke within the building, between buildings, and over the walls from one building to another. It also amounts to a relevant defect.
90. We also find that adequate cavity barriers are required around window openings in this wall type to ensure that there is no free flow of air through the cavity. Again, in our view, a failure to do so will constitute a building safety risk from the spread of fire because there the gaps between the windows and the cavity wall will facilitate the spread of fire and smoke within the building, between buildings, and over the walls from one building to another. As Mr Brown suggested in oral evidence, a fire inside a compartment can break into a cavity through a window opening and spread along the cavity. This is why cavity closures are important. That importance is supported by the revision made in 2000 to ADB which required the provision of cavity barriers at the edges of cavities, including around windows (section 8.3 [1284]). This continues to be the case in the current edition of ADB.
91. It is common ground that the closers present in EWT 01 lack the fire-resisting qualities of cavity barriers. We therefore find that the omission of cavity barriers around the windows in this wall type amounts to a building safety risk and a relevant defect.
92. We agree with both experts that, as suggested by Diagram 28, the top of the masonry cavity walls should be closed. Mr Cooper suggests that this requirement has not been complied with. However, we are not satisfied, on the evidence that this is established. Both experts agree that they did not inspect the tops of the walls when they conducted their joint inspection. We agree with Mr Brown, that there is no evidence before us to suggest that cavity barriers are missing from the tops of the walls. We have not been taken to any previous survey or report that refers to this and therefore find no evidence of non-compliance.

Insulation in the wall cavity

93. We agree with Mr Dutton's submission that the question of whether a building contains a relevant defect is to be assessed as at the date of the hearing rather than at the time the building was constructed. As he pointed out, Building Regulations reg.7(2) now prohibits the use of combustible materials in the construction of external walls of buildings unless the requirements of European Classification A2-s1, do or A1 are met. Phenolic insulation is only B rated and does not meet that standard.

The question for us, however, is not whether the Building Regulations have been complied with, but whether there is a risk to the safety of people in or about the buildings containing this insulation, arising from the spread of fire.

94. Mr Brown agreed with Mr Cooper that if fire were to break into a cavity the insulation would “become involved in the fire but is unlikely to spread the fire ... due to its ability to char and inhibit fire spread in the absence of a strong fire source” [8.7.3] **[254]**. Mr Brown also said that phenolic insulation tends to self-extinguish and will result in limited fire spread when encapsulated in non-combustible cladding [8.8.1 a) iv)] **[256]**.
95. However, in cross-examination, Mr Brown made clear that his position was that even though the insulation will char, rather than spread fire, this will generate smoke which could then spread along the cavity, thereby constituting a building safety risk. At the start of his cross-examination Mr Cooper confirmed that when assessing whether or not something constitutes a fire safety risk one needs to look at all risks that fire can pose, both fire and smoke. He also agreed that for the purposes of this legislation, when considering the risk of spread of fire, regard needed to be had to both fire and smoke.
96. We agree with both experts in this respect. We interpret the reference in s.120(5)(a) to the risk to the safety of people in or about the building “arising from the spread of fire” to include the risk posed by the spread of smoke. We consider “fire” to include flames, heat, light, gasses, and smoke generated from burning material. These are all the products of burning material and we see no reason to limit the reference to fire in s.120(5)(a) to ‘flames’. Mr Bates did not argue to the contrary in his closing submissions.
97. We accept Mr Brown’s evidence that if a fire were to enter the cavity the Phenolic insulation would char and generate smoke which, because of the absence of cavity barriers at the top of, and around window openings, would enter the cavity, thereby posing a risk to the safety of people in or about the building arising from the spread of fire, including the occupants of neighbouring flats. Its presence is therefore a building safety defect.

EWT 05 Curtain Wall and Spandrel Panels;

98. Parts of the residential towers have glazed curtain walling systems present, with spandrel panels containing foam insulation **[292]** which Mr Cooper considered was likely to be extruded polystyrene (“XPS”), a combustible material [4.55] **[978]**. Mr Brown considered it was likely to be either XPS or polyisocyanurate (“PIR”) [12.7.1] **[299]**.
99. The IFC Report confirmed that horizontal cavity barriers are missing from behind these spandrel panels in some locations. In its view, the glazed curtain walling system presented “an unacceptable level of risk of fire spread vertically in the event of a fire” [3.5] **[462N]**.

100. Mr Brown agreed with Mr Cooper that given the physical and geometric separation between adjacent spandrel panels, it is extremely unlikely that a fire involving a spandrel panel would spread to involve the spandrel panels on the floors above or below [4.59] **[978]**. However, both experts also agreed that there is a problem of compartmentalisation in relation to this wall type and that the absence of cavity barriers in the void between the spandrel panels would facilitate the spread of fire through the cavity between the spandrels and the wall.
101. The Tribunal asked the experts whether they considered the vertical spandrel panel on the corner of some of the towers amounted to a void that could facilitate fire spread across many stories of the block. Neither expert had investigated or considered that question but, in oral evidence agreed that it could be a route for the spread of fire.
102. In his report, Mr Brown said that the presence of combustible insulation within the spandrel panel will contribute to the spread of fire over the walls and from one apartment to the next and increase the rate at which fire will spread into the apartment above when compared to a building constructed in accordance with the provisions in ADB [12.7.1] **[299]**. He considered that fire will spread to a flat above through the combustible spandrel panels, made easier because of the lack of adequate fire stopping or horizontal cavity barriers [12.8.1] **[299]**. In addition, he considered that lack of adequate vertical fire barriers increases the opportunity for horizontal fire and smoke to spread horizontally between adjacent apartments [12.8.2] **[300]**. He considered the wall type does not comply with Requirements B3(3) or B3(4), and that it causes a building safety risk of spread of fire and smoke from one apartment to another via spandrels [12.7] **[299]**.
103. Mr Cooper, in his report, agreed that horizontal cavity barriers are missing from behind spandrel panels in some locations and that the use of combustible thermal insulation in the walls was contrary to ADB para 12.7. In cross-examination, he accepted that fire stopping or cavity barriers behind spandrels were absent meaning that fire could travel in the manner suggested by Mr Brown. He also agreed that as identified by IFC, in at least one location, a vertical cavity barrier behind a spandrel panel was too short, with no horizontal cavity barrier present **[462D]**.
104. Nevertheless, Mr Bates describes this point as a ‘red herring’ because in Mr Cooper’s opinion before fire will spread in that manner, the curtain walling will already have failed, with fire already spreading along the external walls, entering into other apartments through the broken window. As Mr Cooper explained at [4.53] of his report **[977]** toughened glass is likely to fail at temperatures of approximately 240°C, whilst float glass will fail at temperatures in the range of 150°C to 200°C, these being the two types of glass commonly used in curtain wall systems. As temperatures caused by flames involved in a serious fire will be between 600°C to 800°C, failure of the glazing is, he said, likely to occur soon after the flames come into contact with the glazing. In his view, if fire were to

enter a cavity, it would not result in structural failure or fire spread to the extent that it would pose a threat to people in and around the building.

105. In Mr Bates' submission this means that as the glazing will have failed well before a full fire has taken hold, there is no real risk of fire spread arising from any inadequacies in cavity barriers or compartmentation, and this wall type does not cause a building safety risk. The problems with the wall type are not, he argued a relevant defect but an inherent weakness which common to all buildings with glazed windows.

Decision: Wall Type 5

106. We do not agree with Mr Bates' submission. The likelihood of fire spread occurring through glass failure before it happens as a result of lack of cavity barriers or compartmentation is not, in our view, the relevant question. The question for us is whether the construction of the wall type constitutes a building safety risk. In our view, it clearly does.
107. Both experts agreed that horizontal cavity barriers and/or adequate fire stopping should be present with this wall type but were missing. We agree with Mr Brown that these omissions create a risk of fire spread from one flat to a flat above, through the cavity behind the spandrel panel. We also consider that the combustible insulation that both experts agreed is present is likely to contribute to the rate at which that fire will spread. We also accept Mr Brown's oral evidence that if a fire were to break out in a flat it is possible that flames or smoke may spread from one flat to another through the cavity, behind the spandrel panel, before a catastrophic failure of the glazing occurs. As Mr Dutton pointed out appropriate compartmentalisation and the installation of cavity barriers is designed to inhibit fire spread in such a situation.
108. In our determination, the lack of adequate cavity barriers or firestopping demonstrates non-compliance with:
- (a) Requirement B3(3) because the construction of the building will not adequately inhibit the spread of fire within the building; and
 - (b) Requirement B3(4) because the unseen spread of fire and smoke within concealed spaces in the structure and fabric of the building will not be adequately inhibited.
109. For the reasons given, and in light of non-compliance with Requirements B3(3) and (4), we find that the wall type, as constructed, causes a building safety risk because it causes a risk to the safety of people in or about the building arising from inadequate resistance to the spread of fire and smoke within the building.

EWT 06 EPS Render on Blockwork on Balconies

110. Both experts agree that this wall type is constructed in the same way as wall type EWT 03 – EPS Render on Blockwork, the difference being that instead of being applied to a vertical façade, EWT 06 is present in the internal spaces of the two types of balconies present, inset and protruding concrete balconies. Example photographs are at **[273-4]** and **[306]**.
111. In respect of EWT 03, Mr Cooper agreed with Mr Brown that the lack of horizontal fire barriers amounts to a building safety defect because of failure to inhibit fire spread up the walls of buildings by way of the EPS thermal insulation that is fixed to concrete blockwork [4.36] **[974]**. In Mr Brown's opinion, the same considerations apply in respect of EWT 06. The two wall types are identical, the only difference being the location where the EPS render is present. He considered its presence will result in additional fuel for any fire originating inside a flat and will intensify the fire issuing from the balcony opening. In his opinion, where there is adjacent combustible construction such as EWT 03 which is aligned vertically, the risk of fire spread is the same as for EWT 03, and fire may spread upwards or downwards to the full extent of the panels. Where there are adjacent sections of EWT 05 curtain wall with combustible spandrels present, any defects in the spandrels such as combustible insulation or missing cavity barriers creates an increased risk of fire and smoke spread into adjacent apartments or rooms [13.63-4] **[307]**.
112. Mr Cooper states that this wall system was not inspected as part of the joint inspections and is not referred to in the IFC Report [4.64] **[979]**. He suggests that the experts are therefore not in a position to give an opinion on it. He nevertheless proceeds to do so, stating that as confirmed with Mr Brown, the concrete balconies are extensions of floor slabs. In Mr Cooper's opinion, the balcony flooring will act as a fire break in the event of a fire, and no other fire barriers are required [4.68-9] **[979]**.
113. Mr Bates' submitted that there is supporting evidence for this in CHPK's report where it was said that because the balconies are vertically aligned, there is a potential risk of fire spread across compartment floor lines due to the presence of combustible material, but that the concrete slab forming the structural floor of the balconies forms a considerable barrier to fire spread between balconies **[484-5]**. CHPK said that the EPS is located outside the double leaf masonry construction and is unlikely to be ignited, or to spread fire back into the building. Although, in the event of a balcony fire, the EPS to the soffit may contribute to the heat output of the fire, CHPK considered that the concrete slab structure of the balcony will prevent spread to the balconies above. It considered that the EPS insulation could be left in place.
114. Support, said Mr Bates, can also be found in the general PAS guidance regarding balconies, in which it is said that balconies that project beyond the main building structure on an extension of the floor slab have the ability to deflect fire and smoke plumes away from the from the building **[1151]**. The guidance also suggests that non-combustible open balconies

have the potential to interrupt a cavity and deflect flames away from the façade. It also suggests that management controls such as a prohibition on barbecues is a relevant consideration **[1168]**.

Decision: Wall Type 6

115. In our determination, the presence of combustible EPS in the render to this wall type amounts to a building safety risk due to the risk of fire spread. Both experts agree that EPS is present and it is also referred to in the previous CHPK Technical Note. Both experts have provided an opinion as to whether its presence amounts to a buildings safety risk and the experts had the benefit of inspecting the balconies at the site visit. We see no barrier to us determining the question on the evidence before us.
116. We accept that the concrete floor slabs will act as a fire break and will inhibit fire spread between balconies. Despite that, the evidence suggests that the presence of the EPS render nevertheless causes a building safety risk. As stated in the PAS guidance **[1151]**, regardless of balcony type, the materials used to line balconies (including soffits) need to be assessed in light of their likely contribution to external fire spread Mr Bates pointed us to the section of the guidance that referred to the relevance of management controls, but other potentially relevant factors listed there include the extent to which more than decking is combustible and whether a balcony is in line, or staggered, from others. The balconies at the Development are all in line.
117. We are persuaded by Mr Brown's evidence and Mr Dutton's submissions regarding this wall type. In respect of the protruding balconies **[274]** the balconies do not extend the full width of the rendered wall sections meaning that there is a section of rendered wall immediately to the right of each balcony which does not contain a fire barrier. We accept Mr Brown's oral evidence that if a fire were to spread from a flat to the wall at the rear of the balcony, although the ceiling of the balcony would initially prevent the fire from rising to the floor above, there is a real risk that the fire will spread laterally to the adjacent render, setting alight the EPS present in the rendered wall. As that wall runs the full height of the building without interruption there is then a significant risk of fire spreading vertically up the face of the building, as well as laterally.
118. As to the inset balconies **[273]**. Mr Dutton pointed out that the main wall to one side of these balconies is masonry covered with EPS render and that the render also faces the vertical face of the floor slab which acts as each balcony's ceiling. In oral evidence, both experts confirmed that the wall in question is constructed of WT o3. As identified by Mr Brown **[276]** **[288]**, in its Technical Note CHPK concluded that in the event of a balcony fire, the EPS to the soffit of the balconies may contribute to the heat output of the fire (albeit that the concrete slab structure of the balcony will prevent spread to the balconies above).
119. As Mr Cooper accepted, if there was a fire within one of these balconies there is a risk that the EPS render on that vertical face may act as a fire

bridge, so that a fire within one of the balconies may spread to the EPS render on the main wall. Support for Mr Brown's evidence that the presence of EPS presents a fire safety risk can also be found in the DFC's PAS 9980 reports where it concluded that the fire performance risk in relation to the inset balconies is "between high and tolerable" **[1542]**.

120. We find that the presence of EPS combustible insulation in the walls, floor and soffit of the balcony areas is a building safety risk in respect of fire spread and therefore a relevant defect. We agree with Mr Brown that Requirement B4(1) is not met because the external walls of the building will not adequately resist the spread of fire over the walls and from one building to another.

EWT 07 Reconstituted Stone Cladding.

121. This wall type is present in a section of the external wall spanning parts of both Berkley Tower and Hanover House. It was not intrusively inspected by either IFC or FRC but a borescope investigation was carried out in July 2021 by Elliot Group. CHPK then reviewed the results and carried out a follow-up, non-invasive, inspection before preparing a Note dated 1 December 2021 **[474]**. CHPK recorded that its inspection method had not allowed cavity barriers to be identified, but that the wall design comprised two leaves of masonry more than 75mm thick, meaning that cavity barriers are not required in any event. It said that although combustible insulation is located in the cavity, it is fully enclosed between two leaves of masonry, so that the risk of fire spread into or through the cavity is very low **[475]**.
122. The wall type was also considered in DFC's generic PAS dated 12 May 2025 **[2102]** in which, as Mr Bates pointed out, it was given a PAS Rating of 'low' on the basis that it was ADB compliant because the encapsulation method was reconstituted stonework, with an inner leaf and an 80mm outer leaf **[2119]**.
123. The parties' experts did not inspect this wall type, but both assumed its construction was the same as EWT 01 - masonry cavity wall and repeated their opinions for EWT 01 for this wall type. However, Mr Brown in his report said that further investigation is needed to confirm if a building safety risk is, in fact, present [14.64] **[312]**. He said he was unable to reach a concluded opinion on the wall type due to the limited intrusive inspections conducted [14.8.1] **[313]**.
124. Mr Bates' submission was that the wall type was not a building risk for the same reasons as EWT 01. We have rejected that submission above. Despite that, we are not satisfied on the evidence available that EWT 06 amounts to a building safety risk. During the course of the hearing Mr Thomas referred counsel to Table L9 in the PAS guidance **[1153]** which reads as follows:

"Engineered/reconstituted stone cannot be assumed to be non-combustible (as is the case with natural stone) because it contains

combustible polymeric resin binder. Unless combustibility can be confirmed by small-scale testing, the likely fire performance of these materials needs to be considered by reference to appropriate large-scale fire tests.”

125. Both experts said that additional testing would be needed to know whether the reference in the PAS guidance was relevant.

Decision: Wall Type 7

126. We are not satisfied, on the evidence before us, that this reconstituted stone wall type has precisely the same characteristics as EWT 01. On Mr Brown’s own evidence further investigation is needed to confirm whether it constitutes a building safety risk. Mr Cooper agreed and their view is supported by the recommendations made at Table L9 of the PAS guidance that testing be carried out to identify combustibility of reconstituted stone materials.
127. No such investigations have been undertaken. We have not seen the results of the borescope investigation carried out by Elliot Group, only CHPK’s subsequent Note. However, in our assessment a borescope investigation, being very limited in scope, is clearly insufficient to establish the provision (or lack of) cavity barriers or cavity closers, as CHPK itself identified. Given the uncertainty surrounding the composition of this material, and Mr Brown’s own evidence that further investigations were needed before he could confirm if a building safety risk is present, we determine that there is insufficient evidence for us to conclude that this wall type causes a building safety risk.

Amran Vance
6 January 2026

Rights of appeal

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

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not

complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

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

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



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

Case reference	:	LON/00BB/BSD/2024/0601 LON/00BB/BSA/2025/0002 LON/00BB/BSA/2025/0003
Property	:	Land at the East Village, Stratford, London E20, comprising the four buildings known as Mellor House (Block A), Chroma Mansions (Block B), Seasons House (Block C) and Patina Mansions (Block D) at Plot 26 (North and South)
Appellants	:	(1) STRATFORD VILLAGE PROPERTY HOLDINGS 1 LIMITED (2) STRATFORD VILLAGE PROPERTY HOLDINGS 2 LIMITED
Representative	:	Jones Day
Respondent	:	East Village Management Limited
Representative	:	Bevan Brittan LLP
Type of application	:	Appeal under Regulation 3 of the Building Safety (Leaseholder Protections) (Information Etc.) (England) Regulations 2022/859
Tribunal	:	Judge S McGrath Judge A Sheftel
Date	:	16th January 2026 29th January 2026

DECISION

Introduction

1. In this matter we are considering two appeals against notices served under regulation 3 of the Building Safety (Leaseholder Protections)(Information etc.)(England) Regulations 2022/859 (as amended) (“the Regulations”). The Regulations were made under the Building Safety Act 2022 (“the BSA”). Regulation 3 makes provision for the recovery of the costs of the remediation of unsafe buildings by landlords with the responsibility for carrying out the remedial works from landlords responsible for the construction or conversion of relevant buildings, or from their associates.
2. The regulation 3 notices in this case were served by East Village Management Limited (EVML) on Stratford Village Property Holdings 1 Limited and Stratford Village Property Holdings 2 Limited (in this decision referred to together as SVPH). At the hearing the SVPH companies were represented by Cecily Crampin of counsel and EVML by Timothy Polli KC.
3. Although some provisions of the BSA have already been considered by the Supreme Court in *BDW Trading Ltd v URS Corporation Ltd* [2025] UKSC 21 (*BDW Trading Ltd*) and by the Court of Appeal in *Triathlon Homes LLP v Stratford Village Development Partnership* [2025] EWCA Civ 846 (*Triathlon*) and *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point* [2025] EWCA Civ 856 (*Adriatic*), this is the first case where the Regulations have been directly in issue. *Triathlon* concerns Remediation Contribution Orders (RCOs) under section 124 of the BSA. In RCO cases, the Tribunal may order a landlord and/or associate to pay remediation amounts if it considers it “just and equitable” to do so. In regulation 3 cases, there is no equivalent or similar test to “just and equitable.” If the conditions prescribed in regulation 3 are made out, then the Tribunal must make an order for the payment of the relevant costs of remediation.
4. We think it is important to cite the context and purpose of the BSA. It is a key part of the Government’s response to problems in the building industry that were brought to light as a result of the Grenfell Tower Fire in 2017. The provisions of the BSA are far reaching and, in some respects, radical. In *BDW Trading Ltd*, Lord Hamblen described the origin of the BSA as follows:

“1. On 14 June 2017 a fire broke out at Grenfell Tower in London leading to the tragic death of 72 residents of the 24-storey tower block. It later transpired that the main reason why the fire engulfed Grenfell Tower so quickly was the use of unsafe cladding around the outside of the building, which did not comply with relevant building Regulations.

2. Investigations carried out following the fire led to the discovery that a number of high-rise residential buildings across the country were subject to serious safety

defects. Aside from unsafe cladding, other issues were identified, including other fire safety concerns, such as lack of compartmentation and flammable balconies, and serious structural defects that gave rise to risks of buildings (or parts of buildings) collapsing.

3. The Government encouraged developers to investigate medium or high-rise developments for which they were responsible and to carry out any necessary remedial work for safety defects discovered. In 2022 this encouragement was reinforced by legal responsibilities imposed on developers and contractors under the BSA.”

Background

5. SVPH have been the joint registered legal proprietors of the freehold estate in the land and buildings known as East Village, in Stratford, since 2009. The buildings at the East Village were constructed as part of the Athletes’ Village for the London 2012 Olympic Games and, following the Games, were converted into residential flats. Within each tall building there are flats, almost all of which are arranged over one storey, and some dwellings referred to as “townhouses”. The townhouses are typically arranged over two or three storeys and have front doors opening directly onto the street. Some buildings have commercial units on the ground floor.
6. SVPH hold their legal estate on trust for Stratford Village Development Partnership (‘SVDP’). SVDP (which was then owned and controlled by the Olympic Delivery Authority) acted as the developer of the former Athletes’ Village and then the East Village. SVPH is therefore an associate of SVDP, the developer.
7. The East Village is divided into various “Plots”, each identified by the letter ‘N’ and then a number. Premises in each of the plots are demised either to Triathlon Homes LLP (‘Triathlon’), which owns and deals with social and affordable housing, or to wholly owned and controlled subsidiaries of Get Living PLC, which specialises in the private rental market and owns (through subsidiaries) the private rented housing.
8. EVML is owned jointly by Get Living and Triathlon and was established in 2009. EVML manages the estate of 11 Plots across the East Village, comprising about 63 relevant buildings and 2,500 residential flats. It is contractually responsible for remedying defects in the blocks. It is the head landlord and Estate Management Company for the properties and is the Principal Accountable Person in respect of all the buildings for which it is responsible.
9. All of the relevant buildings suffer from multiple fire safety defects, both to the external walls and also the balconies and to the internal compartmentation. Some buildings have already had some remediation works carried out. The buildings on Plot N26 have had their external walls remediated by Errigal Facades (the N26

Works). The N26 works were partly funded by the Building Safety Fund pursuant to a Grant Funding Agreement dated 1st June 2023.

10. In *Triathlon Homes* the Remediation Contribution Order under section 124 of the BSA was made against SVDP for Triathlon's share of those external works. The first appeal notice in this case seeks to recover the majority of the costs of those works that do not fall within the RCO, which is the majority of the Get Living share of those costs.
11. In March 2025 EVML applied for further Remediation Contribution Orders against SVDP, Get Living, SVPH and other companies in relation to the costs of external and internal remediation of the remaining blocks in the East Village. That case is likely to be heard later this year. No figure has yet been given for the total costs sought but reference has been made to the remediation costs being approximately £400 million.

The Notices and Grounds of Appeal

12. EVML had originally served three regulation 3 notices on SVPH, all of which were appealed. However, by agreement between the parties and with the consent of the FTT, the third notice and the associated appeal were withdrawn. There are therefore two appeals against two notices:

The N26 Notice

13. The first notice (the N26 Notice), dated 14th October 2024, is for £10,270,544.94. It relates to 4 blocks (A, B, C, and D of plots N26). This sum is said to represent 40.46% of the costs of remediation of the 4 blocks calculated by reference to the number of units held by Get Living companies. The remainder of the costs were the subject of the Remediation Contribution Orders made in the *Triathlon Homes* case mentioned above.
14. An appeal dated 11th November 2024 was lodged against the N26 notice on three grounds, as follows:
 - (a) Ground 1: the remediation amount does not represent the cost of the relevant measure
 - (b) Ground 2: the Notice includes amounts which fail the "but for" requirement
 - (c) Ground 3: the Notice is defective

Two further grounds were added in SVPH's statement of case dated 27 June 2025. They are as follows:

- (d) Ground 4: at the date the N26 Notice was given, not all of the costs included were costs EVML had paid or was liable to pay to the contractor Errigal, and
- (e) Ground 5: Regulation 3 does not have retrospective effect and thus does not include costs which EVML was liable to pay or paid prior to the Regulations coming into force on 21st July 2022.

The OPEX Notice

15. The second notice (the OPEX Notice), dated 20th December 2024, is for £2,305,026.15. It relates to all of the plots demised by the Headlease, for the costs of a remediation team set up by EVML, which are the “operating costs for the Remediation Team that EVML has paid or is liable to pay in order to deliver the remediation of the defects across the Estate.”
16. An appeal dated 17th January 2025 was lodged against the OPEX notice as follows:
- (a) Ground 1: the “expects to pay” costs do not fall within regulation 3(1) which states that regulation 3 applies where “a landlord (L) has paid or is liable to pay the costs of a relevant measure relating to a relevant defect...”
 - (b) Ground 2: the remediation amount does not represent the cost of the relevant measure.

A further ground was added (subject to the Tribunal’s permission to amend if required) in SVPH’s statement of case dated 27 June 2025, as follows:

- (c) Ground 3: the second notice includes amounts which fail the “but for” requirement in regulation 3(1).
17. As will be clear, Grounds 4 and 5 of the appeal against the N26 Notice and Ground 3 of the appeal against the OPEX Notice were added by inclusion in the Appellants’ statement of case. A formal application for permission to amend the grounds of appeal was not received by the Tribunal until shortly before the hearing. Although there was some resistance to the application from Mr Polli, the Tribunal allows the inclusion of the additional grounds. Firstly, they were originally raised following receipt of information that had not been available at the dates of the original appeals and secondly the Respondent had had ample notice in order to meet the grounds and had prepared its case on that basis.

The Issues

18. By the time of the hearing, the issues had been narrowed. SVPH only pursued Grounds 2, 4 and 5 (not 3) in respect of the N26 Notice. Ground 1 was pursued only to the extent it arises in the context of grounds 2, 4 and 5. For the OPEX Notice, SVPH only pursued Ground 3. A joint list of issues was provided as follows:
- (a) The N26 Issues
 - (i) The Strike Out Issue: Whether, as EVML says, Ground 4 of the appeal against the First Notice should be struck out?
 - (ii) The ‘But For’ Issue (Ground 2): whether EVML is entitled to recover costs that are funded by the Building Safety Fund pursuant to the Grant Funding Agreement (GFA), even though EVML would not, by reasons of the GFA, have

been able to recover those costs pursuant to the service charge under any lease.

- (iii) The Contingent Costs Issue (Ground 4): whether EVML is entitled to recover costs (the costs that were to be paid to Errigal in due course for the N26 Major Works) that it was under a future or contingent liability to pay as at the date of service of the N26 Notice.
- (iv) The Retrospectivity Issue (Ground 5): whether EVML is entitled to recover by a regulation 3 notice, costs that were paid prior to the commencement of regulation 3 on 21st July 2022.

(b) The OPEX Issues

- (i) The Strike Out Issue: whether, as EVML contends, Ground 3 of the Appeal against the OPEX Notice should be struck out and not proceeded with any further.
- (ii) The 'But For' Issue (Ground 3): whether EVML is entitled to recover costs that are funded by the BSF pursuant to the GFA, even though EVML would not, by reason of the terms of the GFA, have been able to recover those costs pursuant to the service charge under any lease.

Part 5 of the BSA

19. Part 5 of the BSA was considered in detail by the Court of Appeal in both *Triathlon Homes and Adriatic*. We respectfully adopt the description of the main provisions of Part 5 given by Lord Justice Nugee in *Triathlon Homes* (which, as already noted, concerned Plot N26 on the East Village):

“8..... The BSA was Parliament’s main legislative response to the Grenfell Tower tragedy. Much of the Act was passed to implement the recommendations of the review into building Regulations and fire safety led by Dame Judith Hackitt, and Parts 2 to 4 duly establish a new regulatory regime for high-rise buildings, improving the focus on safety both at the design and construction stage and at the stage when buildings are occupied.

9. Part 5 contains a variety of provisions, including a group of sections headed “Remediation of certain defects”, consisting originally of sections 116 to 125 (although section 125 has subsequently been repealed). In *Adriatic* I referred to these sections together with schedule 8 (which contains much of the detail and is given effect to by section 122) as “the remediation provisions”. The BSA was passed on 28 April 2022 and by section 170(3)(a) the remediation provisions all came into force two months later, that is on 28 June 2022. Unlike Parts 2 to 4 which are forward-looking and set up new regulatory provisions for the future, the remediation provisions were designed to deal with a one-off problem, referred to as the building safety crisis, which saw many leaseholders of flats in high-rise blocks facing unprecedentedly high, and

often unaffordable, service charge bills to pay for the costs of existing fire safety and structural safety defects in their blocks. As explained in more detail in *Adriatic*, a central purpose of the remediation provisions was to provide a substantial measure of protection against such service charges for leaseholders. These protections are found in schedule 8 and in most cases are confined to those with “qualifying leases” – that is where the lessee occupied the flat as their only or principal home, or owned at most 2 other properties in the UK, on the qualifying date of 14 February 2022: see sections 119 and 119A.

10. Paragraph 2 of schedule 8 however contains a more wide-ranging protection, the effect of which is to relieve any lessee from having to pay via their service charges for the costs of remedying fire safety defects if the original developer – or an associated company – is their landlord, or is a superior landlord. It provides as follows:

”No service charge payable for defects for which landlord or associate was responsible

(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.”

11. Subject to certain exceptions, a “relevant building” is “a self-contained building, or self-contained part of a building, in England that contains at least two dwellings and (a) is at least 11 metres high, or (b) has at least 5 storeys”: see section 117(2). There is no dispute that the blocks in the present case are relevant buildings.”

20. In this case the parties agree that as a result of paragraph 2 of schedule 8 to the BSA, EVML is precluded from recovering costs as service charges from leaseholders. It was also agreed that SVPH is associated with the developer of the East Village (Stratford Village Development Partnership “SDVP”), which was responsible for the building safety defects.

21. Lord Justice Nugee described the Regulations as follows:

“19. There are also Regulations made under the BSA . In particular paragraph 12 of schedule 8 empowers the Secretary of State to make Regulations for the recovery from a relevant landlord of any amount not recoverable under a lease as a result of the leaseholder protections in schedule 8 . Pursuant to this power Regulations 3 , 4 and 5 of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 SI 2022/589, made in July 2022, (‘the 2022 Regulations’) enable landlords who are unable to recover service charges from their tenants as a result of schedule 8 to the BSA to pass on costs to other landlords.

20. Regulation 3 of the 2022 Regulations allows a landlord who has paid or is liable to pay the cost of a relevant measure relating to a relevant defect which, but for paragraph 2 of schedule 8 to the BSA, would have been payable as a service charge by a tenant under the lease to recover the cost from the “responsible” landlord(s). By Regulation 3(8), the “responsible” landlord is:

‘(a) the person who, at the beginning of 14th February 2022, was the landlord of the tenant referred to in paragraph (1) or any superior landlord and was on that date—

(i) responsible for the particular relevant defect to which the relevant measure relates; or

(ii) associated with a person responsible for that relevant defect;
or

(b) the person who, on or after 14th February 2022, became the owner of that landlord’s, or superior landlord’s, interest.’

21. Regulation 4 of the 2022 Regulations allows a landlord who has paid or is liable to pay the cost of a relevant measure relating to a relevant defect which, but for paragraph 3 of schedule 8 to the BSA , would have been payable as a service charge by a tenant under the lease to recover the cost from the “contributing” landlord. By Regulation 4(7) , the “contributing” landlord is the person who is “the landlord under the qualifying lease referred to in paragraph (1) provided that they met the contribution condition in paragraph 3 of Schedule 8 to the Act on 14th February 2022” or “after 14th February 2022 became the owner of that landlord’s interest”.

22. Regulation 5 of the 2022 Regulations applies where a landlord has paid or is liable to pay the cost of a relevant measure relating to a relevant defect which, but for paragraphs 4 to 9 and 11 of schedule 8 to the BSA, would have been payable as a service charge by a tenant under the lease. In such a case, each landlord under any lease in the building is liable to pay a share of the cost.”

22. As to the impact of the leaseholder protections in Schedule 8, Lord Justice Nugee stated:

“24. As I said in *Adriatic*, this statutory scheme all flows from the decision to intervene in the contractual scheme of obligations by protecting leaseholders from the full extent of their contractual service charge liabilities. Once this decision had been made, it was necessary not only to define who could benefit from the leaseholder protections, but also to make provision for the level of protection they would receive; for who would pick up the costs that were no longer to be met through the service charges; and for what rights the latter would have to make claims over against others, including those ultimately responsible.”

23. For the sake of completeness, it is important to note the provisions of section 124 of the BSA in relation to Remediation Contribution Orders (RCOs). This provides:

(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 relevant defects (or specified relevant defects) relating to the relevant building.

In particular, and in contrast to regulation 3, a Tribunal must be satisfied that it is “just and equitable” to make an RCO before it may do so.

The Strike Out Issue

24. We start with a consideration of the strike out issue. This concerns the extent of the Tribunal’s jurisdiction under regulation 3. In order to understand the arguments it is essential to consider regulation 3 in some detail. Regulation 3(1) is as follows:

“(1) This Regulation applies where, in relation to a lease of premises in a relevant building, a landlord (L) has paid or is liable to pay the cost of a

relevant measure relating to a relevant defect (“the remediation amount”) which, but for paragraph 2 of Schedule to the Act, would have been payable as a service charge by a tenant under the lease.”

If the conditions of paragraph (1) are not met, then the remainder of regulation 3 will not apply. Since by paragraph 3(2), where paragraph (1) applies “the responsible landlord is liable to pay L, the remediation amount....” one of the questions we must resolve is whether the Tribunal has jurisdiction to determine whether paragraph (1) applies or not?

25. Paragraph 3(3) sets out how L is able to recover the remediation amount from a responsible landlord (or landlords). Very simply, L must give at least one responsible landlord a notice which contains the information set out in paragraph 3(3B). That information is:

- (a) the remediation amount that L has paid or the remediation amount that L expects to pay;
- (b) the time limit for appealing to the First-tier Tribunal and for applying for an extension of that time limit; and
- (c) the possible grounds of appeal.

Another question we are asked to resolve is whether the Tribunal has jurisdiction to determine whether a paragraph (3) notice is a valid notice?

26. How an appeal is to be made against a paragraph (1) notice is set out in paragraphs 3(5) and 3(5A)-(5C). Paragraph 3(5) states:

“(5) A person who is notified by L of a requirement to pay all or part of the remediation amount referred to in paragraph (2) may appeal to the First-tier Tribunal within 30 days of the notification, specifying the grounds of appeal”.

Paragraphs 3(5A)-5C) set out how to seek a 30-day extension to the time limit from the Tribunal.

27. There are two statutory grounds of appeal. These are set out in paragraph 3(6) and are:

- (a) that the remediation amount does not represent the cost of the relevant measure; or
- (b) that the person sent the notice is not a responsible landlord.

28. Paragraphs (6A) and (6B) explain the consequences of an appeal succeeding or failing and provide:

“(6A) Where an appeal made on the grounds specified in paragraph (6)(a) –

- (a) is unsuccessful, subject to the outcome of an appeal on another ground under this Regulation the person who was notified by L is required to pay the remediation amount set out in the notice unless that person’s liability has

been discharged by payment of the remediation amount by another recipient of the notice;

(b) is successful, subject to the outcome of an appeal on another ground under this Regulation the First-tier Tribunal must substitute the remediation amount it rules is the correct one for the remediation amount in the notice.

(6B) Where an appeal made on the grounds specified in paragraph (6)(b)

(a) is unsuccessful, subject to the outcome of an appeal on another ground under this Regulation the person who was notified by L is required to pay the remediation amount set out in the notice unless that person's liability has been discharged by payment of the remediation amount by another recipient of the notice;

(b) is successful, the person who was notified by L is not required to pay the remediation amount set out in the notice."

29. Paragraphs 3(8) and 3(10) are also relevant:

"(8) In this Regulation "the responsible landlord" means—

(a) the person who, at the beginning of 14th February 2022, was the landlord of the tenant referred to in paragraph (1) or any superior landlord and was on that date—

(i) responsible for the particular relevant defect to which the relevant measure relates; or

(ii) associated with a person responsible for that relevant defect; or

(b) the person who, on or after 14th February 2022, became the owner of that landlord's, or superior landlord's, interest.

.....

(10) An amount payable to L under this Regulation is recoverable by L as a civil debt."

30. In this case, the Appellants ask the Tribunal to decide a number of issues which the Respondent says do not fall within the limited scope of paragraph 3(6) and therefore, fall outside the jurisdiction of the Tribunal. As a consequence, the Respondent seeks to strike out a number of the grounds of appeal.

31. Mr Polli's analysis of the Regulations is not controversial. He says that liability on a responsible landlord to pay arises only if the conditions in regulation 3(1) are satisfied. Those conditions are that L has paid or is liable for the cost of a relevant measure in respect of a relevant defect (being the remediation amount) and that "but for" paragraph 2 of Schedule 8, the remediation amount would have been payable by way of a service charge.

32. If the conditions are satisfied the trigger for the recovery of the remediation amount is proper service of a valid paragraph (2) notice. If no valid notice is served then the right to recover the remediation amount does not arise and the remainder of

Regulation 3 is not engaged, and accordingly, the right to appeal under paragraph (6) will not arise.

33. Mr Polli submitted that issues pertaining to the satisfaction of regulation 3 conditions to the validity of a regulation 3 notice (“a regulation 3 notice”) are for the court and not for the Tribunal. He contends that the lack of formal requirements for a paragraph (2) notice to be valid limits the scope to argue that a notice fails. He also says that regulation 3 does not expressly provide for an application to be made to the Tribunal for a decision on validity. That omission, he argues, would be surprising if it was intended that the Tribunal should have jurisdiction. He points out that enforcement would be by the Court against the person said to be the responsible landlord.
34. In consequence, Mr Polli submitted that a recipient of a regulation 3 notice who brings an appeal to the Tribunal against that notice must necessarily be taken to accept that the conditions in paragraph (1) are satisfied and that the notice is valid. Although he accepted that the Tribunal undoubtedly has jurisdiction to resolve any question that must be resolved in order to determine a challenge pursuant to regulation 3(6), including issues as to the extent of its jurisdiction, it cannot (he says) be appropriate for a Tribunal to encourage a party to bring an appeal solely in order to argue that the paragraph (1) conditions were not satisfied or that there was no valid notice.
35. On behalf of the Appellants Ms Crampin asserts that the Tribunal does have jurisdiction to decide issues both under Regulation 3(1) and 3(2) and she rejects the suggestion that in lodging appeals, the Appellants are estopped from denying that a notice is valid, or is bound to accept that the Tribunal has jurisdiction and hence that Regulation 3(1) applies. She submitted that the Tribunal is required to consider jurisdiction under rule 9(2) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 which provides that the Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal does not have jurisdiction in relation to the proceedings or case or that part of them.
36. For the following reasons we consider that the Tribunal is the correct forum to determine whether the conditions in Regulation 3(1) are met and whether a notice under Regulation 3(2) is valid.
 - (a) As Mr Polli acknowledges, the Tribunal must be able to resolve questions which are required to determine a challenge under Regulation 3(6). In our view this includes being satisfied that the Regulations are applicable and that a notice is valid and validly served.
 - (b) Later in this decision we consider some of the policy considerations underlying the Regulations. In our view, it is intended that the Regulations should be a straightforward remedy for landlords who have incurred or who will incur

remediation costs. The position advocated by Mr Polli would introduce a complexity which would undermine that policy.

- (c) Furthermore, there seems to be no justification for Mr Polli's approach. Part 5 of the BSA confers jurisdiction on the Tribunal to decide the majority of disputes between the parties. Splitting-off jurisdictional questions under regulation 3 to the courts is out of kilter with the structure of the BSA.
- (d) Paragraph 10 of regulation 3 provides that an amount payable to L under this Regulation is recoverable by L as a civil debt. An amount will only be payable if the conditions of paragraphs (1) and (2) are met. There is no indication that those issues will fall for separate determination or that the Tribunal's jurisdiction lacks finality. This is not a case where the Tribunal's jurisdiction is merely declaratory.
- (e) The period to appeal a notice is short and the prescribed contents of a paragraph (2) notice are sparse. We do not agree that by lodging an appeal, a landlord would be estopped from contesting jurisdiction. Although the statutory grounds for appeal do not include considerations of applicability or validity, in our view it is implicit that the Tribunal must be satisfied of those issues before proceeding to a determination. In the context of this legislation it would be odd if a recipient of a notice had to put in a protective appeal and immediately ask that it be stayed so that validity can be determined by the county court. In any event, the delay that would be caused would probably be against the Respondent's interest in receiving payment quickly.

The “But for” Issue

- 37. Having satisfied ourselves that we can decide issues of jurisdiction we turn to the first, which is the “but for” issue. On behalf of the Appellants, it is said that the condition in regulation 3(1) that the costs of “a relevant measure...which *but for* paragraph 2 of schedule 8 to the BSA would have been payable as a service charge by a tenant under the lease” is not met in this case. This is because, it is said, the terms of the BSF funding agreement for the N26 external works itself prevents the Respondent from recovering those costs from any leaseholder. Therefore the “but for” test is not met in this case where service charge costs were not recoverable in any event.
- 38. Ms Crampin approached this in two ways. Firstly, she said that the “but for” ground of appeal is a regulation 3(6)(a) ground of appeal because the costs, in these circumstances, cannot be the “cost of a relevant measure.” Alternatively, she said that the “but for” argument meant that the N26 Notice was invalid and that its service did not permit recovery of the sums in issue by EVML from SVPH. Accordingly she contended that SVPH is not liable to EVML under regulation 3(2).
- 39. It is not disputed that a proportion of the costs sought under the N26 and OPEX Notices were funded by the Building Safety Fund or that the Grant Funding Agreement (GFA) prohibits the recovery of grant funded costs from lessees. The

relevant term of the GFA is at clause 4.3.1(d), which states that EVML “shall not claim the cost of any Qualifying Expenditure funded by the Funding...from any Leaseholder...” It is agreed that the clause is operative in respect of those N26 costs and OPEX costs.

40. Ms Crampin said that to construe regulation 3 it is necessary to identify the power under which was made. This is paragraph 12 of schedule 8 to the BSA, which provides:

“12. The Secretary of State may by Regulation make provision for and in connection with recovery, from a prescribed relevant landlord, of any amount that is not recoverable under a lease as a result of this schedule.”

41. In her submission the power in paragraph 12 is not to give the remediating landlord a right to payment from the responsible landlord even though by reason of the terms of the GFA, the remediating landlord cannot charge a service charge for the costs of the relevant measure in any event. Instead, she contended, the power in paragraph 12 is strictly to provide for a replacement where the application of schedule 8 was the only and the only operative reason the landlord was out of money for remediation.
42. In support of her argument, Ms Crampin referred to observations by Lord Justice Nugee in *Triathlon* at paragraph 23(5) where he said “the inevitable corollary of relieving lessees of their contractual service charge liabilities is thatcosts will be incurred by whoever is doing the work...that would otherwise have been met by the lessees through their service charges but will now not be. The BSA therefore contains provisions enabling those costs to be passed on to others. This include....Regulations 3, 4 and 5 of the 2022 Regulations.”
43. She said that “bearing the cost” means bearing the cost “without funding” and that the Regulations apply precisely where the service charge source has been removed. In her submission the “but for” in regulation 3(1) is strict, it must be paragraph 2 of schedule 8 and paragraph 2 alone which prevents the service charge being payable if regulation 3(1) is to apply. Otherwise, she said that a construction of the “but for” test that included costs which are not recoverable from a leaseholder because of a reason other than the application of paragraph 2 would make the Regulation *ultra vires* because it would exceed the powers in schedule 8, paragraph 12.
44. Secondly, Ms Crampin said that if it were correct that the “but for” test should be considered by reference to the terms of the leases alone, then it would mean that even if the remediating landlord had funds for the works from another source (in particular one in which the money was expressly provided in place of the service charge as with the GFA) then regulation 3(1) would still permit recovery from the responsible landlord. In her submission that would not be to “transfer the cost of

remediating the relevant defects in question to the responsible landlord”, instead it would be to give the remediating landlord a second source of payment, for no reason.

45. Thirdly, she said that a construction of the “but for” test, which is limited only to looking at the terms of the lease, would mean that the service charge limitations under the Landlord and Tenant Act 1985 would not apply to what could be recovered under regulation 3, so that a remediating landlord could recover more than it could have under the service charge. In that case, she contended, the “but for” test would again have a meaning beyond the power in schedule 8, paragraph 12.
46. In her submission, the requirements of sections 18 to 30 of the 1985 Act, including questions of reasonableness, consultation and limitation under section 20B cannot be considered to have been excluded by regulation 3. Instead, she contended that those matters would need to be resolved or determined in order to establish that the service charge was payable and that any amount not payable, despite being expended, would be excluded from the “but for” calculation. Otherwise, she argued the consequence would be that a relevant landlord would have a strict, no fault, liability for costs of relevant measures even at an unreasonably incurred “gold-plated” level chosen by the remediating landlord.
47. Ms Crampin also pointed out that strict liability under regulation 3 would be imposed not only on landlords who were developers but also on associate landlords who may have had no financial benefit from the development. The imposition of such a strict liability would be, in her submission, contrary to the requirement to construe regulation 3 in a way compatible with convention rights under section 3 of the Human Rights Act 1998, where by section 3(1) “so far as it is possible to do so...subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights.”
48. The particular Convention Right relied upon is contained in Article 1 of Protocol 1 which provides:
- “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”
49. Ms Crampin contended that the effect of regulation 3, where it applies, is to deprive the relevant landlord of its money because a valid regulation 3 notice makes the relevant landlord liable to pay money to the remediating landlord, a liability which it had not had before. Even if this could be justified by reference to the public interest

in protecting lessees from service charges for the cost of existing fire safety and structural safety defects, it would not justify imposing a strict liability in respect of costs for which the remediating landlord had no right, or did not need because it has the money from another source. That is so in particular, she said, where a Remediation Contribution Order could be sought, with the just and equitable test allowing the Tribunal to balance the interests of the remediating landlord and the paying party. Seeking a RCO should be the route where a landlord wants costs beyond the service charge.

50. We do not accept Ms Crampin's submissions. In our view, the "but for" condition has been met in this case. The only relevant consideration is whether or not a service charge would have been payable by a tenant under a lease. We do not consider that the condition can be treated as not being fulfilled where BSF funding has been made available to a remediating landlord. We also do not consider that the requirements imposed by sections 18 to 30 of the Landlord and Tenant Act 1985 which may (hypothetically) have reduced the amount of service charge that would have been payable are relevant.
51. In reaching this conclusion we start with the policy of the BSA. On behalf of the Respondent, Mr Polli drew our attention to *URS* where the Supreme Court accepted the Secretary of State's submission that:

"83. It has become clear that the unprecedented level of remediation works required cannot be met by residential leaseholders alone. Leaseholders living in high-rise flats purchased their properties in good faith and could never have foreseen the nature or scale of the costs in question. In a large number of cases where building safety defects have been identified, leaseholders have been unable to afford the costs of remediation, which in many cases stretch into the tens, or even hundreds, of thousands of pounds (and in certain cases exceed the amount paid for the property). Nor can these costs be met by the taxpayer alone (although the Government has provided substantial grant funding, in particular to remedy buildings with unsafe cladding).";

and

"The Government has consistently taken the view that, where building developers and other contractors are responsible for building safety defects, it is fair that they should cover the costs of remediation, and that holding wrongdoers to account will speed up the remediation process and reduce the risks posed by unsafe residential buildings to their residents."

As a result, the Court concluded that

"84. The BSA is part of the Government's response to the need to identify and remediate historic building safety defects as quickly as possible, to protect

leaseholders from physical and financial risk and to ensure that those responsible are held to account.”

52. Mr Polli submitted that this made it clear that the BSA and the Regulations together are part of the intervention by which the Government sought not only to protect leaseholders from the costs of remedial works, but also to ensure that those responsible for them (or their associates) bear the financial burden. In our view, this is correct. Additionally, it is our view that a further policy driver is identified in the remarks, namely the desire to speed up the remediation process and reduce the physical risks to residents living in dangerous buildings.

53. Schedule 8 is primarily concerned with making provision to protect leaseholders from paying service charges. The provisions are nuanced and in the main apply to “qualifying leaseholders” with varying degrees of liability imposed on different categories of landlord. However, so far as paragraph 2 of schedule 8 is concerned, all lessees are relieved from having to pay service charges under a lease for the costs of remedying fire safety defects if the original developer (or an associated company) is their landlord or is a superior landlord. No qualification is included in the statutory language and there is no policy indication that any mitigation was intended.

54. In our view the existence of the BSF funding agreement does not displace the applicability of regulation 3 to the recovery of the remediation amount in this case.

55. There are clear differences between Remediation Contribution Orders under section 24 of the BSA and regulation 3 payments. However, the underlying policy is sufficiently similar to justify our having regard to some of the dicta of the Court of Appeal in the *Triathlon* case. First are the observations on the consequences of schedule 8. At paragraph 23(5) Lord Justice Nugee said that:

“(5) The inevitable corollary of relieving lessees of their contractual service charge liabilities is that (unless Government was proposing, which it was not, that the taxpayer would pick up all the costs) costs will be incurred by whoever is doing the work (whether landlord or management company) that would otherwise have been met by the lessees through their service charges but will now not be. The BSA therefore contains provisions enabling those costs to be passed on to others. This includes section 124 under which the FTT can make RCOs where it is just and equitable to do so, and regulations 3, 4 and 5 of the 2022 Regulations.”

Then at paragraph 69 in commentating on the decision of the FTT in that case:

“69. I do not see that it undermines the reasoning of the FTT. The point they were making is that the policy of the Act is that primary responsibility for the costs should fall on the original developer. As I have already said I did not

understand Mr Selby to dispute this as a general proposition, and it has now been endorsed by the Supreme Court in *URS*. The FTT referred to regulation 3 of the 2022 Regulations as giving a clear indication of that policy. I think they were justified in doing so. The effect of paragraph 2 of schedule 8 and regulation 3 taken together is that where the original developer (or its associate) retains (or retained as at 14 February 2022) an interest in the building in question, lessees do not have to pay the service charges, and any other landlord who ends up bearing the cost as a result can pass that liability to the landlord-developer or the landlord that is an associate of the developer. That, unlike section 124, is not a discretionary matter: regulation 3(2) provides that where the regulation applies the responsible landlord “is liable to pay” (and where there are two or more persons who are responsible landlords, each “is jointly and severally liable” for the remediation amount). Recovery is triggered by the claiming landlord simply serving a notice specifying the amount (regulation 3(3)). The recipient of a notice may appeal to the FTT but only on very limited grounds, namely that the remediation amount does not represent the cost of the relevant measure, or that the recipient is not a responsible landlord (regulation 3(5) and (6)).

70. That does to my mind provide, as the FTT said, a clear illustration of the policy that costs should fall on the original developer.”

56. In our view the strength of the policy identified goes some way to addressing Ms Crampin’s suggestion that “bearing the cost” means “bearing the cost without funding.” The approach of the Court of Appeal to regulation 3 is more straightforward. Very simply, it is the developer or an associate of the developer who should pay. The limited nature of the prescribed grounds of appeal reinforce this conclusion.

57. If we are correct, and the BSF funding does not displace paragraph 3 and fall foul of the “but for” test, then in consequence we accept there will be a danger of double recovery. However, funding from the BSF is not final or once and for all and includes obligations to repay money to the BSF where sums have been provided from another source. The Secretary of State has already taken RCO proceedings in the FTT in respect of a number of BSF awards and this remains an option. Furthermore, the terms of the GFA include the following provisions:

“4.5.1 The GLA may reduce the Maximum Sum by such amount as it determines appropriate –

(a) In the event that the Applicant receives and/or accepts an offer of any other funding and/or finance which relates to any part of the Qualifying Expenditure which the Funding is financing, which shall include without limitation:

(i) any other public sector finance; or

- (ii) any amount recovered pursuant to any litigation and/or claim relating to the installation

.....

4.5.2 In the event that the Applicant receives and/or accepts an offer of any other funding and/or finance which relates to the Project (which shall include without limitation the types of funding/finance referred to in clause 4.5.1(a)(i)...., the Applicant shall advise the GLA as soon as reasonably practicable.

Hence, other funding is anticipated by the GLA and notification and, implicitly, recovery are catered for.

58. That the BSA funding is not final was also recognised in *Triathlon* at paragraphs 110 and 111 as follows:

“ 110 The funding provided by the Fund is not an out-and-out grant: the Grant Funding Agreement, which we were told is in a standard form, by clause 5.4.1 requires the applicant (here EVML) to use all reasonable endeavours to pursue claims as follows:

”Save where there has been an assignment under Clause 5.4.4, the Applicant shall use all reasonable endeavours to pursue reasonable remedies available to it in respect of the Unsafe Non-ACM Cladding on any Building (including, without limitation, any claims against insurers, any relevant contractors and/or manufacturers and/or warranty providers responsible for the manufacture and/or installation of the Unsafe Non-ACM Cladding and/or with any liability in relation to the Building) (”Non-ACM Remedies”).”

By clause 5.4.3 the Applicant is required promptly to pay over any net monies recovered in the next 12 years from such claims to DLUHC or the GLA (so far as attributable to the matters funded by the Fund). In reply Mr Selby accepted that the obligation under clause 5.4 could include applying for an RCO in an appropriate case.

111. That illustrates that there is, as one would expect, a public interest in the Fund being reimbursed if and when claims against others are successfully made. In other words it is only intended as temporary funding pending recovery from those who can be made legally liable. Although there is what may appear to be a generous 12 year period, this is explicable by the fact that such litigation may be long and complex; it does not affect the fact that the Applicant is under an obligation to pursue claims, to notify DLUHC within 10 working days of receiving any monies, and to pay them over promptly.

112. Against that background I do not think one can infer from the fact that the Fund provided funding to EVML that the public bodies concerned had no interest in RCOs being made where appropriate. On the contrary, I think the FTT were entitled, indeed plainly right, to take the view that there was a public interest in securing reimbursement of the funds as quickly as possible. And they recorded at [270] that Mr Selby “recognised the attraction of the proposition that the public should not have to pay for work when there was a well-resourced commercial entity which could be made liable under the Act” and “did not suggest that protecting the public purse by securing the earliest possible reimbursement of remediation costs was irrelevant.”

59. Similar considerations concerning the nature of the BSF funding apply in regulation 3 cases. As already observed, the clear policy of paragraph 2 of schedule 8 and of regulation 3 is to ensure that leaseholders are protected from paying service charges and that the burden of meeting remediation costs is diverted to the developer or associate. In our view, the process under regulation 3 is intended to be straightforward. These are public policy issues and we do not accept Ms Crampin’s submission that the availability of BSF funding in this case means that an order under regulation 3 would offend against the Human Rights Act or Article 1 of Protocol 1 to the Human Rights Convention. Furthermore, we do not accept that the omission of a “just and equitable” test offends Convention rights.
60. For completeness we also need to address the question of the particular service charge deficit that would be recoverable under regulation 3. Ms Crampin submitted that the “but for” test would not be met unless a landlord (L) could demonstrate that they had complied with the provisions of sections 18 to 30 of the 1985 Act, otherwise L could claim costs which would not ordinarily be considered to have been reasonable or that might have offended any of the other statutory leaseholder protections. Mr Polli submitted that we simply had to be satisfied that there was a relevant requirement to pay service charges within a lease and that we need not go any further. We agree with Mr Polli.
61. Paragraph 10 of schedule 8 explains what is meant by “no service charge is payable” For the purposes of paragraph 2 (among others). The provisions are technical. Sub-paragraph (2) states:
- “(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....
 - (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...

By sub-paragraph (3) “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).

62. Since paragraph 10 provides that schedule 8 service charges are not “relevant costs”, then they are not subject to the section 18-30 regime. Paragraph 2 applies where service charges fall within the definition of section 18 of the 1985 Act but otherwise any restrictions such as the limitation of service charges by (for example) section 19, section 20 or section 20B are removed. In our view, the amounts recoverable under regulation 3 must mirror the paragraph 2 of schedule 8 provisions and therefore sections 18 to 30 are also irrelevant (save that the service charge must fall within section 18) to the application of the “but for” test.
63. During the hearing, the question was also raised: if the mechanics of a lease such as the service of notices for payment were not complied with, whether this would displace the “but for” presumption? In our view it would not. A failure to comply with internal notice provisions has a suspensory effect rather than rendering a service charge not payable. The same applies to the suspensory provisions of sections 47 and 48 of the Landlord and Tenant Act 1987. The “but for” test cannot be read to include the words “for the time being” or “from time to time.”
64. Furthermore we accept Mr Polli’s submission that Parliament cannot have intended that a detailed exploration of the contractual or statutory payability of a service charge need be conducted as a pre-condition of liability under regulation 3.
65. Accordingly, the Tribunal considers that regulation 3(1) applies in this case.

Future/contingent costs

66. The second substantive area of dispute concerned future and contingent costs: specifically, whether EVML is entitled to recover the costs that were to be paid to Errigal in due course for the works to block N26 that it was under a future or contingent liability to pay as at the date of service of the N26 Notice (Ground 4 of the appeal).
67. The sum in issue between the parties under this head is £3,924,232.39. The explanation for such costs was set out in a letter from EVML’s solicitors, Bevan Brittan, dated 20 January 2025, following the issuing of the present appeals. That letter identifies which of the total costs of the N26 external works were paid before 31 July 2024, and which EVML expected to pay. It should be noted that the final account, agreed with Errigal, had led to a reduction as against what had been included in the N26 Notice, hence the reduction between the sum of £3,927,780.19

referred to in EVML's statement of case (as the EV Companies' share of £9,707,593.20 included in the N26 Notice), and the sum of £3,924,232.39 now in issue. In other words, the "*expects to pay*" sum in the N26 Notice was greater than for which EVML was liable at the final account.

As noted in Mr Polli's skeleton argument, the issue regarding future and contingent costs requires the tribunal to consider what sort of liability is required of the remediating landlord by regulation 3(1) and, therefore, what sort of liability is imposed upon the responsible landlord by the service of a regulation 3 notice as a consequence of regulation 3(2).

68. The starting point is the wording of regulation 3(1), which applies where the remediating landlord:

"has paid or is liable to pay the cost of a relevant measure relating to a relevant defect" (emphasis added).

Similar wording appears within regulation 3(2):

"Where this regulation applies the responsible landlord is liable to pay the remediation amount ..." (emphasis added).

69. On SVPH's case, the phrase "*is liable to pay*" in regulation 3(1) (and also regulation 3(2)), requires the remediating landlord to be legally liable to pay the costs in question as at the date it gives a regulation 3 notice. An estimate of costs is not enough. Nor is a contract under which the remediating landlord is not yet liable, because there is a condition precedent to liability as yet not fulfilled (for example if a contractor has not yet done works, or payment to the contractor is contingent on certification, or where the cost is a salary, where the date for payment is in the future). In all such cases, the obligation on the remediating landlord to pay might never arise because the condition precedent might not be fulfilled or might not be fulfilled for the whole cost.

70. It should be noted, however, that the language is not consistent throughout regulation 3. Regulation 3(3B)(a), which sets out information the notice under regulation 3(3) must contain, requires inclusion of "*the remediation amount that L has paid or the remediation amount that L expects to pay*" (emphasis added). That is different from the phrase "liable to pay" in regulations 3(1) and (2) above.

71. In EVML's submission, the phrase "expects to pay" is plainly wide enough to contemplate a present liability that has not yet crystallised. This was relied on in support of the submission that all that is required of the liability to which regulations 3(1) and (2) refer is that it must be one that can be said to give rise to an 'expectation' that a payment will probably have to be made – the use of the language of expectation is not naturally compatible with a liability that is overdue.

72. In contrast, Ms Crampin stressed that it is regulation 3(1) which defines when regulation 3 applies, and thus when valid notice can be given. As such, "*expects to pay*" must be read as meaning "*liable to pay*", in accordance with the phrase in

regulation 3(1). In other words, the landlord “*expects to pay*” the sums it is “*liable to pay*” but has not paid.

73. Other parts of regulation 3 were also referred to by SVPH in support of the argument that it does not extend to future or contingent liabilities.

(1) Where the statutory appeal process is followed, and is unsuccessful, the responsible landlord is “*required to pay the remediation amount set out in the notice*” (regulation 3(6A)(a) and regulation 3(3)(6B)(a) respectively to the two statutory grounds of appeal). However, regulation 3 does not state that the responsible landlord is required to pay the remediation amount set out in the notice “*if and when L is required to pay it*”. Indeed, regulation 3(6A)(a) and 3(3)(6B)(a), in using the words “*required to pay*”, are emphasising a current liability, not a contingent liability, thus supporting the contention that the phrase “*liable to pay*”, wherever it is used in regulation 3, is not a contingent liability.

(2) A cost which is only what EVML expects to pay without yet any liability “*does not represent the cost of a relevant measure*” within the meaning of Regulation 3(6)(a). The wording is “*the cost*” (emphasis added), not “the expected cost” or “an estimate of the cost”.

(3) The word “*represent*” in Regulation 3(6)(a) is certain, as is the phrase “*the correct one*” in Regulation 3(6A)(b): i.e. on a successful appeal on a Regulation 3(6)(a) ground the “*Tribunal must substitute the remediation amount it rules is the correct one for the remediation amount in the notice*”. Neither sit easily with the notion of a future or contingent liability.

74. Mr Polli referred to several authorities in which it was said that it has been recognised that a future or contingent liability has some sort of present existence as a liability properly so called – although he readily accepted that the examples given arose in different contexts and that the Regulations must be construed on their own terms. So, for example: (i) they feature (by reason of statute and the applicable insolvency rules) in the administration of insolvencies (see, by way of example, *In re Lehman Bros International (Europe) (No 4)* [2015] EWCA Civ 485); (ii) the existence of an un-crystallised future or contingent liability is recognised as a reason why redemption of a security might be refused (see by way of example, *Rudd & Son* (1986) 2 BCC 98955); or, (iii) in a landlord and tenant context, in *Burr v OM Property Management Ltd* [2013] 1 WLR 3071 Lord Dyson MR commented that, “*as a matter of ordinary language, there is an obvious difference between a liability to pay and the incurring of costs.*” He accepted that a liability did not become a cost incurred until that liability had crystallised.

75. EVML contended that although a future or contingent liability might not have crystallised or become immediately payable as at the date of a Regulation 3 Notice, some sort of nascent liability already exists in the present. That *something* is a liability that exists *now* either to pay a sum in the future, or to pay a sum in the future depending on how circumstances unfold. A future or contingent liability is therefore a liability properly so called.

76. Further, having regard to the wider policy of the BSA and the Regulations, Mr Polli stressed that it is entirely consistent with their aims and objectives that a regulation 3 notice should be able to include future and contingent costs. The question, he identified, is whether regulation 3 should operate on a ‘just in time’ basis, or in arrears. In EVML’s submission, it should be the former: the purpose of regulation 3 was for a landlord, who might be thinly capitalised in the way that EVML is, to have quick and ready access to funds so that remediation works are not unnecessarily held up.
77. Ms Crampin also emphasised practical considerations associated with a conclusion that would allow future or contingent costs to be included within a regulation 3 notice. However, in contrast to Mr Polli, she contended that the approach advocated by EVML leads to numerous difficulties and potentially unfairness.
78. By regulation 3(10), “*an amount payable to L under this regulation is recoverable by L as a civil debt*”. A right of recovery arises as soon as the remediating landlord has given notice under regulation 3(3), subject to any appeal. In other words, the remediating landlord can issue a complaint in the Magistrates’ Court for a civil order for recovery under section 58(1) of the Magistrates’ Courts Act 1980. The order which the Court can make under section 58(1) is “*for the payment of any money recoverable summarily as a civil debt*” (emphasis added). Moreover, by section 96 of the 1980 Act, the remediating landlord could then by complaint seek an order that the Magistrates’ Court commit the responsible landlord to prison. The key point, however, is that the 1980 Act is not directed at contingent sums, but at sums which the debtor could be in default of payment.
79. Pausing there, it should be noted that the language of regulation 3(10), dealing with enforcement – i.e. “... *an amount payable...*”, is again different to that used earlier in regulation 3 as noted above. In EVML’s submission, the use of the words “*an amount payable*” in this provision is of significance:
- (1) It is said that it may be inferred that the reference to “an amount payable” conveys (or, at least, contemplates) a different meaning to the earlier references to an amount for which the remediating or the responsible landlord is “liable” or “required to pay”;
 - (2) Consequently, the fear of EVML being able to enforce the immediate payment of a debt for which EVML is only subject to a future or contingent liability – cannot arise: if it is only a future or contingent liability, it is not yet ‘payable’.
80. This is part of EVML’s wider submission as to the status of a future or contingent liability on the recipient of a regulation 3 Notice. Mr Polli accepted that to the extent that the remediating landlord is faced with a future or contingent liability, such liability would be mirrored with regard to the responsible landlord. In other words, the responsible landlord’s liability would also be future or contingent, notwithstanding the receipt of a regulation 3 Notice, until it crystallised for the remediating landlord.

81. There are several difficulties with such analysis. First, as noted above, where the statutory appeal process is followed, and is unsuccessful, the responsible landlord is “*required to pay the remediation amount set out in the notice*” (regulation 3(6A)(a) and regulation 3(3)(6B)(a) respectively). In other words, the requirement to pay is immediate. Secondly, it is difficult to see how the responsible landlord would know when its contingent liability had become immediate. There is no process for the remediating landlord to update the notice it serves. Moreover, having regard to the limited information required in a notice by regulation 3(3B), there is no certainty that a notice would contain details of what the contingency is or when it would become payable. There is no mechanism in the Regulations which would accommodate the responsible landlord’s liability to pay only arising when any contingency on the remediating landlord’s liability has been met. The responsible landlord is simply required to pay the cost in the notice given under regulation 3(3). The Tribunal has no jurisdiction to make an order that the responsible landlord pay only when the remediating landlord is required to pay. The Tribunal’s powers on an appeal such as in the present case are as contained in regulation 3(6A). Those powers differ from the Tribunal’s power in respect of RCOs under section 124(4)(aa) and (b) of the BSA which allow the Tribunal to make an order that the specified payer (aa) “*is liable for the reasonable costs of specified things done or to be done*” and/or requiring “*a payment to be made at a specified time, or to be made on demand following the occurrence of a specified event*”.
82. Moreover, on SVPH’s case, if “*liable to pay*” in regulation 3(1) could include a contingent liability on the remediating landlord, then the responsible landlord could be required to pay a sum which the remediating landlord itself would never have to pay (where the condition precedent never arises). The responsible landlord would be at risk of recovery in the Magistrates’ Court, and, in principle, of imprisonment for default of payment under section 96 of the 1980 Act. Similarly, it was argued that construing regulation 3 so that it allowed for payment of a cost only estimated by the remediating landlord, or for which the remediating landlord had only a contingent liability, would not be compatible with a responsible landlord’s Article 1 Protocol 1 right to the peaceful enjoyment of its possessions because it would not strike a fair balance between the demands of the general interest and the protection of the responsible landlord’s rights. There is no mechanism under the Regulations to recover a payment where it transpires that the total amount due was less and we do not accept that it is an answer to the possibility of bringing an unjust enrichment claim, which would be both costly and uncertain.
83. Returning to the principal question of interpreting the words “paid or is liable to pay in regulations 3(1) (and 3(2)), we agree with the submission that these are, in essence the ‘operative’ parts of the regulation: regulation 3(1) sets out when it applies. In our view, the phrase “liable to pay” most easily sits with the concept of a liability which has already arisen – not one that is future or contingent.
84. In construing these words, it is correct that we must have regard to the Regulations as a whole and also the wider policy of their enabling Act, the BSA. We agree with Mr

Polli that the purpose is not merely the protection of leaseholders and, consequently, filling the gap which would otherwise have been provided by service charges, but also consideration of the ‘who pays?’ question. In this regard, we acknowledge the thrust of the BSA that it is generally the developer that will sit at the top of the hierarchy of liability. The same is also true of Regulations 4 and 5 (indeed Regulation 5 can be applied to ‘any landlord’).

85. As to Mr Polli’s point that the Regulations should operate on a ‘just in time’ basis so as not to delay remedial works, while we agree that avoiding delay in remediation of defective buildings must be a clear policy objective of the BSA, it is difficult to see that there would be much delay in requiring a liability to crystallise before a notice under the Regulations may be served. This is particularly so in light of EVML’s acceptance that the liability of a responsible landlord would mirror that of a remediating landlord, such that a contingent liability for the remediating landlord would remain a contingent liability of the responsible landlord unless and until such liability crystallised. In other words, even on EVML’s case, the responsible landlord is not asked to pay until the liability crystallises.
86. We therefore agree with SVPH that the wider policy of the BSA is not frustrated by limiting sums recoverable under regulation 3 to extant liabilities. As new liabilities arise, further notices can be served. Furthermore, regulation 3 is not the only way in which a remediating landlord can obtain payment from a responsible landlord. Section 124 applications for a Remediation Contribution Order are available, with the tribunal’s jurisdiction more flexible, allowing for payment before liability has arisen for the remediating landlord and for repayment to the paying party if the costs of remediation are reduced.

The Retrospectivity Issue

87. The question here is whether regulation 3 can apply to remediating landlord costs paid prior to the coming into force of the Regulations.
88. In Ms Crampin’s submission the starting point is the presumption against retrospective effect and that, unless the contrary intention appears, the statute is presumed not to be intended to have retrospective effect. She also submitted that since regulation 3 is contained in a statutory instrument, there is a second issue, which is whether the scope of the enabling power in paragraph 12 of schedule 8 could have given the Secretary of State power to make regulations with retrospective effect.
89. She does accept for the purposes of this FTT matter that amounts not recoverable as service charges under Part 5 of the BSA can include amounts paid by a landlord prior to the coming into force of the BSA on 28th June 2022. That is the result of the Court of Appeal’s decision in *Adriatic*. Permission to appeal the point has been given by the Supreme Court and Ms Crampin reserved SVPH’s position on any appeal against the FTT decision in this case.

90. In summary, Ms Crampin contends that there is nothing in regulation 3 which positively indicates that it is to have retrospective effect and she suggests that, just as in *Triathlon*, “the language ...does not take one very far.”
91. She submitted that regulation 3 differs from section 124 since the onus is on the responsible landlord to challenge liability once a regulation notice has been served. That is unlike section 124, which puts the onus on the applicant remediating landlord. She said that the older the costs are, the more difficulty that task becomes.
92. She said that as the law currently stands, a section 124 order can be made in relation to costs incurred before that section came into force on the basis that the just and equitable test was a “safety-valve” against unfairness and that the retrospectivity of section 124 was needed to make the BSA scheme work as a whole. In her contention, none of that reasoning applies to regulation 3.
93. The Tribunal does not accept those submissions. Unless the Supreme Court takes a different view from the majority of the Court of Appeal in *Adriatic*, we consider that costs incurred prior to the commencement of the Regulations fall within regulation 3. In reaching this conclusion, we acknowledge that regulation 3 does not include a “just and equitable” test but consider that the scheme of the BSA must incorporate retrospectivity in order to operate as a whole. There can be no justification for treating regulation 3 differently than other costs within schedule 8 and, in particular, we are mindful that in *URS*, the Supreme Court clearly accepted the Secretary of State’s submission that:

“Retrospectivity is central to achieving the aims and objectives of the BSA. Many of the building safety issues identified in the wake of the Grenfell Tower fire arise in relation to buildings constructed many years ago . . . A retrospective approach provides for effective routes to redress against those responsible for historical building safety defects that have only recently come to light, whatever level of the supply chain they operated at.”

Conclusion

94. In conclusion, we determine that:
- (a) The FTT has the power to determine its jurisdiction to decide appeals under regulation 3 of the Building Safety (Leaseholder Protections)(Information etc.) England Regulations 2022. The determination of its jurisdiction includes deciding whether the conditions in regulation 3 have been established and whether a notice under paragraph 3 is valid;
 - (b) The “but for” condition in paragraph 3(1) means that but for paragraph 2 of schedule 8 to the Building Safety Act, a lessee would have been liable under their lease to pay the remediation cost. The fact that Building Safety Funding has been

granted is not relevant. The possibility that the amount of service charge might otherwise be restricted by contract or law is not relevant.

- (c) The responsible landlord's liability under regulation 3 is restricted to costs for which the remediating landlord is immediately liable and does not extend to future estimated or contingent costs.
- (d) Regulation 3 costs can include costs paid by the remediating landlord prior to the coming into force of the Regulations on 21st July 2022.

95. Accordingly, save for Ground 4 of the N26 Notice appeal, the Appeals fail.

Judge Siobhan McGrath

Judge Andrew Sheftel

~~16th January 2026~~

29th January 2026

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. Where possible you should send your further application for permission to appeal by email to London.RAP@justice.gov.uk as this will enable the First-tier Tribunal to deal with it more efficiently.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide

whether to extend time or not to allow the application for permission to appeal to proceed.

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



Neutral Citation Number: [2026] UKUT 18 (LC)

Case Nos: LC-2025-120
LC-2025-125
LC-2025-129

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

Ref: CAM/26UH/HYI/2023/0003

**The Rolls Building, 7 Rolls Buildings,
Fetter Lane, London EC4A 1NL**

27th January 2026

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

CATCHWORDS: Building Safety Act 2022 – remediation contribution order under Section 124 – whether FTT had jurisdiction to make the order on a joint and several basis – whether just and equitable to make the order – meaning of building safety risk – whether certain costs reasonable

BETWEEN:

**EDGEWATER (STEVENAGE) LIMITED AND OTHERS
(being the Appellants listed in Appendix 1 to this Decision)**

Appellants

and

GREY GR LIMITED PARTNERSHIP

Respondent

**Vista Tower,
Southgate,
Stevenage, SG1 1AR**

**The President, Mr Justice Edwin Johnson
16th and 17th October 2025**

Tom Morris, instructed by Teacher Stern LLP, for the TS Appellants
Simon Hughes KC and Keith Knight, instructed by Greenwood and Co., for the Greenwood Appellants
Mark Warwick KC, instructed by Bude Nathan Iwanier, for the BNI Appellants
Alexander Hickey KC and Jennie Gillies, instructed by DAC Beachcroft LLP, for the Respondent

The following cases are referred to in this decision:

BDW Trading Limited v URS Corporation Ltd [2025] UKSC 21 [2025] 2 WLR 1095
Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point [2025] EWCA Civ 856
Triathlon Homes LLP v Stratford Village Development Partnership, Get Living Plc and East Village Management Ltd [2025] EWCA Civ 846
Chief Constable of Cumbria v Wright [2006] EWHC 3574 (Admin) [2007] 1 WLR 1407
R(O) v Secretary of State for the Home Department [2022] UKSC 3 [2023] AC 255
R (PACCAR Inc and others) v Competition Appeal Tribunal [2023] UKSC 28 [2023] 1 WLR 2594
Sutton v Norwich City Council [2021] EWCA Civ 20 [2021] 1 WLR 1691
Jepsen v Rakusen [2023] UKSC 9 [2023] 1 WLR 1028
Royal Brompton Hospital NHS Trust v Hammond [2002] UKHL 14 [2002] 1 WLR 1397
S Franes Ltd v Cavendish Hotel (London) Ltd [2018] UKSC 62 [2019] AC 249
Blue Metal Industries Ltd v Dilley [1970] AC 827
Georgiou v Customs and Excise Commissioners [1996] STC 463
Fage UK Limited v Chobani UK Limited [2014] EWCA Civ 5
Ingenious Games LLP v HMRC [2019] UKUT 0226 (TCC)
Megtian Limited (in Administration) v HMRC [2010] STC 840

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Introduction

1. This is my decision on the hearing of three appeals against a set of remediation contribution orders made by the First-tier Tribunal Property Chamber (“**the Tribunal**”) on 24th January 2025, pursuant to Section 124 of the Building Safety Act 2022.
2. The remediation contribution orders were set out in a single document, in the format of a single order. I will use the expression “**the RCO**” to refer to the set of orders made by the Tribunal on 24th January 2025.
3. The RCO was made on the application of the Respondent, Grey GR Limited Partnership (“**Grey**”), by application notice dated 20th April 2023 (“**the RCO Application**”). The RCO Application related to a building known as Vista Tower, Southgate, Stevenage SG1 1AR (“**the Building**”). Grey purchased the freehold interest in the Building from the first respondent to the RCO Application, Edgewater (Stevenage) Limited, in 2018.
4. By the time the RCO Application came to a hearing before the Tribunal there were some 96 respondents to the RCO Application (“**the Original Respondents**”). The RCO Application was heard over ten days between 4th and 15th November 2024. The decision of the Tribunal on the RCO Application is dated 24th January 2025 (“**the Decision**”). For the reasons set out in the Decision the Tribunal determined that the RCO should be made against 76 of the Original Respondents.
5. By the RCO the Tribunal ordered those of the Original Respondents who were specified in the RCO (“**the Specified Respondents**”) to make payments to Grey in the total sum of £13,262,119.08. Under the terms of the RCO the liability of the Specified Respondents to make these payments was declared to be joint and several. The RCO provided that the

payments were to be made for the purposes of meeting the costs incurred or to be incurred in remedying or otherwise in connection with the relevant defects relating to the Building.

6. The Appellants say that the Tribunal were wrong to make the RCO, either in whole or in part. They say that the RCO should be set aside and, depending upon the outcome of the various grounds of appeal, remade, in a reduced form, either as a remediation contribution order against only one of the Specified Respondents or as a remediation contribution order against only two of the Specified Respondents.
7. The Appellants are identified in Appendix 1 to this decision, As there are 75 Appellants, I will refer to individual Appellants, as they were referred to in the Tribunal and in the appeals, as “**R1**”; meaning the First Respondent to the RCO Application and now First Appellant in the appeals, and so on. In Appendix 1 the Appellants are divided into three groups. These three groups into which the Appellants are divided have been referred to in the appeals and before the Tribunal by reference to the solicitors acting for them. I will continue this form of identification:
 - (1) The TS Appellants comprise R1, R4-R11 and R13-R16, all represented by Teacher Stern LLP.
 - (2) The Greenwood Appellants comprise R18-R21 and R23-R25, represented by Greenwood & Co.
 - (3) The BNI Appellants comprise R26-R28, R30-R31, R33-37, R39-43, R45-R47, R49-R54, R56, R59, R61-R62, R64-R67, R69-R77, R79-R82, R84-R88 and R90-94, represented by Bude Nathan Iwanier.
8. On the hearing of the appeals the TS Appellants were represented by Tom Morris. The Greenwood Appellants were represented by Simon Hughes KC and Keith Knight. The BNI Appellants were represented by Mark Warwick KC. Grey, the Respondent to the appeals, was represented by Alexander Hickey KC and Jennie Gillies. I am most grateful to all counsel for their assistance in my consideration of the appeals, by their written and oral submissions.

The conventions of this decision

9. For convenience, I will refer to the appeals themselves as “**the Appeal**”. References to Paragraphs, without more, are references to the paragraphs of the Decision. References to “**the FTT**” are references to the First-tier Tribunal (Property Chamber) as a whole. References to the FTT are to be distinguished from references to the Tribunal. I am using the latter expression to refer to the FTT panel which made the Decision. I will refer to the Upper Tribunal (Lands Chamber) as “**the Upper Tribunal**”.
10. I will be making extensive reference to the provisions of the Building Safety Act 2022 (“**the Act**”) in this decision. References to Sections and Schedules, without more, are references to the Sections of, and Schedules to the Act.
11. Italics have been added to quotations in this decision.

The background to the RCO Application

12. The Decision sets out the background to the RCO Application in detail. What follows is a summary only of the background, taken from the Decision, sufficient to set the scene for what I have to decide in the Appeal.

13. The Building, which is now known as Vista Tower, was built, from the early 1960s, for the Stevenage Development Corporation. It was used as offices and known as Southgate House.
14. R1 acquired the freehold interest in the Building on 17th July 2014 for a price of £3,950,000. R1 acquired the Building for the purposes of carrying out a redevelopment of the Building, by its conversion into residential flats. R1 then commissioned the carrying out of the conversion works (**“the Development”**). In the course of 2016/2017 R1 sold off the new flats in the Building, created by the Development, on long leases at premiums in the total sum of £15,633,725.
15. On 20th June 2018 R1 sold the freehold interest in the Building to Grey. The price paid by Grey was £587,650. The Building was one of some 200 or more residential buildings acquired by Grey as a portfolio of ground rent investments for the Railpen Group. The Railpen Group is a pension fund operated mainly for railway workers, with about 500,000 members. Grey became the immediate landlord of tenants of the flats in the Building. There were no intermediate leases.
16. As converted, the Building is 49.5 metres high. It has 16 storeys, including what is described as a mezzanine level in part of the double-height ground floor. The ground floor level includes two pedestrian entrances, a large open-sided car park area, plant rooms and bin storage. There are 73 flats in the Building.
17. The basic frame of the Building is composed of concrete floor slabs supported by columns. The Building is rectangular in plan, with narrower north and south elevations. It has two staircases, one at each end. It had a sprinkler system in the flats but, according to the Decision, this had not been commissioned. For the purposes of one of the grounds of the Appeal the key features of the Building are three of its external walls, which have the following design features. The south, east and west elevations of the Building are glazed and had two main external wall types in alternating horizontal strips. During the investigations and the remedial works which have given rise to the RCO Application, the following features of these two main wall types emerged:
 - (1) Type 1 was a cavity wall built above each floor slab. The external face was render applied to pre-existing concrete façade panels. The wall had a blockwork inner leaf. Where the wall enclosed a flat, foam insulation had been injected into the cavity through holes drilled in the blocks or the mortar between them. I will refer to this type of wall as **“the Type 1 Wall”**.
 - (2) Type 2 was a UPVC window frame system sitting above wall type 1, with glazing and intermittent blanking panels. The blanking panels were UPVC sheets either side of expanded polystyrene with an MDF core. Where the wall enclosed a flat, foil-faced insulation had been installed behind the blanking panels. I will refer to this type of wall as **“the Type 2 Wall”**.
18. As is well-known, the Grenfell Tower tragedy on 14th June 2017 prompted investigations and widespread concern about fire safety in high residential buildings, particularly those constructed or converted in recent decades. In December 2018, the Building (Amendment) Regulations 2018 came into force. These amended the Building Regulations 2010 (which had included provisions requiring such matters as adequate resistance to the spread of fire) so as to prohibit the use of combustible materials in external walls of buildings at least 18 metres high. On 20 January 2020, the Consolidated Advice Note (**“the CAN”**) was published to combine 22 guidance notes produced since the Grenfell Tower tragedy. The

CAN required the removal of all combustible material, to comply with the new building regulations.

19. In June 2020, Grey applied to the Building Safety Fund (“**the BSF**”) for funding for remedial works based on the CAN. In July 2020, Tuffin Ferraby Taylor (“**TFT**”), property consultants, were instructed by Grey, in relation to the Building and other buildings in Grey’s portfolio, for the purposes of investigating and determining what remedial works were required. In September 2020, TFT produced their proposed strategy to assess the relevant buildings for compliance and, where deficiencies were discovered, to endeavour to access the BSF and undertake all necessary upgrade works. Given the difficulty of specifying remedial work adequately in advance of full opening-up, TFT recommended a two-stage design and build procurement approach.
20. The course of the subsequent investigations and works is set out in detail, in the Decision. I do not need to repeat that account in this decision. For the purposes of one of the grounds of appeal however, it is important to note that the Government withdrew the CAN on 10th January 2022. The reason given for this withdrawal was the CAN had, so it was said, been wrongly interpreted and had driven too cautious an approach to building safety, going beyond what was necessary in safe buildings. In the place of the CAN the BSI published building safety standard PAS9980:2022 (“**PAS9980**”), which was a new code of practice for appraising the fire risk of external wall construction/cladding on blocks of flats. In June 2022 a fire engineering company called CHPK Limited (“**CHPK**”) was instructed to carry out an investigation and assessment of the external works required by reference to PAS9980.
21. Again, it is not necessary to go into the detail of the investigations and works, subsequent to the withdrawal of the CAN, which can be found in the Decision. For the purposes of this summary, I need only mention the following events.
22. On 1st August 2022 reports prepared by reference to PAS9980 were sent to the BSF for several properties in Grey’s portfolio, including the Building. On 17th August 2022 the BSF responded to these reports, asking for application forms for each of the relevant properties to transition from the CAN to the PAS9980 standard. I take this reference to transition to mean that the application forms were required to be reformulated by reference to the PAS9980 standard. In October 2022 Grey withdrew its application to the BSF, which had been based on the CAN, and re-submitted the application by reference to the PAS9980 report.
23. On 2nd November 2022 the Secretary of State for the Department then known as Levelling Up, Housing and Communities applied to the FTT for a remediation order against Grey in respect of the Building, pursuant to Section 123 (“**the RO Application**”).
24. On 24th February 2023 the BSF confirmed that all of the works said to be required by the PAS9980 report in respect of the Building were eligible for funding. Grey engaged a company called Lancer Scott Limited as the contractor to design and implement the works required to remedy the defects identified in the PAS9980 report.
25. By letter dated 19th September 2023 Grey was informed that, subject to conditions, funding totalling £12,443,565.93 (including VAT and pre-tender support paid earlier) towards the costs of the remedial works had been approved. On 15th December 2023 Grey entered into a full design and build contract with Lancer Scott Construction West Limited for the external remedial works to the Building.

26. On 17th January 2024 Grey entered into a grant funding agreement (the “**GFA**”) in relation to the funding provided by the BSF. Grey entered into the GFA with the Homes and Communities Agency (trading as Homes England), using the published template form of grant funding agreement. Clause 5.4 of the GFA provided as follows:
- “...the Applicant shall use all reasonable endeavours to pursue reasonable remedies available to it in respect of any litigation and/or claim relating to the design and construction of the Building and/or manufacture of any part or parts of the Building or any materials or components used and installed at the Building where the remediation of any defective Building design or as to any construction, materials or components relates to Works in respect of which Funding is provided pursuant to the terms of this Agreement or any litigation and/or claim relating to the specification and installation of the same on the Building (including, without limitation, any claims against insurers, any relevant contractors and/or manufacturers and/or warranty providers with any liability in relation to the Building)...”*
27. Clause 5.4.3 of the GFA requires Grey to account to Homes England for any amount received in respect of such “*Litigation Remedies*”, or at least the amount referable to the elements funded, subject to further provisions.
28. The external remedial works started in January 2024. Under the terms of the contract with Lancer Scott, and under the terms of the GFA, the works were due to be completed in September 2025.
29. Turning back to the RO Application, as made by the Secretary of State against Grey, the RO Application was heard by the FTT over two days, in March 2024. The decision of the FTT on the RO Application is dated 29th April 2024. For the reasons set out in the decision the FTT determined that a remediation order should be made. The remediation order itself (“**the RO**”) is dated 10th May 2024 and, subject to various supplementary provisions in the order, required Grey to remedy the relevant defects in the Building by 9th September 2025, by carrying out the works specified in a schedule to the RO.
30. I should also mention that, in parallel with the RCO Application, Grey has also commenced proceedings in the High Court (Technology and Construction Court), against R1, R16 and R17, for a building liability order pursuant to Section 130. Those proceedings in the High Court have not yet come to trial.

The RCO Application

31. Grey made the RCO Application on 25th April 2023. The original respondents to the Application were the TS Respondents (R1 and R3-R16), R2 and R17. The Greenwood Respondents, the BNI Respondents and the remainder of the Original Respondents were joined later, by amendment, as respondents to the Application.
32. The hearing of the RCO Application took place over ten days before the Tribunal between 4th and 15th November 2024. Grey, the TS Respondents, the Greenwood Respondents and the BNI Respondents were all represented by counsel. The Tribunal heard evidence from a number of witnesses of fact, and from expert witnesses in the disciplines of fire safety, architecture and quantum.

The Decision

33. The Decision is dated 24th January 2025. The Decision is lengthy, and has attached to it two schedules, the first of which is also lengthy. I will need to come back to the Decision when I come to consider the grounds of appeal, but for present purposes, I can summarise the Decision in the following terms.
34. At Paragraphs 1-38 the Tribunal set out the basic background to the RCO Application and, at Paragraphs 39-50, the procedural history. The Tribunal then dealt with the hearing itself, including representation and the witnesses who gave evidence at the hearing, in Paragraphs 51-62.
35. The Tribunal summarised the relevant law in Paragraphs 63-79. In this section of the Decision the Tribunal took the time to deal with two particular issues of construction which had arisen. The first issue was the meaning of “defect”, in the expression “relevant defect” in Section 120(2). The Tribunal rejected the argument of Mr Morris, for the TS respondents (as they then were) that it was reasonable to interpret defect as meaning building work which did not comply with the Building Regulations 2010, as at 9th October 2014. The decision of the Tribunal in this respect is not in issue in the Appeal, but I note that the Tribunal concluded that non-compliance with the building regulations was merely one way, and not the only way, in which something could be a defect for the purposes of the Act.
36. The second issue concerned the meaning of “building safety risk”, in Section 120(5), which is in issue in the Appeal. The Tribunal recorded the argument of Mr Morris in the following terms, at Paragraph 71:
- “71. Second, Mr Morris argued that whether something causes a “building safety risk” for the purposes of section 120(5) depends on whether the risk is tolerable, having regard to the other features and characteristics of the building. The fire safety experts had opined that, when assessing the risks associated with fire safety of external walls under PAS9980, a “medium” fire risk that is considered to be “tolerable” would not be a building safety risk. Mr Morris argued for this narrow interpretation, particularly in view of the interference (by Schedule 8 to the Act) with private/property law rights in preventing or limiting recovery of service charges relating to relevant defects.”*
37. The Tribunal did not accept this argument. They expressed their view in the following terms, at Paragraph 72:
- “72. We think the better view is that any risk above “low” risk (understood as the ordinary unavoidable fire risks in residential buildings and/or in relation to PAS9980 as an assessment that fire spread would be within normal expectations) may be a building safety risk. Section 120(5) describes a risk to the safety of people arising from the spread of fire or collapse, not a risk reaching an intolerable or any other particular threshold. We do not think “collapse” indicates the risk must be of catastrophic fire spread, as was suggested. It need only be a risk to the safety of people arising from the spread of fire in a tall residential building.”*

38. At Paragraphs 80-90 the Tribunal considered the general arguments, and what they referred to as Applicant factors. The Tribunal then turned to the technical aspects of the dispute, at Paragraphs 91-172. This included analysis of the issues in relation to the Type 2 Wall and the Type 1 Wall.
39. The analysis and conclusion of the Tribunal in relation to the Type 1 Wall are in issue in the Appeal. The work which had been done in relation to the Type 1 Wall involved the removal of the combustible foam insulation which had been injected into the Type 1 Wall. The essential question which arose was whether the remedial works which had been carried out in this respect were reasonable. This question was not necessarily an easy one, for the reason explained by the Tribunal at Paragraph 143:

“143. The agreement between the experts, that from a purely technical perspective the remedial works for wall type 1 were not proportionate, has very significant weight. However, they acknowledged that the scope of the remedial works may have been affected by other factors. Do these justify what was done?”

40. The Tribunal proceeded, at Paragraphs 144-165, to review the chronology of the work which was done in relation to the Type 1 Wall, and to consider what other factors there were. I will need to consider this part of the Decision in detail, when I come to the relevant ground of appeal. For present purposes however, it is sufficient to record that the Tribunal concluded, on the basis of their analysis at Paragraphs 144-165, that there was sufficient to justify the work which was done in this respect. The Tribunal expressed their conclusion at Paragraph 166, in the following terms:

“166. Ultimately, as Mr Hickey and Miss Gillies pointed out, the residents of Vista Tower had been living in unsafe conditions since they took up occupation and then throughout the earlier attempts to check/reduce the scope of the remedial works and costs (for example, changing from the CAN to PAS, considering in 2020 and 2021 whether new frames could/should be spliced into the window frames at junctions with compartment walls rather than replacing all of the frames, and seeking to avoid decanting). It seems each investigation of a different part of the building had thrown up unexpected variations, challenges or new uncertainties. The Secretary of State had selected Vista Tower to use as an example to require that remedial works be carried out for this type of high risk building without further delay, to minimise the continuing risk to residents. At this stage and in the circumstances of this case, we consider that it was reasonable to press on with the remedial works based on the CHPK report.”

41. The Tribunal then proceeded, at Paragraphs 173-192, to consider other items of costs which Grey was seeking to include in its claim for a remediation contribution order. At Paragraphs 193-348 the Tribunal embarked on a lengthy review of the case of the Original Respondents and the evidence, including a detailed review of the evidence of each of the factual witnesses called by the Original Respondents.
42. At Paragraph 349 the Tribunal came to their decision on whether it was just and equitable to make a remediation contribution order. The reasoning of the Tribunal is set out in Paragraphs 349-381. For the reasons set out in this part of the Decision the Tribunal concluded that it was just and equitable to make the RCO. The essential conclusions of the Tribunal can be found in Paragraphs 373-376, in the following terms:

- “373. In view of the general and specific linking factors noted above, and the additional specific reasons noted in Schedule 1 below, we consider it just and equitable to make, and have decided to make, a RCO in the joint and several terms described below against the Respondents marked “Yes” in the last column of Schedule 1 below. In relation to these companies, the linking factors outweigh the factors against making an order.*
- 374. There is real force in Mr Hickey’s argument that it should be for these Respondents (or the relevant members of the Frankel and/or Dreyfuss families) to ensure that sufficient funds are found, when there has been no real explanation in relation to the sources of their funds and their businesses, including those who are said to have independent investors who have not been declared at Companies House, and the publicly available (and disclosed) information is opaque. Having provided only limited information as to why they say it would not be just and equitable to make an order against them, it appears just and equitable to make them all responsible. We hope they will be able to arrange for those more closely linked to pay so that independent investors do not suffer, but in this case these Respondents must know that they are each liable for the entire sum if the others do not pay.*
- 375. For the avoidance of doubt, we would include these Respondents whether or not R17 is also made the subject of a RCO in future.*
- 376. We are not satisfied that it would be just and equitable to make such a RCO against those marked “No”, for the reasons explained in this decision and/or the table.”*

43. The reference to Schedule 1 is a reference to the first of the two schedules attached to the Decision. Schedule 1 to the Decision (“**Schedule 1**”) lists all 96 of the Original Respondents, and contains three columns. The first column gives the number of the Original Respondent. This is the same numbering as I am using to identify the individual Appellants. The second column sets out a brief statement of the Tribunal’s reasons for deciding whether the particular Original Respondent should be included in the RCO. The third column sets out, by a “Yes” or a “No”, the actual decision of the Tribunal on whether the Original Respondent should be included in the RCO, with a few exceptions for Original Respondents who were no longer parties to the RCO Application and, in one case (R17), an exception because the decision was deferred.
44. In this section of the Decision the Tribunal also dealt with the argument of certain of the Original Respondents that the Tribunal could not and should not make a single remediation contribution order because this was not permitted by the terms of Section 124. The Tribunal could only, so it was argued, make individual orders against each of the Original Respondents against whom a remediation contribution order was to be made and, in the case of each of the Original Respondents, could only make an order for payment of a specified and separate share of the total sum found to be payable. Alternatively, even if a single remediation contribution order was permissible, and if the Tribunal were minded to grant relief pursuant to Section 124, it was not just and equitable to make such a single order. Instead, so it was argued, the Tribunal should make individual orders against each of the relevant Original Respondents, in each case for a specified and separate share of the total sum found to be payable.
45. The Tribunal rejected these arguments, at Paragraphs 378-381. The essential reasoning of the Tribunal can be found in Paragraphs 379-380:

“379. When these submissions were made, we asked about section 6 of the Interpretation Act 1978, which provides that in any Act, unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular. Mr Morris warned by reference to Bennion on Statutory Interpretation (8th Ed.) [19.12] that this can give rise to uncertainty. We do not agree with his submission that the natural and ordinary meaning of the wording only allows a singular order, and this cannot be joint and several because those or similar words are not spelled out. We do not accept that a contrary intention appears from “payments” (an order against a single respondent may be more likely to require several payments in respect of different matters or times, so using the plural here makes sense), section 124(3) or the other wording of the Act. Nor do we accept that reading the Act in the way it would normally be interpreted creates uncertainty. We consider that a single RCO (or a number of RCOs in a single document) may be made against specified bodies corporate or partnerships and such order(s) may require them to make payments jointly and severally if the tribunal considers that just and equitable in a given case.

380. Further, we accept the submission from Mr Hickey that, in this case, this is the just and equitable approach. We do not accept that the Applicant should be confined to a limited share from each relevant Respondent, or should have to wait to see whether a given Respondent is solvent (or how much they can pay) before they move on to the next, even if some kind of top up machinery could be included in the wording of a RCO to accommodate this as Mr Morris suggested. It would obviously mitigate the huge impact on each Respondent, but would be impractical for an applicant. It does not seem consistent with the purpose of this jurisdiction, as noted above. We accept Mr Hickey’s submission that in this case it leaves a grave risk that assets which should be included will be missed. In any event, there are questions about the reliability of the accounts and related documents in relation to the Respondents (which again we regard simply as matters of blurred divisions between company affairs and finances and/or inadequate administration and record keeping). Even if assets are shown in the last filed accounts of a given Respondent and those accounts were accurate, it may now genuinely have none left. Those Respondents we have included appear sufficiently linked for us to consider it just and equitable to expect them to arrange between themselves what contributions should be made by each company, on the basis described above.”

46. In the Appeal the Appellants challenge the decision of the Tribunal that it was just and equitable to make the RCO. The Appellants say that if, contrary to their primary case, the Tribunal had jurisdiction to order the Specified Respondents to make payment of the same sum on a joint and several basis, the Tribunal were wrong to decide that it was just and equitable to grant any relief under Section 124 against the bulk of the Specified Respondents. The Appellants also say, in the alternative, that if it was just and equitable to grant any relief under Section 124, the Tribunal either could not or should not have made remediation contribution orders against all of the Specified Respondents on a joint and several basis. Instead, and on this hypothesis, the just and equitable course would have been for the Tribunal to consider the position of each Specified Respondent and decide whether that Specified Respondent should, by a separate remediation contribution order, be required to make its own separate and distinct contribution to the total sum payable.

The RCO

47. As I have said, the RCO was made on 24th January 2025. I have already identified the 76 respondents (the Specified Respondents) against whom the RCO was made.
48. The RCO is contained in a single document, but it is headed “**REMEDIATION CONTRIBUTION ORDERS**”. The third recital to the RCO is in the following terms:
*“AND UPON the Tribunal being satisfied that it is just and equitable to make remediation contribution orders for the reasons set out in the decision dated 24 January 2025 (the “**Decision**”)”*
49. Paragraphs 1 and 2 of the RCO Order provide as follows:
*“1. These are remediation contribution orders made pursuant to section 124 of the Building Safety Act 2022 (as amended by the Leasehold and Freehold Reform Act 2024) which apply to the Respondents whose company names are set out in the title above who are specified in these Orders (the “**Specified Respondents**”) and each of them jointly and severally in respect of the Building.*
2. The Specified Respondents and each of them jointly and severally shall make the payments identified in these Orders to the Applicant for the purpose of meeting the costs incurred or to be incurred in remedying or otherwise in connection with relevant defects relating to the Building.”
50. Paragraphs 3-6 of the RCO Order contain the payment provisions, as follows:
*“3. The Specified Respondents shall make payment to the Applicant, by no later than 4pm on **28 February 2025**, in the sum of **£1,975,905** for the purpose of meeting the costs described in paragraphs 173-180 of the Decision.*
*4. The Specified Respondents shall make payment to the Applicant, by no later than 4pm on **28 February 2025**, in the sum of **£11,275,352** for the purpose of meeting the costs described in paragraphs 181-189 of the Decision.*
*5. The Specified Respondents shall make payment to the Applicant, by no later than 4pm on **28 February 2025**, in the sum of **£10,862.08** for the purpose of meeting the costs described in paragraph 190 of the Decision.*
6. Payment as required by these Orders may be remitted by bank transfer to such account as is specified by the Applicant for the purpose and should make it clear which of the Specified Respondents it is being made by.”
51. There are then various supplemental provisions which it is not necessary to set out.
52. The key feature of the RCO Order, so far as the Appeal is concerned, is that it requires the Specified Respondents to make the payments specified in paragraphs 3-5 of the RCO Order (“**the Specified Payments**”) on a joint and several basis. As such, the RCO Order is enforceable for the entire amount of the Specified Payments (£13,262,119.08), against any one or more of the Specified Respondents.

The grounds of the Appeal

53. The position in relation to permission to appeal was somewhat complicated. There were applications for permission to appeal against the Decision, made by various of the Appellants, both to the Tribunal and to the Upper Tribunal. Permission to appeal was in part granted and in part refused by the Tribunal and the Upper Tribunal. Matters were however much simplified in this respect by an order of the Deputy Chamber President of

the Upper Tribunal (Martin Rodger KC), made on 16th June 2025, which gave directions in the Appeal including a direction for the Appellants to serve on Grey a consolidated document setting out the grounds of appeal on which they had permission to reply.

54. Pursuant to this direction the Appellants have produced consolidated grounds of appeal. The consolidated grounds of appeal are as follows.
55. The first ground of appeal (“**Ground 1**”) is that the Tribunal went wrong in making a single remediation contribution order, pursuant to which a large number of respondents, namely the Specified Respondents, were made jointly and severally liable to make the Specified Payments. The case of the Appellants is that Section 124 did not give the Tribunal jurisdiction to make an order of this kind or, in the alternative and if such jurisdiction did exist, it would only have been just and equitable to order each of the Specified Respondents to pay a fixed and separate share of the total sum due by way of the Specified Payments.
56. The second ground of appeal (“**Ground 2**”) is that the Tribunal went wrong in its approach to determining whether it was just and equitable to make the RCO against the various Appellants and, in doing so, wrongly eroded the principle of separate corporate identity far beyond the scope of the specific purposes permitted by the Act, and far beyond the specific limits within which this is permitted by the Act. In particular, it is said that the Tribunal:
 - (1) wrongly failed to appreciate and decide that participation in a particular development or receipt (directly or indirectly) of remuneration from that development is a minimum requirement or “*touchstone*” for it being just and equitable to make a remediation contribution order;
 - (2) wrongly imposed an evidential burden on respondents to an application for a remediation contribution order to show why it would not be just and equitable to make such an order against them;
 - (3) wrongly drew adverse inferences against the Specified Respondents based on a supposed failure to discharge that evidential burden.
57. The third ground of appeal (“**Ground 3**”) is that the Tribunal wrongly concluded that a “*building safety risk*” for the purposes of Section 120 is any risk above “*low*” risk, so as to include tolerable risks. The Tribunal should have directed themselves that only an “*intolerable*” risk could be a “*building safety risk*”.
58. It is accepted by the Appellants that Ground 3 can be said to be academic. This is because both the Tribunal and the Upper Tribunal refused permission to appeal against the decision of the Tribunal to include the costs of replacing the Type 2 Wall within the RCO. The question of what constituted a building safety risk, for the purposes of Section 120, would have been relevant to an appeal against this decision of the Tribunal. Nevertheless, the Appellants have permission to appeal on Ground 3, and I am asked by all the parties to address the issue raised by Ground 3, with a view to giving guidance to other tribunals on the question of what constitutes a building safety risk.
59. The fourth ground of appeal (“**Ground 4**”) is that the Tribunal wrongly concluded that it was just and equitable to include within the scope of the RCO the costs of replacing the Type 1 Wall in its entirety. To the extent that the Tribunal did so, it is said that the Tribunal also wrongly included the professional fees in respect of those works.

60. In terms of the outcome sought by the Appellants, if the Appeal is successful on all or any of Grounds 1, 2 and 4, the position is as follows:
- (1) If the Appeal is successful on Ground 1, the Appellants say that the RCO should be set aside. On this hypothesis R1 (Edgewater (Stevenage) Limited), as the developer in respect of the Development, accepts that the RCO should be remade as a remedial contribution order against R1 alone.
 - (2) If the Appeal is successful on Ground 2, the Appellants say that the RCO should be set aside. On this hypothesis R1, as the developer in respect of the Development, and R16 (DFS Three Limited), as a party which accepts that it benefited financially from the Development, accept that the RCO should be remade as a remedial contribution against R1 and R16 alone.
 - (3) If the appeal is successful on Ground 4, the Appellants say that the RCO should be set aside and remade for an amount which excludes the costs of replacing the Type 1 Wall.
61. Before I come to my analysis and determination of the Grounds, it is helpful to set out certain parts of the legal framework relevant to my decision. First, I set out some key provisions of the Act relevant to what I have to decide. Second, I set out some of the principal case law, as it currently exists, in relation to the Act. Third, I explain the role of the Explanatory Notes to the Act in the construction of the Act.
62. In the skeleton arguments filed on behalf of the Appellants for the hearing of the Appeal, the presentation of the arguments was not in identical terms. This is not a criticism. It simply reflected the fact that there are three groups of Appellants, as explained earlier in this decision. In oral submissions counsel for the three groups of Appellants sought, sensibly, to avoid traversing the same ground. I mention this only because I find it convenient, as a general rule and save where making references to specific submissions of counsel, to refer to the arguments in support of the Grounds as the arguments of the Appellants. In doing so, I keep firmly in mind that these arguments were made in respect of particular groups of Appellants and, where necessary, need to be considered as such. I also find it convenient, subject to the same proviso, to adopt the same approach where I need to make reference to the arguments advanced on behalf of the Appellants in the hearing before the Tribunal

The Act

63. I start with Section 124 itself, which confers upon the FTT the power to make a remediation contribution order. This power is set out in the following terms, in subsections (1) and (2):
- “(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.”*
64. Subsection (3) identifies a body corporate or partnership which may be specified in a remediation contribution order in the following terms:

- “(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).”*

65. A remediation contribution order is thus an order which requires “*a specified body corporate or partnership*” to make payments to a specified person, for the purpose of meeting costs referred to in subsection (2). Subsection (2A) then sets out certain categories of costs which fall within subsection (2):

“(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.”*

66. The forms of order which the FTT may make, by way of a remediation contribution order, are identified in subsection (4), in the following terms:

“(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.”*

67. Subsection (5) then sets out a series of definitions of expressions used in Section 124. For present purposes I should mention, in particular, the definition of “*associated*”, as that expression is used in subsection (4)(d). The concept of an associated person is defined in Section 121. Section 121 is lengthy, but for present purposes I need only set out subsections (1) to (5), which explain the concept of association in relation to a partnership or body corporate:

“(1) For the purposes of sections 122 to 124 and Schedule 8, a partnership or body corporate is associated with another person in the circumstances mentioned in subsections (2) to (5).

- (2) *Where a person's interest in a relevant building was held on trust at the qualifying time, any partnership or body corporate which was a beneficiary of the trust at that time is to be regarded, for the purposes of the provisions mentioned in subsection (1) as they apply in relation to the relevant building, as associated with the person.*
- (3) *A partnership is associated with any person who was a partner in the partnership, other than a limited partner, at any time in the period of 5 years ending at the qualifying time ("the relevant period").*
- (4) *A body corporate is associated with any person who was a director of the body corporate at any time in the relevant period.*
- (5) *A body corporate is associated with another body corporate if—*
 - (a) *at any time in the relevant period a person was a director of both of them, or*
 - (b) *at the qualifying time, one of them controlled the other or a third body corporate controlled both of them."*

Case law

- 68. There are three recent cases dealing with the Act which contain important guidance on the construction and application of the Act.
- 69. The first of these cases is the decision of the Supreme Court in *BDW Trading Ltd v URS Corporation Ltd* [2025] UKSC 21 [2025] 2 WLR 1095. The case was concerned with two developments in respect of which BDW Trading Ltd was the developer and URS Corporation Ltd had been appointed to provide structural design services in relation to the developments. BDW commenced proceedings against URS, prior to the Act coming into force, alleging that URS had failed to exercise reasonable skill and care. BDW considered the fire safety defects in the developments to be dangerous and had voluntarily carried out remedial works to address the same. BDW carried out the works notwithstanding its understanding, based on the legal position as it then was, that the claims of home owners against BDW under the Defective Premises Act 1972 would have been time barred.
- 70. On appeal to the Supreme Court there were four issues for decision. For present purposes however I need only mention the second of these issues, which was whether Section 135 applied and, if so, what was its effect. Section 135(1) introduced a new Section 4B into the Limitation Act 1980 which, in its material part, introduced a new 30 year limitation period for a claim under Section 1 of the Defective Premises Act 1972, in the following terms:

"Where by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the commencement date [the date when Section 135 was brought into force – 28th June 2022], to bring an action against any other person, this section applies in relation to the action as if the reference in subsection (1) to 15 years were a reference to 30 years."

- 71. By Section 135(3), this new limitation period was to be treated as having always been in force. The central question before the Supreme Court, in relation to this ground of appeal, was the extent of the retrospective effect of the amendment to the Limitation Act 1980 introduced by Section 135. What was in dispute was whether Section 135 applied so as to produce the effect that the claims of homeowners against BDW under the Defective Premises Act 1972, in respect of the fire safety defects, which had been statute barred at

the time when BDW carried out its voluntary repair works, should be treated as not having been statute barred.

72. For the reasons given by Lord Hamblen and Lord Burrows JJSC in their joint judgment, with which the other Justices of the Supreme Court agreed, the Supreme Court decided that Section 135 did have this retrospective effect. Lord Hamblen and Lord Burrows expressed their conclusion in the following terms, at [125]:

“125 For all these reasons, URS’s appeal on Ground 2 is dismissed. When the meaning of the words used in section 135(3) is considered in the light of their context and the purpose of the statutory provision, they should be interpreted as applying in the circumstances of this case. More specifically, they apply where, as in this case, there is a claim for damages for repair costs in the tort of negligence, or there is a claim for contribution in respect of those repair costs, and it is contended that there is a rule of law that the repair costs are irrecoverable as voluntarily incurred, or that there was no liability for the same damage, because the DPA claim was time-barred. The effect of the retrospective limitation period extends to such claims, which are dependent on the limitation period in section 1 of the DPA but are not actions brought under that section, with the consequence that there was no relevant time bar at the time that the repair costs were incurred. Section 135 does not, however, retrospectively affect any issue at trial as to the reasonableness of BDW’s actions in carrying out the remedial works as a matter of legal causation or mitigation.”

73. I am not directly concerned with questions of retrospectivity in the Appeal, but the decision of the Supreme Court in this case, which I will refer to as “**BDW**”, is of particular relevance by reason of their Lordships’ analysis of the background to and purposes of the Act, at [78]-[92] in their judgment. It is not necessary to quote the entirety of this extract from the joint judgment. I should however set out the following survey of the Act, at [85] and [86]:

“85 The BSA is both forward and backward-looking. The forward-looking provisions include Part 2 which sets up a new Building Safety Regulator in England to oversee a new, more stringent regime for higher-risk buildings and to drive improvements in building safety and performance standards in all buildings; Part 3 which amends the Building Act 1984, reforming the process for the design and construction of higher-risk buildings, and provides for the registration of building inspectors and building control approvers with a view to improving standards across the industry; and Part 4 which creates a new regulatory regime for the management of occupied higher-risk residential buildings in England, and places duties on an “Accountable Person” (for example, the freeholder) in relation to building safety risks in their building.

86 The backward-looking provisions are set out in Part 5, which includes section 135. Part 5 makes a number of changes to the law in order to address the problem of historical building safety defects. In summary, the main changes are:

- (1) Section 135 which provides for a new 30-year limitation period for accrued claims under section 1 of the DPA.*
- (2) Section 124 which provides persons with a legal or equitable interest (such as leaseholders) in medium and high-rise buildings, the Secretary*

of State, and other bodies, with a new right to seek remediation contribution orders from the First-tier Tribunal against the building's developer, landlord, or associate. Such an order requires a respondent to contribute to the costs of remedying historical building safety defects if this is considered "just and equitable" (see section 124(1)). Section 124 sits within a broader suite of "leaseholder protections" at sections 116 to 124 of, and Schedule 8 to, the BSA, which provides for a range of new safeguards that ensure owners of qualifying leases in medium and high-rise buildings are protected as far as possible from the costs of remediating historical building safety defects that they played no part in creating.

- (3) Section 130 which provides the High Court with a power to grant "building liability orders". Section 130(2) and (4) provide that a building liability order will extend a "relevant liability" of a body corporate to another "associated" body corporate, so that both bodies are jointly and severally liable for the relevant liability.*
- (4) Sections 147 to 151 which introduce various new causes of action to hold the manufacturers and sellers of unsafe construction products to account."*

74. The second of the cases to which I have referred above is the decision of the Court of Appeal in *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point* [2025] EWCA Civ 856 ("**Adriatic**"). The case came before the Court of Appeal by way of an appeal from my decision, sitting as Chamber President in the Upper Tribunal, on an appeal from the FTT. The case was concerned with the recovery of the costs of remediating fire safety defects in a high-rise building by way of the service charge provisions in the leases of the flats in the building. There were three grounds of appeal before the Court of Appeal:

- (1) The first ground of appeal was whether the costs of an application for dispensation, pursuant to Section 20ZA(1) of the Landlord and Tenant Act 1985, fell within the scope of paragraph 9 of Schedule 8, which provides that 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.
- (2) The second ground of appeal was whether paragraph 9 of Schedule 8 applies in relation to costs which had been incurred before the Act came into force.
- (3) The third ground of appeal was whether words needed to be read into paragraph 9 of Schedule 8 in order to render it compatible with Article 1 of Protocol 1 to the European Convention on Human Rights.

75. The Court of Appeal were unanimous in deciding that the costs of a dispensation application fell within the scope of paragraph 9 of Schedule 8, and that words did not need to be read into paragraph 9 in order to render it compatible with the European Convention on Human Rights. The Court of Appeal were not agreed on the second ground of appeal. In a dissenting judgment Newey LJ concluded that the provisions of Schedule 8 only applied to costs which had been incurred after 28th June 2022, and were not retrospective in their effect. Nugee LJ concluded however that the effect of paragraph 9 was that no service charge was payable from 28th June 2022, regardless of whether the relevant service charge had already been incurred, or had already been demanded or had fallen due. Holgate LJ agreed with Nugee LJ. The Court of Appeal thus decided, by a majority, that paragraph 9 was retrospective in its effect, to the extent identified by Nugee LJ. My understanding is that permission to appeal to the Supreme Court has been granted by the

Supreme Court in respect of the decision on the retrospective effect of paragraph 9 of Schedule 8.

76. As I have noted in relation to *BDW*, I am not directly concerned with questions of retrospectivity in the Appeal. As with *BDW*, the decision of the Court of Appeal is relevant to what I have to decide by virtue of the analyses of the Act and its purposes, in particular Part 5 of the Act, which are to be found in the judgments of Newey and Nugee LJ. Although their Lordships were not agreed on the retrospectivity question, this disagreement does not, as it seems to me, affect those parts of their judgments which provide general guidance on the questions which I have to decide in the Appeal.
77. I will come back to *Adriatic*, in the next section of this decision, in relation to the role of the explanatory notes to the Act in the process of construction, and in relation to the correct approach to statutory construction. At this stage I should however make specific reference to the analysis by Nugee LJ of the legislative purpose of the Act, which is to be found in his judgment at [145] to [162]. I should also make specific reference to Nugee LJ's analysis of the legislative scheme of what he referred to as "*the remediation provisions*"; meaning Sections 116-124 and Schedule 8. This analysis is to be found at [163] to [176].
78. Both of these analyses need to be read in full, but at this stage I set out the concluding part of Nugee LJ's analysis of the legislative scheme, at [174] to [176]:

"174. These are the principal features of the leaseholder protections. But they are supplemented by other provisions in the BSA. As I have already referred to, the inevitable corollary of providing protection for leaseholders was (unless Government was proposing, which it was not, that the taxpayer should pick up all the costs) that costs will be incurred (by whoever is responsible for carrying out the work, whether that be a landlord or a management company) which would otherwise have been recoverable from leaseholders through the service charge provisions in the leases, but will now not be. The BSA therefore contains provisions enabling those costs to be passed on to others. This includes section 124 under which the FTT can make remediation contribution orders where it is just and equitable to do so (see paragraph 21 ii) above), and regulations 3, 4 and 5 of the 2022 Regulations (see paragraphs 23 to 26 above).

175. Whoever ends up bearing the costs is given new rights against those ultimately responsible, namely (i) by an extended limitation period under the DPA 1972 (section 135 of the BSA) and (ii) by a new cause of action against those manufacturing or mis-selling cladding products (section 149). In addition the High Court is given power to make associated companies liable for breaches of the DPA 1972 (section 130): see paragraphs 21 iii) to v) above.

176. As can be seen this statutory scheme all flows from the decision to intervene in the contractual scheme of obligations by protecting leaseholders from the full extent of their contractual service charge liabilities. Once this decision had been made, it was necessary not only to define who could benefit from the leaseholder protections, but also to make provision for the level of protection they would receive; for who would pick up the costs that were no longer to be met through the service charges; and for what rights the latter would have to make claims over against others, including those ultimately responsible."

79. The third case is the decision of the Court of Appeal (with the same constitution as in *Adriatic*) in *Triathlon Homes LLP v Stratford Village Development Partnership, Get Living Plc and East Village Management Ltd* [2025] EWCA Civ 846 (“**Triathlon**”). The case was concerned with applications for remediation contribution orders pursuant to Section 124. The applications were made by Triathlon Homes LLP (“**Triathlon Homes**”), a provider of social housing, which held long leasehold interests in the social housing in five residential blocks in Stratford, London. The five residential blocks were originally constructed as part of the Olympic Village for the 2012 Olympics. Following the Olympics the accommodation in the Olympic Village was converted to provide residential housing, creating a large permanent residential estate known as the East Village, of which the five residential blocks formed part.
80. The management of the East Village was in the hands of East Village Management Ltd (“**EVML**”). In 2020 the five residential blocks were found to have serious fire safety defects in respect of both the design and construction. EVML made a successful application to the BSF for funding to replace the external cladding of the blocks, and work commenced in April 2023. By reason of the restrictions in Schedule 8, the costs of this work could not be recovered from the tenants of the flats in the blocks through their service charges.
81. Triathlon Homes made five applications for a remediation contribution order, with each application being made in respect of a particular block. The first respondent to the applications was the Stratford Village Development Partnership (“**SVDP**”), which was the original developer of the East Village. The second respondent to the applications was a company called Get Living plc (“**Get Living**”). Get Living is a property company which, through subsidiaries, specialises in the private rental market. Get Living owned all the private rented accommodation in the East Village, while Triathlon Homes owned all the social and affordable housing. By the time of the applications, Get Living was the owner of SVDP, although it did not own SVDP at the time when the development work was undertaken.
82. By the applications Triathlon Homes sought orders for SVDP and Get Living to reimburse Triathlon Homes for (i) sums already paid by Triathlon Homes, by way of service charges, in respect of costs already incurred, in relation to interim fire safety measures and investigative and preparatory works, (ii) further sums demanded of Triathlon Homes and not yet paid, and (iii) costs and anticipated costs which had not yet been the subject of service charge demands. Triathlon Homes also sought orders for SVDP and Get Living to pay a much larger sum by way of reimbursement to EVML in respect of expenditure by EVML, incurred or to be incurred in remedying the fire safety defects. No order for payment was sought against EVML, but EVML was also joined as a respondent to the applications, at the suggestion of the FTT, but only to enable it to participate in the applications if it wished to do so.
83. The applications were heard by myself and the Deputy Chamber President. We were obliged to sit as the FTT to hear the applications, because the Act confers no first instance jurisdiction upon the Upper Tribunal to hear applications for remediation contribution orders pursuant to Section 124. For the reasons which we set out in a decision dated 19th January 2024, we concluded that Triathlon Homes was entitled to the remediation contribution orders which it had sought. The parties were invited to submit agreed orders giving effect to our decision.

84. In response to this invitation we were presented with a single document, which was headed "*Remediation Contribution Orders*". The document contained what were, in effect, five orders, with one order being made in each of the five applications. In terms of what was actually ordered, the document contained a single set of provisions. Not all of the terms of this documents were agreed. We were invited to determine, on paper, the areas of disagreement, which we did. I shall refer to the order (strictly set of orders) which we made, after resolving the points of disagreement, as "**the Triathlon Order**".
85. By paragraphs 1-4 of the Triathlon Order we ordered SVDP and Get Living to make payment of various sums to Triathlon Homes and EVML. Each of paragraphs 1-4 of the Triathlon Order ordered payment of the relevant sum or sums to be made by "*SVDP and/or Get Living*". It follows from our use of the expression "*and/or*", that we ordered the relevant payments to be made by SVDP and Get Living on a joint and several basis. It should however also be recorded that there was no argument raised, either in the trial or in relation to the dispute over the terms of the Triathlon Order, to the effect that we had no jurisdiction to make a remediation contribution order on a joint and several basis. It was assumed, without the point being raised, that we did have this jurisdiction.
86. Our decision in the case, as the FTT, was the subject of an appeal, which lay to the Upper Tribunal in the first instance. At the joint invitation of the parties the appeal to the Upper Tribunal was subject to an agreed dismissal and grant of permission to appeal, without engagement with the substance of the argument, thereby creating an effective leapfrog appeal from the decision of the FTT to the Court of Appeal. There were two grounds of appeal. The first ground of appeal was that the FTT had erred in concluding that it was just and equitable to make the remediation contributions orders contained in the Triathlon Order. The second ground of appeal was that the FTT had erred in concluding that a remedial contribution order could be made in respect of costs incurred before the relevant part of the Act came into force.
87. The appeal was heard by the Court of Appeal with the same constitution as in *Adriatic*, and directly after the hearing of the appeal in *Adriatic*. In *Triathlon* the Court of Appeal were unanimous in dismissing the appeal. The leading judgment was given by Nugee LJ. Holgate LJ agreed with the judgment of Nugee LJ. Newey LJ delivered a short concurring judgment in which he briefly explained, in relation to ground 2 of the appeal, his reasons for concluding that Section 124 did allow remediation contribution orders to be made in respect of costs pre-dating the coming into force of Section 124, in contrast to the different conclusion which he had reached, in *Adriatic*, in relation to Schedule 8.
88. In his judgment in *Triathlon* Nugee LJ dealt more shortly with the legislative scheme of the remediation provisions in the Act (Sections 116-124 and Schedule 8), because this was ground which he had already traversed in *Adriatic*. For the purposes of the Appeal what is most relevant is Nugee LJ's analysis of the ten sub-grounds of appeal which were relied upon by the appellants in relation to ground 1 of the appeal. For the reasons set out in his judgment Nugee LJ dismissed all of these sub-grounds of appeal, and thereby dismissed the appeal against the decision of the FTT that it was just and equitable to make the remediation contribution orders against SVDP and Get Living. I will need to come back to *Triathlon* later in this decision, in particular in relation to Ground 2, but at this stage it is not necessary to highlight any particular part of Nugee LJ's judgment.
89. So far as I am aware, there was no argument in the Court of Appeal in *Triathlon* that the FTT had not had any jurisdiction to make the Triathlon Order on a joint and several basis.

The Explanatory Notes

90. Considerable reference was made, in the written and oral submissions in the Appeal, to the Explanatory Notes to the Act, which were published by the Department for Levelling Up, Housing and Communities in July/August 2022 (“**the Explanatory Notes**”). There is an extremely useful analysis of the role to be played by explanatory notes in the process of statutory construction in the judgment of Newey LJ in *Adriatic*, at [65]-[72]. There is also an equally useful explanation of the history of the Explanatory Notes, which is material to the question of what influence they should have in the construction of Section 124 and certain other provisions of the Act.

91. As Newey LJ explained in his judgment, at [29]-[30], what became Sections 116-125 and Schedule 8 were not in the original Building Safety Bill. They were introduced by amendment on 22nd March 2022, at the House of Lords report stage:

“29. On 10 January 2022, the Government announced that it had “reset its approach to building safety with a bold new plan to protect leaseholders and make wealthy developers and companies pay to fix the cladding crisis”. Soon afterwards, on 13 January, the Government tabled amendments to the Building Safety Bill. A further and more substantial set of amendments followed on 14 February (when the Bill was at the Committee stage in the House of Lords) and some additional amendments were put forward on 22 March (at the House of Lords Report stage). The amendments introduced for the first time what became sections 116-125 of the BSA and schedule 8 to it. (Section 125 has since been repealed by the Leasehold and Freehold Reform Act 2024.)

30. The Building Safety Bill received Royal Assent on 28 April 2022 and most of the provisions in Part 5 came into force automatically two months later, on 28 June 2022, by virtue of section 170(3).”

92. As Newey LJ went on to explain, what I am referring to as the Explanatory Notes, published in July/August 2022 were not in the same form as the original explanatory notes to the Bill. The commentary on Section 116-125 and Schedule 8 came later, in the Explanatory Notes as published in July /August 2022, after the Act had been enacted. As Newey LJ explained, at [34]:

“34. In paragraph 105 of their judgment in *URS*, Lords Hamblen and Burrows (with whom Lords Lloyd-Jones, Briggs, Sales and Richards agreed) quoted from the explanatory notes in respect of the BSA. Lords Hamblen and Burrows said in paragraph 105 that they had been “provided with the Explanatory Notes to the Bill and to the BSA which were in materially the same terms” and, in the next paragraph, that the passages they had set out “show that ensuring that those directly responsible for building safety defects are held to account was central to the BSA and various of its provisions, including specifically section 135”. It is evident, however, that the Supreme Court was under a misapprehension. The explanatory notes to the BSA were by no means in the same terms as those in respect of the Bill. In fact, the explanatory notes to the Bill did not include any of the paragraphs quoted by Lords Hamblen and Burrows. They featured for the first time in the explanatory notes which the Government published after the BSA had already been enacted.”

93. Newey LJ went on to explain the role to be played by explanatory notes in the process of statutory construction, at [65]-[72]. In terms of the general role played by explanatory notes Newey LJ said this, at [65]:

“65. *In R (O) v Home Secretary* [2022] UKSC 3, [2023] AC 255, Lord Hodge explained that the “primary source” from which the meaning of a statute is ascertained is “the words which Parliament has chosen to enact as an expression of the purpose of the legislation” and that “[e]xternal aids to interpretation therefore must play a secondary role”: see paragraph 30. He nevertheless acknowledged in paragraph 30 that “Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions”.”

94. Newey LJ went on however to draw the following distinction, at [66]-[67]:

“66. A distinction is, however, to be drawn between explanatory notes which were available when the legislation was being enacted and those which have come into existence subsequently. A passage from the judgment of Lord Sales (with whom Lords Reed, Leggatt and Stephens agreed) in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594 (“PACCAR”) is relevant in this context. Lord Sales said in paragraph 42:

“It is legitimate to refer to Explanatory Notes which accompanied a Bill in its passage through Parliament and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be ascertained Reference to the Explanatory Notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen” (emphasis added).

67. Where explanatory notes have “accompanied a Bill in its passage through Parliament”, there is sense in regarding them as capable of shedding light on what Parliament intended. Where, on the other hand, explanatory notes in respect of a statute did not exist when it was being passed, there is less reason to see them as a guide to Parliament’s intentions. They may, of course, show what the Department which promoted the Act understands it to mean, and possibly what it wished it to mean, but the materials plainly cannot have informed Parliamentary decision-making.”

95. Newey LJ also drew, at [69]-[70], the following analogy from what was said by Lloyd Jones J in *Chief Constable of Cumbria v Wright* [2006] EWHC 3574 (Admin) [2007] 1 WLR 1407:

“69. *In Chief Constable of Cumbria v Wright* [2006] EWHC 3574 (Admin), [2007] 1 WLR 1407, Lloyd Jones J, with whom Keene LJ agreed, said in paragraph 17:

“It is, of course, for the courts and not the executive to interpret legislation. However, in general, official statements by government departments administering an Act, or by any other authority concerned with an Act, may be taken into account as persuasive authority on the legal meaning of its provisionsIn the present case we are concerned with guidance published by the Home Office, which is the government department which had responsibility for the enactment and operation of the legislation in question. In any given case, it may be helpful for a court to refer to the guidance in the interpretation of the legislation. It may be of some persuasive authority. However, to my mind that is the limit of its influence. It does not differ in that regard from a statement by an academic author in a textbook or an article. It does not enjoy any particular legal status. There seems to me to be no satisfactory basis for the submission that it gives rise to a presumption that the views it contains are correct and should be rejected only for good reason.”

70. *In my view, the position is similar where explanatory notes have been published only after a statute has already been enacted. The notes may be of persuasive authority, but they do not enjoy any particular legal status and can be compared with academic writings.”*

96. Newey LJ also cited with approval, at [71], the following passage from Bennion, Bailey and Norbury on Statutory Interpretation (8th Edition), in section 24.14:

“71. Bennion says this in section 24.14 about explanatory notes:

“The rationale for using explanatory notes in the way discussed above appears to be that they form part of the background material available to the legislature at the time at which legislation is passed and may therefore help to inform its interpretation in the same way as other pre-enactment materials. It seems to follow that only the explanatory notes published during the Bill’s passage through the legislature can be used in this way.

The explanatory notes for the Act itself post-date its enactment and therefore cannot be viewed as part of the context against which it is enacted. Those notes should be given no more weight than other post-enactment expressions of opinion by the government as to the meaning of legislation In other words, the weight to be given to them should depend on the cogency of any reasoning contained in them.

... It should be acknowledged that, in practice, it will not always make a difference since changes between different versions of the notes are often relatively minor”

97. In his judgment in *Adriatic Nugee* LJ expressed, at [141], his specific agreement with the analysis and conclusions of Newey LJ at [65]-[72].

98. I note two points, in particular, from Newey LJ’s analysis of the role of the Explanatory Notes in the process of statutory construction. First, the Explanatory Notes can, at best, play only a secondary role in the process of construction. They may cast light on the meaning of a particular statutory provision. Second, there is a distinction to be drawn between explanatory notes which were available when the relevant legislation was being enacted and those which have come into existence subsequently. In the latter case there is less reason to see the explanatory notes as a guide to Parliament’s intention. In the present case this distinction is material because I am concerned with provisions in the Act

in respect of which the relevant parts of the Explanatory Notes did not come into existence until the Act had been enacted.

Ground 1 (the first argument) – analysis and determination

99. There are two distinct arguments within Ground 1. The first argument is that the Tribunal had no jurisdiction to make the RCO on a joint and several basis. This raises a point of statutory construction. The second argument is that even if the Tribunal had this jurisdiction, it was not just and equitable to make the RCO against all the Appellants on a joint and several basis. This requires consideration of the just and equitable test in Section 124(1), and thereby overlaps with Ground 2. In these circumstances I find it convenient to consider only the first argument, of statutory construction, in this section of my decision. I will consider the second argument as part of my analysis of Ground 2.
100. Dealing then with the first argument, I should start by setting out the basic principles which govern the exercise of statutory construction.
101. An authoritative summary of these principles can be found in the judgment of Lord Hodge DPSC in *R(O) v Secretary of State for the Home Department* [2022] UKSC 3 [2023] AC 255, at [29]-[31]:

“29 The courts in conducting statutory interpretation are “seeking the meaning of the words which Parliament used”: Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: “Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.” (R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, p 397: “Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.”

30 External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the

words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.

31 Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:

“The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the “intention of Parliament” is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House . . . Thus, when courts say that such-and-such a meaning “cannot be what Parliament intended”, they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.”

102. I have already made reference to Nugee LJ’s analysis of the legislative purpose and scheme of the Act, in his judgment in *Adriatic* at [145]-[176]. At [142]-[144] Nugee LJ explained why he found it helpful to approach the question of statutory construction which was before the Court of Appeal by “first orientating ourselves by reference to the legislative purpose and scheme of the Act”:

- “142. As I have said the exercise we are engaged in is one of statutory construction. The general principles applicable to such an exercise have been authoritatively laid down in a series of cases in the House of Lords and Supreme Court and I think can be considered as well settled.
143. A convenient recent summary can be found in the judgment of Lord Sales in *PACCAR* at paragraphs 40-41. At paragraph 40 he said (by reference to *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349 (“*Spath Holme*”) at 396 per Lord Nicholls) that the basic task was clear: the Court was required to identify the meaning borne by the words in question in the particular context.
144. At paragraph 41 he referred to the numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose, referring to *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at paragraph 8 per Lord Bingham (“the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment”) and *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] UKSC 25, [2011] 1 WLR 1546 at paragraph 10 per Lord Mance (“in matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance”). Lord Sales summarised the position as follows:

“The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it.”
So I find it helpful to approach the question of construction before us by first orientating ourselves by reference to the legislative purpose and scheme of the BSA.”

103. I should also quote what Lord Sales JSC said in his judgment in *R (PACCAR Inc and others) v Competition Appeal Tribunal* [2023] UKSC 28 [2023] 1 WLR 2594, at [40] and [41]:

“40 The basic task for the court in interpreting a statutory provision is clear. As Lord Nicholls put it in *Spath Holme* [2001] 2 AC 349, 396, “Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.”

41 As was pointed out by this court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2022] AC 690, para 10 (Lord Briggs and Lord Leggatt JJSC), there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. The examples given there are *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 and *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] 1 WLR 1546. In the first, Lord Bingham of Cornhill said (para 8):

“Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.”

In the second, Lord Mance JSC said (para 10):

“In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance . . . In this area as in the area of contractual construction, “the notion of words having a natural meaning” is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme.”

The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it.”

104. With these principles in mind, I turn to the question of statutory construction raised by the first argument within Ground 1.

105. At the outset, and following the guidance of Nugee LJ in *Adriatic*, at [144], I find it helpful to approach the question of statutory question by first orientating myself by reference to the legislative purpose and scheme of the Act. I have already made reference to the statements of legislative purpose and scheme of the Act which are to be found in *BDW*, *Adriatic* and *Triathlon*, but I find it helpful to make reference to the following explanations of the legislative purposes and scheme of the Act, given by Nugee LJ in, respectively, *Adriatic* and *Triathlon*.

106. Following the extract from his judgment in *Adriatic* which I have quoted above, at [142]-[144], Nugee LJ identified the general purpose of the provisions in Part 5 of the Act (Sections 116-160) in the following terms, at [146]-[147]:

“146. Part 5 (sections 116 to 160), which is headed “Other provisions about safety, standards etc”, contains provisions dealing with a variety of matters. Some of these are also forward-looking. But others, including those with which we are concerned, are intended to address the historic problems associated with existing safety defects in buildings. This was not something included in the review led by Dame Judith, as that had not been tasked with considering how remedial work on existing stock should be carried out or how it should be paid for.

147. The first group of sections in Part 5 (originally sections 116 to 125, although section 125 has now been repealed) are grouped together under the heading “Remediation of certain defects”. As explained in section 116(1), they (together with schedule 8) make provision in connection with remediation of relevant defects in relevant buildings. I will refer to these sections and schedule 8 together as “the remediation provisions”; by section 170(3)(a) of the BSA, they all came into force together two months after the BSA was passed, that is on 28 June 2022.”

107. Turning to the general purpose of the remediation provisions, at [148] Nugee LJ approved the following identification of the broad purposes, provided by counsel for the appellants in *Adriatic*:

“148. There was no dispute between the parties as to the general purpose of the remediation provisions. Mr Allison himself identified the broad purposes as fourfold:

- i) To ensure that historic safety defects were remediated.*
- ii) To protect leaseholders.*
- iii) To ensure that those responsible for the defects were held liable.*
- iv) To restore stability to the lending market.”*

108. Turning to *Triathlon*, Nugee LJ addressed the scheme of the Act in the following terms, in his judgment at [23]:

“23. Before coming to the facts, it is worth standing back from the detail and considering the legislative scheme of these provisions. In my judgment in Adriatic I attempted to identify a number of features that can be discerned from the remediation provisions taken as a whole (see paragraphs [164] to [175]). As there set out in more detail, they can be summarised as follows:

- (1) If the person responsible for the defect retains an interest in the building (as at the relevant date, 14 February 2022), they will be likely to have to bear the costs of remedying it (paragraph 2 of schedule 8, and regulation 3 of the 2022 Regulations).*
- (2) If the lessee has more than a very small portfolio of properties, they get no further protection (this is the effect of confining the other protections to those with qualifying leases); conversely if the landlord is part of a well-resourced corporate group they meet the “contribution condition” and cannot pass on costs to protected lessees at all (paragraph 3 of schedule 8). In other words those who are more likely to be able to afford to pay are required to do so.*

- (3) *Next there are certain categories of costs (cladding remediation under paragraph 8 of schedule 8, and legal and other professional costs under paragraph 9 of schedule 8) which protected lessees do not have to contribute towards at all.*
- (4) *In other cases remediation costs can in principle be passed on to protected lessees, but subject to a cap on their liability (or a complete exemption from liability) depending on the value of their flats (paragraphs 4 to 6 of schedule 8).*
- (5) *The inevitable corollary of relieving lessees of their contractual service charge liabilities is that (unless Government was proposing, which it was not, that the taxpayer would pick up all the costs) costs will be incurred by whoever is doing the work (whether landlord or management company) that would otherwise have been met by the lessees through their service charges but will now not be. The BSA therefore contains provisions enabling those costs to be passed on to others. This includes section 124 under which the FTT can make RCOs where it is just and equitable to do so, and regulations 3, 4 and 5 of the 2022 Regulations.*
- (6) *Whoever ends up bearing the costs is given new rights against those ultimately responsible, namely (i) by an extended limitation period under the DPA 1972 (section 135 of the BSA) and (ii) by a new cause of action against those manufacturing or mis-selling cladding products (section 149). In addition the High Court is given power to make associated companies liable for breaches of the DPA 1972 (section 130)."*

109. Nugee LJ went on to say this, at [24]:

"24. As I said in Adriatic, this statutory scheme all flows from the decision to intervene in the contractual scheme of obligations by protecting leaseholders from the full extent of their contractual service charge liabilities. Once this decision had been made, it was necessary not only to define who could benefit from the leaseholder protections, but also to make provision for the level of protection they would receive; for who would pick up the costs that were no longer to be met through the service charges; and for what rights the latter would have to make claims over against others, including those ultimately responsible."

110. While all of this guidance as to the statutory purposes behind Part 5 of the Act is important, it seems to me that what was said by Nugee LJ in *Triathlon*, at [23] and [24] is of particular importance in the present context, because *Triathlon* was directly concerned with the jurisdiction under Section 124. Once the decision had been made to intervene in the contractual scheme of obligations by protecting leaseholders from the full extent of their contractual service charge liabilities, it was necessary for Parliament to deal with a number of consequential matters, including the questions of who would pick up the costs that were no longer to be met through the service charges; and what rights the latter would have to make claims over against others, including those ultimately responsible. The jurisdiction in Section 124 is part of this Parliamentary purpose.

111. I come next to the statutory language in Section 124. Subsection (1) identifies the jurisdiction of the FTT to make "*a remediation contribution order*" in relation to "*a relevant building*". Subsection (2) identifies a remediation contribution order as "*an*

order requiring a specified body corporate or partnership” to make payments to a specified person.

112. The Appellants relied upon these singular references to mean that it is only open to the FTT to make a single remediation contribution order against a single specified body corporate or partnership at any one time. As I understood the argument, it is open to the FTT to make a series of orders against different specified persons in respect of the same sum to be paid pursuant to those orders, but what the FTT cannot do is to make an order which imposes joint liability on two or more specified persons for all or any part of that sum. Each specified person can only be made liable to pay a distinct and separate part of the sum.
113. The Appellants’ argument, as I understand it, can be illustrated by an example. A remediation contribution order might be sought against, say, ten specified persons, whom I will refer as A-J, for a total payment of £1million. The FTT might then decide that it was just and equitable to make remediation contribution orders against all ten of A-J, on the basis that it was fair that all of them should be held equally responsible for the costs of remedying the relevant defects. On the Appellants’ argument A-J could not be made jointly and severally liable for the entire sum of £1 million. Instead, the FTT would be required to apportion the payment of the sum between A-J. The FTT would have to determine the split of liability which, assuming that the FTT considered each of A-J to be equally responsible, might result in a series of orders, each of which required each of A-J to pay £100,000. Once each of A-J had paid their allotted sum of £100,000 they would then have no liability to the applicant, under the relevant order, to contribute to the remaining sum of £900,000 or, if a lesser sum, to contribute to whatever remained unpaid, out of the total sum of £1 million, under the relevant set of orders.
114. In support of this argument the Appellants contended that the making of an order under Section 124 is not an order which reflects a pre-existing liability. Rather, it is an order which creates a statutory liability. As such, so it was argued, the FTT can only create a joint liability in a remediation contribution order if the statutory language in Section 124 gives it the jurisdiction to do so. The Appellants’ argument was that the wording of Section 124 does not confer such a jurisdiction upon the FTT.
115. In this context I was referred to the decision of the Court of Appeal in *Sutton v Norwich City Council* [2021] EWCA Civ 20 [2021] 1 WLR 1691. The case was concerned with an appeal to the FTT, by Mr Sutton and a company which he controlled, against notices of financial penalties which had been served on each of them. The notices arose out of the failure of the company to comply with improvement notices served on the company by the local authority, in respect of a residential property owned by the company. The notices served on Mr Sutton were served upon him, as the relevant legislation permitted, in his capacity as a director of the company. One of the issues which the Court of Appeal had to consider was the question of how the financial penalties should have been apportioned, as between Mr Sutton and his company. In his judgment in the Court of Appeal, Newey LJ (with whom Underhill and Moylan LJ agreed) did not suggest that liability for such a financial penalty, under the relevant legislation, could be joint, or joint and several. There were separate financial penalties in the case of Mr Sutton and the company. There was no joint, or joint and several liability, by reference to which problems of apportionment could be addressed. Ultimately, Newey LJ concluded that the significantly greater financial penalty imposed upon Mr Sutton was justified.

116. In this context I was also referred to the decision of the Supreme Court in *Jepsen v Rakusen* [2023] UKSC 9 [2023] 1 WLR 1028. The case was concerned with an application to the FTT for rent repayment orders by the occupiers of a flat which constituted a house in multiple occupation. A licence had been required for the use of the flat as a house in multiple occupation, but no such licence had been obtained. The application for the rent repayment orders was not made against the applicants' immediate landlord, but was instead made against Mr Rakusen and a Ms Field, who held a superior long leasehold interest in the flat. The Court of Appeal upheld an appeal against the decision of the Upper Tribunal that a rent repayment order could be made against a superior landlord. The appeal to the Supreme against this decision was dismissed. The Supreme Court decided that, on the true construction of Section 40(2) of the Housing and Planning Act 2016, a rent repayment order could only be made against the immediate landlord under the tenancy in respect of which a rent repayment order was sought. The order could not be made against a superior landlord.
117. In their joint judgment (with which Lord Lloyd-Jones, Lord Kitchin and Lord Richards JJSC agreed) Lord Briggs and Lord Burrows JJSC acknowledged the difficulties which this construction of Section 40(2) created, in a situation where the immediate landlord turned out to have insufficient assets to meet the relevant rent repayment order or orders. They were however unpersuaded that this was a justification for adopting a different construction of Section 40(2). As they said, at [43]:
- “43 Having said all that, we accept that the interpretation we take renders RROs less effective than they perhaps could be if they were to be made available against superior landlords. But in our view that development would undermine the clear definition of an RRO, as set out in section 40(2) of the 2016 Act, and would therefore require new legislation. In other words, if this is thought to be a problem any reform would be a matter for Parliament and cannot be achieved through a distorted interpretation of the relevant provisions in the 2016 Act.”*
118. The Appellants drew my attention to the Renters' Rights Act 2025 (due to be brought into force on 1st May 2026), which will allow rent repayment orders to be made against superior landlords. In particular Section 102(7) of the new Act will insert a new Section 46A into the Housing and Planning Act 2016, in the following terms:
- “(1) A rent repayment order made against more than one landlord must provide for the landlords to be jointly and severally liable for the amount due under the order.*
- (2) If a rent repayment order (“the original order”) has been made in respect of rent under a tenancy and another rent repayment order (“the new order”) is made in respect of rent under the same tenancy, the new order may not require payment to be made in respect of any period in respect of which the original order required payment to be made.”*
119. It was submitted that this provision was a Parliamentary response to the difficulty, said to be illustrated by the *Sutton* decision and the *Rakusen* decision, that joint and several liability could not be imposed upon parties subject to statutory liabilities such as financial penalties and rent repayment orders, without specific provision for such liability in the relevant statute.

120. The Appellants also placed at the centre of their argument on statutory construction what was said to be the contrast in language between Section 124 and Section 130. Section 130(1) gives the High Court jurisdiction to make a building liability order if it considers it just and equitable to do so. Indeed, as mentioned earlier in this decision, Grey has commenced proceedings in the High Court (Technology and Construction Court) for a building liability order against R1, R16 and R17. Those proceedings have yet to come to trial.

121. Subsections (2)-(5) of Section 130 identify a building liability order in the following terms:

- “(2) A “building liability order” is an order providing that any relevant liability (or any relevant liability of a specified description) of a body corporate (“the original body”) relating to a specified building is also—*
 - (a) a liability of a specified body corporate, or*
 - (b) a joint and several liability of two or more specified bodies corporate.*
- (3) In this section “relevant liability” means a liability (whether arising before or after commencement) that is incurred—*
 - (a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984,*
 - or*
 - (b) as a result of a building safety risk.*
- (4) A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body.*
- (5) A building liability order—*
 - (a) may be made in respect of a liability of a body corporate that has been dissolved (including where dissolution occurred before commencement);*
 - (b) continues to have effect even if the body corporate is dissolved after the making of the order.”*

122. The Appellants pointed to the specific reference to joint and several liability in subsection (2), and to the reference to *“a specified body corporate”*. The Appellants argued that this language demonstrated that the person drafting the Act was aware both of the distinction between (i) singular or individual liability and (ii) joint and several liability, and was also aware of the need to make specific provision for joint and several liability in Section 130(2). By contrast, so the Appellants argued, no similar provision was made for joint and several liability in Section 124. Given that both Sections appear in the same Part of the same Act, and given the presumption that, where the same words are used more than once in an Act they have the same meaning, it was clear from the statutory context that Parliament had not intended to confer jurisdiction upon the FTT to make remediation contribution orders against multiple parties on a joint and several basis. If Parliament had intended to go this far in Section 124, so the argument went, Parliament would have said so, and would have needed to say so.

123. I am not persuaded by the arguments of the Appellants in support of their construction of the scope of the FTT’s jurisdiction under Section 124. I say this for the following reasons.

124. The starting point seems to me to be the reference to *“a specified body corporate or partnership”*. Although the reference is singular I do not see why, at least on an initial reading and concentrating only upon Section 124 itself, it cannot be read as a plural reference. If statutory support is required for that conclusion, it can be found, subject to a

contrary intention appearing, in Section 6 of the Interpretation Act 1978, which provides as follows:

“6 Gender and number.

In any Act, unless the contrary intention appears,—

- (a) words importing the masculine gender include the feminine;*
- (b) words importing the feminine gender include the masculine;*
- (c) words in the singular include the plural and words in the plural include the singular.”*

125. I will come back to the question of whether a contrary intention can be found, either in Section 124 or more widely in the Act. As I have said, as a matter of initial reading, I cannot see why the reference to a specified body corporate or partnership cannot be plural.
126. In this context it needs also to be borne in mind that concentration upon the reference to “*a specified body corporate or partnership*” in Section 124 does not necessarily answer the question of whether the FTT has the power to impose joint and several liability. The reason for this is that, as I understood the Appellants’ arguments, it was accepted by the Appellants that, in a case such as a present case, it was open to the FTT to make a series of individual orders against each of the Specified Respondents, as “*a specified body corporate or partnership*”. What the FTT could not do, on the Appellants’ argument, was to impose joint liability, or joint and several liability on any two or more of the Specified Respondents. Indeed, although I am referring to the orders made by the FTT as “*the RCO*”, they are expressed to be orders in the plural, as was the case with the Triathlon Order. It follows that if the reference to “*a specified body corporate or partnership*” in Section 124 has to be read as singular only, this does not prevent the FTT from making a series of individual orders against each one of multiple respondents, in respect of a sum to be paid for the remedying of a particular set of relevant defects. Nor does it prevent the FTT from incorporating a series of individual orders of this kind, in the case of multiple respondents, into a single form of order, as was done in the RCO and in the Triathlon Order. Nor does it necessarily mean that there cannot be joint and several liability between those respondents or some of them, in respect of the sum to be paid.
127. I am also not persuaded that there is the contrast contended for by the Appellants, as between Section 124 and Section 130. Section 130 is concerned with a different jurisdiction to Section 124, and works in a different way. Section 130 is engaged where a body corporate has a relevant liability, of a kind described in Section 130(3). That liability can then be made transmissible from the original body to a specified body corporate, or it can be made transmissible as the joint and several liability of two or more specified bodies corporate. The transmission of liability takes place pursuant to paragraph (a) or paragraph (b) of subsection (2), depending upon whether a building liability order is sought against one specified body corporate or two or more specified bodies corporate, and provided, in each case, that there is the required association with the original body.
128. While it is the case that Section 130, along with Section 124, is part of the set of remedial provisions in Part 5 of the Act, which are intended to ensure that the cost of remedying defects can be passed on to the parties who should, ultimately, be held responsible for that cost, it will be noted that Section 130 is fairly rigid in its operation. The pre-existing liability which founds the jurisdiction in Section 130 can be made transmissible to an associated party or associated parties. The liability which is transmitted is the same liability to which the original body is subject. The jurisdiction in Section 124 is more

flexible and open ended. It is for the FTT to decide what amount should be paid, and by whom, and on what basis.

129. In these circumstances I do not find it surprising that Parliament should spell out in Section 130(2) the joint and several nature of the liability in Section 130(2)(b), when dealing with the transmission of the liability of the original body, but should not have thought it necessary or, for that matter, convenient to spell matters out, to the same degree, in relation to the more flexible jurisdiction in Section 124.

130. I am also wary of being guided in the construction of Section 124 by provisions in separate legislation, which are intended to perform a different function. In my view neither the *Sutton* case nor the *Rakusen* case nor the provisions of the Renters' Rights Act 2025 provide a reliable analogy for the construction of Section 124. This point is illustrated by the terms of Section 40(2) of the Housing Planning Act 2016, which was in issue in *Rakusen* and which provides as follows:

“(2) *A rent repayment order is an order requiring the landlord under a tenancy of housing in England to - (a) repay an amount of rent paid by a tenant, or (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.*”

131. As Lord Briggs and Lord Burrows noted, in their joint judgment at [28], if a straightforward interpretation exercise was carried out, it was clear that the reference to the “*landlord under a tenancy*” in Section 40(2) had its “*ordinary and generally understood meaning*”; namely the immediate landlord under that tenancy. This seems to me to be a different interpretation exercise to the interpretation exercise in the present case. Equally, the decision of Parliament to spell out the joint and several nature of the liability for a rent repayment order, if made against more than one party, does not seem to me to justify a general rule that, in the absence of such a provision, joint and several liability is not possible.

132. Beyond the analysis above however, Section 124 has to be construed by reference to the legislative purpose and scheme of the Act, and specifically by reference to the legislative scheme and purpose of the remediation provisions in Part 5 of the Act. In this context the Appellant's construction of Section 124, as precluding the imposition of joint and several liability, seems to me to raise serious problems with the operation of remediation contribution orders.

133. If the Appellants are correct, what the FTT was constrained to do in the present case was to apportion out the Specified Payments (the sums payable pursuant to the RCO) between the Specified Respondents. Whether the FTT had made a single order or a series of orders, each of the Specified Respondents could only, on the Appellants' case, be ordered to pay a specified part of the Specified Payments, with no overlap between that specified part and the specified parts payable by other Specified Respondents. If the FTT considered all the Specified Respondents to be equally responsible it could not require each of the Specified Respondents to pay the entirety of the Specified Payments. If, by way of example, the FTT had considered it just and equitable that R1 should be liable to pay all of the Specified Payments, and made an order to that effect, the FTT would effectively have shot its bolt, so far as the jurisdiction under Section 124 was concerned. None of the remaining 75 Specified Respondents could be required to pay anything, because R1 had been required to pay the entirety of the Specified Payments. If the FTT had considered it just and equitable that each of the Specified Respondents should be

responsible for the entirety of the Specified Payments, the best that the FTT could have done was to order each of the Specified Respondents, either in one order or in a series of orders, to pay a seventy-sixth share of the Specified Payments. This result would not however actually have reflected what the FTT had considered to be just and equitable on this hypothesis. On this hypothesis each of the Specified Respondents would be liable to pay only one seventy-sixth of what the FTT considered to be just and equitable, in terms of what each Specified Respondent should be liable for.

134. It seems bizarre that the jurisdiction of the FTT to make remediation contribution orders should be hamstrung in this way. Beyond this however, there is an additional, and obvious problem which results from the inability of the FTT, on the Appellants' case, to order payment on a joint and several basis. In a case, which will not be uncommon, where a remediation contribution order is sought against more than one respondent and the FTT is persuaded that the remediation contribution order, or orders should be made against multiple respondents, there is an obvious problem with enforcement. If one or more of the respondents turns out to be impecunious, a gap or gaps will appear in the ability of the party or parties, in whose favour the remediation contribution order is made, actually to recover the cost of the relevant remedial work.
135. This problem is illustrated by the present case. The relevant developer in the present case is R1. Unfortunately, it appears that R1 may not be good for the Specified Payments. The Tribunal recorded the position of R1 in the following terms, at Paragraph 350:

“350. We agree the developer is a key target, at the top of the hierarchy of liability (or waterfall). We are therefore in no doubt that a RCO should be made against R1 in view of the nature of their residential conversion works and the relevant defects in this building. We would say that even if it were not for the negative factors noted above, such as the untrue warranty in the sale contract, failure to deal with those fire safety defects which were identified in 2017/2018 and failure to ensure the sprinkler system was commissioned. However, it appears R1 has little or no remaining assets and may soon be subject to administrative strike off for failure to file documents. In the sale contract, R1 gave an indemnity, but that does not mean that associates must be treated as if they had given indemnities or share any blame with R1.”

136. In a case such as the present case, where there are multiple respondents in respect of whom the FTT considered it just and equitable that there should be a liability to make a payment, the best that the FTT could achieve, if the Appellants are right, is a separately apportioned liability for each respondent. If one then assumes a situation, which will not be uncommon, where some of the respondents are or may be unable to pay, the applicant party or parties will be left with something resembling a colander, in terms of their ability to recover the total sum ordered to be paid.
137. Bearing in mind the legislative scheme and purpose of the Act and, in particular, the legislative purpose and scheme of the remediation provisions in Part 5 of the Act, as identified in *BDW*, *Adriatic* and *Triathlon*, the problems created by the Appellants' construction seem to me to be completely at odds with what the remediation provisions in Section 124 were intended to achieve. As Nugee LJ explained in *Adriatic*, at [176], the statutory scheme of the Act flows from the decision to intervene in the contractual scheme of obligations by protecting leaseholders from the full extent of their contractual service charge liabilities. Once that decision had been made it became necessary to address other matters including *“who would pick up the costs that were no longer to be met through the*

service charges; and for what rights the latter would have to make claims over against others, including those ultimately responsible". If the FTT does not have the ability to impose joint and several liability but must, as the Appellants contend, apportion out the sum to be paid, with no overlap in liability as between multiple respondents, it seems to me that Section 124 cannot work as it was intended to work. Effectively, the statutory purpose is frustrated.

138. In oral argument Mr Morris, who undertook the principal burden of the oral submissions in support of Ground 1, sought to meet this problem by contending that if the person making the application for a remediation contribution order, that is to say the interested person, was confronted with a shortfall in recovery, the interested person could return to the FTT and ask for a re-arrangement of the apportioned shares of the respondents, in order to assign the shortfall between those able to pay. Mr Morris suggested three possible sources for this jurisdiction to return to the FTT for a variation of the original remediation contribution order. The first source was Section 124(1) itself which, Mr Morris submitted, did not preclude return applications of this kind. The second source was the jurisdiction of the FTT to vary its own orders. I was not given a specific reference in this context, but I assume that the intended reference was to the case management powers of the FTT in Rule 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the FTT Rules**"), and/or to the powers of the FTT to correct, set aside or review its own decisions in Part 6 of the same Rules. The third source was derived from Chitty on Contracts, 35th Edition, at 20-025, where the editors explain the principle of law that joint debtors and joint and several debtors have a restitutionary right of contribution among themselves, so that if one has paid more than their share of the debt, they can recover the excess from the other debtors in equal shares, subject to any agreement to the contrary. Mr Morris submitted that the principle was a precedent upon which the FTT could rely, in a situation where an applicant sought an adjustment to a remediation contribution order in order to compensate for a shortfall in recovery resulting from the insolvency of one or more of the respondents to the remediation contribution order.
139. This did not seem to me to be a satisfactory answer to the problem, for at least three reasons.
140. First, and while I do not regard it as necessary to make a final decision in this particular respect, I have serious doubts that Section 124 actually permits repeated applications of this kind. So far as the FTT Rules are concerned, it does not seem to me that the case management powers of the FTT to amend, suspend or set aside its earlier directions, as contained in FTT Rule 6, would permit variation of a remediation contribution order in the circumstances I am considering. So far as the powers of correction, setting aside and review in Part 6 of the FTT Rules are concerned, those powers are closely confined and would not, it seems to me, extend to the variation of a remediation contribution order in the circumstances under consideration. So far as the principle of contribution between joint debtors is concerned, it does not seem to me to provide an apt precedent in a case where it is the applicant for a remediation contribution order which is returning to the FTT in order to try to secure an adjustment in the sums payable by the respondents. This situation involves adjustment between the applicant and the respondents, not adjustment in a separate dispute between respondents.
141. This leaves Section 124(1) as the possible source for such a jurisdiction. The jurisdiction in Section 124(1) is set out in flexible terms, and I can see that the FTT could, in an appropriate case, include a variety of provisions catering for eventualities such as the

possible insolvency of a party. The RCO itself contains a liberty to apply for variation of certain provisions of the RCO, relating to the use of the sums to be paid; see paragraph 7 of the RCO. This however is a reflection of the broad powers given to the FTT when making a remediation contribution order, in the particular circumstances of a particular case. A provision granting the parties liberty to apply for a variation of the relevant order may be included in the order, in order to deal with particular problems of implementation of that order. I am however doubtful that Section 124(1) was intended to confer upon the FTT a general jurisdiction to entertain repeated applications to the FTT, of the kind contemplated by the Appellants' argument.

142. Second, and if it is assumed that the FTT does have the power to revisit its own decision, in a situation of the kind which I am envisaging, the exercise of the power would, in my view, be seriously problematic. In such a situation one can easily see that the paying respondents would have grounds for objecting to their shares being adjusted as a result of the default of a co-respondent. Even if such an application was possible under Section 124, the paying respondents would no doubt argue, with at least some force, that it was not just and equitable to adjust their shares in order to accommodate the default of another respondent. They would no doubt say that their shares had already been settled by the FTT, and that it either was not permissible, or at least not fair to allow the interested person what would no doubt be characterised as a second bite at the cherry.
143. Third, and even if the problems outlined in my previous paragraph are assumed not to exist, it seems to me contrary to the scheme and purpose of the remediation provisions that an interested person, invoking the jurisdiction in Section 124, should have to face the prospect of repeated visits to the FTT, in order to try to secure full recovery of the sum ordered to be paid.
144. In this context it is also important to keep in mind that, if the FTT has the ability to impose joint and several liability, it is not obliged to do so. In a particular case the FTT might think it just and equitable that a particular, and only a particular respondent should have to pay a particular part of the costs of remedying the relevant defects. On that hypothesis, if that respondent turned out to be unable to pay the relevant sum, one can see that there would no particular unfairness in the interested person (the applicant for the remediation contribution order) being left out of pocket in that respect. The situation would result from the failure of the interested person to persuade the FTT that it was just and equitable to make an order for payment of the relevant part of the costs by anyone other than the defaulting party. This situation stands in stark contrast to a situation where the FTT considered that it was just and equitable to make all the respondents jointly and severally liable for payment of the entire sum due but found itself constrained, on the Appellants' construction of Section 124, to parcel out the liability on an apportioned basis between the respondents. On that hypothesis the FTT would have been frustrated in achieving what it considered to be the just and equitable result, and the interested person would be left out of pocket, unfairly, if particular respondents defaulted on their apportioned liabilities.
145. In his oral submissions in reply Mr Morris suggested that the FTT, in addition to having the ability to entertain a further application by an applicant confronted by a gap in recovery resulting from the insolvency of a respondent, could take into account the risk of the insolvency of a party at the stage of making the remediation contribution order or orders. As I understood this suggestion, it would mean that the FTT could, in deciding who should pay what share of the liability, take into account the risk of a particular respondent becoming insolvent.

146. This suggestion did not seem to me to provide any sensible solution to the problems which I have identified above. Given the breadth of the just and equitable jurisdiction conferred on the FTT by Section 124(1), I can see that the Tribunal might well take into account the risk of a respondent or respondents becoming insolvent in deciding which respondents should be subject to a remediation contribution order. This however is most likely to occur in a scenario, such as the present case, where the respondent in the position of the developer is at risk of becoming insolvent. In those circumstances, there is good reason for the FTT to consider whether it is just and equitable to make a remediation contribution order against other respondents, in order to avoid the risk of a shortfall in recovery. It would however, in such a situation, be perverse for the developer respondent to escape a remediation contribution order on the basis of the risk of its becoming insolvent. Such a situation can be avoided by imposing liability on a joint and several basis, with the result that, while no respondent can rely on its own insolvency or likely insolvency to escape an order, recovery can be made against the solvent respondents if the developer respondent, or for that matter any other respondent does turn out to be insolvent. If a remediation contribution order cannot be made on a joint and several basis, the perverse result which I have just identified cannot be avoided by the suggestion put forward by Mr Morris.
147. In theory, there is another route by which the problems, which I have identified as arising from the inability of the FTT to impose joint and several liability, might be avoided. The jurisdiction under Section 124(1) is, as I have noted, a flexible one. In theory, and if the imposition of joint and several liability is not available, the FTT could craft an order which provided for one respondent to assume the liability of another respondent, if the latter respondent failed to pay its share of the total liability. The position would obviously become significantly more complicated, in the case of a remediation contribution order against multiple respondents, but in theory the FTT could try to create a sort of waterfall of liabilities within the remediation contribution order, to compensate for its inability to impose joint and several liability.
148. I cannot see however that this is a satisfactory answer to the problems which exist if the FTT has no jurisdiction to impose joint and several liability. The difficulties with constructing an order of the kind contemplated in my previous paragraph, in any but a simple case, are obvious. Construction of such an order might be possible in a case with a simple and obvious hierarchy of respondents, but most cases involving multiple respondents will not fit into this category. The position is likely to be a good deal more complex, and is also likely to raise time-consuming and intractable issues of which respondent or respondents should have a contingent liability imposed upon them, and in respect of the liability or liabilities, if left unsatisfied, of which respondent or respondents. Such an order would also be of no assistance in a case, such as the present case, where the FTT considered it just and equitable that all of the relevant respondents should shoulder the entirety of the relevant liability. It will be appreciated that the question of whether the Tribunal were right to take this view in the present case is beside the point for present purposes. Whether the Tribunal were right to take this view in the present case is for Ground 2. The relevant point is that in a case where the FTT took a view of this kind, it would not be able to impose joint and several liability. At best, the FTT would have to try to construct an order with contingent liabilities. Even if such an order could be constructed, it could not and would not replicate or reflect the answer which the FTT had, on this hypothesis, decided should be given to the just and equitable question.
149. All of the above considerations seem to me to point strongly in favour of a construction of Section 124 which permits the imposition of joint and several liability upon multiple respondents, in a case where the FTT considers that it is just and equitable to take this

course. A construction of Section 124 which means that the FTT does not have this ability seems to me to be in direct conflict with the scheme and purpose of Section 124.

150. The Appellants sought to counter arguments based on the legislative purpose and scheme of Section 124 by arguing that the construction of Section 124 favoured by the Tribunal produces an injustice of its own.
151. The Appellants argued that, if joint and several liability was imposed on respondents to a remediation contribution order, there was no means by which those respondents could, as between themselves, adjust their joint and several liabilities. If one respondent ended up paying the entire sum due, that respondent would have no means, by proceedings in the FTT, of recovering a contribution towards this payment from their co-respondents. The contribution provisions in the Civil Liability (Contribution) Act 1978 (“**the 1978 Act**”) would not apply, and the FTT would have no jurisdiction of its own to order contribution, as between the respondents. In oral submissions Mr Morris drew my attention to the history behind the statutory rights of contribution between those liable in respect of the same damage, which are now to be found in the 1978 Act. This history is set out in the speech of Lord Bingham in *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14 [2002] 1 WLR 1397. As Mr Morris explained, historically, claims for contribution between joint tortfeasors liable for the same injury could not be made at common law. This problem was originally addressed by the Law Reform (Married Women and Tortfeasors) Act 1935, from which the relevant provisions in the 1978 Act derive. The jurisdiction in the 1978 Act is however a statutory jurisdiction, which applies to courts. The essential point made by Mr Morris was that the jurisdiction of the FTT is statutory. As such, and in the absence of the FTT having any powers equivalent to those of a court to entertain a claim for contribution under the 1978 Act, the FTT would have no jurisdiction to entertain a claim by one respondent to a remediation contribution order for a contribution from a co-respondent or co-respondents. This would produce an injustice if multiple respondents could be required to pay a sum on a joint and several basis pursuant to a remediation contribution order. If one respondent ended up having to shoulder the burden of the entire payment, it would have no means of making application to the FTT for a fair contribution to be made by its co-respondents.
152. The Appellants argued that this problem had been glossed over by the FTT in the Decision at Paragraph 380, where the FTT dealt with the question of contribution between the Specified Respondents in the following terms, in the final part of the Paragraph:

“380. Further, we accept the submission from Mr Hickey that, in this case, this is the just and equitable approach. We do not accept that the Applicant should be confined to a limited share from each relevant Respondent, or should have to wait to see whether a given Respondent is solvent (or how much they can pay) before they move on to the next, even if some kind of top up machinery could be included in the wording of a RCO to accommodate this as Mr Morris suggested. It would obviously mitigate the huge impact on each Respondent, but would be impractical for an applicant. It does not seem consistent with the purpose of this jurisdiction, as noted above. We accept Mr Hickey’s submission that in this case it leaves a grave risk that assets which should be included will be missed. In any event, there are questions about the reliability of the accounts and related documents in relation to the Respondents (which again we regard simply as matters of blurred divisions between company affairs and finances and/or inadequate administration and record keeping). Even if assets are shown in the last filed accounts of a given

Respondent and those accounts were accurate, it may now genuinely have none left. Those Respondents we have included appear sufficiently linked for us to consider it just and equitable to expect them to arrange between themselves what contributions should be made by each company, on the basis described above.”

153. It seems to me that there are two points which are important in this context.
154. First, and as demonstrated by the findings made by the Tribunal in the Decision, the Tribunal found that R1, as the developer in respect of the Development, was part of a wider corporate structure through which the individuals who controlled this structure conducted their business. This wider corporate structure included the remainder of the Specified Respondents. In the light of their findings in this respect, the Tribunal concluded not only that it was just and equitable to make the RCO against all of the Specified Respondents on a joint and several basis, but also that it was just and equitable, given the linkage between the Specified Respondents, to expect them to arrange between themselves what contributions should be made by each Specified Respondent. On the evidence in this case therefore, the Tribunal concluded that it was fair to leave the Specified Respondents to sort out contributions themselves. It follows that, on the findings made by the Tribunal on the evidence in this case, the problem identified by Mr Morris does not arise. Whether there were any errors in the way the Tribunal exercised its discretion on the just and equitable question is a matter to which I will have to return when I come to Ground 2.
155. This first point is particular to this case. It does not address the point of principle made by Mr Morris, which is that the FTT has no jurisdiction to determine contributions, as between respondents who are ordered to make payment pursuant to a remediation contribution order on a joint and several basis. This brings me to my second point.
156. In dealing with this particular submission of the Appellants Mr Hickey, in his oral submissions, did not pull his punches. As I understood Mr Hickey’s submissions, he did not dispute that the FTT has no jurisdiction to entertain contribution proceedings between respondents, where those respondents are liable on a joint and several basis, of the sort which a court could entertain under the 1978 Act. I understood him to accept that the 1978 Act had no application. Mr Hickey’s short point was that Parliament, in enacting Section 124, had simply not concerned itself with solving the problem of respondents seeking contributions between themselves. As the same submission was explained in Grey’s skeleton argument for this hearing, the 1978 Act is fault-based and is concerned with the position between parties liable for the same damage. Section 124 is not fault-based, but is a new and entirely different form of statutory direct liability, the purpose of which is to facilitate payments for remediation. Section 124 is not concerned with arguments between associated persons as to who should pay in respect of a joint and several liability.
157. It was not clear to me, on the submissions of the parties, whether it was being said by the Appellants that there were no means, either in the FTT or in court, whereby respondents could seek contributions, as between themselves, in respect of a joint and several liability pursuant to a remediation contribution order. As I have said, I understood it to be common ground that the FTT had no jurisdiction to deal with a contribution claim of this sort. The question of whether such contribution proceedings could be brought in court, on the basis of a restitutionary right, was not properly explored in the submissions.

158. Whether or not any such claim in contribution could be pursued by court proceedings is not a matter which I am in a position to decide, and I do not do so. In my view it is not necessary to explore this particular point because the position seems to me to be as characterised by Mr Hickey. Section 124 creates a new form of statutory liability, in respect of which Parliament has not concerned itself with the question of rights of contribution as between respondents to a remediation contribution order.
159. Whether this creates an injustice, in a situation where the FTT opts for a remediation contribution order on a joint and several basis, seems to me to be at least open to debate. I say this for three reasons. First, the question of contribution between respondents who are liable on a joint and several basis is most likely to arise where the FTT is persuaded that associated parties should be brought into the liability, through the gateway of paragraph (d) of Section 124(3). In such a case there will, by definition, be the required element of association between the respondents, which might in turn be expected to result in a situation where it is reasonable to leave the respondents to sort out contributions between themselves. Second, the problem identified by Mr Morris arises where the FTT decides to make a remediation contribution order on a joint and several basis. Before making such an order the FTT will need to be satisfied, as the Tribunal were in the present case, that it is just and equitable to impose joint and several liability upon the respondents. If the FTT is satisfied that it is appropriate to impose joint responsibility, that is likely to be because there is a degree of linkage between the respondents which renders it reasonable to leave the respondents to sort out contribution themselves. Third, and as Mr Hickey pointed out, where an applicant seeks a remediation contribution order against multiple respondents on a joint and several basis, it is open to the respondents or any of them to argue, when the just and equitable question comes to be considered, that such an order should not be made because it is likely to create unfairness and/or problems, as between the respondents, in terms of who is likely to end up having to pay what share of the joint and several liability. Given the breadth of the just and equitable discretion in Section 124(1), the FTT would clearly be entitled to take arguments of this kind into account, in its consideration of the just and equitable question.
160. In summary, I am not persuaded that the absence of specific provisions for adjustment of contributions, as between multiple respondents to a remediation contribution order, provides any real support for the argument that the FTT has no power under Section 124 to impose joint and several liability.
161. I was also pressed with the argument, by the Appellants, that Section 124 constitutes expropriatory legislation, which should be construed, so far as possible, in a manner which leaves property rights intact. I was referred to the judgment of Newey LJ in *Adriatic*, at [60]-[64], where the presumption against interference with property rights is explained. This part of Newey LJ's judgment was not affected by his dissent on the issue of retrospectivity in *Adriatic*. In particular, at [64], Newey LJ made reference to the judgment of Lord Sumption JSC in *S Franes Ltd v Cavendish Hotel (London) Ltd* [2018] UKSC 62 [2019] AC 249 at [16], where Lord Sumption stated that "*as a statutory interference with the landlord's proprietary rights, the protection conferred by the Act [Part II of the Landlord and Tenant Act 1954] should be carried no further than the statutory language and purpose require.*". The principle is not in doubt, but it is a general principle of construction, which must be considered in the overall context of the particular question of statutory construction where it is said to be engaged. I do not think that the construction of Section 124 which I prefer infringes this principle. Nor do I think that the principle is sufficient to override all the other reasons which, in my judgment,

point strongly to the FTT having the power, when making a remediation contribution order, to impose joint and several liability.

162. I indicated earlier that I would come back the question of whether a contrary intention can be found in Section 124 or elsewhere in the Act, for the purposes of Section 6 of the Interpretation Act 1978, which means that the singular reference to “*a specified body corporate or partnership*” in Section 124(2) cannot be read as including the plural. I have deferred this question because the question of whether a contrary intention can be found in the relevant statute depends heavily upon the particular statutory context, and falls to be answered by considering the relevant statute as a whole; see Bennion at 19.3 and see the judgment of the Privy Council, delivered by Lord Morris, in *Blue Metal Industries Ltd v Dilley* [1970] AC 827, at 846D-847A and 848C-E. In these circumstances it seemed to me that this question was best left until I had considered the scheme and purpose of the relevant legislation as a whole, which I have now done.
163. What was said by Lord Morris in *Blue Metal Industries* in this context seems to me to be instructive in the present case. The issue with which the Privy Council was concerned in that case was the construction of Section 185 of the Companies Act 1961 (N.S.W.). Section 185 provided for the compulsory transfer of shares where there was a scheme or contract involving the transfer of shares or any class of shares in a company to another company or corporation, which had been accepted by the holders of not less than nine-tenths in value of the shares affected. The essential question in the appeal to the Privy Council was whether Section 185 applied only to a scheme or contract involving the transfer of shares in a single company to a single transferee company, or whether it could extend to a scheme or contract involving the transfer of shares in a company to two or more transferee companies. This, in turn, engaged the question of whether the statutory equivalent (in the relevant legislation of New South Wales) of Section 6(c) of the Interpretation Act 1978 applied to Section 185. The Privy Council decided that the singular references to the transferor company and transferee company in Section 185 could not, bearing in mind the purpose and policy behind the legislation, be read as references to plural companies. Lord Morris put the matter this way, at 848C-E:

“If regard is being had to the substance and tenor of the provisions in section 185 (1) their Lordships think that there is great force in the submission that whereas there are many policy considerations making it appropriate that if an offer which a company has made has proved acceptable to nine-tenths or more of those to whom the offer was addressed the company should be given powers of acquisition, there may not be equal policy considerations making it appropriate to give the powers to a group of companies acting jointly. It would seem unlikely that the legislature would solely depend upon the provisions of the Interpretation Act if there was an intention to legislate with such important consequences as to give powers of compulsory acquisition not to a single acquiring company but to a group of companies. The Interpretation Act is a drafting convenience. It is not to be expected that it would be used so as to change the character of legislation. Acquisition of shares by two or more companies is not merely the plural of acquisition by one. It is quite a different kind of acquisition with different consequences. It would presuppose a different legislative policy.”

164. It seems to me that there is an instructive contrast to be drawn between the reasoning of Lord Morris in *Blue Metal Industries* and the present case. In the present case I cannot see that a reading of Section 124 as permitting the imposition of joint and several liability

changes “*the character*” of Section 124 in any way. To the contrary, it seems to me that this reading of Section 124 works with the grain of the legislation in Part 5 of the Act.

165. In my view, and based on my analysis of the provisions of the Act which have been drawn to my attention in the context of this construction issue, a contrary intention of the kind referred to in Section 6(c) of the Interpretation Act 1980 is not to be found in the Act, in relation to Section 124. While Section 6(c) is described as a drafting convenience, it seems to me that it is one which applies in the present case; if and to the extent that it is required in order to read Section 124 as permitting the imposition of joint and several liability. I therefore conclude that the presumption in Section 6(c) is available, when reading Section 124(2), so that the singular reference to “*a specified body corporate or partnership*” can be read as including the plural.
166. Before I come to my conclusion on the first argument in Ground 1, I should mention, for the sake of completeness, that there was some reference to the Triathlon Order in Grey’s arguments. The Triathlon Order did impose joint and several liability upon the respondents in that case. There is no suggestion in the judgments in the Court of Appeal in *Triathlon* that we, as the FTT, had not been entitled to make an order in this form. In my view it would be wrong to attach much importance to the form of the Triathlon Order, in weighing the arguments in the present case. As I have explained, the short point is that the question of whether the FTT had the power to make an order in a joint and several form was simply not raised in *Triathlon*, either in the FTT or, so far as I am aware, in the argument in the Court of Appeal. In these circumstances I do not think that it is right to treat *Triathlon* as any authority in support of Grey’s case on Ground 1. Nor is any such support required, given the outcome of my analysis of Ground 1.
167. Drawing together all of the analysis in this section of my decision, and for the reasons which I have set out, I reach the following conclusions. In my view the correct construction of Section 124, bearing in mind the language of Section 124 and the place of Section 124 within the legislative scheme and purpose of the remediation provisions in Part 5 of the Act, is that the FTT does have the power to order payment to be made by two or more respondents on a joint and several basis. I therefore conclude, in relation to the first argument within Ground 1, that the FTT does have the power to make a remediation contribution order against multiple respondents on a joint and several basis.
168. It follows that Ground 1 fails, so far as the first argument within Ground 1 is concerned.

Ground 2 and Ground 1 (the second argument) – analysis and determination

169. I find it convenient to take Ground 2 first, and then to consider the second argument within Ground 1.
170. In relation to Ground 2 the Appellants’ arguments assumed, contrary to their first argument within Ground 1 but in accordance with what I have now decided in relation to Ground 1, that the Tribunal did have jurisdiction to make the RCO in the form in which they did; that is to say by ordering the Specified Respondents to make the Specified Payments on a joint and several basis. The question raised by Ground 2 therefore becomes whether the Tribunal were right to find that it was just and equitable to make the RCO against all of the Specified Respondents.
171. Although this particular point did not receive much attention in the skeleton arguments for the hearing of the Appeal, I start by reminding myself that the Tribunal, in determining

that it was just and equitable to make the RCO, were exercising a discretion conferred upon them by Section 124(1). Mr Warwick and Mr Hughes undertook the principal burden of the oral submissions in support of Ground 2. In their oral submissions both accepted, quite correctly on the hypothesis that the Tribunal had jurisdiction to make the RCO on a joint and several basis, that the Tribunal were exercising “*a broad discretionary power*” (the expression used by Mr Hughes). As such, both Mr Warwick and Mr Hughes accepted that it was not open to me to interfere with the Decision simply on the basis that I might disagree with the determination of the Tribunal that it was just and equitable to make the RCO. I could only interfere if the Tribunal had gone wrong in the exercise of their discretion in such a way as to vitiate the exercise of that discretion.

172. The Appellants’ case is that this is what occurred in the Decision. For ease of reference, I repeat the three principal arguments which are relied upon in support of Ground 2:

- (1) The Tribunal wrongly failed to appreciate and decide that participation in a particular development or receipt (directly or indirectly) of remuneration from that development is a minimum requirement or “*touchstone*” for it being just and equitable to make a remediation contribution order.
- (2) The Tribunal wrongly imposed an evidential burden on respondents to an application for a remediation contribution order to show why it would not be just and equitable to make such an order against them.
- (3) The Tribunal wrongly drew adverse inferences against the Specified Respondents based on a supposed failure to discharge that evidential burden.

173. At the conclusion of his oral submissions in support of Ground 2 Mr Hughes helpfully summarised the ways in which he submitted that the Tribunal had gone wrong in the exercise of their discretion. This summary, which I found helpful, was as follows:

- (1) The Tribunal wrongly conflated Section 121 and Section 124. Section 121 defines who can be an associated person within paragraph (d) of Section 124(3). In the remainder of this decision I will refer to the paragraphs of Section 124(3) as “**Paragraph (a)**” and so on. A person falling within Paragraph (d) qualifies as a specified body corporate or partnership, within the terms of Section 124(2), against whom a remediation contribution order may be made. A person cannot however be made the subject of a remediation contribution order simply because that person is an associated person falling within Paragraph (d). Before a remediation contribution order can be made against such a person, there is a separate and additional exercise which the FTT must undertake; namely the determination of whether it is just and equitable to make a remediation contribution order against the relevant associated person. In the present case, so Mr Hughes submitted, the Tribunal were, in effect, invited to elide the investigation of associate status with the just and equitable enquiry. Grey was wrong to make that invitation and, in any event, the Tribunal were wrong to accept the invitation.
- (2) The Tribunal were wrong in making no attempt to recognise the very different status and position of the various Specified Respondents. Some of the Specified Respondents, so it was submitted, had no connection whatsoever to the Building, and no connection was pleaded, no connection alleged, no connection proved, and no connection demonstrated in the Decision. In other cases there was a connection and, in the case of R1, an obvious connection. It was however wrong for the Tribunal to lump all the Specified Respondents together, given the substantial differences, in terms of status and position, as between the Specified Respondents. Nor were the Tribunal entitled to justify this approach on the basis that there was a paucity of evidence.

- (3) The Tribunal were wrong to accept the invitation, again from Grey, to embark upon an all or nothing approach to questions of liability and responsibility under Section 124. This all or nothing approach was wrong, and resulted in the Tribunal effectively reversing the burden of proof, by accepting the submission of Grey that there was some initial prima facie position which Grey could permissibly put forward, which then required the Specified Respondents to explain their positions. There was nothing in the Act or at common law which required or justified such an approach, and the Tribunal were wrong to adopt this approach.
174. In relation to the consideration of the position of each of the Specified Respondents Mr Hughes also submitted that there had to be a clear nexus, a rational nexus between the relevant body corporate and the imposition of a remediation contribution order to deal with relevant defects. The question of whether such a rational nexus existed was not investigated, still less answered by the Tribunal in relation to any of the Specified Respondents.
175. In considering the Appellants' case in support of Ground 2 the starting point is to identify those elements of the task required of the FTT, when considering an application for a remediation contribution order, which are relevant to the Appellants' case.
176. I agree with the Appellants that, in considering an application for a remediation contribution order, there are two separate exercises required of the FTT.
177. The first exercise is to determine whether the gateway conditions for the making of a remediation contribution order are satisfied. Grey summarised the nature of this exercise in the following terms, in its skeleton argument for the hearing of the Appeal:
- (1) The FTT must determine whether the application is made in relation to a relevant building.
 - (2) The FTT must, as the case may be, determine whether the respondent or respondents are persons falling within one of Paragraphs (a) to (c); that is to say a landlord of the specified kind or a developer in relation to the relevant building.
 - (3) The FTT must, as the case may be, determine whether the respondent or respondents are associated, within the terms of Paragraph (d), with persons falling within Paragraphs (a) to (c).
 - (4) The FTT must determine whether the costs in respect of which the remediation contribution order is sought were or will be incurred for the purposes of meeting the costs of remedying relevant defects relating to the relevant building.
178. I did not understand this summary of the gateway conditions to be disputed by the Appellants. I also did not understand it to be in dispute that the burden is on the applicant (the interested person) to satisfy the FTT that these gateway conditions are met, so that the FTT has jurisdiction to make a remediation contribution order.
179. The second exercise is for the FTT to consider whether it is just and equitable to make the remediation contribution order against the relevant respondents. It seems to me that this is a separate exercise, or determination on the part of the FTT. I accept the Appellants' argument that it is not sufficient for the applicant simply to satisfy the FTT that the gateway conditions have been met. There has to be something more before the FTT can be satisfied that it is just and equitable to make the remediation contribution order against each of the relevant respondents.

180. In his oral submissions in reply Mr Warwick invited me to provide some guidance, whatever the outcome of the Appeal, as to how the FTT should approach the just and equitable question. The invitation was extended in good faith, but I do not think that it is one to which I can or should accede. I do not think that it is either possible or sensible to seek to catalogue the factors upon which the FTT may rely in determining, in any particular case, whether it is just and equitable to make the order sought against any particular respondent. I say this essentially for two reasons. First, the breadth of the discretion conferred upon the FTT, namely whether the FTT “*considers it just and equitable*” to make the order sought, is very wide. The factors which may be taken into account in any particular case are not limited by the terms of Section 124(1) and are not, in my view, capable of exhaustive classification. Second, and if I was to attempt this task, it seems to me that I would be at risk of committing the basic error of attempting to re-write Section 124(1). In Section 124(1) Parliament has chosen not to list or limit the factors which can be taken into account in the exercise of the just and equitable discretion. In these circumstances it is not appropriate for me to attempt to do so.
181. So far as the just and equitable question is concerned, it seems to me to follow from my analysis above that the initial burden is on the applicant to put forward a case as to why it is just and equitable to make a remediation contribution order against the relevant respondent or respondents. One can, I think, test the matter this way. If one assumes a case where an applicant attended before the FTT, and confined itself to proving that the gateway conditions were satisfied, without putting forward any case as to why it was just and equitable to make a remediation contribution order, and without putting forward any evidence on the basis of which the FTT could consider the question of whether it was just and equitable to make the order, I find it difficult to see how the FTT could make the order. There would be no material upon which the FTT could conduct the second exercise of considering the just and equitable question.
182. It is however important, in my view, not to overstate this initial burden. It seems to me that it is no more than an initial burden on the applicant to put forward its case as to why it is said to be just and equitable for the remediation contribution order to be made. The example given in my previous paragraph may be thought to be somewhat unrealistic. It is highly unlikely that an application for a remediation contribution order would come before the FTT, with the applicant having proved the gateway conditions but otherwise electing to sit on its hands, and with the respondent also electing to sit on its hands. In reality, of course, in any such application the FTT is likely to require, as in the present case, statements of case from the parties, with the applicant going first. From a practical point of view therefore, the applicant will have the initial burden of putting forward its case on why it is just and equitable for the remediation contribution order to be made. This burden is however only an initial burden. The discretion of the FTT is a broad one. Once the applicant has stated its case, it is for the respondent or respondents to put their case in response. So far as evidence is concerned, I do not accept that the evidential burden is necessarily on the applicant. It is for the applicant to prove those matters upon which it relies in support of its case that it is just and equitable to make the order. It is for the respondent or respondents to prove those matters on which they rely in support of their case that it is not just and equitable to make the order.
183. This completes my brief analysis of the task required of the FTT, when considering an application for a remediation contribution order. With this analysis in place, I proceed to the question of whether the FTT, in the Decision, went wrong in any of the ways alleged by the Appellants in support of Ground 2.

184. In my view the FTT did not go wrong, in the Decision, in any of the ways alleged by the Appellants. To the contrary, it seems to me that the Appellants' case proceeds on the basis of a misconception of the reasons given by the Tribunal for their decision that it was just and equitable to make the RCO. I say this for the following reasons.
185. The starting point is that this is not a case where Grey failed to put forward a case that it was just and equitable for remediation contribution orders, in the form of the RCO, to be made. This is demonstrated by Grey's Amended Statement of Case, which pleaded its case against all 96 of the Original Respondents. The structure of this Amended Statement of Case is as follows:
- (1) Paragraphs 3-7 identified the parties. R1 was identified as a developer, within the meaning of Paragraph (c). R2-R96 were identified as associated bodies corporate, within the meaning of Paragraph (d).
 - (2) Paragraphs 8-14 identified the Building as a relevant building, within the meaning of Section 117(2).
 - (3) Paragraphs 15-18 identified the relevant defects which were said to exist in relation to the Building.
 - (4) Paragraphs 19-25 set out the costs said to have been incurred or to be incurred in remedying the relevant defects.
 - (5) Paragraph 26 made reference to the RO Application.
 - (6) Paragraphs 27-30 set out Grey's case as to why it was just and equitable for remediation contribution orders to be made.
 - (7) Paragraphs 31-34 set out the alleged failures of the Original Respondents to engage in appropriate pre-action conduct.
 - (8) Paragraphs 35-36 identified the remediation contribution orders which were sought.
186. The obvious, but important point is that the Amended Statement of Case (i) set out Grey's case that the gateway conditions were satisfied, so that the Tribunal had jurisdiction to entertain the RCO Application, and then (ii) separately set out Grey's case as to why it was just and equitable for the remediation contribution orders to be made. At least therefore so far as the pleaded case was concerned, the two distinct exercises required of the Tribunal in considering the RCO Application were observed and addressed.
187. Turning specifically to Grey's case on the just and equitable question, I need to set out paragraph 27 and the bulk of paragraph 28 of the Amended Statement of Case, where Grey put its case in the following terms (the underlining is my own):

“27. It in the circumstances, the Applicant avers that it would be just and equitable for the Respondents to be subject to a Remediation Contribution Order on the following basis:

27.1 Remediation Contribution Orders are a new legal remedy that requires developers to pay for the cost of remediation³ [the footnote refers to paragraph 1011 of the Explanatory Notes].

27.2 Edgewater [R1] acted as the developer in respect of the Conversion Works [the Development] that were carried out and made a substantial profit as a result of the subsequent sales of the leasehold interests in the Building.

27.3 However, those Conversion Works were not compliant with the applicable Building Regulations and good and normal building practices at the time. This is clearly evidenced by the enclosed Reports.

27.4 As a result, there are significant building safety risks to the leaseholders in relation to the spread of fire. Accordingly, the Conversion Works

have caused a number of relevant defects to arise as defined under the Act.

27.5 *On this basis, Edgewater is responsible for the Conversion Works that caused the relevant defects at the Building, and has gained a substantial profit from the same. It should therefore be required to meet the costs of the remedial works.*

28. *Edgewater has previously indicated in the Remediation Order Proceedings that it does not have the funds to meet the costs of remediation. Edgewater's approach fails to consider the scope and purpose of the Remediation Contribution Order.*

28.1 *The Explanatory Notes to the Act note at paragraph 977 that*

"section 124 also gives the First-tier Tribunal the ability to require developer and their associated companies to make payments. It is also common practice for developers to use special purpose vehicles which are wound up after the completion of the development. The associated persons provision similarly allows the assets of the wider group structure to be accessed".

28.2 *It further states at paragraph 1013 that "remediation contribution orders can also be made against persons associated with the developer; this will include, for example parent companies where developments have been run through special purpose vehicles which are thinly capitalised or have since been wound up".*

28.3 *Whilst Edgewater itself has limited assets as indicated by its last set of accounts filed at Companies House, it is part of a wider corporate structure which includes the Associated Parties [R2-R96]."*

188. As can be seen, the case against R1 was put on the basis that R1 was the developer in respect of the Conversion Works, was thereby responsible for the relevant defects in relation to the Building, and had gained a substantial profit from the Conversion Works. Turning to R2-R96, the case was put on the basis that while R1 had only limited assets, it was part of a wider corporate structure which included the Associated Parties; namely R2-R96.

189. Although the relevant parts of the Explanatory Notes are, for the reasons which I have explained, of limited assistance in construing Section 124, there is no doubt that the obvious purpose of the associated person provisions in Paragraph (d) was to address the problem of special purpose vehicles being used as developers which were either thinly capitalised or were wound up once the relevant development project had been completed. In such cases Section 124, by the associated persons provisions in Paragraph (d), *"allows the assets of the wider group structure to be accessed"*. Such associated persons include parent companies where developments have been run through special purpose vehicles which are thinly capitalised or have since been wound up.

190. *Triathlon* was a good example of such a case. The party in the position of the developer was SVDP, which depended upon its parent company, Get Living, for financial support. Get Living was the wealthy parent company. In our decision in *Triathlon*, sitting as the FTT, we set out the factors which we considered to be important in determining whether it was just and equitable to make a remediation contribution order. The first related to SVDP, and to our identification of SVDP as the responsible developer. We then turned to the position of Get Living. At [266] we said this:

“266 If, as we are provisionally minded, it is just and equitable to make an order against SVDP, it would also be just and equitable to make an order against Get Living, on which SVDP depends for financial support. As we have explained, section 124 permits applications for remediation contribution orders to be made against developers and those associated with developers. The obvious purpose behind the association provisions is to ensure that where a development has been carried out by a thinly capitalized or insolvent development company, a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedying the relevant defects by hiding behind the separate personality of the development company. It seems to us that the situation of SVDP, with its relatively precarious financial position and its dependence for financial support upon Get Living, its wealthy parent, constitutes precisely the sort of circumstances at which these association provisions are targeted. We say this notwithstanding that we have declined to decide whether Get Living is associated with SVDP, as a limited partnership, for the purposes of section 121. It is common ground that Get Living is caught by the association provisions in section 124, by virtue of its association with the freeholder and each of the landlords in the relevant chain of title. Get Living is also the ultimate parent company of the corporate partners which comprise the limited partnership. In relation to the question of what is just and equitable, and in the context of the point we make in this paragraph, technical questions as to precisely how Get Living is caught by the association provisions in section 124 seem to us to be of little weight.”

191. *Triathlon* may, with the benefit of hindsight, be said to have been an easy case. There was a thinly capitalised developer, and a wealthy parent company. It may be said that this was a classic case for the making of a remediation contribution order against both parties.
192. For present purposes however, the relevant point is this. In its pleaded case Grey sought to bring itself within the same category of cases to which *Triathlon* belonged. Grey was unable to point to a single parent company. Grey was also unable to identify a simple corporate structure to which R1 belonged. Instead, Grey’s case was that the wider corporate structure, of which R1 was part, included R2-R96.
193. There may be said to have been an element of risk in this strategy. Mr Warwick drew my attention to the transcript of the hearing before the Tribunal and, specifically, to what was submitted by Mr Hickey, at the conclusion of his submissions to the Tribunal, in explaining the basis on which Grey sought orders against R2-R96:

“It is just and equitable to make a joint and several order against these respondents because there would be, in this situation, in these circumstances, no other fair and equitable way of addressing each of these 96 respondents. There is no other mechanism that really helps you to allocate between the respondents what that should be. It allows them to work out between themselves how to fill the pot, and it won’t work injustice on them because they collectively can put their heads together to find the money wherever it may be found.”

194. A short while earlier in his submissions Mr Hickey put the following analogy to the Tribunal:

“My intention was the wisdom of a mother in dealing with children who will not own up to something is to say “I don’t care how you deal with it between yourselves, you are going to have to work it out between yourselves”. That is why I say that this order, on a joint and several basis against a number of respondents who are all associated, should be able to work out between themselves -- because they know where the money is and have the ability to arrange it so that they can pay -- should pay.”

195. I agree with the Appellants that the case put by Grey to the Tribunal may be described as an all or nothing case. Grey’s case was that it is not feasible to try to allocate responsibility between R2-R96. The appropriate “*mechanism*” was to hold all of R2-R96 jointly responsible. I say that there may have been an element of risk in this strategy because, as I understand the way Grey’s case was put to the Tribunal, Grey had no fallback case which sought to allocate responsibility between R2-R96, on an individual basis, if its primary case on responsibility failed.
196. This then brings me to the Decision itself. I have already summarised the terms of the Decision, earlier in this decision. For present purposes, I can go straight to the essential reasoning of the Tribunal on the just and equitable question, at Paragraphs 349-381.
197. The Tribunal commenced by considering the position of R1. They were in no doubt that R1 should be held responsible for the relevant defects, as the party in the position of the developer; see Paragraph 350 in particular. As I understand the Appellants’ case, this particular part of the reasoning is not challenged. I assume that this is why it is conceded by R1, if the RCO is set aside on Ground 1 or Ground 2, that the RCO can be remade as a remediation contribution order against R1.
198. The Tribunal then turned to the question of whether it was just and equitable to make a remediation contribution order against R2-R96. It is the reasoning of the Tribunal on this question which is challenged by the Appellants. I will address the grounds of the Appellants’ challenge in turn, starting with Mr Hughes’ helpful summary of the grounds of challenge.
199. The Appellants say that the Tribunal wrongly conflated Sections 121 and 124, and treated the fact of association as sufficient to justify the making of a remediation contribution order. It seems to me that this misrepresents the reasoning of the Tribunal. It is quite clear, from the reasoning in Paragraphs 349-381, that the Tribunal were addressing themselves to the just and equitable question. It is equally clear that the Tribunal were not treating the fact of association, within the meaning of Paragraph (d), as sufficient to justify a decision that it was just and equitable to make the orders sought. This is clear from the entirety of the reasoning of the Tribunal, but by way of example I refer to Paragraph 357, where the Tribunal said this:

“357. We are not persuaded that there is an automatic presumption that any associate must be made liable unless they can show good reasons why they should not have to pay, particularly where they are associated only by common directorship. We agree that some circumstances will suggest additional linking factors (which may be short of linkage with the development or evidence of abuse) and those may call for an explanation and/or evidence of countervailing factors. Ultimately, these cases will be very fact-sensitive and this is a matter for our discretion.”

200. At Paragraph 359 the Tribunal again made it quite clear that the fact of association was not sufficient in itself to justify a remediation contribution order:

“359. We recognise that, as Mr Warwick argued, the association provisions in section 121 could include very remote associates. He gave examples, such as a director of the lessee-owned freeholder of the building they live in who is also a director of completely different bodies. However, this is not a case where the wide association provisions have caught many completely unrelated companies who are operated by others and merely happened to have the wrong director at the wrong time.”

201. What the Tribunal did find, on the evidence before them, was that almost all of R2-R96 could be regarded as part of a wider corporate or group structure. The relevant finding of the Tribunal is to be found in Paragraph 360, and should be quoted in full (the underlining is added):

“360. For the following reasons, we consider that whether (loosely, as in the explanatory notes to the Act) called a group, or wider corporate structure, or something else, almost all of the remaining Respondents have links in addition to association by common directorship during the specified period which are sufficient to call for an explanation and/or evidence of countervailing factors. It does not follow that a RCO should be made against every such Respondent. However, since the parties have pleaded and given their evidence by reference to whether this was a wider corporate or group structure, we take that as a relevant consideration. We give this sensible scope; we do not accept that only ultimate beneficial ownership by a single person would be sufficient. We mean that some or all of the same relevant beneficial owners are involved (with or without others) and/or there are other factors of similar significance to indicate a wider corporate structure or connection such that a very substantial RCO may be just and equitable.”

202. The Tribunal then proceeded to set out the factors which indicated this wider corporate structure, which existed on the basis of links *“in addition to association by common directorship”*. These factors all involved findings made by the Tribunal on the evidence which was before them at the hearing. It is clear, not least from the length of the hearing before the Tribunal, that this evidence, both oral and documentary, was voluminous.

203. The conclusion of the Tribunal, on the basis of these factors, was set out in Paragraph 373:

“373. In view of the general and specific linking factors noted above, and the additional specific reasons noted in Schedule 1 below, we consider it just and equitable to make, and have decided to make, a RCO in the joint and several terms described below against the Respondents marked “Yes” in the last column of Schedule 1 below. In relation to these companies, the linking factors outweigh the factors against making an order.”

204. It is to be noted that not all of the Original Respondents were found to be part of the wider corporate structure which the Tribunal found to exist, and of which R1 was found to be part. A few of the Original Respondents escaped the net, for the reasons given in Schedule 1.

205. It is also important to note that I am, in my review of the essential reasoning of the Tribunal, disregarding the careful and conscientious consideration by the Tribunal, prior to the section of the Decision on which I am concentrating, of the evidence and arguments of the parties at the hearing.
206. In my judgment it is quite clear, from the Decision as a whole and, in particular, from a review of the essential reasoning of the Tribunal at Paragraphs 349-381, that the Tribunal did not conflate or elide Sections 121 and 124. The Tribunal made it quite clear, in their reasoning, that they were addressing the just and equitable question, and were addressing that question separately to the question of whether the gateway conditions were satisfied. The Tribunal made this clear at numerous points in their reasoning, but if an example of this is required, it can be found in Paragraph 360, where the Tribunal referred, in terms, to links “*in addition to association by common directorship.*”.
207. The essential problem confronting the Appellants, in relation to Ground 2, is that the Tribunal found, on the evidence before them, that the bulk of the Original Respondents were all members of the wider corporate structure of which R1 formed part, and through which the individuals who controlled the wider corporate structure conducted their business. There was no individual parent company, such as Get Living in *Triathlon*, but there was the wider corporate structure.
208. I am in no position, sitting in an appellate capacity, to interfere with this overall finding by the Tribunal or to interfere with any of the other findings of the Tribunal in this context. They were findings made by the Tribunal on the basis of the evidence which they heard and read. In any event, it is clear that the relevant findings were solidly based. In this context, and by way of example only, I should quote the findings of the Tribunal in Paragraph 369:
- “369. *Fourth, the Respondents are likely to be linked by financial or other dealings and their records are opaque and/or do not appear reliable (although again we see this as a matter of poor and disorganised practice, not dishonesty). Mr Hickey argued that the disclosed documents and Companies House records showed a complex and interconnected web of relationships and interdependencies. The relationships are obviously complex and part of the community connections which may be based on trust and which we may not fully understand, not least because little has been explained about them. In any event, as was suggested, it appears many of the relevant Respondents were not actually run as carefully separated SPVs but as part of a fluid, disorganised and blurred network or structure, controlled by Jack Frankel and/or Jacob Dreyfuss. This (or they, or those working for them) probably had a tendency to take from whichever company had money when it was needed by another (as a loan or otherwise) and at least sometimes repaid it, at least in part.*”
209. In the light of findings of this kind, I have difficulty in understanding how it can be said that the Tribunal elided the investigation of associate status with the just and equitable enquiry. The Tribunal found that R1 formed part of a wider corporate structure which included the bulk of the Original Respondents. If there had been a single wealthy parent company within that wider corporate structure, the position might have been equivalent to the position in *Triathlon*, and it might have been just and equitable to single out the wealthy parent company. That was not however how the relevant individuals identified in Paragraph 369 ran their business. The business was run through the wider corporate

structure which the Tribunal found to have existed, as “*a fluid, disorganised and blurred network or structure*”. In those circumstances the Tribunal decided that it was just and equitable to hold all of the Specified Respondents jointly responsible. There was no elision of the gateway conditions and the just and equitable question.

210. My analysis of the reasoning of the Tribunal above also seems to me to supply the answer to the Appellants’ argument that the Tribunal were wrong in making no attempt to recognise what is alleged to have been the very different status and position of the various Specified Respondents. The Tribunal explained, in their reasoning, why they were not persuaded that it was appropriate to differentiate between the Specified Respondents. On the evidence the Tribunal concluded that it was just and equitable to impose joint responsibility on all those Original Respondents who, on their findings, were part of the wider corporate structure of which R1 formed part. As the Tribunal said, at Paragraph 381, they accepted the submission of Mr Hickey “*that in this case the fair approach is an “all or nothing” one.*” (my underlining). The decision of the Tribunal to impose joint responsibility was a decision which they made on the evidence before them. I cannot see that this decision was wrong, given the evidence before the Tribunal. Still less can I see any basis on which I would be entitled to interfere with that decision.
211. The position is the same in relation to the Appellant’s argument that the Tribunal were wrong to adopt an all or nothing approach. Once it is accepted, as it is for the purposes of Ground 2 and indeed as I have now decided, that the Tribunal were entitled to make remediation contribution orders on a joint and several basis, it was open to the Tribunal to decide that joint responsibility should be imposed upon the Specified Respondents, without differentiation. As I have said, I cannot see that the Tribunal went wrong in this decision, still less that I am entitled to interfere with this decision.
212. It is said that a result of the Tribunal adopting the all or nothing approach was that the Tribunal reversed the burden of proof. It seems to me that there is a confusion in this part of the Appellants’ argument. As I have explained, it seems to me that the initial burden was on Grey to state its case. Grey did so, in the Amended Statement of Case. That case included the pleaded contention that R1 was part of a wider corporate structure which included R2-R96. This was said by Grey to render it just and equitable that joint responsibility be imposed on the Original Respondents. It was then for Grey to prove, on the evidence before the Tribunal, that the factual basis for this case was made out. Grey was successful in that endeavour, as it is clear from the findings made by the Tribunal on the evidence. There was no reversal of the burden of proof in this respect. This is clear from the reasoning in the Decision. I note in particular what was said by the Tribunal at Paragraph 357, which I have already quoted but which I repeat for ease of reference:
- “We are not persuaded that there is an automatic presumption that any associate must be made liable unless they can show good reasons why they should not have to pay, particularly where they are associated only by common directorship.”*
213. I have difficulty in seeing how this statement can be squared with the argument that the Tribunal reversed the burden of proof.
214. In reality this part of the Appellants’ argument seems to me to be a disguised complaint that the Tribunal took an unfavourable view of the evidence adduced by the Original Respondents. It is clear that the Tribunal were not impressed by the evidence of the Original Respondents, and took the view that, in a number of respects, it was incomplete and unsatisfactory. This, in turn, was clearly a factor in the Tribunal’s findings. In

particular, this was clearly a factor in the Tribunal's finding, at Paragraph 369, that many of the Original Respondents "*were not actually run as carefully separated SPVs but as part of a fluid, disorganised and blurred network or structure controlled by Jack Frankel and/or Jacob Dreyfus*". In making this and their other relevant findings the Tribunal were not reversing the burden of proof. In making these findings the Tribunal were entitled, indeed bound to have regard to the entirety of the evidence, including the evidence adduced by the Original Respondents. If there were problems with the evidence on the Original Respondents' side the Tribunal were quite entitled to take those problems into account in weighing the evidence and making their findings. An exercise of this kind is a basic, and standard task of any fact finding court or tribunal, and should not be interfered with by an appellate court or tribunal without very good reason. There is no such good reason in the present case.

215. Turning to Mr Hughes' submission that there has to be a clear or rational nexus between the relevant body corporate and the imposition of a remediation contribution order to deal with relevant defects, it seems to me that there are two problems with this submission.
216. First, I do not think that it is right to say that there is a requirement for a clear or rational nexus. This is not what Section 124(1) says. Provided that the gateway conditions are satisfied, the question for the FTT is whether it considers it just and equitable to make a remediation contribution order. While this is a separate exercise to the question of whether the gateway conditions are satisfied, the question of what is just and equitable is left at large. It is for the FTT to decide what is just and equitable, on the facts of the particular case before the FTT. As the Tribunal correctly noted, at Paragraph 357, decisions on what is just and equitable are very fact-sensitive.
217. Second and if, contrary to my view, there was a requirement for a clear or rational nexus, it seems to me that it can be found in the reasoning of the Tribunal. The Tribunal considered it just and equitable, on the evidence, that the Specified Respondents, as members of the same wider corporate structure should jointly shoulder the burden of remedying the relevant defects. A primary purpose of the jurisdiction in Section 124 is to ensure that a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedying the relevant defects by hiding behind the separate personality of the development company. On the evidence in the present case the Tribunal decided that it was appropriate to treat all of the Specified Respondents in the wider corporate structure (here meaning the Specified Respondents with the exception of R1) as the effective equivalent of the wealthy parent company or other wealthy entity caught by the association provisions. Given this effective equivalence and if, contrary to my view, a nexus of the kind contended for by the Appellants was required before it could be considered just and equitable to make a remediation contribution order, such a nexus could be found and was found by the Tribunal in the present case.
218. Turning to the arguments in support of Ground 2 which are set out in the consolidated grounds of appeal, I can take them more briefly. They are largely dealt with by the analysis above.
219. The Appellants argue first that participation in a particular development or receipt (directly or indirectly) of remuneration from that development is a minimum requirement or touchstone for it being just and equitable to make a remediation contribution order. As with the argument that a nexus must be shown, it seems to me that this argument does not respect the wording of Section 124(1). As I have already noted, the question of what is

just and equitable is left at large. It is for the FTT to decide what is just and equitable, on the facts of the particular case before the FTT. There is no requirement for direct participation or receipt of profits.

220. Beyond this, the Appellants' argument finds no support in the case law. In *Triathlon*, Get Living had not participated in the relevant development. Get Living was inserted into the corporate structure after the development, when it acquired the assets and liabilities of the East Village. Nor had it received, directly, the profits of the relevant development. At most, it had derived a benefit from the increase in the value of its investment in the East Village, although this was a matter to which we did not give any great weight; see the FTT decision in *Triathlon* at [255]. As *Triathlon* demonstrates, and as I have already noted, the obvious purpose behind the association provisions in Paragraph (d) is to ensure that a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the costs of remedying the relevant defects by hiding behind the separate personality of the development company. There is no additional requirement for participation in the relevant development or for the direct or indirect receipt of profits from the development, although these matters are clearly matters which can be taken into account in considering what is just and equitable.
221. There is also this further point. As with the Appellants' nexus argument, if one assumes that the Appellants are correct to say that there is a minimum requirement or touchstone which applies to the just and equitable question, it seems to me that this requirement was satisfied, on the findings of the Tribunal, in the present case. The Tribunal found that the Specified Respondents were all included within the wider corporate structure through which the individuals in control of the structure conducted their business, which business included the carrying out of the Development and the receipt of the profits from the Development. As such, all of the Specified Respondents can be seen both as having participated in the Development and as having received the profits therefrom. They were all, on the findings of the Tribunal, part of the same business.
222. In his oral submissions in reply Mr Hughes made forceful submissions to the effect that it was wrong to draw an analogy between the position of the parties in *Triathlon* and the position of the parties in the present case. He submitted that the Specified Respondents (here not including R1) could not be seen as the parent of R1 or as in any equivalent position to Get Living. The problem confronting Mr Hughes in this respect was however that, in seeking to make good this submission, he was obliged to make submissions on the evidence which was before the Tribunal and to contend that, on the basis of that evidence, the analogy with *Triathlon* did not hold up. I am however in no position to make any findings of my own on the evidence before the Tribunal. The relevant findings have been made by the Tribunal. It is clear from those findings, with which I am not entitled to interfere, that the analogy with *Triathlon* does hold up. On the Tribunal's findings the Specified Respondents (not including R1) were in an equivalent position to Get Living.
223. The Appellants' second argument is that the Tribunal wrongly imposed an evidential burden on the Original Respondents to show why it would not be just and equitable to make an order against them. For the reasons which I have already set out, I do not think that the Tribunal did commit any error of this kind. As I have explained, in making their findings the Tribunal were entitled, indeed bound to have regard to the entirety of the evidence, including the evidence adduced by the Original Respondents. If there were problems with the evidence on the Original Respondents' side, the Tribunal were quite entitled to take those problems into account in weighing the evidence and making their findings. The point bears repeating that an exercise of this kind is a basic, and standard

task of any fact finding court or tribunal. Such an exercise should not be interfered with by an appellate court or tribunal without very good reason. There is no such good reason in the present case.

224. The Appellants' third argument is that the Tribunal wrongly drew adverse inferences against the Specified Respondents based on a supposed failure to discharge the evidential burden wrongly placed upon them by the Tribunal. For the reasons which I have set out, the Tribunal did not commit any error in relation to the burden of proof. It is true that the Tribunal did draw adverse inferences against the Specified Respondents, based on the unsatisfactory nature of their evidence. Without repeating my earlier analysis, the Tribunal were, for the reasons which I have given, quite entitled to draw adverse inferences from the unsatisfactory nature of this evidence.
225. Drawing together all of the above analysis, I conclude that the Tribunal made no error in its approach to determining whether it was just and equitable to make the RCO against the Specified Respondents. The Tribunal directed themselves correctly in the exercise of their just and equitable discretion and, in my judgment, their exercise of that discretion cannot be faulted.
226. I consider that it is worth adding this point to my analysis. The essential problem confronting the Appellants, in relation to Ground 2, is that the findings of the Tribunal, on the evidence before them, justified the imposition of joint or collective responsibility on the Specified Respondents. As I have commented, Grey took what may be described as a risk in advancing its case on what I understand to have been an all or nothing basis; that is to say without a fallback case which dealt with the Specified Respondents on a non-collective basis. On the findings of the Tribunal on the evidence, the risk paid off. In another case, on different evidence, the Tribunal might have concluded that it was not just and equitable to impose joint responsibility on a large number of respondents. This however simply goes to bear out the wisdom of the Tribunal's observation that consideration of the just and equitable question is a very fact sensitive exercise.
227. Mr Hughes argued that the decision of the Tribunal that it was just and equitable to make the RCO raised the spectre of an investor putting £100,000 or £200,000 into a multi-million pound venture, and then finding itself jointly and severally liable for the full amount of a multi-million pound remediation contribution order. I do not agree that the Decision raises any such spectre. If and to the extent that any of the Specified Respondents are in this position in the present case, that is the result of the findings made by the Tribunal, on the evidence in the present case, as to the wide corporate structure which was found to exist and as to the way in which the individuals who controlled that structure conducted their business through the structure. It was these findings which underlay the decision of the Tribunal to impose joint responsibility. As I have said, in another case involving multiple respondents, and on different evidence, the result might be different.
228. This leaves the second argument within Ground 1 to deal with. The second argument within Ground 1 is that if, again contrary to the Appellants' argument but in accordance with what I have decided in relation to Ground 1, the Tribunal had jurisdiction to impose joint and several liability upon the Specified Respondents, it would have been just and equitable to order each of the Specified Respondents to pay a fixed share of the total sum due by way of the Specified Payments.

229. On the basis of my analysis of Ground 2 it seems to me that this argument must also fail. The Tribunal decided that it was just and equitable to impose joint responsibility upon the Specified Respondents. The Tribunal set out their reasons for this decision in very clear terms in Paragraphs 349-381. Those reasons were based on the findings made by the Tribunal on the evidence. For the reasons which I have given, the Tribunal did not go wrong in the exercise of their discretion. In these circumstances it seems to me that there is no basis on which it can be said that the Tribunal should, in the exercise of their discretion, have opted for an order or orders requiring each of the Specified Respondents to pay a fixed share of the total sum due by way of the Specified Payments. Indeed, such an exercise of discretion would have been inconsistent with the findings of the Tribunal on the evidence.
230. On the basis of the analyses set out above, my overall conclusions are (i) that Ground 2 fails, and (ii) that the second argument within Ground 1 also fails.

Ground 3 - analysis and determination

231. The argument in Ground 3 is that the Tribunal wrongly concluded that “*a building safety risk*” for the purposes of Section 120 is any risk above low risk, so as to include tolerable risks. The Tribunal should have directed themselves that only an “*intolerable*” risk could be a “*building safety risk*”.
232. As I have explained, and as the Appellants have acknowledged, Ground 3 can be said to be academic because permission to appeal was refused in respect of the decision of the Tribunal to include the costs of replacing the Type 2 Wall within the RCO. The question of what constituted a building safety risk, for the purposes of Section 120, would have been relevant to an appeal against this decision of the Tribunal.
233. In oral submissions, and on the Appellants’ side, Mr Morris made brief reference to Ground 3. He indicated that, given the academic nature of Ground 3, he proposed to rest on the written submissions in support of Ground 3 set out in the skeleton argument of the TS Appellants, and not to expand upon those submissions in the oral argument. I took the opportunity, in this exchange, to inform all counsel that I was reluctant to decide Ground 3, as an abstract ground of appeal. I also made it clear that I had made no decision as to whether I should decide Ground 3, and that it was open to any of the parties to seek to persuade me to overcome my reluctance to go into Ground 3. Mr Morris, after taking instructions, indicated that he did not wish to seek to persuade me out of my reluctance. For the Respondent however Ms Gillies indicated that she did wish to address me on Ground 3 and did wish to persuade me to give some guidance on the question of construction raised by Ground 3.
234. In these circumstances, and in addition to the written submissions on Ground 3 in the skeleton arguments of the TS Appellants and Grey, I had the benefit of some well-organised and helpful oral submissions from Ms Gillies. On the basis of these submissions I was persuaded that I should venture into Ground 3 and state, as briefly as possible, my views on the issue of construction raised by Ground 3.
235. The Tribunal recorded the argument of Mr Morris in the following terms, at Paragraph 71:
- “71. Second, Mr Morris argued that whether something causes a “*building safety risk*” for the purposes of section 120(5) depends on whether the risk is tolerable, having regard to the other features and characteristics of the

building. The fire safety experts had opined that, when assessing the risks associated with fire safety of external walls under PAS9980, a “medium” fire risk that is considered to be “tolerable” would not be a building safety risk. Mr Morris argued for this narrow interpretation, particularly in view of the interference (by Schedule 8 to the Act) with private/property law rights in preventing or limiting recovery of service charges relating to relevant defects.”

236. The Tribunal did not accept this argument. Their construction of the expression “building safety risk” was in the following terms, at Paragraph 72:

“72. We think the better view is that any risk above “low” risk (understood as the ordinary unavoidable fire risks in residential buildings and/or in relation to PAS9980 as an assessment that fire spread would be within normal expectations) may be a building safety risk. Section 120(5) describes a risk to the safety of people arising from the spread of fire or collapse, not a risk reaching an intolerable or any other particular threshold. We do not think “collapse” indicates the risk must be of catastrophic fire spread, as was suggested. It need only be a risk to the safety of people arising from the spread of fire in a tall residential building.”

237. A building safety risk is defined in Section 120(5) to mean, in relation to a building and for the purposes of Section 120:

“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 part of it;”*

238. It is important to note that the “risk” referred to in this definition does not sit on its own. The relevant risk is closely defined. It must be “a risk” (i) “to the safety of people”, (ii) “in or about the building”, (iii) “arising from”, (iv) “the spread of fire” or “the collapse of the building or part of it”. It will also be noted that the risk identified in paragraph (a) of the subsection is not just a risk of fire, but a risk of the spread of fire.

239. This point can be taken further. For the purposes of Section 120 the definition of building safety risk is required because it forms part of the definition of a relevant defect, in Section 120(2). A relevant defect is defined, for the purposes of Sections 122-124 and Schedule 8, in the following terms in Section 120(2):

“(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.”*

240. It follows that, for the purposes of the specified parts of the Act, a building safety risk cannot exist unless there is a defect in relation to the relevant building which has caused that building safety risk. Equally, for the purposes of the jurisdictions in Sections 123 and 124, the building must be a relevant building, as defined in Section 117.

241. In these circumstances it is difficult to see a justification for imposing any kind of external gradation or limit on the level of risk which is capable of qualifying the reference to “a

risk” in the definition of building safety risk. I say this for two reasons. First, there is no such qualifying wording in Section 120(5). There is no qualifying adjective such as “*significant*”, or “*intolerable*”, or, for that matter, “*low*”. The reference is simply to “*a risk*”, which is naturally read as meaning any risk. Second, if “*a risk*” is read as meaning any risk, this does not have the consequence that the definition of building safety risk is unrestrained. The risk will only a building safety risk if it satisfies the various conditions which I have just set out. The risk must exist in relation to a building, as 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. The risk must have been caused by a relevant defect and, so far as the jurisdiction in Section 124 is concerned, the defect must exist in relation to a relevant building. These conditions impose considerable restraints upon what can qualify as a building safety risk.

242. In her oral submissions Ms Gillies explained the wider role which a building safety risk plays in the Act. She drew my attention to the definition of building safety risk which applies for the purposes of Part 4 of the Act. Part 4 of the Act is forward looking, and contains provisions concerning the management of building safety risks. The actual definition is to be found in Section 62. The definition in Section 62 is not in the same terms as in Section 120(5), and includes risks to the safety of people in or about a building arising from “*any other prescribed matter*”, for which purpose the Secretary of State is empowered to make regulations. Another example of a definition of building safety risk, different to that in Section 120(3), can be found in Section 130(6). In relation to the power to make regulations under Section 62 there are supplementary provisions in Sections 63 and 64. The definition of building safety risk in Section 62 is carried over into Section 4. Section 4 is located within part of Part 2 of the Act, which is also forward looking and deals with the building safety regulator. The building safety regulator is defined by Section 2(1) to mean the Health and Safety Executive.
243. References to building safety risk can also be found in Section 87 and Section 101 in Part 4. Section 87 imposes mandatory reporting requirements and creates an offence where an accountable person for an occupied higher-risk building fails, without reasonable excuse, to give prescribed information in prescribed circumstances to the regulator by the prescribed time and in the prescribed way. Section 101 creates an offence in relation to a contravention of a relevant requirement by an accountable person which “*places one or more people in or about the building at critical risk*”. A critical risk is defined to mean “*a significant risk of death or serious injury arising from a building safety risk*”.
244. On the same theme Regulation 6 of Higher-Risk Buildings (Management of Safety Risks etc) (England) Regulations 2023/907 contains provisions in relation to the mandatory reporting requirements in Section 87. These provisions include a definition of the expression “*safety occurrence*”. A safety occurrence means “*an incident or situation relating to the structural integrity of, or spread of fire in, a higher-risk building that meets the risk condition*”. The risk condition is met in relation to a part of a building “*if the use of that part of the building without the incident or situation being remedied would be likely to present a risk of a significant number of deaths, or serious injury to a significant number of people*”.
245. The above provisions demonstrate that Parliament has, at various points in the legislation, defined a risk as a particular level of risk; such as a critical risk in Section 101, and a risk of a significant number of deaths, or serious injury to a significant number of people, in Regulation 6. In addition to this, Parliament has also defined the expression “*building safety risk*” in different terms in different sections of the Act. All this, in turn, strongly

suggests that Parliament did not intend that the reference to “a risk” in Section 120(5) was intended to mean a particular level of risk.

246. Further support of this conclusion can be found elsewhere in the machinery of the Act. Ms Gillies drew my attention to Section 83(1), which requires an accountable person for an occupied higher-risk building to assess the building safety risks as regards the part of the building for which they are responsible. As she pointed out, the assessment obligations are at risk of not working as they were intended to work, if it is open to a landlord to treat a “tolerable” risk as not constituting a building safety risk. It is easy to see the sorts of arguments and problems which could arise over what constitute tolerable and intolerable risks. Beyond this, problems would also be likely to arise in relation to the restrictions on service charge recovery in Schedule 8, if a landlord argued that a particular item of work was not caught by the restrictions because it was dealing with a tolerable risk, and thus not a building safety risk. Again, these considerations point against the reference to a risk in Section 120(5) being intended to mean a particular level of risk.
247. I also bear in mind a further point which was touched upon by the Tribunal in Paragraph 75. In relation to the jurisdictions in Section 123 and Section 124, it seems to me that the level of risk engaged, where a building safety risk exists, is not excluded from the consideration of the FTT. If the FTT decides that a remediation order or a remediation contribution order should be made, the question of what work is required to remedy the relevant defect will then arise. I can see that the level of risk posed by the relevant building safety risk will, or at least may be a relevant factor in the decision of the FTT as to what works are required. In this sense therefore the level of the building safety risk is not excluded from consideration. This seems to me however to be a further reason why it is wrong to seek to impose an initial filter, based on the level of risk, on what risk can qualify as a building safety risk.
248. In their skeleton argument for the hearing of the Appeal, the TS Appellants argued that a threshold on the level of risk which can qualify as a building safety risk, which the TS Appellants set at the level of a risk which is intolerable, can be implied into Section 124. I was referred to both Bennion and case law on the principles which apply, in terms of implying something into the meaning of statutory wording. In my view, the application of these principles does not permit a qualifying adjective to be added to the reference to “a risk” in Section 120(5). Doing so seems to me, for all the reasons which I have set out above, to cross the line between the legitimate implication of meaning into the statutory wording, and rewriting the statutory wording.
249. The TS Appellants also rely upon the Explanatory Notes, at paragraphs 957 and 958, which are in the following terms:

“957 The leaseholder protections deal only with historical building safety defects; they are backward-looking only. They are a one-off intervention designed to deal with the current serious problems with historical building safety defects in medium- and high-rise buildings. The protections afforded only apply to defects created in the 30-year period prior to commencement of the provision, so in practice between mid-1992 and mid-2022. A 30-year period has been chosen as evidence shows that this period captures all buildings affected by the relevant safety issues. It aligns with changes this Act makes to the limitation period under section 1 of the Defective Premises Act 1972 (to which see section 135) and the relevant limitation period under the new cause of action relating to cladding products (sections 150 and 151). The

Government has also agreed with major residential property developers that they will remediate buildings they had a role in developing or refurbishing in the past 30 years.

958 *Subsections (2) and (5) define what is meant by a “relevant defect” and set out that for a defect to be a relevant defect, it must give rise to a building safety risk. A “building safety risk” is one that puts people’s safety at risk due to either the risk of the spread of fire or structural collapse of a building.”*

250. For the reasons which I have already set out, the assistance which the Explanatory Notes can provide, in construing Section 120(5), is very limited. Independent of this point, I would not be persuaded in any event that the terms in which the Explanatory Notes are expressed justify reading words into Section 120(5) which are simply not there.
251. Finally, the TS Appellants make further reference to the principle that Section 124 constitutes expropriatory legislation, of which Section 120(5) forms part and which should be construed, so far as possible, in a manner which leaves property rights intact. The principle is not in doubt, but in my view it cannot be relied upon to read words into Section 120(5) which, as I have said, are simply not there.
252. I also add this point, before concluding my analysis. Returning to the present case, I can understand why the fire safety experts, as recorded in Paragraph 71, sought to derive assistance from PAS9980 in looking for guidance as to what constituted a building safety risk. PAS9980 is however a code of practice. It is not, in itself, a guide to the meaning of a building safety risk in Section 120(5).
253. Drawing together all of the above analysis, I reach the following conclusions:
- (1) In my view the reference to “*a risk*” in Section 120(5) means what it says. It refers to any risk, subject to the point that the relevant risk will only qualify as a building safety risk if it satisfies all the other conditions, which I have identified above, for the risk to qualify as a building safety risk. The reference to “*a risk*” does not refer to any particular level of risk and is not gradated. It refers to any risk.
 - (2) It follows that I do not accept the argument of the TS Appellants that the reference to a risk in Section 120(5) is confined to a risk which can be described as “*intolerable*”.
254. It also follows, from the conclusions which I have reached, that I find myself in respectful disagreement with the Tribunal in relation to the view which they expressed in the first sentence of Paragraph 72. The Tribunal considered that the reference to “*a risk*” meant any risk above a low risk. While I can understand why the Tribunal took this view, and while I consider that the Tribunal were correct to reject the argument that a risk meant an intolerable risk, it follows from my reasoning above that it was not appropriate to impose the threshold condition of anything above a low risk. If a risk is a low risk, it is still capable of qualifying as a risk, for the purposes of Section 120(5), but whether it will be a building safety risk will depend upon whether it can satisfy the other conditions for the existence of a building safety risk. Equally, if the relevant risk is a low risk, but qualifies as a building safety risk, one would expect that factor to play some part in the question of what remedial action is required.
255. I therefore conclude that Ground 3 fails. It follows from my reasoning that I also conclude that the Tribunal were wrong in their own conclusion on the meaning of the expression “*a risk*” in Section 120(5).

Ground 4 – analysis and determination

256. By Ground 4 the Appellants challenge the decision of the Tribunal that it was just and equitable to include within the scope of the RCO the costs of replacing the Type 1 Wall in its entirety, including professional fees in respect of those works.
257. This requires a little more explanation. The actual work which was done to the Type 1 Wall involved the removal of the combustible foam insulation which had been injected into the Type 1 Wall. As explained by Mr Morris, what this meant in practice was that the Type 1 Wall was replaced in its entirety. In order to remove the combustible foam insulation, the outer concrete leaf of the wall was removed and a steel framed walling system was put back in its place. I will refer to the works to the Type 1 Wall which were carried out, and which involved the removal of the combustible foam insulation, as **“the Removal Works”**.
258. It is recorded in Paragraph 143 that the experts were agreed that, from *“a purely technical perspective”* these remedial works were not proportionate. There was an alternative and, I assume, simpler and cheaper solution which involved leaving the combustible insulation in place, but putting in place effective fire stopping by installing cavity barriers which sealed the gap where the top of the insulation was exposed; see Paragraph 146. The combustible insulation would thereby have been sealed off and made safe. I will refer to these alternative works, which the Appellants say should have been carried out, as **“the Sealing Works”**.
259. The conclusion of the Tribunal in this respect which is challenged can be found in Paragraph 166, which I have set out earlier in this decision, but which I repeat for ease of reference (I have underlined the key part of this conclusion):

“166. Ultimately, as Mr Hickey and Miss Gillies pointed out, the residents of Vista Tower had been living in unsafe conditions since they took up occupation and then throughout the earlier attempts to check/reduce the scope of the remedial works and costs (for example, changing from the CAN to PAS, considering in 2020 and 2021 whether new frames could/should be spliced into the window frames at junctions with compartment walls rather than replacing all of the frames, and seeking to avoid decanting). It seems each investigation of a different part of the building had thrown up unexpected variations, challenges or new uncertainties. The Secretary of State had selected Vista Tower to use as an example to require that remedial works be carried out for this type of high risk building without further delay, to minimise the continuing risk to residents. At this stage and in the circumstances of this case, we consider that it was reasonable to press on with the remedial works based on the CHPK report.”

260. In his oral submissions Mr Morris submitted that this conclusion, as set out at the end of Paragraph 166, was based on a number of findings of fact *“along the way”* which were unsupported by the evidence or contradicted by the evidence and, as such, were findings which it was not open to the FTT to make.
261. The starting point, in relation to Ground 4, is therefore, as Mr Morris correctly acknowledged, that the conclusion of the Tribunal which is challenged was a conclusion on the evidence; that is to say a conclusion on the facts, based upon findings of fact made by the Tribunal. It is also important to record, in this context, that the hearing of the

Appeal has been conducted by way of a review of the Decision. The hearing of the Appeal was not the rehearing of the RCO Application.

262. On reading the skeleton arguments for the hearing of the Appeal I noted that the parties had not made express reference to certain authorities which set out important principles in relation to appeals against findings of fact. In these circumstances I notified the parties, in advance of the hearing, of three authorities on which I invited short submissions. The three authorities in question were *Georgiou v Customs and Excise Commissioners* [1996] STC 463, at 476, *Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ 5, at [114]-[116], and *Ingenious Games LLP v HMRC* [2019] UKUT 0226 (TCC), at [53]-[64].
263. The warning, and guidance given by Lewison LJ in the *Fage* case to appellate courts, in relation to interfering with findings of fact made by trial judges, are very well-known, but bear repeating. It seems to me that they should have equal application on an appeal, to an upper tribunal, against findings of facts made by a tribunal. The entirety of what was said by Lewison LJ at [114]-[116] is important, but I will confine myself to quoting [114]:
- “114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include*
- i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
 - ii) The trial is not a dress rehearsal. It is the first and last night of the show.*
 - iii) Duplication of the trial judge’s role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*
 - iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
 - v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
 - vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.”*
264. As a general rule, and subject to some exceptions, Section 11 of the Tribunals, Courts and Enforcement Act 2007 confines the right of appeal from a first-tier tribunal to an upper tribunal, as set out in that Section, to an appeal on a point of law. This means that, where Section 11 applies, there cannot be an appeal on a pure question of fact which is decided by the first-tier tribunal. However, a tribunal may arrive at a finding of fact in a way which discloses an error of law, as was explained by the Upper Tribunal Tax and Chancery Chamber (Falk J, as she then was, and Judge Tim Herrington) in *Ingenious*

“However, a tribunal may arrive at a finding of fact in a way which discloses an error of law. That is clear from Edwards v Bairstow [1956] AC 14 in which Viscount Simonds referred to making a finding, without any evidence or upon a view of the facts which could not be supported, as involving an error of law: see at page 29. In the same case, Lord Radcliffe, at page 36, regarded cases where there was no evidence to support a finding or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding, as cases involving errors of law. The LLPs rely on this reasoning for their challenges to the FTT’s findings of fact set out in their grounds of appeal. As Lord Diplock observed in his speech in Council for Civil Service Unions v Minister for the Civil Service [1985] AC 374, at 410F - 411A, a better term for this ground for challenging a decision might be “irrationality”. ”

265. In this context it is necessary to have in mind the nature of a challenge of this kind, as explained by Evans LJ in *Georgiou*, at 476:

“It is right, in my judgment, to strike two cautionary notes at this stage. There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. That is well seen in arbitration cases and in many others. It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be misused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.”

266. In the same part of his judgment Evans LJ also gave the following invaluable guidance on steps an appellant must go through, in order to make the case that the tribunal made a finding of fact which it was not entitled to make, and thereby made an error of law:

“... for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. “What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal’s conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court.”

267. In response to these authorities Mr Morris produced a most helpful Note in support of his case on Ground 4, which identified the three findings of fact made by the Tribunal which are the subject of the challenge in Ground 4, and explained why the Tribunal were not

entitled to make those findings. In a well-organised and equally helpful set of oral submissions Mr Morris took me through the grounds of challenge, and elaborated on why, in his submission, the Tribunal had not been entitled to make these findings of fact.

268. Before leaving the authorities, it is also useful to make reference to what was said by Briggs J (as he then was) in *Megtian Limited (in Administration) v HMRC* [2010] STC 840, at [11], on the nature of the question the appellate tribunal must ask itself, in determining whether a finding on the evidence has engaged an error of law:

“There are numerous authoritative statements of the precise meaning of the concept that a finding of fact involves an error of law when it is based upon non-existent or inadequate evidence. They were very recently summarised by Christopher Clarke J in Red 12 Trading Ltd v HMRC [2009] EWHC 2563 (Ch) at paragraphs 113-120. The question is not whether the finding was right or wrong, whether it was against the weight of the evidence, or whether the appeal court would itself have come to a different view. An error of law may be disclosed by a finding based upon no evidence at all, a finding which, on the evidence, is not capable of being rationally or reasonably justified, a finding which is contradicted by all the evidence, or an inference which is not capable of being reasonably drawn from the findings of primary fact.”

269. It seems to me that the guidance given in *Ingenious Games*, *Georgiou* and *Megtian* on what constitutes an error of law is equally relevant in the present case. The same goes for the guidance given by Evans LJ in *Georgiou* on the correct approach to an appeal against a finding of fact which is said to constitute an error of law. I did not understand this to be disputed by the Appellants. Indeed, the Appellants put their case on Ground 4 on the basis that the Tribunal had, in their relevant findings of fact, committed errors of law.
270. Before coming to the three findings of fact which are the subject of challenge, it is necessary to make reference to certain documents which formed part of the evidence before the Tribunal.
271. On 6th December 2022 CHPK produced a report described as “*Modelling Scenarios Based on PAS9980 Technical Note*” (“**the Modelling Report**”). By way of reminder, CHPK was a fire engineering company which was instructed to carry out an investigation and assessment of external works required, by reference to the then recently published code of practice for appraising the fire risk of external wall construction/cladding on blocks of flats. The new code of practice in question was the BSI published building safety standard PAS9980, which I am referring to as PAS9980, which replaced the CAN (the previously published Consolidated Advice Note).
272. For the purposes of Ground 4 the key part of the Modelling Report is to be found in paragraphs 1.2-1.4, which stated as follows:

- “1.2. CHPK Fire Engineering (CHPKFE) has been commissioned by Grey GR Limited Partnership (Grey, the client) to carry out scenario modelling assessments of the external wall for the Vista Tower, Southgate, Stevenage, SG1 1AR (the building).*
- 1.3. CHPKFE have carried out these assessments based on the information provided in the FE01225/05 FRAEW report for Vista Tower on the 13th of October 2022 and six scenarios where some of the materials in Wall Type 1 and 2 are assumed to be altered to non-combustible materials.*

1.4. *This technical note will consider the following six scenarios from applying the PAS9980 perspective that will be explored to understand each scenario risk rating.”*

273. The different scenarios were then set out in paragraph 1.4. For present purposes the relevant scenario is Scenario 4 (“**Scenario 4**”), which is the following terms:

*“**Scenario 4** – The wall build-up of Wall Type 1 in Figure 4 in this Technical Note is considered to remain unchanged but the window-sill should provide full fire stopping to encapsulate the combustibile insulation PIR. Fire risk assessment according to PAS990 methodology shows that the risk of external fire for this scenario spread is **LOW**.”*

274. As I understand the position Scenario 4 constituted, or envisaged a scheme of works to seal off the combustibile foam insulation, which I am referring to as the Sealing Works. Scenario 4 was then explained in the following terms, later in the Modelling Report:

*“**Scenario 4** – The wall build-up of Wall Type 1 in Figure 10 of the FE01225/05 FRAEW report is considered to remain unchanged but the window-sill should provide full fire stopping to encapsulate the combustibile insulation in the wall build-up. Figure 4 shows the sketch of Wall Type 1 in detail. Effective cavity barriers/fire stoppings are considered to be in place for Wall Types 1 and 2 according to the current version of Approved Document B. If Effective fire stops or cavity closers (in case of the presence of a cavity), this configuration can be considered as a double leaf masonry since both outer and inner leaves have 75mm or higher thickness. The risk of external fire spread in a double leaf wall is normally low if there are cavity closers around the opening and the façade edges.”*

275. On 9th December 2022 Mr Kevin Allen of TFT sent an email to various persons, including a number of persons at the Railpen Group. The Railpen Group, it will be recalled, acquired the Building, by Grey, as part of a portfolio of ground rent investments. This email (“**the Email**”) first identified that the Modelling Report had been received, and discussed at the “weekly TFT/Railpen call this morning”. Mr Allen stated that “*the scenario modelling has provided positive findings and has reached early conclusions, which is good news.*”. The Email then summarised the modelling carried out by CHPK. The purpose of the scenario modelling was described in the following terms, at the end of the summary:

“• The purpose of the scenario modelling was to further refine the outline scope of works at Vista to help focus the ongoing design process. The modelling indicates that the works can be undertaken from outside the building, more substantial works within the flats should be avoidable and therefore decanting of residents should also be avoidable. It must be noted though that some screening will still need to be provided within the flats, to provide protection when the glazing systems are removed.”

276. The Email concluded by setting out “Key Next steps”. This included a statement that “*the PAS FRAEW for Vista must be updated to reflect the findings of the scenario modelling and be finalised*”. In the same section of the Email it was stated that “*the outline scope (as identified in the scenario modelling) must be fed into and verified as part of the stage 4 design process. As per the draft project programme, the contractor is due to enter into*

the PCSA for the stage 4 design after the PAS has been finalised and submitted to DLUHC.”.

277. There was some dispute between Mr Hickey and Mr Morris, in the course of Mr Morris’ oral submissions, as to whether TFT were engaged to advise Grey on the scope of the remedial works and, in particular, on the scope of the works to be carried out to the Type 1 Wall. Mr Morris described TFT as project managers and professional advisers on the remediation works. Mr Hickey was anxious to point out, as he asserted, that TFT had not been engaged to advise on the scope of the remedial scheme. I am not sure that this dispute particularly matters, in the context of Ground 4. The Tribunal helpfully attached a second schedule to the Decision, which listed the principal parties in the case. In that Schedule 2 TFT were described as project managers for Grey. I proceed on the basis that this was a correct description of their role, in relation to the remedial works, and on the basis that the Email was written in that capacity, as an email reporting on the content of the Modelling Report to their client, Grey, and giving advice to Grey on the suggested way forward. It is also worth pointing out the Email was not, as I read it, giving any direct advice on the scope of the remedial works. Rather, the Email was advising that the advice from CHPK be updated, to reflect the content of the Modelling Report.
278. The reference to “*FRAEW*” in the Email stood for “*Fire Risk Appraisal External Walls and Attachments*”. The reference to “*PAS FRAEW*” was, as I understand the position, a reference to previous fire risk appraisal reports provided by CHPK. On 19th January 2023 CHPK produced a further FRAEW report (“**the January 2023 FRAEW Report**”).
279. The January 2023 FRAEW Report is lengthy, but for present purposes I need only quote section 9, which set out the recommendations of CHPK, in terms of remedial works:
- “The below remedial works are recommended:*
- Remove the opaque panels and combustible insulation in Wall Type 2 and replace them with non-combustible materials in line with the current version of ADB.*
 - Remove the PIR insulation in Wall Types 1-C and 1-E and replace them with non-combustible materials in line with the current version of ADB.*
 - Install vertical cavity barriers at the vertical compartmentations according to the current version of ADB.*
 - Install cavity barriers around the window openings according to the current version of ADB.*
 - Install effective firestops around the vent ducts and openings according to the current version of ADB.*
- The open-sided car park should be closed until the external walls highlighted here are fully remediated to avoid potential fire spread from the car park to the external walls.*
- Periodic Fire Risk Assessments should be carried out and the finding of this FRAEW should be considered.*
- If any changes in the fire safety of the building are done, this report should be reviewed immediately.”*
280. As I understand the position, and so far as the Type 1 Wall was concerned, the remedial works recommended by the January 2023 FRAEW Report were the Removal Works.
281. The first finding of fact challenged by the Appellants is in Paragraph 155. I quote the whole paragraph for context, but the challenged finding is underlined:

“155. The modelling exercises gave different configurations from that shown in most of wall type 1 (with the cavity completely full in scenario 4 and an empty cavity in scenarios 5 and 6; scenarios 1-3 describe different types of wall type 2). The exercises, particularly scenario 4, had been criticised by other fire engineers (Design Engine in January 2023, as noted below). In any event, these modelling exercises were carried out to inform the PAS9980 assessment, which apparently took them into account but decided on a more cautious approach. ADI had for the previously planned remediation scheme produced drawings showing differing wall types, but a variety had been described in the CHPK PAS9980 report and many earlier reports. ADI themselves fell away when it emerged they did not have the requisite insurance cover for work of this high-risk type. The reference in the PAS9980 report to a “shared inner leaf” did not call for the report to be challenged either, because it should be read in context. Mr Ferguson confirmed that in his view the inner leaf of most of the wall was shared - the concrete and foam insulation below and the UPVC/insulation above could reasonably be described as a shared inner leaf.”

282. The reference to “*the PAS9980 assessment*” was a reference to the January 2023 FRAEW Report. The essential submission made by Mr Morris was that there is nothing in the January 2023 FRAEW Report which demonstrates or suggests that the modelling scenarios set out in the Modelling Report had been taken into account. Section 4 of the January 2023 FRAEW Report set out “*Provided Documents and References*”. The Modelling Report is not mentioned amongst these documents. There are no other references to the modelling scenarios in the January 2023 FRAEW Report, and no evidence of the modelling scenarios having been taken into account. In this context I was referred to the written and oral evidence of Mr Pemberton of TFT, who gave evidence for Grey at the hearing before the Tribunal. The point which was made by Mr Morris was that Mr Pemberton was unable himself to say that the January 2023 FRAEW Report had taken the modelling scenarios into account. Given the position on the evidence, so Mr Morris submitted, the finding of the Tribunal in Paragraph 155, as underlined above (“**the First Finding**”), was a finding which the Tribunal could not, on the evidence, have made.
283. The second finding of fact challenged by the Appellants is in Paragraph 158. Again, I quote the whole Paragraph for context, but the challenged finding or, it may be said, findings are underlined:

“158. It appears the only fire engineering advice the Applicant had seen criticising the CHPK reports criticised them for not being cautious enough. Design Engine (as fire engineer for ADI) had reviewed the CHPK reports in January 2023 [E/5.2/115]. They queried scenario 4 from the modelling exercise, indicating that to provide a fire barrier the cavity in wall type 1 would need to be over fixed with a stainless steel plate or the “PIR” insulation would need to be partially removed and replaced with a compressed, rated mineral wool fire barrier. They warned that the condition of the concrete façade panels may have corroded or become unstable over time and advised consideration of the structure of the existing concrete panels and inner leaf blockwork. In relation to wall type 2, they also warned that correct installation and design of vertical compartment walls may require breaking the ribbon windows at compartment wall positions. They also criticised various assumptions which they said were made in the CHPK report and were “optimistic”.”

284. The reference to the first engineering advice seen by Grey is a reference to a report from Design Engine Limited (“**Design Engine**”) dated 23rd January 2023, Design Engine produced this report (“**the Design Engine Report**”) for its client, ADI Building and Refurbishment Limited, the previously proposed external remedial works contractor. In the executive summary to the Design Engine Report it was stated that Design Engine had reviewed the PAS assessments as provided by CHPK for the Building. The executive summary then set out the observations of Design Engine, having reviewed “*the DCH/PK report*”. For present purposes I need only quote the observations in paragraphs 1 and 3:

“1 *The removal of combustible materials to Wall Types 1C & 2 do not change the previously raised concerns of Design Engine report DES-XX-DR-Y-R-0001 RevP02*

a. *Technical Note FE01225/00 Scenario 4 Page 7 states that this wall build up is acceptable if the window cill provides as effective fire barrier. This may be achieved by;*

i. *Over fixing the cavity with stainless steel plate*

ii. *Partial removal of the PIR insulation and the fitting of a compressed, rated mineral wool fire barrier such as Siderise RV120/120”*

“3 *The effects on the structure and retained inner leaf blockwork and external concrete façade panels to remove combustible materials needs careful consideration – this review must also include a review of the condition of the façade panels as these may have corroded/become unstable over time.*

a. *This is not covered by the Technical Note but there may be a scenario where inner leaf blockwork has to be broken out to provide an effective party wall as stated in 2.a)iii)”*

285. Mr Morris submitted that the Tribunal had simply misread the Design Engine Report. So far as Scenario 4 was concerned, he submitted, the Design Engine Report did not criticise Scenario 4, but simply explained how it could be achieved. The concerns about the effect on the structure of the removal of the combustible materials did not arise in relation to Scenario 4, which involved leaving the combustible materials in place. As such, the relevant findings in Paragraph 158 (“**the Second Finding**”) were findings which were inconsistent with the evidence and, as such, were not open to the Tribunal to make.

286. The third finding of fact challenged by the Appellants is in Paragraph 162. Again, I quote the whole Paragraph for context, but the challenged finding is underlined:

“162. *It is obvious that the remedial works team were all proceeding on the basis that the foam insulation had to be removed, as advised by the PAS9980 report. In view of the significant time pressure that existed, we are not persuaded that it was unreasonable to fail to press pause and attempt to go back to the drawing board to ask CHPK whether a way could be found to leave the combustible insulation in place. Lancer Scott were required to produce their design for the remedial works in September 2023, the end of their pre-contract services period. The directions given in the RO proceedings required the Applicant to produce their full proposed specification of the remedial works at the same time. As expected, they did so using the design produced by Lancer Scott. Again, this appears largely to have been driven by the requirements of the BSF and the Secretary of State, who promptly agreed*

the specification of remedial works which had been produced by Lancer Scott and grant funding for those works.”

287. The submission of Mr Morris was a simple one. He submitted that there was simply no evidence before the Tribunal, on the basis of which they could find that there was any causal link between the existence of time pressure and the decision of Grey, if it was a decision, to implement the Removal Works. If, in the alternative, the Tribunal simply considered that the time pressure justified proceeding with the Removal Works, without finding a causal link, on the basis of the January 2023 FRAEW Report, this finding was equally not open to the Tribunal on the evidence, in the light of the advice in relation to Scenario 4 contained in the Modelling Report and the Email. I will refer to the finding in Paragraph 162 as **“the Third Finding”**. My use of this expression is intended to encompass both of the alternative constructions placed upon the Third Finding by Mr Morris,
288. The overall result, in the submission of Mr Morris, was that the conclusion of the Tribunal, in Paragraph 166, namely that it was reasonable to press on with the Removal Works, based on the January 2023 FRAEW Report (i) was unsupported in the evidence, (ii) was unexplained, and (iii) ran contrary to the agreement of the experts, which reflected the Modelling Report, that the Removal Works were disproportionate. As such, the conclusion could not stand.
289. It seems to me that there are a number of difficulties with this case. The starting point is that it was accepted by Mr Morris, quite correctly in my view, that the Tribunal asked themselves the correct question at Paragraph 144. The Tribunal first noted the agreement between the experts at Paragraph 143:

“143. The agreement between the experts, that from a purely technical perspective the remedial works for wall type 1 were not proportionate, has very significant weight. However, they acknowledged that the scope of the remedial works may have been affected by other factors. Do these justify what was done?”

290. The Tribunal then proceeded, at Paragraph 144, to pose the question which they had to answer, on the evidence before them (the actual question is underlined):

“144. As noted above, from 2020 the Applicant had engaged experts and procured proposals for a remediation scheme based on the CAN, which would have required removal of all combustible material. In 2022 they switched to a new approach based on the (then new) PAS9980, because this might reduce the scope of work and/or enable them to secure BSF funding for all works advised. The PAS9980 report from CHPK advised that the presence of the combustible insulation in wall type 1 was a “high” risk and it needed to be removed. In these proceedings, the experts agreed that advice was too cautious (or “conservative”, as they put it). But was it reasonable to rely on it as the basis for the design of the remedial works and not to revisit it later to attempt to reduce the scope of the works?”

291. The first, and most obvious difficulty with the Appellants’ case is that Grey had advice, in the January 2023 FRAEW Report, that it should proceed with the Removal Works. Given that this was advice from the specialist fire engineering company which had been engaged by Grey to carry out an investigation and assessment of the external works required by

reference to PAS9980, it is difficult to see how the Tribunal went wrong in concluding that it was reasonable for Grey to proceed with the Removal Works. The Removal Works had been recommended by its own expert adviser. In their skeleton argument for the hearing of the Appeal Grey's counsel drew my attention to a number of authorities which establish the principle that a claimant is generally entitled to recover the cost of work carried out pursuant to expert evidence, unless the defendant shows that the advice was negligent.

292. This was the conclusion reached by the Tribunal, at [154]:

“154. Particularly in 2022 and 2023, when the PAS9980 standard was new, it does not seem unreasonable for CHPK to have taken a cautious approach. In any event, it was reasonable for the Applicant to rely on the advice in their report without attempting to conduct their own analysis of the reasoning in it. Ms Leigh accepted that CHPK were reputable advisers and a sensible choice, as were the other professional advisors the Applicant had appointed.”

293. The Appellants argue that the decision of Grey to proceed with the Removal Works was unexplained on the evidence. There was however a finding of fact made by the Tribunal, at Paragraph 154, that Grey did rely on the expert advice in the January 2023 FRAEW Report. Further findings of reliance on this expert advice can be found in Paragraphs 162 and 166. Given that the Tribunal read and heard all the evidence, while I am, at best, island hopping in the same sea of evidence, I can see no basis on which I can or should interfere with these findings of reliance. By the same token, and although Mr Morris was not prepared to concede this in his oral submissions, it is equally clear from the findings of the Tribunal, so far as this is not a matter of simple common sense, that Grey did make a decision to proceed with the Removal Works. Grey's proceeding with the Removal Works was clearly not either inadvertent or the result of some mistake on the part of Grey.

294. I can also see nothing wrong with the conclusion of the Tribunal that it was not for Grey to conduct its own analysis of the reasoning of CHPK in their recommendations in the January 2023 FRAEW Report. As Ms Leigh, the fire safety expert instructed by the TS Appellants is recorded in Paragraph 154 as having accepted, CHPK was a reputable adviser and a sensible choice, along with the other professionals instructed by Grey. If one assumes that there was the inconsistency between the Modelling Report and the January 2023 FRAEW Report asserted by the Appellants, I cannot see that it was the responsibility of Grey to identify this inconsistency and interrogate CHPK on the inconsistency. I cannot see that Grey was obliged to query its own professional advice.

295. It is however important not to overlook that the professional advice given by CHPK was not the only reason for Grey's decision to proceed with the Removal Works. The Tribunal found that Grey was under significant time pressure, for a number of reasons, by the time it received the January 2023 FRAEW Report; see in particular the findings to this effect in Paragraphs 156, 162, 163 and 166. In his oral submissions Mr Morris conceded that he was not in a position to dispute the finding of the Tribunal that there was significant time pressure. His argument, as I have explained, was that there was no evidence of a causal link between the existence of this time pressure and the decision of Grey to proceed with the Removal Works.

296. This argument engages the challenge of the Appellants to the Third Finding. The problem here however is that the Tribunal clearly were satisfied that time pressure was a significant factor which justified the decision of Grey to proceed with the Removal Works. Not only

that, but it is apparent from the findings made by the Tribunal in relation to the existence of significant time pressure that there was ample material upon which the Tribunal could conclude that this significant time pressure was a factor in Grey's decision to proceed with the Removal Works. To take just one example, if one looks at the final conclusion of the Tribunal, at Paragraph 166, there is reference to the selection of the Building, by the Secretary of State, *"to use as an example to require that remedial works be carried out for this type of high risk building without further delay, to minimise the continuing risk to residents."* This was part of the evidence which went to support the Tribunal's finding of significant time pressure. The Tribunal were however also quite clear, in their findings, that this significant time pressure was not something to which Grey was oblivious, but was instead something of which Grey was acutely aware, to which Grey was subject, and which was both a cause and justification for Grey's decision to proceed with the Removal Works.

297. It follows, in my view, that the challenge to the Third Finding fails. As I read the Decision the Tribunal did find, and were quite entitled to find a causal link between the significant time pressure which existed, and the decision of Grey proceed with the Removal Works.
298. The above analysis also assumes that there were no reasons for the decision of Grey to proceed with the Removal Works other than the advice in the January 2023 FRAEW Report and the significant time pressure which existed. This assumption is itself wrong. If one reads Paragraphs 143-166, it is clear that the Tribunal also identified other factors which, in their view, justified the decision to proceed with the Removal Works. By way of example only, in Paragraph 153 the Tribunal found that, at least before the remedial works began, no one working for Grey *"could reasonably be expected to have known how much of the Building was covered by which wall type or what other configurations of the observed wall types, or other wall types or defects, might be found when the full remedial works were carried out."*
299. This finding is not addressed in Ground 4. It was however another reason found by the Tribunal as to why it was reasonable for Grey to proceed with the Removal Works. It is also a demonstration of a problem which so often arises in relation to an appeal against findings of fact. The argument in support of the appeal seeks to chart a particular course through the evidence, picking out findings of fact which can be challenged. The challenged findings of fact are however only part of a much wider set of evidential findings made by the fact finding tribunal. The finding in Paragraph 153 to which I have just made reference is a good example of this problem.
300. This point can be taken further. Concentration on the reasoning of the Tribunal at Paragraphs 143-166 disregards the findings made by the Tribunal in their careful and thorough analysis of the evidence in relation to the Type 1 Wall, at Paragraphs 113-133. An important example of the problems which this concentration can create is to be found at Paragraph 126, where the Tribunal recorded the following matters:

"126. However, the experts agreed that the scope of the remedial works may have been affected by other considerations, such as requests by building control or other statutory bodies, a lack of sufficient information about the as-built construction and pressure from stakeholders to adopt cautious or rapid resolutions, but the relevance of such matters was for the tribunal. They all agreed that, if removal of the combustible foam insulation in wall type 1 was required to remedy the building safety risk, the scope of the remedial works was reasonable."

301. The important point here is the agreement between the experts that the scope of the remedial works may have been affected by other considerations, which are then listed by the Tribunal. In support of Ground 4, the Appellants say that the Tribunal should not have departed from the agreement of the experts that, from a purely technical perspective, the Removal Works were not proportionate. That agreement between the experts, as recorded in Paragraph 143, must be read subject to Paragraph 126, where it is recorded that the experts themselves agreed that other factors, which were agreed to have existed, (i) might have been in play, and (ii) were for the Tribunal to consider.
302. The points which I have just made are relevant to the challenge to the First and Second Findings. Thus far in my analysis I have not addressed the Appellants' challenge to the First and Second Findings. The reason for this is that I do not accept that either finding is material, in the sense of being necessary to the conclusion reached by the Tribunal at Paragraph 166.
303. Taking first the Second Finding, if one assumes that the Tribunal should have read the Design Engine Report as containing no query or criticism of Scenario 4, I cannot see that the notional correction of this misreading comes anywhere near subverting the remainder of the reasoning in Paragraphs 143-166. If the Design Engine Report should have been read as offering no support to the recommendation to proceed with the Removal Works, I cannot see what difference this would have made. Putting the matter more simply, if one notionally removes Paragraph 158 from the Decision, there remains ample evidence, on the findings of the Tribunal, to support the reasoning of the Tribunal.
304. The same applies to the First Finding. If one assumes that there was an inconsistency between the Modelling Report and the January 2023 FRAEW Report, so far as Scenario 4 was concerned, I cannot see what difference this makes to the reasoning of the Tribunal. On this hypothesis the Tribunal should have found this inconsistency existed. If they Tribunal had made this finding, I cannot see what difference this would have made either to the Tribunal's finding that it was reasonable for Grey to rely on the advice in the January 2023 FRAEW Report, or to the Tribunal's findings that there were various other factors, most notably the significant time pressure which existed, which justified Grey's decision to proceed with the Removal Works.
305. I am not however persuaded that either the First Finding or the Second Finding were actually wrong. I say this for the following reasons.
306. Starting again with the Second Finding, at Paragraph 158 the Tribunal described the Design Engine Report as querying Scenario 4 from the Modelling Report. The Tribunal then went on to quote from paragraphs 1 and 3 in the executive summary section of the Design Engine Report. I have quoted those paragraphs in the executive summary above. I am a long way from satisfied that the Tribunal were actually wrong in their characterisation of the relevant sections of the Design Engine Report. If I had heard and read all the evidence which was before the Tribunal, I do not doubt that I would have a better understanding of what Design Engine were saying, in relation to Scenario 4 in the Design Engine Report, and that I would be in a better position to judge whether the Tribunal did go wrong in their characterisation of the Design Engine Report. As that is not my position, I am not persuaded that the Tribunal did go wrong, as alleged by the Appellants, in the Second Finding.

307. Turning to the First Finding I reach the same conclusion. The finding of the Tribunal, at Paragraph 155, was that the January 2023 FRAEW Report “*apparently*” took the modelling exercises in the Modelling Report into account, but decided on a more cautious approach. This is certainly what one would have expected to happen. CHPK produced the Modelling Report. CHPK also produced the January 2023 FRAEW Report, following the advice in the Email that the previous advice from CHPK needed to be updated and finalised in the light of the Modelling Report. As Mr Hickey pointed out in his oral submissions, the Modelling Report was recorded as having been checked by Dr Harem Hussein, Associate Director of CHPK. The January 2003 FRAEW Report was authored by Dr Hussein. It seems somewhat implausible that Dr Hussein forgot about Scenario 4 when he wrote the January 2003 FRAEW Report and recommended proceeding with the Removal Works. This is however my own speculation. To repeat the equivalent point which I have made in relation to the Second Finding, if I had heard and read all the evidence which was before the Tribunal, I do not doubt that I would have a better understanding of the January 2023 FRAEW Report, and that I would be in a better position to make a finding on whether Scenario 4 was taken into account in the advice in that report. That is not my position. The Tribunal were in that position, They clearly took account of the fact that Scenario 4 was not mentioned in terms in the January 2023 FRAEW Report, because they were only able to find that the report “*apparently*” took the modelling exercises into account. I am not persuaded that the Tribunal did go wrong, in making that cautiously expressed finding.
308. In relation to the First Finding there is one other point which I should make, for the sake of completeness. I have already explained why the First Finding, even if it was wrong, was not material to the conclusion reached by the Tribunal. In this context the First Finding might conceivably have been relevant, if it had been said that the advice in the January 2023 FRAEW Report was negligent, with the consequence that Grey was not entitled to rely on that advice. There are however two answers to this point. First, and as I have noted, there were other factors, as found by the Tribunal, on which Grey was entitled to rely in deciding to proceed with the Removal Works, whether or not it was entitled to rely on the advice in the January 2023 FRAEW Report. Second, the Appellants did not advance Ground 4 on the basis that the advice in this report was actually negligent. The Tribunal made no such finding, and I am certainly not in a position to make any such finding.
309. A further and final point which I should make in this context is that the Appellants’ argument assumes that the state of evidence was such that the position, in terms of the remedial works to the Type 1 Wall was a perfectly simple one in January 2023. The argument assumes that Grey was faced with a straight choice between the Removal Works and the Sealing Works, with no uncertainties or complications. As is apparent, from even a cursory reading of Paragraphs 113-133, where the evidence was subject to a careful review by the Tribunal, and Paragraphs 143-166, which contain the relevant reasoning of the Tribunal, the position was nowhere near as simple as this. In their written and oral submissions Grey’s counsel made their own foray into the evidence which was before the Tribunal, with a view to demonstrating that the agreement between the experts, as recorded in Paragraph 143, was only part of the picture, and that there was plenty of other evidence to justify the decision to proceed with the Removal Works. The conclusions which I drew from these submissions, by way of reinforcement of the points which I have already made above, were (i) that the evidential picture was actually far more complicated than the Appellants suggest, and (ii) that I am in no position to interfere with the findings made by the Tribunal in this context.

310. In summary, and notwithstanding what was agreed between the experts, as recorded in Paragraph 143, it is clear that there were a number of factors in the evidence on which the Tribunal were entitled to rely and did rely, in concluding that it was reasonable for Grey, on the basis of the advice in the January 2023 FRAEW Report, to proceed with the Removal Works. This is not a case where the Tribunal's findings are either unexplained or unsupported by any evidence. To the contrary, the Tribunal's findings are both explained and grounded in the evidence which was before the Tribunal.

311. Drawing together all of the above analysis, I conclude that Ground 4 fails.

The outcome of the Appeal

312. For the reasons set out in this decision, the Appeal is dismissed.

Postscript in relation to Ground 2 and the second argument within Ground 1

313. In the hope that this will be of some assistance, both to the FTT and to parties involved in applications for remediation contribution orders pursuant to Section 124, I add the following two short points, by way of postscript to my decision on Ground 2 and on the second argument within Ground 1.

314. My first point is directed to the situation of parties who are brought into applications for remediation contribution orders as respondents, on the basis that they are caught by the association provisions in Paragraph (d) and Section 121. In circumstances where the applicant's case is that it is just and equitable to make a remediation contribution order on a joint and several basis against such respondents, it is important that the respondents explain clearly to the FTT the nature and extent of their relationship. This is not a point based upon burdens of proof or rules of evidence. It is simply good practice, which assists the FTT in making the decision on whether it is just and equitable to make the remediation contribution order against multiple respondents and, if so, on whether it is just and equitable to make the remediation contribution order on a joint and several basis. In the present case the Specified Respondents failed to do this. The difficulties with their evidence, as recorded by the Tribunal in the Decision, were plainly a factor in the decision of the Tribunal, which cannot be faulted, that it was just and equitable to make the RCO against the Specified Respondents on a joint and several basis.

315. My second point brings out one aspect of the exercise required of the FTT, in deciding whether it is just and equitable to make a remediation contribution order against multiple respondents and, if so, on what basis. Although, for the reasons which I have explained, I have declined Mr Warwick's invitation to provide general guidance as to how the FTT should approach the just and equitable question, I venture to spell out this point, although it is one which the Tribunal had well in mind in the present case and which, I am sure, the FTT will have well in mind in other cases.

316. Where there are multiple respondents to an application for a remediation contribution order, joint and several liability is not the starting point in every case where the FTT is persuaded to make the order against multiple respondents. The FTT is required to consider carefully, in relation to each respondent, what constitutes the appropriate just and equitable outcome. The appropriate just and equitable outcome may not be joint and several liability. It may be an apportioned liability. It may, as in the present case, be no liability at all in the case of particular respondents. It may be something else. In the present case the Tribunal carried out this exercise and, for the reasons which I have

explained, their conclusion that the imposition of joint and several liability on the Specified Respondents was the just and equitable outcome cannot be faulted. In another case and on different evidence, as I have explained earlier in this decision, the outcome of this exercise might produce a different conclusion.

Mr Justice Edwin Johnson
The Chamber President

27th January 2026

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

Appendix 1

The Teacher Stern Appellants

- (1) EDGEWATER (STEVENAGE) LIMITED [R1]
- (2) EDGEWATER (EAST GRINSTEAD) LTD [R4]
- (3) EDGEWATER (HAMPSHIRE) LTD [R5]
- (4) EDGEWATER (HARROW) LTD [R6]
- (5) EDGEWATER (PHOENIX HEIGHTS) LTD [R7]
- (6) EDGEWATER (POOLE) LTD [R8]
- (7) EDGEWATER (SWINDON) LTD [R9]
- (8) EDGEWATER (SWINDON) SUB LTD [R10]
- (9) EDGEWATER (TREVER) LTD [R11]
- (10) EDGEWATER (WEYBRIDGE) LTD [R13]

- (11) EDGEWATER (WOKINGHAM) LTD [R14]
- (12) JACKSONS (CHELSEA) LTD [R15]
- (13) DFS THREE LTD [R16]



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

Tribunal case reference : **CAM/26UG/BSA/2025/0003**

Property : **Somerville Court, Newsom Place,
St Albans AL1 3DA**

Applicants : **1.Mr Ditson and Mrs Jolanta
Ladaya
2.Ms Karen Finn and Mr David
Waghorn
3.Ms Lilian Goldberg (R Gold Ltd)
4.Mr Alex Sherratt**

Representatives : **1.Mr Ditson Ladaya
2-4.Mr Francis Glenister**

Respondents : **1.Hightown Housing Association
Limited
2.Nicholas King Homes Plc**

Representatives : **1.Jennie Gillies, instructed by
Devonshires Solicitors
2.Mattie Green, instructed by
Knights Solicitors**

Type of application : **Remediation order: Section 123
Building Safety Act 2022**

Tribunal : **Judge Wayte
Judge MacQueen
Tribunal Member Williams**

Date : **9 February 2026**

DECISION

Decision

- (1) The tribunal makes a Remediation Order in the terms set out separately.**

- (2) The tribunal also makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the costs of these proceedings may be passed by the first respondent to the second to fourth applicants by way of a service charge.**

Reasons

Somerville Court

1. The Property is a detached 5-storey block of 40 flats, some 11.4 metres high. The basement car park and ground floor transfer slab are constructed in concrete, with a timber framed structure above that level. Internally, there are eight two-bedroom flats on each floor, with a single communal staircase and one lift. Construction was completed in 2015 and practical completion certified in 2016. All of the flats are subject to long leases for a term of 125 years from and including 1 July 2014. It is common ground that the Property is a “relevant building” and the applicants, who are all long leaseholders, are “interested persons” as defined in the Building Safety Act 2022 (“the BSA”).

Background to the application

2. Somerville Court is one of around 25 new and refurbished buildings on the site which was formerly Oaklands College, St Albans. The site was developed by Nicholas King Homes Plc (“NKH”) under a Development Agreement with Hightown Housing Association Limited (“Hightown”) dated 13 April 2011. Under the terms of that agreement, NKH marketed and sold the flats in the Property but Hightown owned the freehold and therefore became the landlord under the leases. As the terms of those leases include landlord repairing obligations, Hightown accept they are a “relevant landlord” as defined in the BSA in respect of those obligations.
3. On 14 June 2017 the newly refurbished Grenfell Tower in West London caught fire, leading to 72 deaths. That tragedy and the general background is described in Triathlon Homes LLP v Stratford Village Development Partnership & Ors [2024] UKFTT 26 (PC).
4. On 3 July 2017 one of the leaseholders in the Property emailed NKH to ask if, following the fire at Grenfell Tower, they needed to worry. The response, sent that same day, indicated that NKH had not specified the same cladding on their developments. They used non-insulated aluminium rainscreen cladding which was not flammable. Unfortunately, this was not correct for the Property as NKH’s subcontractors had substituted the design choice with ACM cladding, due to supply shortages. This was, of course, the same cladding used at Grenfell Tower.
5. In January 2020, the Department for Levelling Up, Housing and Communities published the Consolidated Advice Note for building owners to assess and assure their fire safety for residential occupiers.

6. In July 2020, Mr Sherratt wrote to Hightown to request that they arrange for an EWS1 certificate for the Property, as he was unable to remortgage his flat without one. Following consultation with the leaseholders (as it was anticipated at that time that the cost would fall on them), Hightown instructed Tri-Fire Limited to carry out the work. Their report and EWS1 was issued on 13 January 2021. They gave the Property a B2 rating (remedial works required) due to the insulation behind the aluminium cladding and some timber cladding, neither being of limited combustibility. Both needed to be removed and replaced with materials achieving Euroclass A2 or better. Their report indicated that there was no requirement for interim measures or a change to the evacuation procedure pending remedial action.
7. The report and EWS 1 was sent to the leaseholders by Hightown in February 2021. They confirmed that Hightown would look into a claim against the building guarantee and see whether any funding by Government may assist, however in their absence, the cost of the works would fall to the leaseholders. At that stage, Hightown estimated it would be 6-18 months before the replacement of the insulation could start. Mr Ladayal responded to that email on 10 February 2021, asking whether alternative solutions such as sprinklers had been considered.
8. Hightown entered into some correspondence with NKH in 2021, seeking further information as to the materials used on the Property. They also started a claim under the building guarantee policy held by Amtrust.
9. In January 2022 the Government withdrew the Consolidated Advice Note and endorsed the British Standards Institution (“BSI”) document PAS (Publicly Available Specification) 9980:2022, intended to introduce a more proportionate approach to remediation following a Fire Risk Appraisal of the External Walls (a “FRAEW”).
10. On 18 April 2022 the BSA was given Royal Assent.
11. In May 2022 the Fire Safety Act 2021 came into force, amending The Regulatory Reform Fire Safety Order 2005 (“the Fire Safety Order 2005”) to the effect that the Fire Risk Assessments of multi occupancy residential buildings must include the building’s structure, external walls and any communal parts.
12. That same month Amtrust declined the insurance claim.
13. On 28 June 2022 section 123 of the BSA came into force.
14. On 6 July 2022 Hightown held a virtual meeting with the leaseholders. They confirmed that they had tendered for a contractor to complete a Technical Fire Assessment (“TFA”) to establish what materials were used during construction as they had been unable to obtain that information from NKH. Several leaseholders, including Mr Ladayal, pressed the issue of whether further action could be taken against NKH at that stage.

15. On 27 October 2022 Tri-Fire Ltd were instructed by Hightown to carry out a FRAEW in accordance with PAS 9980:2022. Their report was received in April 2023 and confirmed that remedial works were required. It also confirmed (following testing) the presence of ACM cladding of the worst performing category (Euroclass rating E-F/Category 3 ACM). The report reiterated that the ACM and timber cladding needed to be removed but also confirmed that no interim measures, such as a waking watch, were required.
16. Hightown referred that report to lawyers who advised them to seek a desktop review from Virtus Fire Engineering Limited (“Virtus”) due to concerns about the lack of interim measures. In May 2023 a waking watch was implemented pending the installation of a communal fire alarm. At another virtual meeting with the leaseholders, Hightown explained they had instructed lawyers to bring legal proceedings against the developer and pursue the building guarantee. They declined to share a copy of the FRAEW with the leaseholders and indicated it would be overtaken by a survey taking place on 30 May 2023. NKH would be invited to attend the inspection.
17. On 30 May 2023 the inspection took place. Mr Speller, a director of NKH, attended and at that stage observed that the cladding was different to the material used on the other blocks in the development.
18. The communal fire alarm works were completed by the end of June 2023 and some urgent fire stopping works undertaken by Intrinsic Fire Protection Ltd in July and August 2023.
19. Following a further joint inspection on 6 October 2023 NKH made an offer to replace the ACM cladding and carry out other necessary fire safety works. Over the next couple of months Hightown obtained draft expert reports from Expert Architect Ltd and JP Chick & Partners.
20. In January 2024 Mr Ladayal emailed Hightown to ask for an update on the works. In the absence of a satisfactory response, he made a formal complaint about the poor communication from Hightown, which was rejected by them but eventually upheld by the Ombudsman (in 2025).
21. On 24 January 2024 Hightown issued a letter of claim to NKH. Copies were sent with that letter of the report based on the inspection carried out on 30 May 2023, the two draft reports referred to above and a costed scope of works prepared by Airey Miller.
22. In March 2024 NKH repeated their offer and over the next 12 months it would appear negotiations continued as to the works to be carried out.
23. On 28 March 2025 Mr Ladayal issued a letter of claim requiring Hightown to provide a comprehensive remediation plan and ensure the works were completed within 6 months. Hightown responded on 15 April 2025 and Mr Ladayal made his application to the tribunal on 23 April 2025.

Procedural background

24. On 29 April 2025 I gave directions for Hightown to respond to the application in advance of a case management hearing and for disclosure of any expert reports, including any PAS:9980 assessment or FRAEW as at that stage Hightown had refused to share them with the leaseholders.
25. On 3 June 2025 the first case management hearing took place. At that date the proceedings only involved the first applicants and Hightown. In the order following that hearing, I noted that in their position statement Hightown claimed to be unable to admit or deny that the defects identified in their various reports (including ACM cladding) were “relevant defects” as defined in the BSA. I therefore made an order for them to provide a Scott Schedule of defects identified at the property, indicating whether they are relevant defects or if not, why not. I also made provision for additional parties to join the proceedings and set a date for a further case management hearing.
26. That hearing took place on 12 August 2025. By that date the additional applicants and the developer had been joined at their request. My order notes that a remediation order cannot be made against NKH but it was considered appropriate to join them to the proceedings to assist with determination of the works that were required and the appropriate timeline for those works to be completed. The order also records that Hightown had identified 15 relevant defects and the necessary remediation works in their Scott Schedule. Directions were given for the other parties to comment on that Schedule and for discussions between the experts to seek to further narrow the issues in dispute.
27. Those same directions anticipated an application for a remediation contribution order by Hightown against NKH under section 124 of the BSA. That application was made on 14 November 2025 and it was originally planned to hear it at the same time as the remediation order application in January 2026. Shortly before the hearing Hightown’s only witness of fact, Donna Spikings – Head of Homeownership and Commercial - was signed off from work due to illness. In those circumstances, it was agreed that the RCO proceedings would be adjourned to a later date but that the technical aspects of the works and the programme would be determined after the hearing in January, given that experts would be attending for both respondents.
28. The hearing of this application ran from 20 to 22 January 2026. By that date, the respondents had agreed a draft remediation order subject to an issue in respect of the window reveals which had only been discovered relatively recently. A dispute also remained in respect of the length of the programme, until Hightown accepted NKH’s programme over the lunch break on the final day. The respondents were said to be “very close” to entering into a contract for NKH to carry out the required works at their risk. The applicants had their own issues with the draft remediation order but supported NKH’s programme and the

works being undertaken by them. In those circumstances and with the consent of the parties, the tribunal has proceeded on the basis that the contract with NKH will be entered into by 28 February 2026. If that is not possible, Hightown will need to return to the tribunal for an order in respect of a third party undertaking the works, which is likely to lead to greater cost and delay.

29. On 27 January 2026, the Upper Tribunal published their decision on the appeal of Edgewater (Stevenage) Limited and Others v Grey GR Limited Partnership [2026] UKUT 18(LC), otherwise known as the Vista Tower RCO. The President gave guidance on the correct approach to determining whether a defect causes a “building safety risk”, in particular whether there was any risk threshold under the BSA. This issue was relevant to the remaining dispute between the respondents as to certain items in the Scott Schedule. The parties were therefore given an opportunity to make representations on that case in writing. Any representations will be referenced below when considering each party’s case.

The Building Safety Act 2022

30. Sections 117 to 125 of and Schedule 8 to the Building Safety Act 2022 came into force on 28 June 2022. Section 123 is set out below (as amended by the Leasehold and Freehold Reform Act 2024). It makes provision for remediation orders requiring a relevant landlord (defined in s.123) to remedy specified “*relevant defects*” (defined in s.120, as set out below, as amended) in a specified “*relevant building*” (defined in s.117, as summarised below) by a specified time.
31. By section 117, “*relevant building*” means (for our purposes and subject to exceptions and further definitions which are not needed here) a self-contained building or self-contained part of a building in England that contains at least two dwellings and is at least 11 metres high or has at least five storeys.
32. It is useful to note that section 120 defines “*relevant defect*” widely, by reference to anything which arises following “*relevant works*” in the preceding 30 years and causes a “*building safety risk*”, each as defined in section 120:

“(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.”

33. Section 123 provides as follows:

“(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.”

34. Schedule 8 provides (amongst other things) that certain service charges relating to relevant defects in a relevant building are not payable. Most of these new protections for leaseholders apply only to qualifying leases, as defined in section 119.

35. The Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 came into force on 21 July 2022 (the “**2022 Regulations**”). By regulation 2(2):

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

The issues in dispute

36. As stated above, by the time of the final hearing, the issues for the tribunal to determine had narrowed to:
- For the first applicants: the terms of the order including the length of the programme;
 - For the second to fourth applicants: the terms of the order and the question of whether Hightown were the “relevant landlord” in respect of works required to the flat entrance doors. Shortly before the hearing, Mr Glenister had also made an application under section 20C of the Landlord and Tenant Act 1985 to restrict Hightown’s ability to claim the costs of these proceedings as a service charge from the second to fourth applicants;
 - For Hightown: the applicants’ proposals for the order, their liability for the flat entrance doors, the extent of the relevant defects and the length of the programme (the latter was conceded on the final day after the lunch break). Hightown also agreed during the proceedings that they would not seek any costs from the leaseholders;
 - For NKH: the extent of the relevant defects (although NKH agreed to all the works set out in the latest draft remediation order) and the length of the programme (prior to the concession by Hightown).

The Applicants’ case

37. Mr and Mrs Ladayal purchased their flat in September 2019 and have occupied it as their family home with their young daughter since then, one of the few owner-occupiers remaining in the Property. They have been waiting for Hightown to remediate the building since the works were first identified as necessary by the EWS1 in January 2021. Remaining in a building known to be unsafe has led to significant financial detriment for the couple due to the inability to remortgage or sell their flat and considerable psychological distress. When recalling an incident where he was at work and the fire alarm went off, Mr Ladayal became emotional. His wife’s friends had lost their home in Spain following the 2024 Valencia fire in which defective cladding was implicated. The constant stress had taken its toll on the whole family.
38. He made his application to the tribunal as he was frustrated by the lack of action by Hightown. He considered that since then, much greater progress had been made than in the last 6 years. In particular, Hightown withdrew their objection to a remediation order being made against

them in December 2025 and the schedule of works had at last been agreed with NKH.

39. In respect of the terms of that remediation order: he preferred NKH's timeline to that proposed by Hightown; an updated EWS 1 was essential to allow the leaseholders to remortgage or sell and he wanted Hightown to accept their responsibility for regular communication with the leaseholders while the works were ongoing. He was also keen to ensure that there was sufficient quality control this time round to ensure that the works were completed to a good and safe standard.
40. Mr Glenister, who was representing the second to fourth applicants, explained how his role at the Property had developed. He was not a lawyer but used his analytical skills from his previous career in industry and finance to get to grips with relevant property law and the requirements for residential landlords. In 2014 his son and daughter had both purchased flats in the Property "off plan" from NKH. At that stage they were unaware of Hightown's involvement. They occupied the flats from 2016 but in 2018, his daughter moved to a different property in St Albans and her flat was transferred to his son to facilitate that move. His son had also planned to sell the flats and buy a house but the pandemic and the issues which arose following the first EWS 1 certificate have prevented that to date.
41. Having retired from work, Mr Glenister started Whatsapp groups for the residents and the leaseholders. He was responsible for pushing Hightown to obtain the first EWS 1, was present at the inspection of the Property in July 2024 (described as "the caretaker") and has assisted with access to the interior of the flats when required. He also provided a template witness statement for the leaseholders to provide evidence in these proceedings.
42. He considered there were four issues left in dispute: whether Hightown was the relevant landlord and therefore responsible for remediating the flat entrance fire doors; the duration of the works – like Mr Ladayal, he preferred NKH's programme to the one proposed by Hightown's expert; the "liberty to apply" clause in the remediation order – Hightown proposed that it would only come into effect after the end of the original proposed end date, which he submitted ignored the leaseholders' interest in both the works and the time taken. He also wanted the order to be clear that any damage to the interior of any of the flats should be made good within 3 months, as opposed to being tied in with the completion date for the works as a whole.
43. In respect of the flat entrance fire doors, Mr Glenister accepted that under the lease, they were part of the property demised to the leaseholders and therefore outside Hightown's repairing obligations. However, he argued that Hightown were responsible under the Fire Safety Order 2005. That order had been amended by the Fire Safety Act 2021 to apply to all doors between domestic premises and the common parts. Mr Glenister submitted that Article 17 of the order imposed an

obligation on Hightown to maintain the doors in efficient working order and good repair. He understood that NKH had agreed to remediate the doors but still wanted Hightown to take responsibility.

44. The applicants did not commission any expert evidence but had provided witness statements of fact. Those statements all covered both the financial and personal issues caused by the unsafe state of the building and Hightown's delay in putting it right. The respondents confirmed before the hearing that they only wished to cross-examine Mr Ladayal.
45. Ms Gillies for Hightown challenged Mr Ladayal's statement that the leaseholders had not been informed that Amtrust had denied the claim. He clarified that the reasons for their refusal had only been spelt out in Donna Spikings' witness statement in these proceedings. On communication, Mr Ladayal accepted that Hightown had set up a web page for the leaseholders, but he wanted emails so that he could keep track of the communications over the period of the works to assist with any enforcement or application in respect of the remediation order.
46. On his frustration with the delay to any works starting, Mr Ladayal confirmed that he had lost trust with Hightown due to their failure to communicate over the past 6 years, as indicated in his complaint. Hightown had even failed to provide the Ombudsman with the information they had sought as part of their decision. He understood that Hightown claimed to be in without prejudice discussions with NKH but felt they could have been more open with the leaseholders as those discussions progressed.
47. Ms Green for NKH queried Mr Ladayal's request for reporting on the works. She confirmed that the draft remediation order agreed between the respondents provided for an updated EWS 1 and FRAEW. Mr Ladayal confirmed that his main concern was the quality of the work.
48. In his closing submissions, Mr Ladayal reiterated his submission that the remediation order needed to include a clear evidence-based timetable, communication by Hightown by email and flexibility in respect of the schedule of defects should further problems arise. He wanted to emphasise the risk to the leaseholders if NKH were not appointed to do the works, given the extent of the works they had agreed to do. He also wanted the tribunal to take into account the impact on all of the leaseholders of any further delay in carrying out the works.
49. Mr Glenister submitted that the dispute about the programming indicated a cultural issue between the respondents. He preferred the approach of NKH to getting on with the works, provided there was effective communication with the leaseholders.

Hightown's case

50. By the time of the hearing, the respondents had agreed a draft remediation order, subject to the tribunal's determination as to the

relevant defects, the issue of the flat entrance doors, the length of the programme and other terms sought by the applicants.

51. In terms of the relevant defects, of the 15 defects identified, the dispute between the respondents' experts was limited to items 5,6 and 8 on the schedule in the draft order and, more fundamentally 9, as set out below:

No.	Relevant Defect	NKH position (in summary)
5	Compression of the rain screen cladding at floor levels which has forced the tiles out from the cladding lines. Stresses have been imposed on the tiles and brackets that they have not been designed to take.	Not a relevant defect as aesthetic and poses no building safety risk. However, NKH will carry out the remedial work proposed.
6	Uneven tile cladding at external corners. Here, there are concerns with the adequacy of the fittings to support multiple cantilevers and there is a possibility that fixing pull out could lead to further deflections of the bracketry meaning the tile clips would not then provide adequate support.	As above.
8	Poorly fixed timber batten fixing at one of the floor level aluminium trims.	As above.
9	Insufficient plasterboard linings to window reveals in some locations identified.	Further evidence required to determine whether the issue will compromise 60 minute fire resistance to the structure and therefore whether this is a relevant defect.

52. Ms Gillies submitted that section 120 of the BSA refers to “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 any part of it. In the FTT remediation contribution proceedings in respect of Vista Tower (CAM/26UH/HYI/2022/0003) the tribunal had concluded that: *“Disagreement about whether a risk is tolerable, alone or with other factors, seems more likely (or logically) to be about whether or what action should be taken from time to time, not whether this is a relevant risk at all”*. That passage was subject to an appeal to the Upper Tribunal but Hightown contends the FTT’s approach was consistent with Parliament’s intention.
53. In particular, she relied on the modern approach to statutory interpretation requiring the tribunal to ascertain the meaning of the words used in a statute in light of its context and purpose. As confirmed in Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point [2025]

EWCA Civ 856 at [145] and [161] the three main purposes which Parliament was seeking to achieve through the BSA are (i) to implement the recommendations of the Independent Review of Building Regulations and Fire Safety led by Dame Judith Hackitt; (ii) to ensure that fire safety defects in buildings are remedied; and (iii) to ensure that leaseholders are protected from unaffordable costs of remediation.

54. When considered by reference to those objectives the meaning of “relevant” defect is clear. A defect amounts to a relevant defect for the purposes of sections 123 and 124 and Schedule 8 of the BSA if:
 - a. There is a hazard of the nature defined by section 120 (i.e. the spread of fire or building collapse) which has arisen as a result of anything done (or not done) or anything used (or not used) in connection with relevant works; and
 - b. The risk arising from one of those hazards constitutes “a risk to the safety of people in or about the building”.
55. The BSA could easily have provided a threshold for the amount of risk but chose not to. The fact that PAS 9980:2022 results in a low, medium tolerable, medium intolerable or high risk assessment is also irrelevant for the purposes of section 120.
56. The conclusion that any risk is sufficient is also consistent with the determination of whether to make a remediation order being in the tribunal’s discretion, as confirmed by the FTT in the Vista Tower remediation order proceedings (CAM/26UJ/HYI/2022/0004). The amendment of section 120 to provide for “relevant steps” to be taken to prevent or reduce risks is further support for that conclusion.
57. With that in mind, Ms Gillies relied on Hightown’s experts who had concluded that all of the disputed items were relevant defects.
58. As stated above, the Lands Chamber has since published its decision on the Vista Tower RCO. The President, having heard from Ms Gillies in similar terms, concluded at [253-4] that the reference to “a risk” in section 20(5) means any risk, including a low risk, assuming the other conditions in the BSA are satisfied. If a risk is low, he would expect that factor to play some part in the question of what remedial action is required. The President’s views are expressed as guidance and *obiter*, since the issue was not pursued as a ground of appeal.
59. Hightown resists any order being made in relation to the flat entrance doors because they form part of the demise to the leaseholders under their leases. Hightown’s only responsibility is in respect of the external decoration of the doors and this obligation was insufficient to make Hightown the “relevant landlord” under the BSA. Ms Gillies dealt with Mr Glenister’s arguments in respect of the Fire Safety Order 2005 in closing but it is convenient to restate them here. In short, the duties under the Order in Article 5 only apply to matters within the responsible person’s control (Article 5(2)). Article 5(4) makes it clear that means

where there is an obligation under any contract or tenancy to maintain the item. Under the lease, that responsibility lies with the leaseholder. Article 17 is clear that in those circumstances, Hightown's duty is met by requiring the leaseholder to do the works, not them.

60. Hightown had up until the lunch break of the final day insisted that the programme devised by their expert Airey Miller was preferable to that proposed by NKH. Following cross examination of Mr Mnili from that organisation, they conceded the point, subject to a request for a 6 month extension as provided by the tribunal in other cases.
61. As to the terms proposed by the applicants, Ms Gillies first objection was to the order including a start date, pointing out that the tribunal's powers as set out in section 123(2) of the BSA provided for a remediation order to identify a "specified time" by which the defects must be remedied or relevant steps undertaken, not a date for the commencement of those works.
62. The draft order agreed by the respondents required NKH to provide monthly updates and recorded Hightown's agreement to publish them on the leaseholder webpage. It also provided for a post-works FRAEW and EWS 1. In closing, in response to Mr Ladayal's request for confirmation of the standard of works, Ms Gillies suggested that Hightown could employ an agent or clerk of works to comment on what they'd observed as the works progressed and as part of the monthly reports.
63. Hightown's sole witness of fact was Donna Spikings. She had worked for Hightown for 8 years and was promoted to her current role of Head of Homeownership and Commercial in January 2020. As stated above, Ms Spikings was unable to attend the hearing for cross-examination but her witness statements were allowed in evidence by the parties, albeit not agreed.
64. In her first statement, dated 5 December 2025, Ms Spikings set out Hightown's role as a housing association and how it "*strived to ensure that those responsible for the defects (NKH) were held to account, rather than depleting the money available to Hightown to support Hightown's existing residents and to develop new housing units*". In contrast to the majority of Hightown's properties, Somerville Court is a private block and the owners of the flats are not social housing residents.
65. Ms Spikings confirms, although without dates, that following Grenfell, Hightown carried out a review of its portfolio to identify properties that they felt needed to be surveyed for fire safety defects. The Oaklands Estate, of which the Property formed part, was identified as high risk due to the amount of cladding on each block. As far as Ms Spikings was aware, none of the other blocks raised serious concerns. She refers to the FRAEW received in April 2023 for the Property but omits to mention the first report by Tri-Fire dated January 2021.

66. She confirms that Hightown do not employ any specialists and therefore they sought specialist advice from the outset, or at least following receipt of the 2023 report. That led to the desk top review by Virtus, the installation of the waking watch and the communal fire alarm system and further investigations and reports sought throughout 2023.
67. Her statement confirmed that discussions with NKH commenced in May 2023 and that NKH made offers to carry out certain works in October 2023 and March 2024. As the negotiations continued without resolution, Hightown was concerned *“by the apparently relaxed approach NKH has taken to the seriousness and extent of the fire safety defects in Somerville Court and Hightown’s need for contractual certainty.”* Hightown understood that the delay had been *“frustrating to”* the leaseholders but felt to agree to NKH carrying out the works without a detailed scope of works supported by expert opinion would only expose Hightown and the residents to more risk.
68. At that time, Hightown were still resisting a remediation order, although their position changed by the time of Ms Spikings’ supplemental witness statement dated 23 December 2025. That statement covered both the remediation order and the remediation contribution order but for the purposes of this decision we will pick out comments in relation to the former.
69. In response to the “concerns” raised by the applicants as to her first statement, Ms Spikings accepted that Hightown had actually first become aware of “some” defects in 2021, having agreed with the leaseholders to instruct Tri-Fire to prepare an EWS 1 at their expense. At that stage, the leaseholders would also be liable for any remediation works required and so when the first EWS 1 was received, Hightown resolved to pursue an insurance claim, which was declined. It was only following the introduction of the BSA that Hightown recognised that it had certain rights and duties to pursue those responsible for the defects for the costs of remediation, i.e. NKH. Having sought legal advice, Hightown also became aware of its own responsibilities and for that reason requested the second report from Tri-Fire in 2022.
70. The rest of Ms Spikings’ statement sought to justify the extent of communications with the applicants and the further delay in starting the works. The main reason given for the latter was the contrast in the approach to the works between Hightown and NKH, with criticism of NKH’s Method Statement, compared to the approach taken by Hightown’s advisors.
71. Hightown’s first expert witness was Ross Findlay, a Chartered Engineer and a member of the Institution of Structural Engineers, of JP Chick & Partners. His expert report was dated 5 December 2023 and his report dealing with the areas remaining in dispute was dated 2 October 2025. Three of those were items 5, 6 and 8 as set out in the table above. He was also able to comment on item 9, from the perspective of a structural engineer.

72. In respect of item 5, the compression of the tile rain screen cladding, his report confirmed that the compression had induced additional stresses on both the tile clip rivets and the tile themselves, which are both likely to be under greater stress than they were designed for. Sudden brittle failure was therefore possible (i.e. a tile falling off) and for that reason he did not consider item 5 could be ruled out as a relevant defect.
73. While he accepted that the risk of brittle failure arising out of the uneven tile cladding at external corners, item 6, was lower than with item 5 – he considered there was a risk of “pull-out” (i.e. a tile falling off) due to the increased forces on the fixings back to the wall.
74. For item 8, the fixing of the timber batten was very poor, with the batten easily and obviously moved under very light hand pressure. The batten is behind a long and lightweight aluminium floor level trim and Mr Findlay conceded that the risk of the trim failing and falling from the building was low.
75. The window reveals, item 9, were considered in an addendum report dated 7 January 2026. Mr Findlay confirmed his understanding that the external walls of the building were required to have 60 minutes fire resistance and that this was intended to be provided by two layers of plasterboard cladding fixed to the inside face of the timber framing. The inspection on 15 December 2025 found that the base layer of plasterboard had been cut back to accommodate straps fixing the windows and balcony doors to the timber frame.
76. NKH’s Fire Safety expert, Dr Crowder, had opined that adequate fire protection would still be provided in these areas by a combination of the single uninterrupted layer of plasterboard and charring of the structural timber behind. His view was that the charring damage sustained would be very unlikely to have an adverse effect on the structure of the building.
77. Although Mr Findlay recognised that considering charring is a legitimate means of ensuring a structural element performs adequately in a fire situation, charring calculations are generally undertaken at the design stage and had not been produced for the Property. He stated that a conclusion could not be made as to whether this item was safe without sight of the timber frame specialists’ drawings or calculations. He also raised other risks which to some extent had been assuaged following the provision of further information from NKH.
78. Mr Williams, the tribunal’s expert member, asked Mr Findlay whether evidence from a series of recent fires in similar properties where timber framed buildings did not perform as expected changed his view as to the importance of further calculations to determine the risk. Mr Findlay confirmed that the industry relied on calculations.
79. The next expert called by Hightown was Mr Gerald McLean, Chartered Architect and principal of Expert Architect Limited. He had been instructed for the inspection on 30 May 2023. His report following that inspection had remained in draft form until 2025. His final report was

dated 1 October 2025, in addition to which he had made comments on the Scott Schedule having spoken to Mr Speller of NKH. He had also produced a supplemental report on 9 January 2026 in respect of the window reveals.

80. He considered that items 5, 6 and 8 were probably relevant defects due to the risk of the terracotta tiles or aluminium trim falling off the building. His supplemental report confirmed the issue in relation to the window reveals, albeit he considered that whether the resulting construction achieves the 60 minute standard recommended in Approved Document B was a matter for fire engineering rather than architectural expertise. However, Mr McLean was able to clarify that any necessary works would be done internally and in reasonably short order, without the need to decant the residents or remove the windows.
81. The tribunal decided that the evidence of the remaining fire safety experts would be heard together, a practice known as “hot tubbing”. Hightown’s expert was Mr Steve Cooper of Virtus Fire Engineering Limited. He had carried out the desktop review of Tri-Fire’s FRAEW and recommended the interim measures carried out by Hightown in 2023. He had subsequently met with NKH’s expert, Dr Crowder, to produce a joint statement dated 12 September 2025 and provided his report on areas of disagreement on 1 October 2025. His addendum report dated 8 January 2026 dealt with the window reveals.
82. Dr Crowder of DCHH Experts LLP had been instructed by NKH shortly before the inspection on 6 October 2023. His report on areas of disagreement was dated 2 October 2025. In summary, there was only one area of disagreement, concerning the window reveals. That said, both experts were in agreement that further work had to be done to assess whether the structure would in fact provide 60 minutes fire resistance. The first option was to obtain the detailed calculations from the timber framing contractors. If they were unavailable, the second option was to submit a replicate structure to testing for fire resistance. It was only if either option failed to provide satisfaction that a remediation strategy would need to be considered. The difference between the experts was that Mr Cooper felt the fact that the plasterboard had been cut back was a defect, while Dr Crowder considered that until the fire resistance could be established, it was not possible to conclude that there was a relevant defect.
83. Mr Williams queried Dr Crowder’s reference in support of his conclusions to the lack of disproportionate collapse in the case of the Waterfront Apartments, when there were several more recent examples of fires in timber framed buildings where disproportionate collapse had occurred. His response was that he was instructed in two of the most recent cases so could not comment on them in a report for these proceedings. Waterfront was a property for which he had sufficient information to comment authoritatively. He also pointed out that in some of the cases, collapse occurred after 60 minutes and after evacuation. The key issue for him was whether there was any risk to life.

84. Mr Cooper confirmed that he was closely involved with one of the disproportionate collapse cases cited by Mr Williams. His view was that the collapse was partly due to issues with firefighting. No one was killed or injured in the evacuation. He confirmed that the regulations are to minimise death or injury during that process not to prevent collapse of the building altogether.
85. Neither expert thought there was any risk of the spread of fire or smoke from the issue.
86. Hightown's final expert was Mr Mnili of Airey Miller, who had produced various programmes for the works. That evidence was also dealt with by way of "hot tubbing" with Mr Speller of NKH and will therefore be considered as part of the summary of NKH's case below.

NKH's Case

87. As stated above, by the time of the hearing, there were only really two issues in dispute: the extent of the relevant defects and the timescales for the works or programming.
88. The main objection in relation to relevant defects set out in the table at paragraph 51 was in respect of the item 9 (the window reveals). In respect of items 5,6 and 8 (tile issues and the timber batten), NKH did not admit they are relevant defects but did not advance a positive case during the hearing as they had agreed to carry out the proposed remedial works in any event. In respect of the window reveals, again NKH would not advance a positive case as the fire safety experts had reached an agreement that further work was required to be able to confirm whether the existing structure provides 60 minutes fire resistance or not. For that reason, NKH agreed to any remedial works for the window reveals being described as *"Ensure that plasterboard linings to window reveals are remediated where necessary to provide not less than 60 minutes fire resistance to the structure."*
89. The main dispute as to the programme was Hightown's insistence on a Pre Contract Service Agreement (PCSA) and the overall length proposed by Airey Miller, Hightown's expert. NKH's position was that they had everything in place to proceed, subject to planning permission, which should be straight forward as they planned to install the aluminium that was originally specified and which would be identical in external appearance to the ACM.
90. NKH's sole factual witness was Kelly Speller, a RICS Chartered Quantity Surveyor. He is a Director of NKH and other entities in that group. Prior to joining NKH in 1998, he worked for Taylor Woodrow for 6 years and Berkeley Homes for about 5 years. NKH as the developer is in effect the main contractor/customer. They contract out the building works to experts and sub-contractors with supervision by their in-house technical team.

91. Mr Speller stated that the St Albans site had been purchased by Hightown with planning permission. Under the development agreement with NKH, the site was further divided into sites A-D. The Property was Block 13 and part of site C. From memory, Mr Speller thought it was the last block in site C to be constructed. The underground car park and transfer slab were completed first, followed by the timber frame. He thought the same expert team and contractors would also have worked on the Property, being Peter Taylor Architects, Southern Maze for the cladding and Cygma for the timber frame, with Barton Engineering as the structural engineers. Supervision was carried out by a directly employed site management team and building control by an approved inspector.
92. Ms Gillies suggested that NKH had failed to provide Hightown with all of the original plans and documents specified in the Development Agreement on handover. Mr Speller found that hard to believe. He recalled that Hightown's agent, BPM Project Management Ltd, had been extremely rigorous and refused handover on other blocks even if a few documents were missing, although he had no personal recollection in respect of the Property.
93. He was then asked about the steps NKH took after Grenfell. He explained that NKH reviewed past projects, looking at the height of the buildings, the cladding used and the architects in order to determine their level of risk. There were over 3,000 units on 117 sites. Having looked at the design plans for St Albans, which specified pressed aluminium sheet with no insulation, NKH considered the site low risk. Briefing packs were put together for each site which is why NKH were able to respond to the 2017 query so quickly.
94. He had no recollection of the correspondence with Alister Wolfisz of Hightown in 2021 but agreed that he had sent him wall section drawings on 6 July 2021.
95. Mr Speller also had no personal recollection of Hightown's letter before claim dated 26 May 2023 (a Friday) but did recall that it arrived the day before the inspection on 30 May 2023, which he managed to attend. It wasn't until he stood in front of the Property that he realised the cladding was different to the design choice. He has since established that during construction Southern Maze had advised of a delay with the originally specified product and offered the ACM as a "like for like" replacement.
96. His witness statement explained that delays had been caused by Hightown's failure to provide NKH with copies of their reports from the outset. However, having discovered from the inspection that ACM was on the Property, in October 2023 NKH agreed to replace it and carry out any other fire safety remedial work that Dr Crowder believed was necessary. There were further delays in reaching agreement as to the actual works to be undertaken, which again Mr Speller thought were due

to Hightown and their experts, the last barrier being the schedules produced by Airey Miller, Hightown's programming expert.

97. NKH's focus had always been on replacing the ACM as soon as possible. They had a contractor lined up who had worked on other Hightown sites and estimated a period of just 12 weeks to remove the ACM and replace it with the original design choice. The planning pack had also been prepared and NKH were ready to do the works as soon as the agreement could be finalised between them and Hightown.
98. As explained above, the tribunal then heard from Mr Mnili of Airey Miller, together with Mr Speller. Following that exercise, Hightown agreed to accept NKH's timeline, together with a 6 month extension. In summary, it became clear during the discussion that Airey Miller's programme was based on a generic approach developed through discussions with their own contacts and did not take into account the agreement already reached in respect of the works or the proposals by NKH's chosen subcontractors, of which they were unaware. Mr Mnili stated that in his experience, contractors would often give an inadequate time estimate to win the contract.
99. Airey Miller had also estimated 78 weeks for the works as opposed to NKH's 47 weeks, due to their concerns about whether there would be an issue with the weight of scaffolding on the transfer slab, potential water damage to the sheathing board behind the cladding and the risk of delays with access for any internal works to the flats. Mr Speller considered that neither the scaffolding nor the sheathing boards would be an issue. Scaffolding was not being used around the whole building (although it had of course been in situ when it was built) and the design incorporated features to reduce the risk of water damage to the sheathing board. In any event, NKH had added plenty of margin to their programme to allow for unforeseen problems and access issues.
100. In closing, Ms Green emphasised that NKH were proceeding at their risk but had confidence in their programme. On relevant defects, she emphasised that NKH's position was as set out in the Scott Schedule, replicated in the table at paragraph 51. In respect of the window reveals, she submitted that in the light of agreement between the experts, the tribunal could only say that there was a risk of a risk, which she submitted was insufficient to be determined a relevant defect under the BSA.

The Tribunal's decision

101. The tribunal consider that the leaseholders are right to feel let down by Hightown. The implication of Ms Spikings' first statement was that as private residents they were somehow less important than Hightown's social housing residents. Her omission of any reference to the EWS 1 produced in January 2021, which confirmed that works were required to make the residents safe, also spoke volumes. We accept that at this time, the leaseholders would have been responsible for the costs of any work,

unless a third party or insurer would accept liability but consider that Hightown took insufficient regard at that point of its duty to its own leaseholders. In particular, there should have been senior management level contact with NKH who may well have realised the mistake as to the cladding at that time and offered to do the works much earlier. Hightown should also have listened to the leaseholders in 2022 when they suggested pursuing NKH, as opposed to assuming, wrongly, that NKH would refuse to do the work.

102. Mr Glenister was also right to identify the total clash of culture between Hightown and NKH, once the developers were engaged. Both Mr Speller and his expert Dr Crowder were highly credible witnesses. NKH, in contrast with the insurers, were very quick to accept responsibility and offer to replace the ACM and any other work recommended by Dr Crowder. Ms Gilles criticised that approach but at the end of the day there was nothing of substance between Dr Crowder and Mr Cooper for Hightown. Both were clearly highly competent and professional experts and once they met as set down in the tribunal's directions, were quick to reach agreement on the important issues.
103. The tribunal considers that Hightown's criticism of NKH's approach to the specification of the works and their timeline is similarly misplaced. In truth, the Method Statement produced by NKH in 2024 contained perfectly adequate details of the works it had then agreed to do in respect of the removal of the ACM and timber cladding, works to the terracotta rainscreen, new cavity barriers and fire stopping. The evidence was unclear as to the reasons for the continued delay since then but again, the tribunal considers that Hightown had insufficient regard for the plight of the leaseholders and the real impact on them of that delay, both financial and psychological. The reference to that delay as merely "frustrating" to the leaseholders in Ms Spikings' first statement supports that conclusion.
104. Hightown's total reliance on experts and their apparent need to specify everything that could be wrong with the property before the works could commence has obviously led to yet further delay and cost. Their other experts appeared to be perfectly competent but largely unnecessary. As Mr Speller observed, the priority for this Property is the removal of the ACM (and timber) cladding. Again, Hightown took their eye off that ball as their extraordinarily cautious approach led to further cost and delay. This was most obvious when the tribunal heard from Mr Mnili and Mr Speller as to the programme, as it became clear that Airey Miller's timeline was based on a theoretical approach which took no account of the steps already taken by NKH to prepare for carrying out the works. Hightown conceded that point over the lunch break on the final day of the hearing, much later than they should have done.
105. As to the defects in dispute, NKH had agreed to undertake all remedial works and therefore did not advance a positive case at the hearing. That said, the tribunal agrees with their position in the Scott Schedule that the compression of the tile rain screen cladding, uneven tiles at the external

corners and poorly fixed timber batten at floor level are not relevant defects. While we recognise the comments of the President in the Vista Tower RCO appeal are not binding on us, they are consistent with our view that any risk is sufficient. However, that risk must be to the safety of people in or about the building arising from the spread of fire or the collapse of the building or any part of it. We consider that a brittle tile falling from the building or some aluminium trim at floor level becoming detached will cause neither building safety risk. Neither Mr Cooper nor Dr Crowder thought the risk from those items was a fire safety issue. Although Hightown relied on Mr Findlay's report which stated those risks were "structural", he made no attempt – rightly in our view - to describe them as building collapse. NKH were right to characterise those items as posing no building safety risk.

106. By way of contrast, the tribunal do consider that the newly discovered issue of the window reveals is a building safety risk as defined by the BSA. Although Ms Green described it as "a risk of a risk", we, supported by the Upper Tribunal, are clear that any risk will do. Obviously, we are here talking of a risk of building collapse arising from the spread of fire. That said, both experts clearly considered the risk to be low and appeared to the tribunal to expect that the further testing would provide confirmation that no further works would be necessary.
107. Hightown have now agreed to a remediation order, which we consider is essential, given the delays to date. The draft order agreed by the respondents included commitments by NKH. However, since a remediation order can only be made against Hightown, we propose to record the agreements made by NKH in respect of works and other matters in this decision rather than in the order itself. In particular, the order is made on the basis that Hightown and NKH will at last enter into a contract for NKH to do the works. As part of that contract, NKH have agreed to undertake all the works or further investigations mentioned in the Scott Schedule (including the items mentioned in paragraph 105 above) and any works necessary to the entrance doors to the flats to bring them into compliance with the relevant Building Regulations. NKH have also agreed to provide monthly progress reports to Hightown and procure a FRAEW and new ESW 1 once the works have been completed.
108. The remediation order against Hightown is made on the basis that it is a relevant landlord as defined in the BSA. On that point, the tribunal agrees that the flat entrance doors are not its responsibility either under the lease or the Fire Safety Order 2005, as Hightown is not the "responsible person" in control of the doors as defined in that Order. However, NKH have agreed to attend to any issues and therefore the leaseholders' interests will be protected as long as NKH are given the contract.
109. The remediation order can also only specify the relevant defects. That means that items 5, 6 and 8 as set out in the table at paragraph 51 above will be omitted but again, NKH have agreed to do the remedial works

required and therefore if they enter into the contract the leaseholders' interests will be protected.

110. The order will oblige Hightown to provide monthly reports to the leaseholders. The tribunal considers that separate emails to the applicants are not necessary but obviously any applications to vary the order must be copied to all parties in these proceedings, which should give the applicants advance notice of anything significant.
111. The order will also oblige Hightown to provide a FRAEW and EWS 1 on completion of the works. These and the monthly reports are Hightown's benefit of the contract with NKH being finalised. The tribunal considers that any further quality control will only add to the costs of the works and risk further delay. NKH are clearly a reputable developer and the tribunal considers that the applicants can have confidence in their ability to supervise the works which are to be carried out at their risk. The works will also be signed off by building control.
112. As to the length of the programme and therefore the date by which the defects must be remedied, Hightown has agreed to proceed on NKH's timeline. That should now start with the contract being signed by 28 February 2026, moving the programme on by a month so that practical completion should be on 4 July 2027. To this date, the tribunal proposes to add 3 months to allow for any unforeseen issues. We consider 6 months is too long, given the relatively straightforward nature of the works and the familiarity of NKH with the Property but accept that it is sensible to build in some extra leeway for which no application to the tribunal will be required.
113. On that point, the order will also allow the works to be varied by agreement between the parties. That must include the applicants. In default of agreement, the issue will need to be referred to the tribunal but we hope that will not be necessary.
114. The tribunal have also agreed directions for Hightown to return to the tribunal in short order in the event that they fail to enter into the contract with NKH by 28 February 2026. Given the obvious advantage to all parties of NKH doing the works, we fervently hope this will also not be necessary.
115. Finally, the second to fourth applicants made an application under section 20C of the Landlord and Tenant Act 1985 for an order preventing Hightown from claiming the costs of these proceedings as a service charge. As stated above, Hightown agreed with them that *"any costs incurred or to be incurred in remedying or otherwise in connection with the relevant defects specified in this order (including but not limited to Hightown's costs of the Remediation Order proceedings) shall not form part of any claim for payment which Hightown might otherwise have benefitted to recover from leaseholders or their successors in title, whether qualifying or non-qualifying"*. This agreement goes wider than any decision the tribunal can make on the

application, which affects only the costs of these proceedings and only the second to fourth applicants but on the basis of the tribunal's findings as set out in this decision and for the avoidance of doubt, the tribunal considers it just and equitable to make the order sought.

Judge Wayte

Rights of appeal

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

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

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

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

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



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

Tribunal case reference : **CAM/26UG/BSA/2025/0003**

Property : **Somerville Court, Newsom Place,
St Albans AL1 3DA**

Applicants : **1.Mr Ditson and Mrs Jolanta
Ladaya
2.Ms Karen Finn and Mr David
Waghorn
3.Ms Lilian Goldberg (R Gold Ltd)
4.Mr Alex Sherratt**

Representatives : **1.Mr Ditson Ladaya
2-4.Mr Francis Glenister**

Respondents : **1.Hightown Housing Association
Limited
2.Nicholas King Homes Plc**

Representatives : **1.Jennie Gillies, instructed by
Devonshires Solicitors
2.Mattie Green, instructed by
Knights Solicitors**

Type of application : **Remediation order: Section 123
Building Safety Act 2022**

Tribunal : **Judge Wayte
Judge MacQueen
Tribunal Member Williams**

Date : **9 February 2026**

REMEDICATION ORDER

IT IS ORDERED THAT:

1. By no later than **4 October 2027** the First Respondent, Hightown Housing Association Limited (the relevant landlord) shall remedy the relevant defects summarised in the attached Schedule 1, providing the Applicants and the leaseholders with monthly progress reports as to the works completed, planned and any newly identified defects.
2. The First Respondent may comply with paragraph 1 by carrying out and completing the remedial works, as set out in Schedule 1 attached to this order. If the First Respondent proposes to comply with paragraph 1 by carrying out different works, they shall notify the Applicants and use all reasonable endeavours to notify the other leaseholders of the Building as soon as practicable, explaining their proposed variations and their reasons, with copies of any essential supporting documents. If the Applicants do not agree with the First Respondent's proposals they must refer the dispute to the tribunal, as set out in paragraph 7 below.
3. The First Respondent shall carry out the Works and remedy the specified Relevant Defects in compliance with the Building Regulations applicable at the time the remedial work is carried out, so that the Relevant Defects no longer exist and such that a post-Works Fire Risk Appraisal of External Walls (FRAEW) pursuant to PAS9980:2022 should not prevent a satisfactory Form EWS1:External Wall System Fire Review (EWS1) from being issued.
4. The First Respondent shall make good any damage caused to the Building, including any individual dwelling and common parts. Any damage to any individual dwelling must be made good as soon as practicable and in any event within 3 months. Any damage to the common parts should also be made good as soon as practicable but in any event by the deadline set out at paragraph 1 above.
5. If the First Respondent will be unable to comply with paragraphs 2, 3 or 4 by 4 October 2027 (or any later completion date proposed in any notification under this paragraph 5, they shall as soon as practicable notify the Applicants and use all reasonable endeavours to notify the other leaseholders of the Building, explaining their new proposed completion date and their reasons, with copies of any supporting documents.
6. The parties have permission to apply to the Tribunal at any time after 4 July 2027 to extend time for compliance with this Order and/or

determine any dispute between the parties about whether the time for compliance with this Order should be extended.

7. Any application must be made using the Tribunal's Form Order 1. The application must be supported by a witness statement endorsed with a statement of truth, with detailed evidence explaining the reason for the application, and a proposed draft order setting out the variation sought. Permission is given hereby (without the need to apply further) for the parties to rely on relevant expert evidence in support of their respective positions in the application. The application must also identify a realistic time estimate for the hearing of the application.
8. The First Respondent shall notify the Tribunal and the Applicants and the leaseholders of the residential apartments in the relevant building that it has complied with this Order, within one month of the certified date of practical completion of the Works, providing copies of:
 - i. The practical completion certificate; and
 - ii. The FRAEW obtained in accordance with paragraph 3 above.
9. This Order is made solely for the purpose of securing the carrying out of remedial works under section 123 of the BSA 2022. It does not determine or prejudice any question of liability for the costs of such works.
10. Pursuant to section 123(7) of the BSA 2022, this Order is enforceable with the permission of the County Court in the same way as if it were an order of that court.

Schedule 1: Schedule of Relevant Defects and the Works

Schedule 1: Schedule of Defects		
No.	Relevant Defect	Proposed Remedial Solution
1	Missing cavity barriers.	Cavity barriers to be provided in line with fire compartment walls and floors, at the top, base and edges of cavities, around duct penetrations and around windows to all external
2	Cavity barriers which have been inadequately or incorrectly installed.	Cavity barriers to be removed and re-installed correctly and in accordance with the manufacturer's instructions, where these have been installed inadequately or incorrectly, such that they will not inhibit the spread of fire and smoke in the wall cavities, to all external wall and cladding systems.
3	The presence of ACM Cladding on the external walls	ACM cladding to be removed and replaced with products/materials that satisfy current requirements.
4	Inadequate fixing of ACM cladding – adhesive strips debonding	Replace the ACM cladding with products/materials that satisfy current requirements and which are to be mechanically fixed to support brackets.
5	The presence of timber cladding and a timber support system.	Timber cladding and timber support system to be removed and replaced with products / materials that satisfy current requirements.
6	Insufficient plasterboard linings to window reveals.	Ensure that plasterboard linings to window reveals are remediated where necessary to provide not less than 60 minutes fire resistance to the structure.
7	Insufficient fire stopping to all services and penetrations that pass through fire resisting walls.	Fire stopping to all services and penetrations that pass through fire resisting walls, replacing any unidentified expanding foam that was applied at construction stage.
8	Incomplete and unidentified expanding foam.	Remove and replace the incomplete and unidentified expanding foam used to fire stop the gaps between timber fire door frames and the door reveals.
9	20mm threshold gap to the AOV door at the first floor	AOV door at the first floor to be adjusted to reduce 20mm threshold gap.
10	Defective intumescent collars/wraps.	Intumescent collars/wraps to be provided to white plastic UPVC ventilation extract ducts where they pass through fire resisting walls

		between habitable rooms and protected entrance halls within flats.
11	Defective fire stopping and / or intumescent pipe wraps or similar.	Fire stopping and / or intumescent pipe wraps (or similar) to be provided to UPVC SVPs where they pass through fire compartment floors.
12	Compromised compartmentation in the smoke shaft.	Such works as are necessary to remediate any the relevant defects discovered in the investigation of the smoke shaft on 15 December 2025.



Neutral Citation Number: [2026] EWHC 351 (TCC)

Case No: HT-2023-000202

IN THE HIGH COURT OF JUSTICE
TECHNOLOGY & CONSTRUCTION COURT

The Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 19 February 2026

Before:

MR JUSTICE CONSTABLE

Between:

(1) GS WOODLAND COURT GP 1 LIMITED
(2) GS WOODLAND COURT GP 2 LIMITED
(ACTING AS GENERAL PARTNERS ON BEHALF OF GS WOODLAND COURT
LIMITED PARTNERSHIP)

Claimants

- and -

(1) RGCM LIMITED
(2) HADFIELD CAWKWELL DAVIDSON LIMITED
(3) MET-CLAD CONTRACTS LIMITED
(4) UNITE MODULAR SOLUTIONS LIMITED
(5) UNITE INTEGRATED SOLUTIONS PLC
(6) EUROLEC SERVICES LIMITED
(7) QUADRO SERVICES LIMITED

Defendants

CLAIRE PACKMAN KC and DANIEL CHURCHER (instructed by Jones Day) appeared
for the **Claimant**
JESSICA STEPHENS KC and DANIEL KHOO (instructed by Reynolds Porter Chamberlain
LLP) appeared for the **First Defendant**

BEN PATTEN KC (instructed by Keoghs LLP) appeared for the **Second Defendant**
JONATHAN SELBY KC (instructed by Walker Morris LLP) appeared for the **Fourth & Fifth Defendants**
ALEXANDER BURRELL (instructed by Howes Percival LLP) appeared for the **Sixth Defendant**

Approved Judgment

This judgment was handed down remotely at 10.30am on 19th February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CONSTABLE :

A. Introduction

1. The Claimant and Applicant (“Woodland”) has applied to adjourn the trial of this matter, presently listed to start on 8 June 2026, to the first convenient date after 1 June 2027 and for consequential directions. The application is opposed by the First Defendant, RGCM Limited, and the Fourth and Fifth Defendants, Unite Modular Solutions Limited (“UMS”) and Unite Integrated Solutions PLC (“UIS”), known as ‘Unite’ collectively. The application is neither supported nor opposed by the Second, Third and Sixth Defendants.
2. Woodland relies upon the second and third witness statements of Mr James Pickavance, a partner at Jones Day with conduct of this matter, dated 12 December 2025 and 5 February 2026 respectively, the first and second witness statements of Mr Rahim Rahemtulla dated 12 September and 12 December 2025, and the first witness statement of Mr Fabio Antoncini dated 30 January 2026. Unite have relied upon a witness statement by Mr Thomas Peel, a partner at Walker Morris LLP, dated 30 January 2026.
3. I gave my determination of the outcome of the application at the conclusion of oral argument, giving brief reasons. I indicated that I would provide fuller reasons in writing following the hearing. These are those reasons.
4. Woodland is the owner of a building (“the Development”) in Islington providing student accommodation. The Development consists of three blocks and at its highest is nine storeys high. The Development was constructed using the construction management method of procurement. Hence, it was not carried out by a conventional main contractor, but was carried out by a “construction manager” and a series of “trade contractors”. The Development was constructed using modular construction, designed, manufactured and supplied by UMS and installed by the Seventh Defendant (“Quadro”). Quadro is now in liquidation.

5. RGCM was the construction manager, and the Second Defendant (“HCD”) was the architect. The Third Defendant, (“Met-Clad”) was the cladding trade contractor, and the Sixth Defendant (“Eurolec”) was the mechanical and electrical trade contractor.
6. Woodland alleges in these proceedings that there are numerous fire safety defects present in the Development as a result of breaches of contractual, tortious and statutory duties by various Defendants. The claims against each Defendant are different given that they all had different roles and responsibilities. Woodland’s claim is for the cost of implementing a remedial scheme which, it says, will directly remedy certain of those defects and mitigate the fire safety risks associated with others (by for example the use of a misting system and VESDA detection system) so as to render the Development compliant with Building Regulations. The total sum claimed is £35m, of which £19.7m is said to relate to the “Mitigation Remedial Scheme”, which is said by Woodland to be necessary to remediate the totality of the defects identified.
7. Of central relevance to the present application is the fact that the Development is a “Higher Risk Building” within the meaning of section 120D of the Building Act 1984 (as inserted by section 31 of the Building Safety Act 2022). It is not disputed that pursuant to Regulation 11 of the Building (Higher Risk Procedures) Regulations 2023 Woodland must obtain approval from the Building Safety Regulator (“BSR”) before commencing any remedial works.
8. On 30 October 2025, the BSR rejected Woodland’s proposed remedial scheme. The reasons included alleged lack of information, lack of substantiation and concerns expressed by the fire engineer (in this case the London Fire Brigade) about the proposed design leaving in place deficiencies such as “*lack of compartmentation both internally (voids in-between modules, non-compliant ductwork) and externally (voids, lack of cavity barriers), combustible materials in the external wall system, extended travel distances proposed in unventilated corridors with studio flats, lack of ventilated lobby protection to ground floor escape routes, and watermist system in lieu of sprinkler system*”.
9. At the heart of the application is consideration of the extent to which this rejection impacts the viability of the present timetable to trial.

B. Procedural Background

10. In light of the arguments and counter-arguments deployed, it is necessary to consider some aspects of the procedural background.
11. As summarised by Mr Pickavance in his Second Witness Statement, Woodland sent a set of initial notification letters to the Defendants in these proceedings in March 2022, asking the Defendants to enter into standstill agreements, given the length of time that had passed since the Development was completed and the limitation issues that might otherwise have arisen. The Defendants all agreed to enter into standstill agreements which were extended on several occasions during the pre-action protocol process. There came a point where UMS was not willing to agree to any further standstill period and, in order to protect its position, Woodland issued proceedings on 9 June 2023.

12. By this point, Woodland had the RIBA Stage 3 design for the remedial scheme in hand. Woodland's claim was put on the basis of the estimated costs of implementing the scheme as shown in the RIBA Stage 3 design which it initially hoped would not require BSR approval. By the time of the first CMC, held on 11 October 2024, Woodland was working on the basis that it would need to obtain BSR approval for its remedial scheme. The Particulars of Claim at that time provided that the BSR process may result in changes to its then intended scheme for remediation and that Woodland was unable to say what remedial measures it would implement until that process was concluded. In the circumstances, Woodland declined to provide further particulars at this stage of the remedial measures that it would implement. Several Defendants sought a direction, in a hearing before Waksman J, that Woodland be required to amend its Particulars of Claim to provide updated particulars of the proposed remedial scheme. The agreed position of all Defendants save UMS was that the *“finalisation of the remedial scheme and costs will impact timelines for amendment to pleadings, disclosure, expert evidence, and ADR.”* UMS also anticipated that if the timetable for BSR approval of the remedial scheme slipped further than anticipated in Woodland's letter of 1 October 2024, the result would be that the quantum case might be pleaded too late for it to be heard at any trial that may be listed at this CMC. UMS reserved its position as to whether the liability issues should be heard separately to the quantum issues in the event that there was slippage in the timetable for finalising the remedial scheme.
13. Waksman J decided that the then-anticipated remedial scheme ought to be both provided to the Defendants prior to submission to the BSR to enable them to comment upon it, and that the remedial scheme actually provided ought to be the subject of a properly formulated quantum claim. As to the second point, he said:

“The second question, it is called an amendment but, in effect, it is starting again with this aspect of the claim and it can be done by way of simple particulars of the loss here, which can then be responded to in a counter-schedule. I do not see any reason why the amendments or the particulars should not be provided by February of next year, which will then of course be based on the actual proposal as it has been submitted to the BSR. Of course it is possible that the BSR will require certain changes, and that might require certain amendments, but I very much doubt whether the BSR is going to look at a considered document like this and decide that it is not worth the paper it is written on and everybody has to start again.”
14. Thus, the link between the particularisation claim and the scheme as submitted was acknowledged by both the parties and the Court, and the Court's direction was predicated on the basis that they did not consider it likely that the BSR approval process would, to any material degree, impact on the as-pleaded case so that any further amendment would likely be limited. Whilst, therefore, Mr Selby KC is correct in his contention that Woodland did not seek a stay of proceedings pending BSR approval, it is apparent that neither the parties nor the Court envisaged the situation which has now arisen.

The Timing of the BSR Submission and the Application to Adjourn

15. Woodland were required to set out its remedial scheme by 7 March 2025. Whilst it did this, this scheme had not by this stage been submitted to the BSR. This did not

occur until 30 June 2025. Notwithstanding the length of time taken to complete the remedial design and submit it, I accept – at least for the purposes of this application – the submission of Ms Packman KC, based upon the evidence of Mr Rahemtulla, that although the process was lengthy, this cannot be attributed to culpability on the part of Woodland. The duration seems on its face to be driven by the complexity of the remedial scheme and the requirements of the new building control regime. There can be no doubt that steps such as the appointment of a shadow team of consultants, aimed to improve the robustness of the design, will add materially to the overall process in terms of time (and no doubt cost).

16. Mr Selby KC advanced a related criticism that Woodland did not accept input into the remedial scheme submitted to the BSR. In circumstances where, as Mr Selby KC made clear in his submissions, the Unite position adopts (without prejudice to liability) an entirely different remedial solution as the correct answer, it is difficult to see in practice what “input” could sensibly have been taken on board. The right remedial scheme will be a matter for trial. It is not said, at least for the purposes of this application, that the BSR rejection was itself caused by the submission of one, rather than the other, scheme; and even if it were said (or will be said at trial), it is not a dispute that could possibly be resolved in the context of the present application to adjourn.
17. This BSR submission covered all three blocks of the Property, and was submitted under a single HRB registration for Block A. On 7 August 2025, it stated that it was of the view that each HRB registration needs to be the subject of its own application. On 1 October 2025, Woodland submitted two additional applications under the HRB registrations for Blocks B and C.
18. Although the period within which the BSR is meant to respond is 8 weeks, the rejection of Woodland’s remedial scheme for Block A was not communicated until 30 October 2025. The BSR’s comments on the remedial scheme came in three parts: a covering letter, and then two comment sheets, one titled “BCAA Assessment Report”, and one titled “Fire and Rescue Authority Report”, prepared by the London Fire Brigade, sent on 5 November 2025. Although it would have been obvious that the same outcome was inevitable for the identical schemes for Blocks B and C, this was not in fact confirmed by the BSR until 19 November 2025.
19. Solicitors for Woodland wrote to the Defendants on 3 December 2025, and issued its application to adjourn just over a week later. The application was issued around 6 months prior to trial. Whilst I accept that the initial communication to the Defendants might conceivably have been sooner, it is readily understandable that the rejection from the BSR, which I accept came as a considerable surprise, would have warranted careful thought as to the appropriate course of action. I do not accept that the application was materially delayed so as to give rise to a factor which outweighs against Woodland.
20. I note that, at least on the evidence currently available, Mr Patten KC for HCD described the application, and which for the reasons I have given I consider to be fair, as a “no fault” application. I emphasise, however, that this is a finding limited to the context of this adjournment application. It may be that Unite, or other defendants, press an argument at trial in relation to the damages claim for e.g. professional fees or other aspects of the claim (including the costs of the adjournment of quantum, which

are to be reserved) that the BSR rejection was an inevitable result of submitting a flawed proposal, such that in this sense the fact of the rejection and any case management determination resulting therefrom is Woodland's "fault". This argument obviously remains open to them.

C. Next Steps with the BSR

21. Woodland set out what it considered to be the likely next steps and the time that those steps would take. This evidence was not challenged substantively.
22. Having reviewed the documentation provided by the BSR, there is force in Ms Packman KC's submission that it presently remains unclear what exactly the BSR requires. At present, the LFB appears unwilling to engage in multidisciplinary meetings to discuss the scheme, which will add to Woodland's difficulties.
23. Mr Rahemtulla explains that, notwithstanding, it is Woodland's hope that the BSR can be persuaded to accept Woodland's remedial scheme if further justification for the scheme is provided and BSR's requests for further information are answered. I accept that Woodland is taking various steps to maximise its chances of success, the detail of which does not matter for the purposes of this application. In light of the work which I consider reasonable, Woodland is targeting 16 March 2026 as the date for resubmission of the scheme to the BSR. Assuming the resubmission takes place as planned, and the BSR meets its eight-week target for dealing with applications, Woodland would find out whether its remedial scheme was approved on 8 June 2026, the first day of the trial as presently listed.
24. However, I accept that realistically Woodland does not expect the BSR to meet its eight-week target, given that the BSR took four months to review and reject Woodland's initial submission. Ms Packman KC points, additionally, to a recent report from a House of Lords committee found that the median time for the BSR to reach a decision on valid applications was 21.5 weeks for applications that were rejected, and 25.1 weeks for applications that were approved. If those sorts of timescales apply to Woodland's resubmitted application, a decision would not be reached until well after the trial was concluded.

D. Adjournment: the Relevant Legal Framework

25. The overriding objective is to deal with cases justly and at proportionate costs. CPR 1.1(2) provides that this includes, so far as practicable:
 - “(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
 - (b) saving expense;
 - (c) dealing with the case in ways which are proportionate;
 - (d) ensuring that [the case] is dealt with expeditiously and fairly;
 - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases...”
26. Each party relied upon and referred to the judgment of Coulson J as he then was in Fitzroy Robinson Ltd v Mentmore Towers Ltd [2009] EWHC 3070 (TCC) (which effectively incorporated the observations of Chadwick LJ in Boyd & Hutchinson v

Foenander [2003] EWCA Civ 1516, which were also referred to by Mr Selby), in which he observed:

“... the court must ensure that the parties are on an equal footing; that the case – in particular, here, the quantum trial – is dealt with proportionately, expeditiously and fairly; and that an appropriate share of the court's resources is allotted, taking into account the need to allot resources to other cases.

More particularly, as it seems to me, a court when considering a contested application at the 11th hour to adjourn the trial, should have specific regard to:

- a) The parties' conduct and the reason for the delays;
- b) The extent to which the consequences of the delays can be overcome before the trial;
- c) The extent to which a fair trial may have been jeopardised by the delays;
- d) Specific matters affecting the trial, such as illness of a critical witness and the like;
- e) The consequences of an adjournment for the claimant, the defendant, and the court.”

27. I also bear in mind Bilta UK Limited v Tradition Financial Services Limited [2021] EWCA Civ 221 Lord Justice Nugee said at [30]:

“The guiding principle in an application to adjourn is whether progressing with the trial will be fair in all the circumstances, that the assessment of what is fair is a fact-sensitive one and not one to be judged by the mechanistic application of any particular checklist.”

E. Discussion

28. It is said by Ms Packman KC that it would not be fair to proceed in the face of the present uncertainty created by the rejection of the proposed remedial scheme by BSR. Ms Packman accepts that it is obviously right in a typical case where remedial works have not yet been commenced, the Court will have to rely heavily on what the relevant experts say is the necessary and reasonable remedial response. The Court makes up its mind on the evidence and determines, insofar as necessary in order to order compensation, what remedial works are reasonably necessary and their cost.
29. It is, as Mr Selby KC rightly observes, inherent that such a prospective exercise will have a degree of uncertainty in it. Any scheme determined as the basis for the assessment of loss by the Court in advance of the works actually being carried out may eventually cost more or less due to a variety of factors, including a decision by the recovering party not to carry out the works either as assumed within the litigation or indeed at all. If the claiming party delays carrying out the works after receiving an award of damages and more stringent building regulations are introduced which will increase the cost, that is the claiming party's risk. Once the litigation is underway, this risk in itself is unlikely to be sufficient to affect a case management decision about when the trial will be heard.
30. However, Ms Packman KC is also right that since the coming into force of the 2023 Regulations, there is to be a further factor which the Court may take into account in relation to remedial works to higher risk buildings such as the Development, namely the fact that it would be unlawful for a claimant in respect of such a building to

implement any remedial scheme which has not been approved by the BSR. Whether this will impact case management is not a question of principle, but fact.

31. In many circumstances, it will not be particularly relevant. So, if the BSR had not made any decision at all by the upcoming date of trial, the case would have remained on course: the Court would have heard the evidence and determined what it (the Court) considered to be reasonably necessary work caused by such defects or collection of defects as liability had been established in respect of. No party was contending that the trial should necessarily have awaited the BSR's determination so as to eliminate any uncertainty around the eventual scheme. Similarly, if the BSR had approved the scheme, the situation is orthodox. The fact of approval may make it more seem difficult for a defendant to argue that the remedial scheme approved would not sufficiently resolve particular defects (which, perhaps counter-intuitively, is an argument advanced by Unite in the present case), albeit it would not make such a conclusion inherently unlikely: ultimately, the BSR decision is not binding as to a question of fact to be determined by the Court. Moreover, the fact of the BSR's approval would be largely irrelevant to the central question which a Court is usually faced with in cases such as this, namely whether the remedial solution is over-designed and/or in any event more costly than might otherwise be achieved by adopting a different solution, so as to make the claimant's scheme unreasonable. Put another way, the BSR is not concerned with whether the adoption of a particular solution is compatible with a claimant's duty to mitigate. Whilst the fact of approval is not irrelevant, it seems to be an overstatement to contend, as pleaded by Woodland, that an approved scheme "is *prima facie* a reasonable remedial scheme" (at least in all senses of the word "reasonable").
32. It is no doubt in light of the relatively limited anticipated impact of the existence or non-existence of BSR approval that Waksman J took the course he did at the CMC, at a time when it was not envisaged that the BSR's intervention would be existential to the ability to adopt a particular remedial approach to mitigating the effect of the alleged defects.
33. However, the Court is faced with a different issue at present: the BSR has rejected the scheme which has to date been the subject of expert consideration and is due to be the subject of the Court's consideration in June 2026. As long as the status quo is maintained, the one certainty that exists is that, at present, the Claimant is not legally permitted to carry out the pleaded remedial scheme.
34. I cannot accept the contention, as advanced by Mr Selby KC and supported by Ms Stephens KC, that this fact is, as a matter of principle, irrelevant. The following example, slightly different to the present facts illustrates the point beyond argument. Assume a scheme of mitigation is proposed by a defendant as the most cost effective and legally compliant scheme (as indeed, Unite has proposed in this case), which (unlike this case) was accepted in principle by the claimant and adopted as the scheme to seek approval of. The dispute at a forthcoming trial would not, therefore, include the nature of the remedial scheme itself, but assume there remained certain specific questions of quantification, as well as liability and other non-remedial scheme related quantum issues for determination. The broadly agreed scheme is then, as here, rejected by the BSR, with a clear indication that its inadequacies could only be rectified by a wholly different and more elaborate approach to remediation. The Court will know with certainty that the scheme hitherto agreed between the parties could not

lawfully be implemented. Would, in this example, it be fair in all the circumstances for the Court to proceed to determine quantum in feigned ignorance of the fact known to all that, through no fault of the claimant, the pleaded losses now significantly underestimated its likely actual losses? The answer is obviously not. The question for the Court would be whether the obvious unfairness in proceeding could be remedied in advance of the start of trial. If not, an adjournment, at least of those parts of the dispute relating to the appropriate remedial scheme, to enable the claimant to investigate and evidence its losses in light of the new fact, would be necessary to meet the guiding principle identified by Lord Justice Nugee in Bilta.

35. It follows from this that I also reject the contention that adjourning the forthcoming trial equates to a determination by the Court that, as a matter of principle, no trial relating to remediation in which the BSR decision is outstanding can ever proceed. It emphatically is not. The fact of a pending, approved, or rejected BSR submission is just that: a fact. Its existence may be highly relevant, or largely irrelevant, to how the case is to be managed depending on the surrounding facts.
36. It is necessary also to address briefly the ambitious submission by Mr Selby KC, that in fact the rejection has now placed the parties on an even footing and allowing an adjournment would be positively unfair and contrary to CPR 1.1(2)(a). The submission is belied by Mr Selby KC's written submissions, which he sought to row back from, in which he contended, *"Of course, absent BSR approval, the Claimants will have the challenge of having to persuade the Court that they can seek damages in respect of a remedial scheme that they cannot lawfully carry out (without BSR approval)"*. At a later point in his submissions, Mr Selby KC states: *"A claimant who commences proceedings in the circumstances of these Claimants always takes the risk that their case will not come up to proof."*
37. These submissions reflect the reality that the only options pleaded by Woodland are (a) a scheme (which seeks to mitigate the effect of all the alleged defects) which it would not presently be lawful to carry out, and (b) a scheme (costed at £102m+) which is premised on correcting all the defects (effectively amounting to a rebuild). The first would not be a sound basis for awarding damages; and the latter is not a scheme advanced as reflecting the intention of Woodland, but merely as a comparator to demonstrate, it is said, the reasonableness of the mitigation scheme. As such, it seems an unlikely candidate for forming the basis of an award of damages. The Claimant is presently in the position – as Ms Packman KC candidly accepts – in which it has no pleaded basis upon which it would be able credibly to argue represents its likely loss. The obvious inference is that at trial Unite plans to submit that the Court can reject the two "options" presented by the Claimants, leaving it with the alternative proposal presented by Unite.
38. However, the dispute framed this way simply does not reflect reality. Whilst, as set out above, a Claimant always may face a risk of non-approval if that takes place after trial and the recovery of damages, that is not, contrary to Mr Selby KC's submission, the same "risk" that has eventuated here. The fact of rejection prior to trial materially changes the way in which the Court will view the Claimant's pleaded case. Quite apart from the impact on the Claimant, it may well leave the Court in an invidious position where it has no evidence reflecting the true likely loss. The difficulty articulated by Mr Selby KC as that facing Woodland in light of the rejection illustrates why it is unfair to insist that Woodland proceeds to trial (at least in respect

of quantum) in circumstances where the situation has arisen through no fault of its own (although I repeat the comments above about “fault”).

39. That it is not fair to insist on proceeding to trial on this basis does not mean, either, that the litigation would remain in permanent stasis until a remedial scheme is approved. It simply means that it would be unfair not to permit Woodland the opportunity to regroup and re-plead a case on the quantification of its losses. In this context, it is significant that none of the Defendants opposing the adjournment advance a set of directions which between now and trial would permit this to happen in good order. That probably reflects the reality that, with around two months to the PTR, it would not be possible for Woodland to provide and cost a new remedial scheme, and for the experts to revise their liability and quantum reports to opine on the new scheme. It also, pragmatically, acknowledges that Woodland ought to be given the opportunity to provide the information sought by the BSR and, as it hopes, obtain approval of its existing scheme, which if successful, means the problem is resolved.
40. Set against the undesirability of proceeding (at least in respect of quantum) is the question of prejudice to the Defendants caused by the delay in ultimate resolution of the dispute.
41. Both Mr Selby KC and Ms Stephens KC submit, fairly, that delay itself is prejudicial and that it is inevitable that an adjournment of all or some of the case will inevitably increase costs. This is correct, and must be weighed in the balance. One specific additional feature of prejudice relied upon by Unite is that a potential witness (unnamed) is due to retire. It is not clear if or why this would necessarily prevent this witness from giving evidence, and in circumstances where the case is heavily expert driven, this argument was not, rightly, given particular prominence in Mr Selby KC’s oral submissions.
42. Mr Selby KC also indicated that it was of significance to Unite that Waksman J had ordered the present case to be heard prior to, and with a 7 or so month gap between, a related case (“the Highbury Proceedings”), which involved a similar modular construction being brought by a related entity to the Claimant, and in which UMS – but not UIS – is also a defendant. The other parties are not common. The timing as originally intended would be upturned, and the advantage to his clients lost, by fixing these proceedings second, as Woodland now propose. I have considered this factor as relevant to how to proceed.
43. It is not necessary for me, however, to consider Unite’s submission that the real reason the adjournment is being sought is Woodland’s belated appreciation in the difficulties of its case: this was not pressed orally, it being rightly acknowledged that this was something the Court would not sensibly be in a position to determine at an application of this sort.
44. Returning to the guidance in Fitzroy, for the reasons above I conclude that an adjournment (to some extent) is the only fair way of proceeding. Woodland is not at fault (for the purposes of this application) for the position it is in; the immediate consequences of the BSR’s rejection of its remedial scheme cannot sensibly be overcome by repleading and/or further evidence before the trial; the trial will be asymmetrical as a result of the unanticipated rejection of Woodland’s remedial

scheme; and whilst an adjournment (to some extent) will increase cost and delay the eventual determination of the matter, there is no other specific prejudice identified by the Defendants which outweighs the prejudice to Woodland in being required to press its quantum case. The costs of the adjournment (rather than the costs of the application to adjourn) may be reserved so that the wider question of “fault”, not determined by the Court in this application, remains live should any of the parties wish to press it.

F. Split Trial

45. In advance of the application, solicitors for RGCM sensibly raised the question of whether, if Woodland was facing difficulties with the quantum side of its case following the rejection of its remedial scheme, the parties might usefully make the most of the present listing by determining as many other issues as possible. That was, regrettably, not met with engagement by Woodland. Ms Stephens KC, whilst maintaining a primary position that there should be no adjournment of any part of the case, advanced the suggestion of a split trial in the alternative.
46. Mr Selby KC’s written submissions included an orthodox overview of the issues (albeit in a slightly different context) as follows:
 - (1) The nature, scope and extent of each defendant’s duties;
 - (2) Whether any Defendant was in breach of duty;
 - (3) The nature, scope and extent of any defects in the Development;
 - (4) Whether, and the extent to which, any defects in the Development are attributable to a breach of duty on the part of any Defendant;
 - (5) Whether the Mitigation Remedial Scheme is a necessary and reasonable remedial scheme to deal with any defects that are proven to have been caused by a breach of duty on the part of any Defendant;
 - (6) The loss, if any, for which each Defendant can be found liable to the Claimants (and the quantum of any such losses)
47. In at least broad terms, issues (1) to (4), in respect of which there is considerable dispute, are “liability” issues capable of being heard prior to issues (5) and (6) for determination at a quantum hearing. It is correct, as pointed out by Mr Patten KC, that only after (5) and (6) were determined could the contribution proceedings between the Defendants, to the extent relevant, be determined. Mr Selby KC adopted the alternative position advanced by RGCM as a preferable solution should the Court be of the view that as adjournment of some sort was necessary.
48. Mr Patten KC’s position on the adjournment, on behalf of HCD, was neutral; but he used his brief and efficient submissions to sound a note of caution in respect of a split trial, emphasising, fairly, that an important issue between the Defendants to the extent liability was established was the question of contribution. In circumstances where a critical aspect of the case overall fell to be determined in the second half of a split trial, Mr Patten KC submitted that the benefit of the almost inevitable additional costs was limited. I consider this below.

49. Ms Packman KC was particularly resistant to a split trial, perhaps strangely in circumstances where (a) Woodland needed the Court to sanction what on any view would be disruption to the Court's allocated resources and (b) where (if Woodland is correct) it would achieve a finding of liability in the relatively near future, leading to inevitably increased commercial pressure on any of the Defendants found liable.
50. The Court was referred by Ms Packman KC to the judgments of Mr Justice Hildyard in Electrical Waste Recycling Group Ltd v Philips Electronics UK Ltd [2012] EWHC 38 (Ch) and of Peter Eggers KC sitting as a Deputy High Court Judge in Jinxin Inc v Aser Media Pte Limited & Ors [2022] EWHC 2431 (Comm). The points made reflect the usual considerations the Court must give to the assessment, which is essentially a pragmatic one. Thus, in some cases it may be sensible to weigh the prospective advantage of saving the costs of an investigation of quantum if liability is not established against the likelihood of increased aggregate costs if liability is established and a further trial is necessary; or consider the likely advantages and disadvantages in terms of trial preparation and management, including the extent to which a split trial may impose unnecessary inconvenience and strain on witnesses who may be required in both trials, or lead to the risk of duplication, delay and the disadvantage of a bifurcated appellate process. Both judges rightly identified potential difficulties of defining an appropriate split or whether a clean split is possible as a relevant factor. Ultimately, the Court must consider the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.
51. A further consideration applies in the present case, which faced neither judges in the authorities referred to the Court, which arises when a Court is faced with adding into the balance the obvious disadvantages of losing a long-planned trial date altogether towards which the parties have been working. This is unlikely to be a determinative factor, but it is an important one. The fact that, when considered at the outset of the proceedings, neither the parties nor the Court would have considered that this was a case in which a split trial was the most appropriate way to manage the litigation, is no bar to re-assessment when faced with what otherwise would be a significant delay to the determination of any of the issues.
52. Ms Packman KC submitted that the most relevant factors here were the difficulty in identifying an appropriate or clean split between the issues to be dealt with in the first and second part of the trial and the impact on costs.
53. As to the first point, the split can, in broad terms, be articulated as issues (1)-(4) above being the subject of the first hearing. Ms Packman KC argued that, to the extent that the Court finds that the Defendants acted in breach of duty, there would then be a two-stage causation exercise to undertake: first identifying the extent to which each breach caused fire safety defects in the Development, and then as to the causal link between each defect or category of defects and the remedial measures proposed. Whilst this may be so, it does not of itself create a difficulty in principle: the first of these stages sits comfortably as part and parcel of issues (1)-(4), and the second as part of issues (5) and (6).
54. Ms Packman KC also echoed the fair point made by Mr Patten KC about the determination of contribution claims which would by definition need to await the second hearing, which may reduce the commercial utility of determining issues of liability separately. This is precisely the sort of point which would, if considered at

the outset of the litigation, have militated strongly against splitting the trial. However, in the present circumstances I do not consider that it outweighs the advantage of moving the litigation meaningfully forward.

55. This is particularly so when, realistically, if the matter did not proceed in June 2026, it could not be listed until mid-2027 at the earliest. This is because there is no suggestion that the Highbury proceedings can or should be adjourned (and in circumstances where there is only some overlap in the parties, this would likely be unfair at least on those non-common parties); and although the possibility of adjourning the trial to some point in November/December 2026 was explored, this was not practical because it would not leave any meaningful gap between these proceedings and the Highbury proceedings. This would be the worst of all worlds.
56. I accept that there would be likelihood of some of the same witnesses giving evidence in both tranches – in particular, some of the professional witnesses. However, particularly in circumstances where the same judge hears both tranches (as would be the intention), duplication of evidence and time (and therefore cost) should be minimised. Whilst there will be some inevitable inefficiency, the disadvantage of this is outweighed by the advantage of maintaining the present trial date to determine a significant amount of the dispute which otherwise is ready for trial, and can and should be determined in June 2026. There is at least some real prospect (given all the Defendants hotly dispute liability) that one or more of the Defendants will not be part of phase two at all, which would have a materially positive effect on efficiency of that phase.
57. Finally, Ms Packman KC more generally points to some collateral advantages to adjourning the whole of the trial, although advantages which she accepts would not of themselves justify an adjournment. These relate to (a) testing planned to be undertaken by Unite; (b) the potential of further inspections by RGCM and (c) the need for Woodland's construction management and client representative expert to be replaced by reason of the sad death of their previous expert. However, in circumstances where it is not suggested that these factors are of themselves, or taken together, sufficient to prevent the progress of the hearing of liability in June 2026, their existence does not outweigh the benefits of progressing the litigation as far as it is possible to do.
58. Whilst, therefore, it may be an imperfect solution, the parties and the Court is faced with a situation in which all outcomes are imperfect. I regard splitting the trial in the manner set out above the least imperfect option.
59. Therefore, the application to adjourn the entirety of the proceedings is refused. The hearing in June 2026 will be retained, and will deal with liability issues, as identified in this judgment. The parties are to seek to agree a more granular list of issues on this basis, and any disagreement will be resolved by the Court at the PTR insofar as necessary. The parties are also to discuss the various options for listing the second phase, the timing of which will again be resolved by the Court if the parties do not agree.



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

Case reference	:	LON/00AY/HYI/2022/0005 & 0016
Property	:	2-4 Leigham Court Road, London SW16 2PG
Applicants	:	(1) Ms Sarah Waite (2) Karin Ida Christina Martensson & (3) Other leaseholders
Representative	:	Mr Philip Waite
Respondent	:	Kedai Limited (freeholder)
Representative	:	Mr David Sawtell, counsel, instructed by Taylor Wessing LLP
Interested Person	:	London Borough of Lambeth (Mr Gibrilla Musa, EHO)
Type of application	:	For the variation of a remediation order made under section 123 of the Building Safety Act 2022
Tribunal	:	Regional Judge Timothy Powell Mrs Helen Bowers MRICS
Date of Decision	:	24 March 2026

DECISION

Decision

1. The Tribunal varies the remediation order dated 9 August 2023 in the terms of the Variation Order that accompanies this decision so that the time for completion of the remediation works is extended from 19 September 2025 to **29 July 2027**.
2. In its reasons below, the Tribunal gives indicative milestones for the Respondent's next steps to achieve the completion of works by the extended date.

Reasons

Remediation order

- (1) On 9 August 2023, the Tribunal made a remediation order under section 123 of the Building Safety Act 2022 requiring the freeholder Kedai Limited (“Kedai”) to carry out remediation works to 2-4 Leigham Court Road, London, SW16 2PG (the “Property”).
- (2) That order was made because the conditions of internal compartmentation and external cladding were relevant defects causing a building safety risk, namely a risk of injury to the residents of the Property through the spread of fire or collapse of the building.
- (3) By paragraph 2 of the remediation order, the Tribunal ordered Kedai to complete the remediation works by 19 September 2025.
- (4) By paragraph 3, the parties had permission to apply to vary the order, in particular to extend the time for compliance in paragraph 2.

Application to the Building Safety Regulator

- (5) On 1 October 2023, the Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 came into force and by section 91ZA of the Building Act 1984, the Building Safety Regulator (“BSR”) became the building control authority for high-rise buildings, of which the Property is one.
- (6) Kedai appointed a new team of professional consultants to prepare for and meet the new procedures. On 11 July 2025, Kedai submitted its completed Gateway 2 application in respect of the works to the BSR seeking its approval for the proposed works to remediate the relevant defects at the Property. The statutory eight-week period for the BSR to determine that application expired on 5 September 2025.
- (7) On or about 24 September 2025, the BSR appointed a lead caseworker to deal with the application and, on 21 October 2025, the BSR asked Kedai to agree to 102-day extension to the statutory deadline to determine the Gateway 2 application. A revised determination date of 16 December 2025 was proposed, to which Kedai agreed having little other choice.
- (8) On 16 December 2025, the BSR requested a further 56-day extension to determine the Gateway 2 application, taking the determination date to 10 February 2026. Again, Kedai considered that it had little choice but to agree to the extension.

Application to the Tribunal

- (9) Meanwhile, on 15 September 2025, Kedai had applied to this Tribunal “to vary the terms of the remediation order dated 9 August 2023 to extend the date by which the Blocks shall be remediated to 22 January 2027.” That was Kedai’s primary case but, in recognition of the opposition of leaseholders, Kedai proposed an alternative extension that included a requirement for Kedai to meet “Milestone Completion Dates”, subject to BSR compliance with its statutory periods.
- (10) The hearing of that application took place on 29 January 2026. Mr David Sawtell of counsel presented Kedai’s application. However, the Tribunal was unable to agree a new timetable for the works in the absence of any information from the BSR about the current Gateway 2 application. In particular, the Tribunal had no way of assessing whether the extended 10 February 2026 statutory deadline for a decision would be met by the BSR and, given the publicly acknowledged backlogs in approving applications, the Tribunal had no confidence that the BSR would not seek a further extension of time which would render any extended timetable for the remediation works immediately unachievable.
- (11) As the Tribunal was effectively prevented from taking further judicial steps and from deciding the application to vary the remediation order, it adjourned the hearing and relisted it on 26 February 2026. The express purpose of the adjournment was to summons the Acting CEO of the BSR, Mr Charles Pugsley, to attend that hearing, pursuant to rule 20 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the Rules”). His attendance was required “to provide a witness statement and give oral evidence about the current state of Kedai’s Gateway 2 application, the reasons for the delay by the BSR in dealing with it, whether there are any issues regarding the application that need to be raised and dealt with now, to provide the Tribunal with a realistic timescale in which the BSR will process and decide the application, and to answer any further questions which the Tribunal and parties may have.”
- (12) On 20 February 2026, the Tribunal received an email from the Health and Safety Executive Legal Services Division on behalf of the BSR attaching witness statements from Mr Charles Pugsley and from Ms Rebecca Gillespie-Jones, the Regulatory Lead with conduct of Kedai’s Gateway 2 application. In addition, the email attached an application to vary the witness summons issued on 29 January 2026, with grounds, and a copy of a letter dated 19 February 2026 from the BSR to Kedai **rejecting** its Gateway 2 application submitted on 5 July 2025.
- (13) The rejection of the Gateway 2 application was said to have become operative on 17 October 2025 by virtue of Regulation 55 of The Building

(Higher Risk Buildings Procedures) (England) Regulations 2023, as the period under regulation 51 for Kedai to make an application to the Secretary of State under section 30A of the Building Act 1984 had expired without Kedai making such an application and the BSR did not determine the original application before the expiry of that period. Unfortunately, the BSR had overlooked the operation of regulation 55 until closer examination of the case occurred as a result of the Tribunal's summons.

- (14) On 24 February 2026, the Tribunal questioned the application of regulation 55 by the BSR, refused the application to vary the witness summons and required the attendance of Mr Pugsley and/or Ms Gillespie-Jones at the adjourned hearing. While the BSR had indicated welcome measures it proposed to take to ensure the speedy progress of a renewed Gateway 2 application from Kedai, the Tribunal still wished to ask questions of Mr Pugsley and Ms Gillespie-Jones to try and find a practical, outcomes-based solution to the problems identified with the original Gateway 2 application, working in a spirit of cooperation and joint endeavour to resolve the problems that had occurred to date.

Hearing on 26 February 2026

- (15) Both Mr Pugsley and Ms Gillespie-Jones attended the hearing on 26 February 2026 to give evidence. They were represented by Mr Aaron Walder of counsel.
- (16) While the Tribunal took issue with the BSR's interpretation of regulation 55 by which the Gateway 2 application had been deemed rejected, it agreed with Mr Walder that the Tribunal was not the appropriate forum to challenge the regulatory decision made by the BSR or to give a definitive interpretation of the law in this field.
- (17) In any event, as the evidence of Mr Pugsley and Ms Gillespie-Jones made clear, even if the original Gateway 2 application had not been deemed rejected under regulation 55, it would have been rejected by the BSR itself due to failings in the structure of the application and in the information provided.
- (18) In giving oral evidence, Mr Pugsley acknowledged the concerns of both Kedai and leaseholders arising from delays in remediating the building, and he emphasised the steps that the BSR and he personally would take to progress remediation and "get this over the line". He referred to paragraph 16 of his witness statement, where he stated:

"In recognition of the organisational oversight in respect of the operation of Regulation 55, I have asked that a process has been put in place to:

i) work with the applicant on any future application to identify those elements of the original application that are sufficient to be transferred to any new application;

ii) ensure continuity of personnel to deal with any new application, where possible; and

iii) prioritise the application upon re-application.”

- (19) In terms of timing, Mr Pugsley said that a well-structured and well-evidenced Gateway 2 application to the BSR could be determined in nine weeks. The prospects for Kedai’s renewed application might be better, because it would not be from a standing start and because of the previous dealings between the BSR and Kedai. However, there could be no guarantees, because the timing and content of the application were down to Kedai and outside the control of the BSR.
- (20) Ms Gillespie-Jones, as Regulatory Lead, gave very useful information about the conduct of the original Gateway 2 application, its shortcomings and how Kedai could prepare better for a renewed application, all of which was very helpful to members of Kedai’s operational team who were present at the hearing.
- (21) On behalf of the leaseholders, Mr Philip Waite regretted the delays and legal disputes regarding the original Gateway 2 application but said he preferred to look forward, producing a proposed timetable for the remediation works from this point onwards. This was addressed by Mr Pugsley, Ms Gillespie-Jones and Mr Walder on behalf of the BSR, and by Mr Sawtell on behalf of Kedai.
- (22) The parties to the proceedings agreed that, realistically, the time for carrying out the remediation works would have to be extended to a date in 2027. The Tribunal agreed with Mr Sawtell that the position was very different to *Centrillion Point* (LON/00AH/HYI/2023/0012), where a different Tribunal refused an application to extend the time for the landlord’s compliance with a remediation order. In that case, no Gateway 2 application had been made. By contrast, Kedai had already carried out important works, agreed a scope of works, and made a Gateway 2 application, albeit one that had been deemed rejected. Nonetheless, the portends for a renewed Gateway 2 application are good and, unlike the applicant in *Centrillion Point*, Kedai is able to point to a firm completion date (being the ‘specified time’ required by section 123(2) of the BSA).
- (23) Instead, the position is closer to that found by the Tribunal in *Junestead (Cypress Point) Ltd v Goodwin and others* (2025) (MAN/00DA/HYI/2023/0011). In that case, the date for completion under the original remediation order was varied from 31 July 2025 to 31 December 2026. This was in circumstances where the landlord had

been endeavouring to progress the works; finalising the design was more challenging than anticipated; the relevant regulatory requirements applicable to the works had changed, and in particular, neither the parties nor the Tribunal had appreciated that separate BSR approval would be required; and it had not been anticipated that the BSR approval process would give rise to significant delay.

- (24) In the present case, substantial preparatory work had been carried out by the respondent landlord and the BSR was thoroughly engaged, there appeared to be every prospect that a revised and renewed Gateway 2 application would be processed and approved relatively swiftly by the BSR. Once building control approval had been granted, it appears that Kedai was ready to proceed with the works almost immediately.
- (25) Regarding the future role to be played by the Interested Person, Lambeth Council, in this process, Mr Musa who appeared at the hearing said that the council wanted a realistic timetable to be set for remediation and for it to be stuck to. He said that he worked closely with the building control officers and gave assurances that Lambeth would fast-track this project.
- (26) Bearing all that in mind, the parties agreed, and the Tribunal approved, an extension of time for compliance with the remediation order to 29 July 2027. In addition, the parties and the Tribunal agreed a timetable of milestones for the remediation works, against which progress could be measured.

Submissions after the hearing

- (27) After the hearing, later on 26 February 2026, the Tribunal received an email from Mr Luke Newman of Taylor Wessing, Kedai's solicitors, with a revised spreadsheet of timings and a draft order. The email read:

“On behalf of Kedai Limited, please find attached the following documents to be forwarded to the Tribunal hearing this matter:

- 1. an Excel spreadsheet with the Proposed Construction Programme; and
- 2. a draft Order.

With apologies to the Tribunal, an error in the earlier spreadsheet meant that the two-week period for Event No. 1 was incorrectly calculated as ending on **5 March 2026** instead of **12 March 2026**. By correcting this date, and based on a 75-week programme, the revised date for Event No. 10 is **5 August 2027**.”

- (28) On 27 February 2026, the Tribunal received an email in response from Mr Philip Waite on behalf of leaseholders, with an amended spreadsheet. The email read:

“Whilst the leaseholders appreciate Kedai’s position in the correction of their arithmetic, however this amendment is not acceptable as the date concluded at the hearing was for overall completion by the end of **July 2027**.

Please see attached the Leaseholders proposed programme arriving at the end of July 2027 and incorporating a couple of additional milestones for clarity.

The Leaseholders simply cannot accept that the completion date keeps moving back on the request of Kedai wanting more time to cover in part their own culpabilities for delay.

We must not forget that the building is in an unsafe state and that the Leaseholders are living with this every day.

The Leaseholders would be grateful if this e mail & programme could be forwarded to the Tribunal Members for consideration in any variation to the remediation order should the award be for all the time, despite the Leaseholders objections.”

- (29) The Tribunal accepts and understands that a minor calculation error has crept into Kedai’s spreadsheet of milestone dates. However, the difference is only one week, and the Tribunal considers it important for leaseholder confidence that the original extension date agreed at the hearing, 29 July 2027, is maintained. The original milestones proposed by Kedai allowed 35 weeks for construction works and this has already been extended by agreement to 44 weeks, to reflect optimism that the renewed Gateway 2 application will be much better presented and, with the measures promised by the BSR, can be processed within the nine weeks mentioned at the hearing.
- (30) Kedai has not commented on the amendments to the milestone spreadsheet proposed by Mr Waite. He accepts a change for Event No.1 to 12 March 2026, thereby correcting the error in the spreadsheet, but he then reduces the six weeks for Event No.2 (Kedai Consultants to amend and enhance Gateway 2 application) to five weeks, which should be achievable given the generous two weeks already provided for Event No.3 (submission of the revised Gateway 2 application), and this puts the previously agreed milestone dates back on track.
- (31) The two other changes proposed by Mr Waite are new Events No.9 and No.10 added “for clarity”. They appear to be uncontroversial: Event No.9 splits Event No.8 (construction), to provide for the original 35 weeks proposed by Kedai for the works but then provides an additional 9 weeks as an “Allowance for undertaking changes”. Looking forward so far in the future, these milestones must necessarily be subject to some flexibility, but it is helpful to clarify a period of nine weeks if changes are needed to the specified works. The new Event No.10 is merely a reminder (with no time consequences) that “Completion of all

building works & issue of documents by Kedai & application for Gateway 3 approval” should take place by 3 June 2027.

- (32) The Tribunal adopts these helpful changes to the milestone dates in the programme incorporated into the separate Variation of Remediation Order.
- (33) These milestone dates are necessarily indicative, but are strong guidance to the parties and the BSR as a yardstick as to how the Tribunal expects the works to progress and as an encouragement to all concerned to take the necessary steps in a timely fashion, to ensure that the overall compliance date is met, without the need for further application to extend. If minor changes are necessary at any stage, they should be capable of agreement by the parties without having to involve the Tribunal.
- (34) Finally, the Tribunal records its thanks to the parties and to Mr Pugsley and Ms Gillespie-Jones for the constructive approach all have taken to overcome the obstacles in remediating the Property and the assurances they have given the Tribunal to do all they can to achieve this by 29 July 2027.

Tribunal: Regional Judge Timothy Powell & Mrs Helen Bowers MRICS **Date:** 24 March 2026

Rights of appeal

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

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

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

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



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

**LON/00AY/HYI/2022/0005 &
LON/00AY/HYI/2022/0016**

IN THE MATTER THE BUILDING SAFETY ACT 2022

B E T W E E N:

**(1) Ms Sarah Waite
(2) Karin Ida Christina Martensson &
(3) Other leaseholders**

Applicants

-and-

Kedai Limited

Respondent

VARIATION OF REMEDIATION ORDER

*In respect of Block A (North Block) and Block B (South Block),
2-4 Leigham Court Road, London SW16 2PG*

Upon considering the application by Kedai Limited, further evidence and submissions in this matter, and upon considering the provisions of the Building Safety Act 2022, and for the reasons set out in its decision of 24 March 2026, the Tribunal orders that that the Remediation Order dated 9 August 2023 in *Sarah Waite and other leaseholders v Kedai Limited*, LON/00AY/HYI/2022/0005 & 0016 shall be amended as follows:

1. Paragraph 2 of the Remediation Order shall be deleted and replaced with:
 - “2. Kedai Limited shall complete the Works specified in the Remediation Order by no later than **29 July 2027**, based on the following programme:

No.	Event	Period	Deadline	Responsibility
1.	Correspondence with the BSR to determine exactly what is missing from Kedai's Gateway 2 application	2 weeks	12 March 2026	Kedai / BSR
2.	Kedai's Consultants to amend and enhance Gateway 2 application	5 weeks	16 April 2026	Kedai
3.	Submission of revised Gateway 2 application	2 weeks	30 April 2026	Kedai
4.	BSR to review revised Gateway 2 application and communicate with Kedai during the process	9 weeks	2 July 2026	Kedai / BSR
5.	Gateway 2 Approval		2 July 2026	BSR
6.	Contractor Site Mobilisation	4 weeks	30 July 2026	Kedai
7.	Contractor Commencement		30 July 2026	Kedai
8.	Construction	35 weeks	1 April 2027	Kedai
9.	Allowance for undertaking any changes	9 weeks	3 June 2027	Kedai
10.	Completion of all building works & issue of documents by Kedai & application for Gateway 3 approval		3 June 2027	Kedai
9.	Gateway 3 Approval	8 weeks	29 July 2027	BSR
10.	Full completion and issue of all necessary documentation to Leaseholders		29 July 2027	Kedai
11.	Total Period to Completion	75 weeks	29 July 2027	

Tribunal: Judge Timothy Powell &
Mrs Helen Bowers MRICS

Date: 24 March 2026

Attached: Remediation Order of 9 August 2023



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

**LON/00AY/HYI/2022/0005 &
LON/00AY/HYI/2022/0016**

IN THE MATTER THE BUILDING SAFETY ACT 2022

B E T W E E N:

**(1) Ms Sarah Waite
(2) Karin Ida Christina Martensson &
(3) Other leaseholders**

Applicants

-and-

Kedai Limited

Respondent

REMEDICATION ORDER

*In respect of Block A (North Block) and Block B (South Block),
2-4 Leigham Court Road, London SW16 2PG*

Upon considering the applications, evidence and submissions in this matter, and upon considering the provisions of the Building Safety Act 2022, and for the reasons set out in its decision of 9 August 2023, the Tribunal orders that:

2. Kedai Limited (the relevant landlord) shall remedy the relevant defects specified by and in accordance with the attached Schedule (the “**Works**”) in Block A (North Block) and Block B (South Block), 2-4 Leigham Court Road, London SW16 2PG (the specified relevant building) (the “**Blocks**”) by the time specified in paragraph 2 below.
3. Kedai Limited shall complete the Works by no later than 19 September 2025.

4. The parties have permission to apply in relation to paragraphs 1 and 2 and the attached Schedule. In particular, Kedai Limited has permission to apply:
 - (1) to be permitted to undertake different Works to those specified by this Order, if it is revealed by investigation and analysis by a suitably qualified consultant that reasonable alternative works will remedy the relevant defects; and
 - (2) to extend the time for compliance with this Order.
5. Any such application must be made using the Tribunal's Form "Order 1". The application must be supported by detailed evidence explaining the reason for the application and a proposed draft order setting out the variation sought. There is permission to the parties to rely on relevant expert evidence in support of the application. The application must also include a realistic time estimate for the application to be heard.
6. Kedai Limited must notify the Tribunal, the Applicants and Lambeth Council that it has complied with this Order, within one month of the certified date of practical completion of the Works.
7. By section 123(7) of the Building Safety Act 2022, this Order is enforceable with the permission of the county court in the same way as an order of that court.

Tribunal: Judge Timothy Powell &
Mrs Helen Bowers MRICS

Date: 9 August 2023

Attached: Schedule

**Schedule of Specified Relevant Defects &
Works Required to Remedy Them**

*In respect of Block A (North Block) and Block B (South Block),
2-4 Leigham Court Road, London SW16 2PG*

By 19 September 2025, Kedai Limited is required to remedy the relevant defects in Block A and Block B, 2-4 Leigham Court Road, London SW16 2PG as specified below:

1. The Aluminium Composite Material (“**ACM**”) is to be removed from the façade of both Blocks and replaced with suitable rainscreen cladding which adequately protects the insulation from the spread of fire.
2. The Kingspan K15 insulation is to be removed from the external wall systems of both Blocks and replaced with suitable non-combustible insulation.
3. The fibre cement panels are to be removed and replaced with panels that are not broken or cracked and properly installed in accordance with their manufacturer's instructions which adequately protect the insulation from the spread of fire.
4. The fire stopping, cavity barriers and internal compartmentation are to be remediated in the following locations so that the Blocks are compliant with the Building Regulations current at the time that the works are carried out:
 - (1) Blocks A and B, ensure that cavity barriers are properly installed in accordance with manufacturer's instructions:
 - (i) Horizontally in line with each floor;
 - (ii) Vertically in line with internal compartment walls;
 - (iii) Around openings;
 - (iv) At the edges of the cavity.
 - (2) Ground floor Block A stairway:
 - (i) Extend plasterboard partitions to the floor slab and seal with suitable fire-resisting sealant or bolstered by suitable

fire-stopping systems so as to allow for 60-minute fire resistance;

- (ii) Remove polyurethane (“PU”) foam and fire batts and replace with suitable fire- stopping systems so as to allow for 60-minute fire resistance;
- (iii) Protect all penetrations to fire resisting partition fire-stopping systems so as to allow for 60-minute fire resistance.

(3) 1st to 4th floor Block A electrical cupboards:

- (i) Protect door frames internally so as to allow for 60-minute fire resistance;
- (ii) Remove PU foam and replace with suitable fire-stopping systems so as to allow for 60-minute fire resistance;
- (iii) Ensure all joints between plasterboards are adequately taped and sealed;
- (iv) Infill lateral breaches allowing for building services to pass from electrical risers to the plenum ceiling with appropriate fire stopping materials.

(4) 1st to 4th floor Block A water/ mechanical riser cupboards:

- (i) Protect door frames internally so as to allow for 60-minute fire resistance;
- (ii) Remove PU foam and fire batts and replace with suitable fire- stopping systems so as to allow for 60-minute fire resistance;
- (iii) Ensure all joints between plasterboards are adequately taped and sealed;
- (iv) Infill lateral breaches allowing for building services to pass from electrical risers to the plenum ceiling with appropriate fire stopping materials.

(5) All floors Block A water / mechanical riser cupboards and means of escape:

- (i) All water damaged areas of plasterboard to be inspected and where appropriate remediated.

(6) 3rd and 4th floor Block A water/ mechanical riser cupboards and means of escape:

- (i) Remove PU foam and fire batts and replace with suitable fire- stopping systems so as to allow for 60-minute fire resistance;
 - (ii) Protect exposed insulation at ceiling height within the fourth-floor riser with appropriate fire-resisting products.
- (7) 5th floor Block A electrical cupboard:
 - (i) Infill lateral breaches allowing for services to pass from the fifth electrical riser through the plasterboard construction with appropriate fire stopping materials;
 - (ii) Remove PU foam and replace with suitable fire-stopping systems so as to allow for 60-minute fire resistance.
- (8) Ground to 6th floor Block B electrical cupboards:
 - (i) Protect door frames internally so as to allow for 60-minute fire resistance;
 - (ii) Remove PU foam and fire batts and replace with suitable fire- stopping systems so as to allow for 60-minute fire resistance;
 - (iii) Ensure all joints between plasterboards are adequately taped and sealed;
 - (iv) Infill lateral breaches allowing for dry rising main outlets to the stair core with appropriate fire stopping materials.
- (9) Ground to 6th floor Block B water/ mechanical cupboards:
 - (i) Protect door frames internally so as to allow for 60-minute fire resistance;
 - (ii) Remove PU foam and fire batts and / or uncertified mastics and replace with suitable fire-stopping systems so as to allow for 60- minute fire resistance;
 - (iii) Ensure all joints between plasterboards are adequately taped and sealed.
- (10) 6th floor Block B smoke shaft:
 - (i) Protect frames to smoke shaft vents internally so as to allow for 60- minute fire resistance;
 - (ii) Ensure all joints between plasterboards are adequately taped and sealed;

- (iii) Infill lateral breaches allowing for automatic fire detection cabling to the means of escape with appropriate fire stopping materials.

(11) 7th floor Block B combined services cupboard:

- (i) Remove PU foam and replace with suitable fire-stopping systems so as to allow for 60-minute fire resistance.

(12) 1st to 4th floor Block B plenum ceiling:

- (i) Inspect and where appropriate remediate.

(13) All floors Blocks A and B escape corridors:

- (i) Inspect and where appropriate remediate the vents in the ceilings either (where not vital for building serviceability) by removal and infilling or (where they are so vital) by replacement with reactive vents.

(14) Ground floor external electrical meter room:

- (i) Inspect soil pipes as to whether they are protected by concealed intumescent pipe closures;
- (ii) Where appropriate, install suitable system to prevent combustion spread.

(15) Ground floor external meter room:

- (i) Inspect and where appropriate remediate the vent providing air circulation either (where not vital for building serviceability) by removal or (where they are so vital) by replacement with reactive vents.

(16) Ground floor external gas meter room:

- (i) Remove PU foam and fire batts and replace with suitable fire-stopping systems so as to allow for 60-minute fire resistance (including suitable pipe closure).

(17) Ground floor commercial unit:

- (i) Inspect and where appropriate remediate.

5. Carry out the Works and remedy the specified relevant defects in compliance with the Building Regulations applicable at the time the remedial work is carried out, so that the relevant defects no longer exist.

6. At the very least, a post-Works Fire Risk Appraisal of External Walls (FRAEW) pursuant to PAS 9980:2022 should not prevent a satisfactory Form EWS1: External Wall Fire Review from being issued.
7. Make good any damage caused to the Blocks on account of the Works.

Tribunal: Judge Timothy Powell &
Mrs Helen Bowers MRICS

Date: 9 August 2023



Neutral Citation Number: [2026] EWHC 789 (TCC)

Case No: HT-2022-000295

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01/04/2026

Before:

MR JUSTICE CONSTABLE

Between:

- (1) CREST NICHOLSON REGENERATION LIMITED
- (2) CREST NICHOLSON (SOUTH) LIMITED
- (3) CREST NICHOLSON OPERATIONS LIMITED
- (4) CREST NICHOLSON PLC

Claimants

- and -

- (1) ARDMORE CONSTRUCTION LIMITED (IN
ADMINISTRATION)
- (2) DAVID RICHMOND AND PARTNERS LIMITED
- (3) YUANDA (UK) CO. LIMITED
- (4) ARDMORE CONSTRUCTION GROUP LIMITED
- (5) ARDMORE GROUP LIMITED
- (6) ARDMORE GROUP HOLDINGS LIMITED
- (7) PADDINGTON CONSTRUCTION LIMITED
- (8) ARDMORE FITOUT LIMITED
- (9) CELEBRATION HOMES LIMITED
- (10) BYRNE PROPERTIES LIMITED

Defendants

Jonathan Selby KC and Harriet di Francesco (instructed by Gateley Legal) for the Claimant
Simon Hughes KC, James Frampton and Connie Trendle (instructed by Rosenblatt Law)
for the Fourth to Tenth Defendants

Hearing dates: 2-4 March 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 01 April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CONSTABLE

Mr Justice Constable:

A. Introduction

1. The Claimants, Crest Nicholson Regeneration Ltd and associated group companies ('Crest') bring an application ('the Application') for building liability orders ('BLOs') pursuant to sections 130-131 of the Building Safety Act 2022 ('BSA'). The Application is brought within the proceedings in which Crest alleges that Ardmore Construction Ltd ('ACL'), now in administration, is liable for extensive fire safety and other defects at the Admiralty Quarter development in Portsmouth ('the Crest Proceedings'). The Crest Proceedings were consolidated with proceedings brought against Crest by Portsmouth Naval Base Property Company (Queen Street) Limited and Portsmouth Naval Base Property Trust (together 'PNB') pursuant to the Court's order dated 25 October 2022 ('the PNB Proceedings' and together, 'the Proceedings').
2. The Claimants seek two forms of relief. First, they seek what has been described as an 'anticipatory' BLO against the Fourth to Tenth Defendants ('the BLO Defendants') in respect of any liability that ACL may ultimately be found to owe under section 1 of the Defective Premises Act 1972 ('the DPA') or arising from a 'building safety risk' within the meaning of section 130(6) of the BSA ('the Anticipatory BLO'). The terms of the Anticipatory BLO sought are as follows:

“Any liability that the First Defendant may have to the Claimants under section 1 of the Defective Premises Act 1972 or as a result of a building safety risk is also the joint and several liability of each of the [BLO Defendants].”
3. Second, they seek an order ('the Adjudication BLO') making the BLO Defendants jointly and severally liable for the sum of c.£14.9m, awarded against ACL in an adjudicator's decision dated 29 August 2025 ('the Adjudicator's Decision').
4. Both limbs of the Application are resisted. The BLO Defendants, who now accept that they are 'associates' of ACL for the purposes of section 131 of the BSA, contend that ordering the Anticipatory BLO would be premature, and that the Court should not determine issues said to be 'just and equitable' without a full trial. They also contend, in any event, that it would not presently be 'just and equitable' to make an Anticipatory BLO. In relation to the Adjudication BLO, they submit that the enforcement of the Adjudicator's Decision is not procedurally before the Court on this Application; that an adjudicator's decision, or the obligation to comply with such a decision, is not a "relevant liability" within section 130(3); that the adjudicator ('the Adjudicator') arguably lacked jurisdiction such that the Adjudicator's Decision is not (summarily) enforceable, and that, if these arguments fail, that it would not in any event be just and equitable to impose the Adjudication BLO.
5. At the heart of this case, therefore, lie the following two questions:

(1) where a principal contractor has entered administration against the backdrop of allegedly extensive fire safety defects, and where both factual and legal responsibility for any such defects is in dispute, is it nevertheless just and equitable for the Court to

determine in advance of trial that associated companies should stand behind any relevant liability ultimately established?; and

(2) how, if at all, are the provisions for BLOs applicable to liabilities arising out of the decision of an adjudicator, pursuant to statutory or contractual regimes required by the Housing Grants, Construction and Regeneration Act 1996 ('HGCRA')?

6. The BLO regime is novel and has been considered by the Courts only to a limited extent so far. The parties' submissions ranged widely over the statutory scheme, its legislative purpose, the relationship between adjudication and BLOs, and the extent to which factual disputes which undoubtedly remain until trial may preclude a fair determination of whether a BLO is just and equitable at this stage. The Court has been enormously assisted by the lengthy and detailed written submissions, and oral submissions (from, pleasingly, both Leading and Junior Counsel on both sides) over three days.

B. Background

7. The Proceedings relate to 19 residential apartment buildings in a development known as Admiralty Quarter in Portsmouth (the "Development"). The Development comprises 18 buildings (the "Buildings"), and a 21-storey tower (the "Tower"). Thirteen of the 18 Buildings have a top storey which is less than 18m above ground level. Five of the Buildings and the Tower have a top storey which is more than 18m above ground level. The construction of the Development was carried out from 2007 to March 2009.
8. ACL was engaged by the First Claimant, then known as Crest Nicholson Regeneration Limited ('CNR'), by a contract dated 13 December 2005, to carry out the design and construction of the Development (the 'D&B Contract'). The Second Claimant (referred to as 'CNS') is the long leaseholder under the headlease of the Development pursuant to an agreement for lease and lease each dated 31 October 2005 and referred to collectively as 'the Headlease'. There is a factual and legal dispute between the parties as to whether CNR was acting as the agent for the Third Claimant ('CNO') as its undisclosed principal, and/or whether Crest is estopped from asserting that anyone but CNR was the contracting party.
9. The D&B Contract was based on the JCT 1998 Standard Form of Building Contract with Contractor's Design incorporating Amendments 1 to 5 and certain bespoke amendments. It is common ground that the D&B Contract was not validly executed as a deed by ACL, although Crest's case is that there is a common assumption estoppel that the D&B Contract was executed as a deed.
10. Following the tragic fire at Grenfell Tower on 14 June 2017, investigations were carried out by third parties into the external walls of the Development to determine whether it was safe to occupy. Those third-party investigations revealed, Crest claim, that the external wall systems at the Development were defective in a number of ways with the result that they posed a fire safety risk to its occupants and users. The scope and extent of the fire safety defects in the external walls are set out in Section F of the Amended Particulars of Claim. In summary they include (a) widespread use of non-compliant combustible insulation including expanded polystyrene ("EPS") insulation and phenolic foam insulation board, (b) missing and defectively installed cavity and

fire barriers across all buildings and (c) missing fire resistant sheathing board in the brickwork cladding system (“the External Wall Defects”).

11. In addition to the External Wall Defects, Crest allege that there are other fire safety defects in the internal areas as particularised in Section G of the Amended Particulars of Claim including: (a) the car park which has been lined using combustible insulation, is not properly separated from residential accommodation or firefighting shafts via ventilated lobbies, and contains movement joints which are either inadequately fire-stopped or not fire-stopped at all, (b) compartment lines in various buildings which are missing putty pads to electrical sockets and switches resulting in those lines providing inadequate fire resistance (c) in communal areas across all buildings where there are widespread defects in compartmentation, firestopping, fire door and service risers/smoke shafts (“the Other Defects”).
12. The nature and extent of participation of ACL following the discovery of the alleged defects was set out in unchallenged evidence from Mr Lennon, Partner at Gateley PLC, Solicitors for Crest. As summarised in Mr Selby KC’s written submissions, ACL was notified about concerns of fire safety defects in the Tower in early 2018 and was directly involved in the initial investigations into the Tower. In October 2018, ACL (or third-party consultants on its behalf) attended intrusive inspections and took its own samples. There were several rounds of pre-action correspondence in 2019, 2022 and 2023 (with these proceedings being issued and stayed in 2022) within which the Claimants provided ACL with detailed defects and loss schedules and several independent expert reports provided by fire engineers, architects and other third-party consultants. During this time, there were ongoing direct discussions between Crest and ACL in relation to further intrusive inspections including those requested by ACL. ACL in turn engaged its own experts, Dr David Crowder of DCCH Experts, Tom Collison of H+H Fire and Richard Francis of RF Architect Expert Witnesses. The parties’ respective experts met on several occasions in 2021 (including to attend intrusive inspections).
13. Dr Crowder’s Fire Risk Appraisal of External Walls dated 27 November 2023 concluded that:

“In its current condition, it is my opinion that the overall risk associated with fire across the external walls of the Development is high, but [it] should be noted that the risk is not evenly distributed across the entire development.

- The risk is highest in Admiralty Tower, where the render system combined with the timber decked balconies provide both a medium for rapid fire spread and a fuel load capable of sustaining a severe fire, in close proximity to the means of escape. A severe fire involving the render could, in my opinion, compromise the means of escape, though it should be noted that given the performance of the curtain wall system there is no reason to suggest that the flats themselves would be compromised by an external wall fire.
- The C Blocks are the next highest, and in my opinion are mid to high risk. A fire affecting the courtyard elevation

will lead to a severe fire requiring the evacuation of all flats, but will not directly compromise the means of escape on the opposite elevation...

- Keppel House is the next highest with a medium risk, arising from it having a single stair, being over 11m to the top storey and being affected by the aluminium rainscreen and, to a limited extent, the render system.
- The various blocks connected to the corridors spanning the Queen Street, Admiralty Road and Bonfire Corner elevations are, in my opinion, all tolerable in terms of risk, albeit at the high end of tolerable....
- All of the two storey blocks (including Hanover and Godolphin) are also of tolerable risk, nearing low risk...

The single biggest contributor to the risk posed by the external walls at the Development is the Stotherm Classic render system. This system, in my opinion, is fundamentally unsuitable for use on high rise buildings, though I acknowledge that it was marketed as suitable for such use at the time of construction....

But for the presence of the render system, it is my opinion that the risk posed by the Development would be medium, although still not tolerable. For the Tower to become a tolerable risk it would also be necessary to deal with the potential for the balconies to contribute to fire spread.”

14. By March 2025, ACL had dis-instructed its then solicitors, CMS, and its experts, including Dr Crowder.
15. By a notice of adjudication dated 29 May 2025, CNR and CNO commenced an adjudication against ACL in relation to their claims against ACL under the D&B Contract (‘the Adjudication’). The Adjudication included ACL’s breaches of their duty under section 1 of the DPA and concerned the External Wall Defects only. It is not in dispute that ACL participated fully in the Adjudication (in part through the involvement of personnel of one or more of the BLO Defendants), albeit subject to a jurisdictional challenge and a claim that the Adjudication breached the rules of natural justice. ACL did not admit liability and advanced a positive case in respect of quantum only.
16. The Adjudicator’s Decision was issued on 29 August 2025. In summary, the Adjudicator decided that: (1) he had jurisdiction to determine the dispute and the Adjudication did not otherwise breach the rules of natural justice; (2) CNO/CNR’s claims for breach of the terms of the D&B Contract were statute barred; (3) the External Wall Defects amounted to a breach of Part B of the Building Regulations and ACL’s duties under the DPA; and (4) ACL should pay CNR, alternatively, CNO c. £14,928,320.40.

17. In respect of the External Wall Defects specifically, the Adjudicator found at [50] and [51]:

“In my view the evidence relied upon by Mr Perry and his identification of noncompliance with the Employer’s Requirements and Statutory Requirements is compelling. Although I acknowledge that the extent of non-conformance and remedial works required to address the fire safety defects are in issue, there is no doubt in my mind that the extent of combustible materials installed and the evidence of defective fire barriers/stopping is such to render Ardmore in breach of Contract. I also agree with and accept Mr Perry’s evidence that the extent of the fire safety defects in the external walls is such to render certain dwellings unfit for habitation. It therefore also follows that Ardmore is in breach of its duty owed to CNR and/or CNO pursuant to Section 1(1)(a) of the DPA.

Accordingly, I find that Ardmore is in breach of the Contract and Section 1(1) of the DPA as a result of the fire safety defects in the external walls of the Development.
[original emphasis]”

18. The day before the Adjudicator’s Decision was issued, ACL went into administration.

C. ACL’s Administration

19. Mr Martyn Horne of Ardmore Group Limited (‘AGL’, the Fifth Defendant), is the Development Director and has day-to-day oversight over the planning, organisation, monitoring and coordination of projects on behalf of Ardmore Construction Group Limited (‘ACGL’, the Fourth Defendant). Mr Horne’s witness statements dealt with, amongst other things, the events leading up to the administration of ACL. He confirms the contents of section 4 of the administrator’s report dated 8 October 2025. The information is also certified as true by Cormac Byrne, whose family trust owns 100% of Ardmore Group Holdings Limited (‘AGHL’, the Sixth Defendant).
20. The report explains that ACL’s problems began post the Grenfell Tower tragedy with the resultant BSA, which extended the limitation period from 6 years post completion to 30 years post completion for claims accruing before June 2022. As a result, ACL was faced with potential significant exposure due to the work it has undertaken since incorporation. It points to the fact that the BSA made provision for the Court to allow retrospective liabilities to be claimed against associated companies or individuals to the party responsible for the defective build in the first instance. The report continues:

“[ACL] has been working towards mitigating the issues arising and has undertaken a significant amount of remedial work to date, spending in excess of £100 million and had agreed with its principal insurers to pay £75million towards these costs. All of these funds have been expended on making good the defects.

In December 2024, the Court issued Judgment in the landmark case of BDW Trading Limited -v- Ardmore Construction

Limited [2024] EWHC 3235. The case revolved around fire safety defects on a particular development that achieved practical completion between 2003 and 2004. Prior to this Judgment, the Company had received and sought to defend all incoming claims and spent huge sums of money on a variety of lawyers in furtherance of this purpose. In February 2025 alone, the Company spent £687,440.

Into the first quarter of 2025 and as a result of the Judgment, the Director and senior Company employees sought advice from solicitors and restructuring professionals. This resulted initially in advice that the Company should consider a restructuring plan but with the process of administration in reserve. They also concluded that expending further sums on defence of claims under BSA22 in the first instance was no longer commercially viable and took steps to withdraw from further engagement. It continued to defend actions which were believed cost effective to do so to mitigate the potential creditor exposure and had also undertaken some work to pursue recovery claims and opportunities.

The Company sought to maximise realisations in the interim and with significant projects reaching practical completion which would allow the release of bonds being completed and debtor and retention monies to be undisputed, other projects were novated to other companies within the group (in addition to the associated liabilities) and the Company proceeded to wind down operations. A restructuring plan was considered but ultimately aborted.

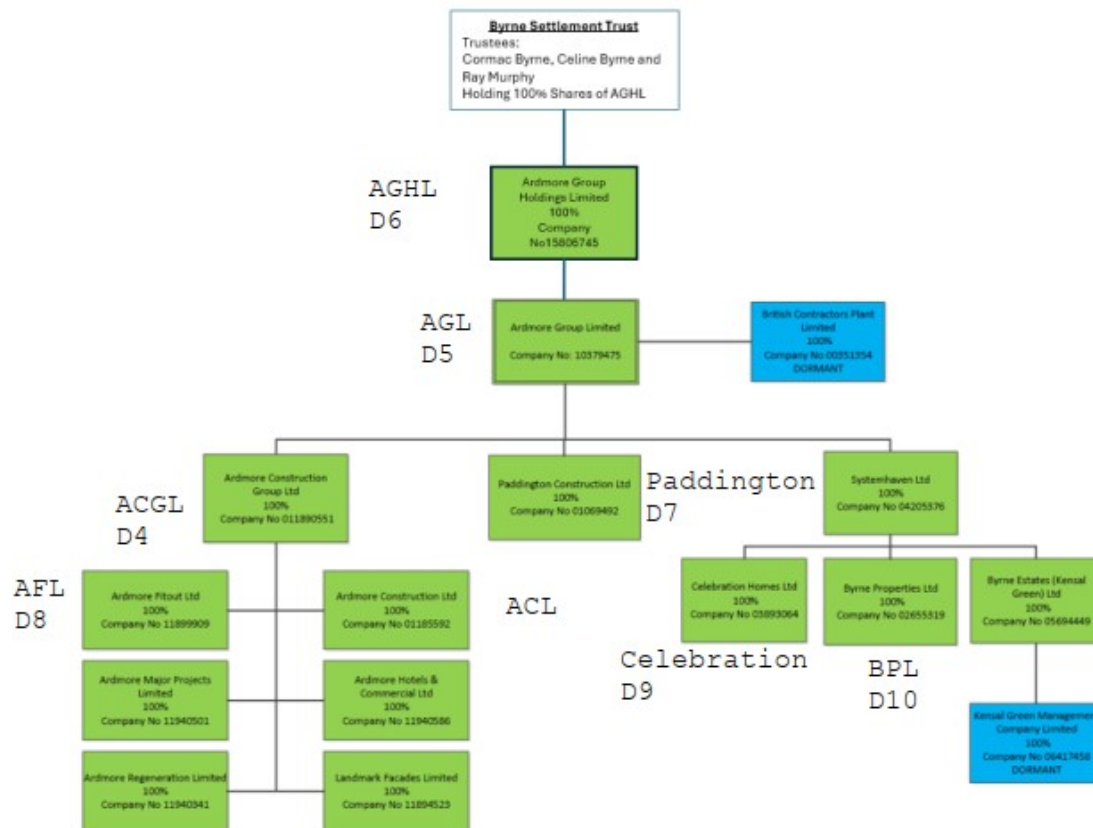
The Company continued trading for a short time but ultimately was running out of cash to discharge liabilities and with many court deadlines looming, sought to deal with procedural documents in house to save on costs or otherwise which it could no longer engage with. At the same time, the Company was suffering cash depletion and consequently only business critical costs only were being met, with no short term funding or recovery imminent. Ultimately, on 27 August 2025 it was sent a threat of winding up petition by a retention creditor with a deadline of midnight to pay the sums due. The following day, the Director concluded that time had run out and provided instructions to proceed with the appointment of administrators resulting in the Company's entry into Administration on 28 August 2025."

21. I accept, at least for the purposes of the Application, Mr Horne's evidence that the fact that ACL was placed into administration precisely the day prior to the provision of the Adjudicator's Decision was coincidental. However, it is clear that on Mr Horne's own evidence, the decision to place ACL into administration was driven wholly or in significant part by the fact of its exposure to claims relating to cladding defects following the Grenfell Fire. There is no suggestion that, following its administration,

ACL would have the means to satisfy either the Adjudicator's Decision, which has as a matter of fact gone unpaid, or any judgment at the conclusion of the Proceedings.

D. The Ardmore Group

22. The Ardmore Group is presently structured as follows:



23. As originally structured, ACL was the main trading company. It was also the holding company of 12 UK subsidiaries (direct and non-direct). By September 2016, AGL was incorporated into the group and the property portfolio was split with all residential properties being held by Celebration Homes Limited, all commercial properties being held by Byrne Properties Limited, and all development properties being held by Byrne Estates (Kensal Green) Limited.
24. In October 2016, a restructure was completed following which AGL became the parent company of ACL, ACGL, and the Eighth Defendant, Ardmore Fitout Limited ("AFL"), were incorporated in March 2019 as part of a further restructuring whereupon ACGL and AFL respectively became a parent company and a co-subsiary of ACL.
25. As emphasised by Mr Selby KC and not disputed by Mr Hughes KC, ACGL was incorporated for the purposes of creating a structure capable of isolating the historic liabilities, reducing insurer and counterparty risk, and enabling distinct trading operations to enter new markets under separate corporate entities, primarily the construction business, which were all valid reasons that were exacerbated by the changing state of the construction industry at that time. Mr Horne explains, and I accept, that the risks associated with the historic liabilities at this point were arising

from 50 years of trading. Whilst they would not, therefore, be limited to cladding or fire safety, liabilities sought to be isolated plainly included liabilities covered by the BSA.

26. A further restructuring took place in 2024 following an agreement between brothers Cormac Byrne and Patrick Byrne that the former would buy out the latter's (and family's) interest in the business. As part of this transaction, the Sixth Defendant, AGHL, was incorporated in June 2024, and it acquired all the shares in AGL. Cormac and Celine Byrne became the shareholders of AGHL. Those shares were subsequently vested in the Byrne Family Trust.
27. Cormac Byrne, along with his brother, ultimately owned and controlled ACL at the time the Development was designed and built. Ultimate control of ACL, and the BLO Defendants, has at all material times and still rests with Cormac Byrne, as confirmed in the AGL consolidated accounts. These propositions were not disputed by Mr Hughes KC.

E. The Relevant Law

E1. The Relevant Section of the BSA

28. Section 130 of the BSA confers the power upon the Court to make a BLO:

“130 Building liability orders

(1) The High Court may make a building liability order if it considers it just and equitable to do so.

(2) A “building liability order” is an order providing that any relevant liability (or any relevant liability of a specified description) of a body corporate (“the original body”) relating to a specified building is also—

(a) a liability of a specified body corporate, or

(b) a joint and several liability of two or more specified bodies corporate.

(3) In this section “relevant liability” means a liability (whether arising before or after commencement) that is incurred—

(a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or

(b) as a result of a building safety risk.

(4) A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body.

(5) A building liability order—

(a) may be made in respect of a liability of a body corporate that has been dissolved (including where dissolution occurred before commencement);

(b) continues to have effect even if the body corporate is dissolved after the making of the order.

(6) In this section—

“associate”: see section 131;

“building safety risk”, in relation to a building, means a risk to the safety of people in or about the building arising from the spread of fire or structural failure;

“commencement” means the time this section comes into force;

“the relevant period” means the period—

(a) beginning with the beginning of the carrying out of the works in relation to which the relevant liability was incurred, and

(b) ending with the making of the order;

“specified” means specified in the building liability order.”

29. There is no longer any dispute that the BLO Defendants are all ‘associates’ for the purposes of section 130.
30. I accept, as Mr Hughes KC submits, that it is important when considering the various authorities referred to further below, to bear in mind the distinction between remediation orders (‘ROs’), pursuant to section 123 of the BSA, and the related remediation contribution orders (‘RCOs’), pursuant to section 124 of the BSA, and BLOs.
31. An RO is an order (which can only be made by the First-Tier Tribunal (‘FTT’)) on the application of an ‘interested person’ requiring a relevant landlord to remedy specified relevant defects and in a specified relevant building or take specified steps in relation to a specified relevant defect in a specified relevant building.
32. An RCO is an order which the FTT may, on the application of an interested person, make in relation to a relevant building ‘if it considers it just and equitable to do so’. The class of applicants for an RCO is limited to ‘interested persons’, as defined by section 124(5). This includes a person with a legal or equitable interest in the building (such as a leaseholder or, to use Mr Hughes KC’s phrase, a ‘domestic property owner’). It is an order that can only be made against ‘a specified body corporate or partnership’, again as defined. This is limited to a landlord under a lease of the relevant building or any part of it; a person who was such a landlord at the qualifying time; a developer in relation to the relevant building, or a person associated with a person within any of the foregoing.

E2. Case Law

33. There are a number of recent cases which provide helpful guidance on the construction and application of the BSA.
34. Chronologically, the first main case is Triathlon Homes LLP v Stratford Village Development Partnership & Ors [2024] UKFTT 26. The dispute was heard before an FTT convened with Edwin Johnson J as President. It concerned the making of RCOs. The first respondent was the developer (within the meaning of section 124(5) of the BSA) of five residential buildings in East Village, Stratford, East London. Long leases in some of the units were owned through subsidiaries of the second respondent (“Get Living”). The long leases in the units provided as social or affordable housing were owned by the applicant (“Triathlon”), a limited liability partnership established to provide affordable housing at East Village. The repair and maintenance of the structure and common parts of the East Village were the responsibility of the third respondent (“EVML”) which was jointly owned by Get Living and Triathlon. Serious fire safety defects were discovered in the five blocks, relating to both the design and construction of the various façade systems. A programme of remedial work was devised by EVML and commenced in 2023 and was projected to complete by August 2025. The cost of the remedial work was initially funded by public money from the Building Safety Fund. The total cost of the work was projected to exceed £24.5 million. Triathlon applied to the FTT for RCOs against SVDP and Get Living requiring them to reimburse charges paid to EVML in respect of interim fire safety measures and investigative works, and to reimburse expenditure incurred, or to be incurred, by EVML in remedying the defects, representing Triathlon’s share of the total remediation costs.
35. The Tribunal noted at [237] that 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. (The same is true for section 130). Edwin Johnson J then observed:
- “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.”
36. In considering the purpose of association provisions (in the context of an RCO) the Tribunal stated [at 266]:
- “The obvious purpose behind the association provisions is to ensure that where a development has been carried out by a thinly capitalized or insolvent development company, a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedying the relevant defects by hiding behind the separate personality of the development company. It seems to us that the situation of SVDP, with its relatively precarious financial position and its dependence for financial support upon Get Living, its wealthy parent, constitutes precisely the sort of circumstances at which these association provisions are targeted.”

37. Of some relevance in light of the arguments before the Court on this Application is the FTT's consideration of the financial position of Get Living. At [255], the following conclusion was reached:

"The increase in value of Get Living's investment in East Village is not a matter to which we give great weight, although to the extent that it is relevant at all it is obviously a point in favour of making an order. It is common ground that Get Living has the resources to enable it to comply with any order the tribunal may make, but even if there had been doubt about that we think it would be an unusual case in which the source or extent of a respondent's assets or liabilities will carry much weight when deciding whether it is just and equitable to order it to bear the cost of remediation."

38. RCOs were made against SVDP and Get Living. The judgment was upheld on appeal ([2026] 1 All ER 574). Amongst other things, the Court of Appeal rejected the argument that the applicant's motive would be relevant to the exercise of discretion justly and equitably: Nugee LJ observed at [78]:

"the FTT were right that it was not necessary for them to resolve any issues as to Triathlon's motivation. In general parties who have legal rights or remedies are entitled to pursue them without having to explain why they have decided to do so, and a litigant's subjective reasons for litigating (save in the unusual case where a litigant is acting out of malice or the like) are usually irrelevant to the merits of its claim. What may be relevant is whether an applicant has a legitimate interest in pursuing an application, but here I do not think there is any difficulty."

39. Nugee LJ also made observations about the statutory purposes of the Act in the context of the argument then advanced that no RCOs were needed as the works were being adequately funded and were being carried out at [87]:

"this is I think to take too narrow a view of the statutory purposes of the Act. I accept that one of those purposes is to ensure that works that are required are actually done. But another purpose is to deal with the 'who pays' question, and as set out above, the Act provides a complex set of answers to this question with a number of facets."

40. Albeit in the (not directly analogous) context of concluding that the FTT had expressed themselves rather more widely than necessary in saying that it was difficult to see how it could 'ever' be just and equitable for 'a party falling within the terms of section 124(3) and well able to fund the relevant works' to be able to claim that the works should instead be funded by the public purse, Nugee LJ considered that there may be circumstances in which it may not be just and equitable to order an RCO. He observed at [65]:

“Those who can be required to contribute by means of an RCO include (by section 124(3)(d)) associates of the developer (or of a landlord), and the effect of section 121(5)(a) is that a body corporate is associated with another body corporate if at any time in the relevant period (the 5 years before the qualifying time of 14 February 2022) a person was a director of both of them. Suppose a case where a director of a landlord was also a director of other companies which have no other connection with the landlord or its group; such companies might have had nothing to do with the development and be engaged in entirely different businesses, or might include a charitable company to which the director had given his time voluntarily. It is not obvious that it would always be just and equitable to make RCOs against such associated companies even if the effect of refusing to do so was to leave the costs to be borne by the public. ...”

41. Mr Hughes KC, unsurprisingly, does not contend that such tenuous association applies to the basis upon which the BLO Defendants are ‘associates’ of ACL. The passage was instead relied upon by Mr Hughes KC to demonstrate the breadth of possible circumstances which can potentially impact the exercise of discretion justly and equitably. However, the passage does serve to illustrate how far away the present case is from the sort of exceptional types of association that might well militate against the making of an order, at least where costs would otherwise be borne by the public purse.
42. In passages highlighted by Nugee LJ at [61], the purpose of the BSA was considered by the Supreme Court in BDW Trading Limited v URS Corporation Ltd [2025] UKSC 21; [2025] 2 WLR 1095. The case related to the application of the retrospective 30-year limitation period. Lords Hamblen and Burrows considered that:

“104. A central purpose and policy of the BSA in general, and section 135 in particular, was to hold those responsible for building safety defects accountable. As was stated in the Secretary of State’s written submissions, at para 15:

‘The BSA makes a number of important changes to the law including, at Part 5, several mechanisms that achieve the central aims of the BSA in relation to historical building safety defects. These mechanisms are designed to ensure that . . . those responsible for defects can be held to account . . .’

105. This purpose and policy are borne out by various of the Explanatory Notes to the BSA. [...]

106. These passages show that ensuring that those directly responsible for building safety defects are held to account was central to the BSA and various of its provisions...”

43. Lords Hamblen and Burrows also emphasised the retrospectivity of Part 5 of the BSA, including section 130, in order to provide “*effective routes to redress against those responsible for historical building safety defects that have only recently come to light,*

whatever level of the supply chain they operated at” (see [87]). At [108], in adopting the written submissions of the Secretary of State, their Lordships considered that the effect of the appellant’s argument (in respect of the proper application of limitation periods) would be that contractors causatively responsible for historical building safety defects would be able to avoid liability in claims (e.g. negligence or contribution claims) brought against them by developers. *“This outcome would undermine the legislative purpose of the BSA in ensuring those who caused historical building safety defects should pay for their remediation.”*

44. At [274], Lord Leggatt in his concurring judgment echoed this:

“A central goal of the legislation is to seek to ensure that safety risks in multi-occupied residential buildings resulting from historical building defects are remedied by those who were responsible for the defects in the first place, and without the leaseholders having to bear the (potentially very large) costs. To achieve that goal, Parliament has decided to enable claims to be brought against property developers, contractors and others responsible for the construction of unsafe residential buildings even when the construction work was completed many years ago.”

45. At [280], reference was also made to the purpose of the Civil Liability (Contribution) Act 1978 (‘the Contribution Act’) and the purpose of the BSA together *“in seeking to ensure that the cost of compensation is ultimately borne by those who were responsible for the damage”*.

46. In another decision concerning an RCO, Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Others CAM/26UH/HYI/2023/0003 (27 January 2025), Edwin Johnson J, as President of an Upper Tribunal, declined an invitation to provide any particular tramlines which could be applied to the test of ‘just and equitable’ in every case:

“In his oral submissions in reply Mr Warwick invited me to provide some guidance, whatever the outcome of the Appeal, as to how the FTT should approach the just and equitable question. The invitation was extended in good faith, but I do not think that it is one to which I can or should accede. I do not think that it is either possible or sensible to seek to catalogue the factors upon which the FTT may rely in determining, in any particular case, whether it is just and equitable to make the order sought against any particular respondent. I say this essentially for two reasons. First, the breadth of the discretion conferred upon the FTT, namely whether the FTT “considers it just and equitable” to make the order sought, is very wide. The factors which may be taken into account in any particular case are not limited by the terms of Section 124(1) and are not, in my view, capable of exhaustive classification. Second, and if I was to attempt this task, it seems to me that I would be at risk of committing the basic error of attempting to re-write Section 124(1). In Section 124(1) Parliament has chosen not to list or limit the factors which can be taken into account in the exercise

of the just and equitable discretion. In these circumstances it is not appropriate for me to attempt to do so.”

47. Edwin Johnson J also rejected, in that case, the submission that in order to make an RCO, there had to be a clear or rational nexus between the relevant body corporate and the imposition of an RCO to deal with relevant defects, principally because the question of what is just and equitable is left at large. Decisions, it was noted, on what is just and equitable are very fact-sensitive. It was also decided, in any event, that if such a nexus was required, it was met through the FTT’s determination that as members of the same wider corporate structure, the relevant respondents should jointly shoulder the burden of remedying the relevant defects. In this context, he observed that:

“A primary purpose of the jurisdiction in Section 124 is to ensure that a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedying the relevant defects by hiding behind the separate personality of the development company.”

48. The only reported case where a BLO has so far been made is the decision of Jefford J in 381 Southwark Park Road RTM Company Ltd v Click St Andrews Ltd [2024] EWHC 3569 (TCC). At paragraphs 10 and 11 of her judgment, Jefford J adopted the judgment of the FTT in Triathlon at first instance quoted above. Parallels were drawn between the ‘*thinly capitalised or insolvent development company*’ referred to in Triathlon and the situation in Click St Andrews, where the company to whom the relevant liability attached was described as a special purpose vehicle whose sole existence was to acquire the freehold of the property, in due course to develop the top floor of the property, and then to divest itself of the freehold. The difference was, however, the absence of the ‘*wealthy parent*’, in circumstances where there remained considerable doubt about the financial standing of the Click Holdings Group. Jefford J agreed on the facts of that case that in considering whether it was just and equitable to make a BLO against Click Holdings Group, the emphasis should be on the financial position of the first defendant rather than on the parent company. This echoed the limited weight placed on the financial position of Get Living as determined at [255] of Triathlon, referred to above.
49. It is of further note in the context of arguments in this case that, in Click St Andrews, Jefford J ordered the BLO at a point at which the relevant liabilities had yet to be quantified. She concluded at [29]:

“I cannot, however, see anything that requires me to quantify the liability in respect of the relevant liabilities as set out in my judgment at the point of making the Building Liability Order. That is particularly relevant here because of the potential issues in identifying what losses, beyond the cost of remedial works, flow from the relevant liability and not the water ingress. It may in future often be the case that such a Building Liability Order will be made in terms of liability for an amount, particularly if, as here, the order is being made following a trial

which has identified the extent of the liability in monetary terms. But it does not seem to me that I am required to do that and to make an order in an amount. At present, there are no figures before me which would enable me to do so, or at least to do so without considerable further interrogation of the spreadsheets that have been produced for the purposes of this hearing. That is not a reason not to make the order in terms that reflect the wording of section 130.”

50. In Willmott Dixon Construction Limited v Prater and others [2024] EWHC 1190 (TCC), the claimant, Willmott Dixon, was the design and build contractor. The first defendant, Prater, was a specialist design and build envelope subcontractor. The second defendant, Lindner, guaranteed Prater’s services. Prater and Lindner were part of the same corporate group as the third party, LPL, and the fourth to sixth parties (referred to as the German Parties). Aecom was the building services engineer, who also provided fire engineering services, including the preparation of fire strategy reports. Willmott Dixon’s claim related to the use of external wall materials, which were alleged to be unsuitable or defective from a fire safety perspective. There were contribution claims amongst the defendants, including a claim for contribution by Aecom against Prater and Lindner. An additional claim was made by Aecom against LPL and the German Parties for a BLO, which would arise in the context of a finding that Prater and Lindner were liable in contribution to Aecom. The German Parties, supported by LPL, sought a stay of the additional claim until after judgment in the main claim, because it argued that the application for a BLO was wholly contingent on the court findings of liability in the main claim.
51. Jefford J refused the stay and directed at [31] the additional claim for a BLO to proceed with the intention that it be heard at the same time as the main claim. At [17] Jefford J observed as follows:

“17. As a matter of principle, it seems to me that the legislation does not require a party against whom a Building Liability Order is sought to be made a party to what I would call the main claim or to participate in those proceedings. That is because, for example, the company against whom the order is sought may be one that does not even exist at the time of the proceedings, or because the circumstances in which the order is sought are not even in contemplation at the time of those proceedings. However, if the making of an application for a Building Liability Order is contemplated, it will generally be sensible and efficient for the company against whom that order is going to be sought to be made a party to the litigation and for that application to be heard together with the main claim, although, as I indicated during the course of this hearing, that does not and would not in any way bind a judge to determine that application as part of the main claim and leave it open to the judge as a matter of case management to direct a further hearing in that respect.”

52. Jefford J then gave a number of reasons why it would generally be sensible and efficient for matters to progress with the main claim and additional claim being heard together. The first was that the associated company might wish to argue that the circumstances in which that liability was established meant that it was not just and equitable to make a BLO, which issue is avoided if the associated company is party to the proceedings (e.g. in that a point of defence was not sufficiently advanced by the original body). The second was the main claim may not make the relevant findings such that the answer to the question of whether there is a ‘relevant liability’ was simply a matter of law or one that followed inexorably from the judgment. The court would either then have to make further determinations on the basis of the evidence already covered or hear further evidence, neither of which would be satisfactory. Neither of these factors are relevant in the present case in circumstances where (irrespective of when, if at all, a BLO is ordered against the BLO Defendants), they will be taking, or will have taken, part in the determination of any relevant liability of ACL.
53. Third, Jefford J considered that an associate company facing a contingent BLO, “*may wish to make submissions or cross-examine or whatever it may be in relation to issues that may arise as to whether there is a relevant liability or whether it is just and equitable to make a Building Liability Order*” and that it was far more sensible and efficient that they do so in the context of the main claim and not in a subsequent and separate hearing. It is implicit in this point that, at least in some cases, it may be envisaged that the nature of the investigation at trial on liability may overlap substantively with issues which a party subject to an application for a BLO may consider relevant to the question of whether the imposition of such an order was just and equitable. In such a case, a determination of what is just and equitable in advance of that factual investigation and determination may not be appropriate. Jefford J’s point is an obviously fair one. However, I reject the broader gloss sought to be placed on this judgment by Mr Hughes KC when submitting that, on the basis of the authorities (and in particular the decision of Jefford J in Prater), it would ‘generally’ be sensible and efficient for the application for a BLO to be determined at the same time as the underlying relevant liability. At paragraph [17] of her judgment, Jefford J was explicit in pointing out that whilst it would be sensible for the main claim and the BLO application to be heard together, in the sense that one should not be stayed pending the outcome of the other, her comments were not intended in any way to bind a judge to determine the BLO application as part of the main claim. When the BLO application is heard remains always open to the judge as a matter of case management.
54. Jefford J’s two decisions were the subject of comment in BDW Trading Ltd v Ardmore Construction Ltd [2025] 1.W.L.R. 3101, a case concerning an application for a building information order under section 132. His Honour Judge Keyser KC (sitting as a Judge of the High Court) made the following observations about BLOs at [13] and [14]:

“13. Certain features of a building liability order may be noted. First, it concerns a relevant liability ‘relating to a specified building’: section 130(2). A building liability order cannot make associated companies liable for the entire liability of the original body to the applicant across a number of developments. The court can, of course, make any number of individual building liability orders in respect of the relevant

liabilities of one original body, but each such order will be discrete. Second, the precise and in that sense carefully confined definition of ‘associate’ is nevertheless relatively extensive on account of the definition of ‘the relevant period’.

14. Third, I can see nothing in section 130 that makes it a precondition to the making of a building liability order that the relevant liability of the original body shall already have been established. Recent decisions of Jefford J illustrate that applications for such orders may be made before the trial of the original body's liability, that such applications may proceed in tandem with the litigation against the original body, and that it may in a given case be convenient to defer consideration of an application for a building liability order until after the trial against the original body; see Willmott Dixon Construction Ltd v Prater [2024] EWHC 1190 (TCC), 214 ConLR 164; 381 Southwark Park Road RTM Company Limited v Click St. Andrews Limited [2024] EWHC 3179 (TCC). However, I do not read any of the Judge’s observations in those cases, made in specific factual contexts, as meaning that a building liability order cannot be made before the existence of a liability of the original body is established. If they did have such a meaning, I would respectfully be of a different opinion, for the following reasons. (1) There are many simple and obvious ways in which such a condition could have been expressed, but it was not. (2) It is unnecessary to imply such a condition. (3) It makes perfectly good sense to allow a building liability order to function as what might be termed an indemnity (‘If this original body has any relevant liability in respect of this specified building, this associate shall also have that liability’). In a given case, it may be very convenient to know in advance that an associate will be liable, if the original body's liability is subsequently established, so that the associate knows where it stands when it seeks to defend the substantive allegations. (4) The use of the word “any” in section 130(2), rather than merely “a”, suggests that an indemnity is permissible. Especially in view of the definition of “relevant liability”, “a” would have done very well to refer to an established liability. (5) The use of the word “is” (“...specified building is also... ”), rather than “shall also be”, is not a significant contraindication, in view of (a) the use of “any”, (b) the fact that a liability may be said to be extant though it is (falsely) disputed and not yet established by judicial determination, and (c) the next reason. (6) Subsection (5) makes clear that a building liability order can be made even if the original body has been dissolved. This clearly envisages that the original body does not have to be restored to the register if it were restored, mention of its dissolution would be pointless. There is nothing to suggest that the original body must have had liability established against it before its dissolution, and in view of the circumstances in which the Act was passed (the appreciation, after Grenfell, that many buildings had serious but hitherto latent safety issues) and the

extended limitation periods provided for in section 135 of the Act (15 or 30 years), section 130 is clearly designed to catch the situation where the original body has passed into history and either could not be restored to the register or, if it were restored, would be a mere empty shell. (7) The example of a building liability order in the Explanatory Notes supports this construction. For reasons mentioned below, any reliance on such an example can only be cautious, because the example of an information order is badly flawed. But in this case the example is consistent both with the wording of section 130 and with good sense. Of course, the construction here advanced does not at all mean that a building liability order cannot be made after liability has been established against the original body, only that it is not available only in such circumstances.”

55. Mr Hughes KC submitted that this passage should be treated with some caution, because (a) it formed no part of the ratio of the decision; (b) it is not clear to what extent the issues were ventilated in argument; and (c) the judge relied upon the Explanatory Notes without recognising that they post-dated the BSA and so had no formal status. Mr Hughes KC did not, however, suggest that anything in the wording of the statute meant that a BLO cannot be made before the existence of a liability of the original body is established. This was the question at which most of HHJ Keyser’s points were directed, and I agree with his analysis. The only additional point of substance going beyond the conclusion that the Court has jurisdiction to make an anticipatory BLO is that expressed by HHJ Keyser KC at point (3), echoed in his use of the phrase ‘good sense’ at point (7), namely that, in a given case, it may be very convenient to know in advance that an associate will be liable, if the original body’s liability is subsequently established, so that the associate knows where it stands when it seeks to defend the substantive claim. To this may be added, of course, convenience to the party prosecuting the claim against the original body, who will benefit from knowing whether the litigation is worth the candle. I respectfully agree with HHJ Keyser KC. That does not, of course, mean that such good sense is determinative of what is, in any particular case, just and equitable.

E3. Other material

56. Mr Hughes KC relied upon a number of statements from the Commons and Lords’ Hansard Records of the debates on the Building Safety Bill. He acknowledged that the quotes relied upon predated the introduction of the amendments in January 2022 which established the BLO provisions, but said they nevertheless gave an insight into what he described as the mischief the amendments were intended to remedy. Each of the statements focussed on the use of special purpose vehicles (‘SPVs’). It is clear from the statements that there was a clear awareness that a long limitation period of itself would be ineffective in providing redress if all the building works had been carried out by SPVs which were wound up following the completion of the development. Amongst the quotations relied upon is one dated 20 April 2022, from

Stuart Andrew MP, the Housing Minister who steered the legislation through parliament, who said:

“We are also introducing an ambitious toolkit of measures to allow those directly responsible for defective work to be pursued. Those measures include ... provisions removing the protections afforded by special purpose vehicles and shell companies...”

57. Both sides also referred the Court to the Explanatory Notes published in July 2022 (as referred to by HHJ Keyser KC in BDW v Ardmore). These explanatory notes post-date the enactment of the BSA 2022, therefore they do not have a special status. However, they can still have persuasive bearing on the meaning and purpose of the BSA in the same way as an academic article (see Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point [2025] EWCA Civ 856; [2026] 1 All E.R. 514). Mr Hughes KC referred to that part of the Explanatory Notes for section 130 which also referred to what was, in effect, the SPV issue which had been referred to in the debates. At paragraphs 1072 to 1073, the Notes say:

“...A practice used in property development is where a subsidiary company (which may be thinly capitalised) is set up to own and manage a development on behalf of the corporate group it is a part of. The subsidiary is often wound up once the development has been completed ...

Building liability orders have been designed to address the consequence described above ...”

58. Mr Hughes KC fairly accepted in oral submissions that it would be an overstatement to contend (as his written submissions had done) that ‘*the primary policy intention*’ underlying section 130 BSA was to avoid SPVs being created to carry out building works and dissolved shortly thereafter to avoid liability. He accepted that the policy intention was better described, as indeed the quotation from Mr Andrew suggests, as one to allow those directly responsible for defective work to be pursued, with the BLO being a tool introduced by the BSA to further that policy.
59. The Explanatory Notes also provide an ‘example’ of section 130 in action. The example is clearly describing an anticipatory BLO:

“The freeholder applies to the High Court for a building liability order to be applied to the parent company. The freeholder must show that the parent company is associated with the development company. The High Court must consider whether it is just and equitable to grant the building liability order, for example whether the parent company can receive a fair trial. In this example, the request for a building liability order is granted. The freeholder can now make a claim under the Defective Premises Act against the parent company. The court proceedings would then proceed as normal.”

60. In circumstances where there is no debate about whether it is, as a matter of jurisdiction, open to the Court to make an anticipatory BLO, this example is of no relevance to whether, in this case, it is just and equitable to do so. However, it perhaps serves to underline that the authors no doubt also considered that there was ‘good sense’, to coin HHJ Keyser’s phrase, in a scheme the purpose of which is to provide effective measures to allow those directly responsible for defective work to be pursued, in allowing a party pursuing a thinly capitalised company to obtain a BLO prior to the substantive pursuit of proceedings.
61. I distil the authorities and other material referred to the Court, insofar as relevant to the matters before me, as follows:
- (1) the assessment of whether it is just and equitable to grant a BLO is a broad test and necessarily fact specific;
 - (2) the power is discretionary and should therefore be exercised having regard to the purpose of the BSA and all relevant factors;
 - (3) the power includes the ability to make an anticipatory BLO, that is a BLO which is ordered before a finding of any relevant liability;
 - (4) the purpose of section 130 of the BSA is to provide the Court with powers to allow those directly responsible for defective work which gives rise to a relevant liability for the purposes of the statute to be pursued through their associates. Whilst those powers may have the effect of removing the protections afforded by special purpose vehicles and shell companies, the purpose of the BSA should not be defined as in any way limited to being directed at special purpose vehicles and shell companies;
 - (5) the Court should not seek to limit or circumscribe the statutory test by setting out an exhaustive list of factors;
 - (6) it will generally be sensible for an application for a BLO to be case managed within the same proceedings as the main action which will determine the liability which is claimed to be the relevant liability for the purposes of the BLO;
 - (7) whether an application for a BLO should be determined in advance of, as part of, or indeed after, the liability hearing in the main claim will be a matter of case management. Ultimately, whenever the application is heard, it may only be acceded to where the Court concludes that, at the point it is making the BLO, it is just and equitable to do so.

F. Prematurity

62. The BLO Defendants’ primary position is that it is premature to decide whether to grant a BLO upon this Application. The central submission advanced by Mr Hughes KC is that, given there is an extremely broad range of factors which a tribunal may and indeed ought to consider when applying the ‘just and equitable’ test, the decision can only be made after full investigation and examination at trial. He submits that the

Court is not in any position to reach a concluded view on relevant factors, whether individually or taken together, which would influence the outcome if the Application was made following trial.

63. By analogy, Mr Hughes KC referred to the approach of the Courts to:

(1) Part 8 claims. The Court will only resolve disputes on a Part 8 basis which are “*unlikely to involve a substantial dispute of fact*”: CPR 8.1(2);

(2) Summary judgment. On a summary judgment application (Easyair Limited v Opal Telecom Limited [2009] EWHC 339 (Ch) at [15]) the Court can only dispose of one party’s factual assertions on a summary judgment basis if there is no real prospect of its evidence on that issue being accepted.

(3) Preliminary issues. The TCC Guide states at §8.2.2:

“The court would ordinarily expect that, if issues are to be dealt with by way of a PI hearing, there would be either no or relatively limited oral evidence. If extensive oral evidence was required on any proposed PI, then it may not be suitable for a PI hearing.”

64. Although these analogies illuminate the approach the Court may adopt on this Application, the ultimate question remains the just and equitable exercise of discretion at the point in time the application is determined. As a matter of principle, and as Mr Selby KC accepted, it is plainly relevant for the Court to consider, by reference to the evidence available at the hearing, the likelihood that, after disclosure, witness evidence and expert evidence at trial, the Court would make a different order assuming a finding of a relevant liability against ACL. Given the overarching focus on what is just and equitable, and the stricture against formulating tests or criteria that might operate to fetter that discretion, both counsel sensibly cautioned against articulating any precise “test” (whether by reference to principles applicable to summary judgment or otherwise) that an applicant for an anticipatory BLO must satisfy. That said, it may safely be recognised, as both counsel agreed, that the greater the Court’s confidence that the same order would be made following a trial, the more inclined it will be to grant an anticipatory BLO.

65. It is for this reason that, contrary to the manner in which Mr Hughes KC structured his submissions, it is inappropriate to consider the question of prematurity separately and in advance of the question of whether it is just and equitable to make a BLO. Instead, it is more appropriate to consider each factor said by each party to weigh in the balance, considering not just the relevance and weight to be given to any particular factor, but the extent to which the Court considers, in relation to that factor, that it is in a position to determine the matter now, or whether the picture may be materially different at the end of the liability trial.

G. Anticipatory BLO: Is it Just and Equitable?

G1. Crest’s case

66. Mr Selby KC relies upon the following ‘key facts’ to underpin his application: (1) ACL is in administration and does not have the means to satisfy any judgment against

it; (2) ACL specifically entered administration because of its exposure to claims in relation to defects following the Grenfell Tower fire; (3) ACL is part of the Ardmore Group, which includes the BLO Defendants; (4) the Ardmore Group has been specifically restructured to ringfence ACL's liabilities from those of other companies within the group; (5) 'all roads lead to Cormac Byrne and/or the Byrne Family Trust'; (6) there can be no real dispute that the Development contains building safety risks within the meaning of section 131(6) of the BSA; (7) there can be no real doubt that ACL will be liable for those building safety risks; (8) ACL has been alive to both Crest's claim and third party claims for a long time; (9) there can be no real doubt that Cormac Byrne, and therefore the BLO Defendants, know all about Crest's claims and have known for some time; (10) the BLO Defendants were sent formal pre-action protocol letters of claim almost a year ago, and they showed little interest in engaging; (11) Cormac Byrne remains remarkably silent in this Application; (12) there is an Adjudicator's Decision for c.£14.9m relating to the External Wall Defects that has gone unpaid.

67. Facts (1) to (5) are, I find, established for the purposes of this Application by reference to the matters dealt with in Sections C and D above.
68. I am also satisfied, to a high degree of confidence, that facts (6) and (7) are made out on the evidence before the Court. Whilst of course the extent of defects, and the nature and cost of the appropriate remedial scheme, remain in dispute such that there must be a trial of the pleaded issues before the nature and extent of liability and quantum can be finally determined, Mr Hughes KC did not dispute either of these propositions. These facts are clear from the evidence placed before the Adjudicator, and the fact that no positive case on breach was advanced before him. Similarly, the Defence in the litigation largely puts Crest to proof of the alleged defects, and describes them, and the claimed remedial works, as 'overstated': whilst this may go to the extent of liability it is very unlikely to negate it. There is no positive case denying fitness for habitation. Notwithstanding the time that has passed since his dis-instruction, there is no evidence before the Court to undermine the conclusions of ACL's own erstwhile expert, Dr Crowder, that there exist defects in the external walls which create an intolerable safety risk (ranging from low-medium to high in different parts of the Development). ACL had full design and construction responsibilities. The BLO Defendants admit that ACL owed a duty under section 1 of the DPA to CNR (although that duty is denied in relation to CNO).
69. A high degree of confidence in these facts is relevant because it means that the Court is much more than likely, in due course, to be asked to make a (non-Anticipatory) BLO. This is relevant to whether such an order should be made now, providing that considering all the other factors it is just and equitable to do so.
70. Facts (8), (9) and (10) are also established on the basis of the evidence in Mr Lennon's witness statement. Again, Mr Hughes KC did not seek to dispute the propositions advanced. Their relevance goes, first, to providing support for facts (6) and (7): ACL (prior to its administration) and/or the BLO Defendants have had a proper opportunity to put forward a positive case on the existence of defects and fitness for habitation, but have not done so. It is also relevant, therefore, to the potential justness of an Anticipatory BLO. There may be cases in which an associate has had no involvement in, or opportunity to investigate, the facts and matters which underlie the basis upon which a BLO is sought against them, as at the date the application is made. In such cases the number of imponderables may be significantly

greater than they are in this case, which may mean that it is not just and equitable to make an Anticipatory BLO. Facts (8), (9) and (10) mean that this is not such a case.

71. Fact (11) is principally relevant to what the Court should make of the evidence of the BLO Defendants' financial standing and is considered further below in the context of the relevant aspects of argument. It is a matter of record that Mr Byrne did not submit any evidence on the application in support of the BLO Defendants' position that it would not be just and equitable presently to make either of the sought BLOs. It is also true, as Mr Hughes KC points out, that it is Mr Byrne who has signed a statement of truth on the Amended Defence, and the propositions advanced in that document (which include reasons why it is said that it is not just and equitable to make an order) can therefore be attributed to him on this Application.
72. Fact 12 is uncontroversial (and is principally relevant to the Adjudication BLO).
73. Mr Selby KC says, on the basis of these facts, that the Anticipatory BLO meets the purpose of the BSA, in requiring the BLO Defendants to stand behind ACL so as to create an effective route of redress against those responsible for the historical building safety defects. Emphasis is particularly placed on fact (5). Whilst it would not be correct to describe the BLO Defendants as 'a fluid, disorganised and blurred network or structure' (as in Edgewater), it is plain that the Ardmore Group is in effect a web of companies all with ultimate control by, and for the benefit of, Cormac Byrne and/or his Family Trust. Moreover, whilst it is fair for Mr Hughes KC to make the point that ACL was never an SPV within a structure designed from the outset to enable the parent to benefit from, but not be liable for defects within, a Development, facts (2) and (4) are clearly matters which weigh in favour of the exercise of discretion. ACL was placed into administration, for the benefit of the wider group, with the specific purpose of avoiding (amongst other things) the very specific liabilities that Parliament has purposefully targeted within section 130 of the BSA. There is no suggestion that doing so was not a legitimate and lawful business practice. However, whilst Mr Hughes KC emphasises the fact that the Ardmore Group did not operate with thinly-capitalised SPVs to avoid its liabilities from the outset, it is plainly of weight that, when those liabilities arose, the Group has restructured and placed ACL in administration, with, at least from that point onwards, the same effect. There is no basis upon which this picture will change between now and the conclusion of a trial against ACL, and the Court is as able to weigh these facts in the exercise of its discretion as it would be in due course.
74. I now deal with each of the points raised by Mr Hughes KC by which he contends it would not be just and equitable to make an Anticipatory BLO. There is inevitable overlap between issues of prematurity and issues relied upon substantively to resist the making of the Anticipatory BLO. Mr Hughes KC's written submissions made 12 points under the heading of 'prematurity', and 15 points made under the general issue of 'just and equitable'. I group points together sensibly in the sections below. (I identify in square brackets the relevant section numbering taken from those submissions).

G2. The purpose of the BLO remedy [H(i)]

75. In his written submissions, Mr Hughes KC characterised the primary policy intention underpinning section 130 as “*to avoid SPVs being created to carry out building works or developments and dissolved shortly after the works are completed to avoid liability, thus preventing domestic property owners from having their properties rectified*”. He pointed out that ACL was not an SPV or thinly capitalised, and that the BLO is not required to facilitate the remedial works which are already being funded. This has been considered in part at paragraphs 58, and 61(4) above. I consider this to be too narrow a characterisation of the purpose of the BSA. Particularly in the context of section 130, the emphasis placed on domestic property holders and a nexus with facilitating the actual carrying out of works is misplaced. These are undoubtedly very important facets of the overall scheme, but if that were the limit of the purpose of the BSA, it would substantially, if not wholly, be met by the scheme for ROs and RCOs. Sections 123 and 124 are focussed in terms of (a) who may bring an RO/RCO: a limited list albeit one which specifically includes, in effect, ‘the domestic property owner’ and (b) against whom an RCO can be brought: a landlord (current or at the qualifying time) or the developer, and a person (i.e. a separate legal entity) associated with one of these. In broad terms, it is the section 123/124 regime, with disputes dealt with by the FTT which provides swifter resolution than complex multi-party determination in the High Court, which enables domestic property owners to obtain orders requiring works to remediate building safety risks at their property, and orders which enable those works to be funded notwithstanding the dissolution or impecuniosity of the development SPV.
76. Yet, even through the more focussed lens of sections 123 and 124, Nugee LJ rejected as too narrow the argument that, considering the purpose of the powers, no RCOs were needed where the works were already being carried out and were adequately funded. The purpose of section 130 is wider: it enables broader justice to be done, reflecting (in the words of Lords Hamblen and Burrows) “*the legislative purpose of the BSA in ensuring those who caused historical building safety defects should pay for their remediation*”. Whilst therefore it is correct that in the present case the BLO is not required in order to facilitate the remedial works to be carried out, this is of little weight in the exercise of discretion.
77. I conclude that a BLO sought by Crest following a finding of liability against ACL would undoubtedly meet the broad purpose of the BSA and section 130 in particular, in ensuring those who caused historical building safety defects to pay for their remediation. This will not change. It is nevertheless necessary to consider the related point made by Mr Hughes KC that, even if a BLO may meet the purpose of the BSA in due course, an Anticipatory BLO does not.
- G3. *No Good Reason* [G(i)]
78. There is no dispute that the progress and funding of the remedial works do not depend upon the making of a BLO. That the BLO will not be needed to fund the works is, of course, *a fortiori* the case in the context of an Anticipatory BLO in circumstances where it is envisaged that it will not become effective (in the sense that the BLO Defendants would be liable to make payment to Crest) unless and until any quantified liability that ACL may have to Crest under section 1 of the DPA or as a result of a building safety risk is established at trial. It will also regularly be the case in the context of BLOs more generally, because the remedial works will often already have been or are in the course of being carried out – and if not voluntarily, then mandated and financially facilitated by the prior use of ROs and RCOs against the landlord or

developer, or their associates. This has been considered to some extent in the context of the ‘purpose’ of the BSA. The purpose is broader than simply the immediate facilitation of remedial works.

79. Nevertheless, Mr Hughes KC submits that if the purpose is to provide ultimate and effective redress against the responsible party, that purpose is met equally well by a BLO at the end of trial as by an Order now. In these circumstances, there is no good reason for a BLO now, and the absence of good reason weighs against the exercise of discretion, particularly if to make it now may prejudice the BLO Defendants.
80. First, the extent to which the Court might look at the ‘reason’ or motivation (good or otherwise) for a party is seeking to exercise a statutory right when judging whether it would be just and equitable is itself questionable: see Nugee LJ in Triathalon at [78] (above).
81. In any event, and contrary to Mr Hughes KC’s submission, I concur with the view given by HHJ Keyser KC in BDW that a good reason plainly lies in allowing a BLO to function as what might be termed an indemnity. Whilst Mr Hughes KC describes this as an entirely one-sided benefit to Crest (such an order is of obvious benefit to Crest in that an anticipatory BLO enables it to know whether the cost and expense of pursuing litigation against ACL will be worth the candle), it is to be noted that HHJ Keyser KC’s remarks in BDW focused on the ‘convenience’ to the *associate* (i.e. in this case the BLO Defendants) in knowing in advance whether they will stand to be liable for the original body’s liabilities, and therefore whether to defend the substantive allegations. This point has force: were the BLO Defendants to establish as they seek to do on this Application, on the basis of matters which would not change between now and the end of trial, that it is not just and equitable to grant a BLO, they would no doubt decide not to resource the defence and allow judgment to be entered against ACL knowing that there could be no effective monetary enforcement by Crest against them. The benefit of an anticipatory BLO is not, therefore, one-sided.
82. Moreover, even if the ultimate purpose of the BSA is served equally well whether the BLO is granted now or at the end of trial, this is not a reason not to grant a BLO in circumstances where the Court clearly has the power to do so, providing it is otherwise just and equitable to do so. Turning the submission on its head, it cannot be said that the purpose of the BSA is *not* served by granting an Anticipatory BLO.
83. Mr Hughes KC makes a number of other or related points about the absence of good reason in his written submissions. For completeness, I deal with them below. Mr Hughes KC’s submissions were that:
 - (1) Crest’s point is circular. It is said that the risk of losing a point (i.e. whether a BLO should be granted at the end of the liability trial), is not a reason why it should be determined now, and that Crest’s position is no different to many claimants where a particular issue may result in its claim failing. Mr Hughes KC goes further, submitting that inherent within the Application is that Crest currently does not know if it will succeed in establishing an entitlement to a BLO at the end of trial, and that given that doubt, it cannot be right for it to be determined summarily. However, the determinative nature of a particular point in a practical sense is often a good reason to have an early determination. Assume Crest had the benefit of a parent company guarantee, the proper construction or validity of which was in dispute. Determining that question

prior to incurring the expense of the main claim against ACL would make obvious (and analogous) sense. Whilst Mr Hughes KC coupled these submissions with the contention that the question of what is just and equitable is not susceptible to early, black-and-white legal analysis, the latter is of course a different point. It is obviously correct that if the Court is not in fact in a position to determine presently whether it is just and equitable to grant an Anticipatory BLO, it should not do so.

- (2) Crest's upstream liability has not been settled or determined, so there is a risk of a windfall. This is not right: on any view there is no windfall associated with the Anticipatory BLO in circumstances where its execution is contingent on the establishment of a quantified relevant liability on the part of ACL.
- (3) The parties' and Court's time and cost would not, in any event, be wasted if a BLO is not granted now, but refused at trial, where (a) the PNB Proceedings remain extant, (b) Crest's claim against Yuanda, the Third Defendant in the Crest Proceedings (who was the specialist subcontractor engaged by ACL to design and construct external wall systems to the Tower) remains extant and/or (c) Crest has sent or is sending letters of claim under the Pre-Action Protocol to Sto (who manufactured and supplied the render system) and Tweeds (the Employer's Agent for the Development). The relevance of other potential claims is considered further below, but in the context of 'good reason', this submission is also unpersuasive: on any view significant costs and expense – on the part of both Crest and (to the extent they continue to fund a substantive defence against ACL's liability) the BLO Defendants, and indeed the Court's, time would be wasted if ultimately the BLO Defendants have no liability to stand behind ACL pursuant to section 130 of the BSA, irrespective of any other extant claims. If that question can be determined justly and equitably at this stage, it makes obvious sense to do so from a case management perspective.
- (4) Even if a BLO is granted, Crest could still lose this claim and the Court cannot presume to the contrary. For the reasons set out above, the Court has a high degree of confidence that the Development contains building safety risks within the meaning of section 131(6) of the BSA and that ACL will be liable to Crest for those building safety risks. However, the Court does not, and does not have to, presume a finding of liability. If ultimately ACL is not liable to Crest, the BLO would be writ in water as there would be no relevant liability triggering an obligation on the BLO Defendants to pay anything. The point goes nowhere.
- (5) Crest can offset any legal costs it incurs against its tax liability. This is not relevant (nor does it meet the point that fruitless litigation is a waste of the Court's resources).
- (6) Granting a BLO now, as opposed to doing so at trial, would not result in material savings in the time and cost of the Proceedings. It is said that even if a BLO is granted, there would still need to be full evidence and argument on the extent and amount of the relevant liability, as well as the claims by both Crest and the BLO Defendants against other parties. This is undoubtedly correct if the Proceedings continue through to trial, but it does not detract from the existence of good sense in granting an Anticipatory BLO in an appropriate

case, or meet the point that the granting of an Anticipatory BLO may increase the prospect that the Proceedings may be subject to commercial settlement.

- (7) the Court would need to ‘revisit’ the question of a BLO in respect of the BLO Defendants’ contribution claim against Sto. However, the Court would not be ‘revisiting’ anything; it would be ‘visiting’. Different considerations may apply to whether it is just and equitable for a BLO to be ordered against Sto’s associates. The fact that the BLO Defendants may in due course seek a BLO against Sto in a separate application does not weigh materially against granting a BLO in favour of Crest on this Application.

84. Mr Selby KC advanced a further argument as to why, on the specific facts of this case, there is a good reason for granting a BLO now: this is what he referred to in argument as the crystallisation of liability but might more accurately be described as the crystallisation of the BLO Defendants’ contingent liability. The unchallenged evidence before the Court is in the administration of ACL, the claim by Crest (an unsecured creditor) against ACL was valued (in a document signed by Cormac Byrne) at (just) £1. Mr Horne, for the BLO Defendants, confirmed in evidence that the current provision for liabilities within the AGL consolidated accounts does not include provision for the present claim by Crest for a BLO. The ‘good reason’ advanced by Mr Selby KC is that granting a BLO now, rather than at the conclusion of trial, would require the BLO Defendants to reconsider its accounting provisions and cashflow forecasts and the like in the knowledge that it is going to have to meet ACL’s historic liabilities insofar as they are caught by the BSA. Mr Selby KC’s submission went as far as to contend that, on the evidence before me, the Court can conclude that without a BLO there is a real risk that there will be nothing within AGL to meet ACL’s liabilities in two years’ time. If that were the case, there would not be effective redress against the party responsible for the defective building, and the purpose of the BSA would be defeated.

85. I do not consider that on the evidence on this Application I can conclude that the real risk identified by Mr Selby exists, not least because its existence (advanced principally in reply submissions) was not pleaded or evidenced as a ‘good reason’ for granting the BLO and not dealt with, at least directly, by the BLO Defendants in evidence. That said, in general terms, the benefit to both sides of the making of appropriate accounting provisions may be a collateral advantage of an Anticipatory BLO. It is of itself unlikely to be of significant weight if it were not otherwise just and equitable to make such an Order in advance of a finding of liability.

G4. Crest is a commercial developer [H(ii)]

86. Mr Hughes KC argues that Crest is an established commercial developer, who has made and makes substantial profits from property development. Crest is not an individual leaseholder, an impecunious management company, a charity or a social housing provider etc., and as such is not the sort of entity in whose favour it is just and equitable to grant a BLO. He submits that in circumstances where Crest developed the Development to make profit, and knowingly took the risk that there may be issues with the Development and it may face claims, there is no injustice for Crest facing that risk.

87. At least on the facts of this case, that Crest is a commercial developer does not weigh against the making of a BLO. Because of the twin regimes – the RO/RCO, and the BLO – it is regularly going to be a (commercial) landlord or developer who has, either itself or through an associate, funded the remedial work and who will seek redress from the contractors, designers or others who caused building safety defects. As discussed at paragraphs 75-76 above, this reflects the purpose of the BSA, and it is in meeting this purpose where the justice lies.
88. There is obviously no issue of prematurity in respect of this factor.

G5. Comparative Profits [H(iv), H(v)]

89. Mr Hughes KC contends an important factor in whether to grant a BLO should be the extent to which an entity has made profits, both in respect of the Development and overall.
90. As to the Development, he contends that ACL's gross margin out of the Development was only c.£1.92m, and that, on the evidence of Mr Horne, accounting for overhead contribution of c.£3.9m, ACL overall made a net loss of £1.94m on the Development such that no profits would have gone to the BLO Defendants from the Development. Mr Hughes KC contends that in contrast, on Crest's figures insofar as they had information, Crest made gross profits of £15.9m from the Development, £7.2m net profit and £5.1m after corporation tax. He points out that Crest also still owns the value of the headlease of the Development, and that after the remedial works are completed, Crest will have the benefit of a Development with new external walls which comply with current Building Regulations, increasing the value of the Development and Crest's interests in the same and/or decreasing its maintenance costs. This characterisation is disputed by Crest. Nevertheless, assuming Mr Hughes KC is correct factually, the submission is that where Crest has made substantial profit on the Development, ACL made a loss and the BLO Defendants did not make a profit, it is not just and equitable to maintain Crest's profit line while increasing Ardmore's losses.
91. As for the position overall, Mr Hughes KC argues that Crest has made significantly more profit than the BLO Defendants since the date of the D&B Contract. He says that since 2006, CNO has made profits of £1.229bn (EBIT) since 2006. CN PLC has filed accounts consolidated on a group basis showing profits of £1,081bn (EBIT). In contrast, since 2006, ACL and AGL have made profits (generally) of only £60.05m (EBIT) and £53.85m (EBIT). He puts it in terms that Crest has the "deepest pockets" compared to the BLO Defendants.
92. In the context of this case, where both Crest and Ardmore are substantial and sophisticated corporations, even if of different relative size, little weight should be afforded to these points. Were it otherwise, at least generally, it would lead to the bizarre outcome that commercially unsuccessful builders were able to avoid the application of the BSA, whilst commercially successful ones could not. There is a myriad of reasons why a project may or may not be profitable for either developer or contractor, none of which have any obvious bearing on whether it is just and equitable that effective redress should be borne by a party responsible for historic building safety defects. The legislative purpose of the BSA is in ensuring those who caused historical building safety defects, not those with the deepest pockets, pay for their remediation. There may, of course, be other situations where, amongst other factors, a

significant disparity in financial heft between applicant and respondent could be a matter which weighs in the balance, but I do not consider that to be the case presently.

93. In the context of prematurity, Mr Hughes KC contends that disclosure provided so far relating to the level of Crest's profits is inadequate and this of itself is a reason that an Anticipatory BLO cannot justly and equitably be ordered. In light of the lack of weight afforded to the point in the assessment of what is just and equitable in this case, the broad outline of 'comparative profit' point is plainly sufficiently clear at this stage for such weight as may ever be afforded to the point to be assessed fairly. Indeed, a detailed and costly granular investigation into Development-related or historic profits of the contractor versus developer would rarely be anything other than an enormously wasteful distraction, far removed from that which may properly shed light on whether a BLO is just and equitable.
- G6. *The Main Claim/The amount of the BLO/Ardmore's Financial Position* [G(ii), G(iii), G(iv), H(iii), H(vi), H(x), H(xii), H(xiii)]
94. Crest has not admitted or settled its liability in the PNB Proceedings, which remain extant, but have been stayed. Mr Hughes KC argues that as far as the BLO Defendants can tell, it is not a mere formality or foregone conclusion that Crest will admit liability or settle and that the quantum of any settlement appears to be entirely at large. It is said that it would not be just and equitable to order a BLO where Crest has not formally recognised or agreed a liability with PNB, and the amount of Crest's liability is not settled. In oral argument, Mr Hughes KC fairly accepted that this point essentially folded into his argument that it was not just and equitable to order a BLO when the quantum that might attach to the BLO was unclear or unresolved.
95. There are plainly considerable uncertainties around what the quantum of any relevant liability may be at this stage. There is a central dispute about the extent of remedial works. There are other specific points that may affect quantum, the outcome of which will not be known until the end of trial, such as an argument that elements of the original works would have cost more, and ACL would have been paid more by Crest, if they had been carried out as Crest alleges that they should have been; and an argument that a credit is required to be given in respect of recoveries already made against the Second Defendant.
96. Mr Hughes KC argues that the amount of the liability must impact the question of whether it is just and equitable for that sum to be subject to a BLO. Mr Hughes KC contends that the Court would have very different views as to whether it is just and equitable if the amount of liability was £50,000 or £30,000,000. However, it is not obvious why this would be so. Jefford J made an Order in Click St Andrews pending quantification of the relevant liability (which may form a subset of the overall liability of the original body to the claimant) and there is nothing inherently inequitable or unjust to make such an order when quantum remains to be determined.
97. Mr Hughes KC links the uncertainty about the amount of any future liability to the BLO Defendants' financial position. It is said the question of whether the BLO Defendants can, in due course, pay the relevant liability, and the impact of a BLO on their financial position, is a relevant factor as to whether it is just and equitable to make a BLO, and that this cannot, by definition, be determined at this stage. However, if the BLO Defendants can pay whatever the relevant liability is in due course, that would be a factor that would be in favour of making the BLO. The Court can, today,

assume the worst, namely that the effect of making the BLO may, at the point at which any liability against ACL is crystallised, expose the BLO Defendants to a liability it then cannot or cannot fully discharge. Set against the other factors which would weigh in favour of making a BLO, I do not consider that this fact would, after trial, weigh against making an order to any material degree, and it need not therefore do so in the context of an Anticipatory BLO. This approach echoes that taken by Jefford J in Click St Andrews. It also reflects that taken by the FTT (and by implication the Court of Appeal) in Triathlon, in which it was observed that it would be an unusual case in which the source or extent of a respondent's assets or liabilities will carry much weight when deciding whether it is just and equitable to order that respondent to meet a relevant liability pursuant to Section 130. There are no particular features of this case which serve to increase the weight that should be attached to the BLO Defendants' present, or potentially, future ability to pay.

98. I afford no weight in the exercise of discretion to Mr Hughes KC's related submission that the effect of making an Anticipatory BLO in this case would be to create a queue of other parties seeking anticipatory BLOs against the BLO Defendants in relation to other claims, that it may make borrowing or raising money for performance bonds more difficult or, vaguely, "*what it will project to the market*". This is, in effect, the claimed prejudice in making an Anticipatory BLO. The first answer is that there is no evidence to this effect: the point was made, as Mr Hughes KC conceded, wholly by way of submission. In any event, if there was to be a deleterious financial effect to the BLO Defendants in the Court stating now that it is just and equitable for, upon the finding of any relevant liability against ACL, the BLO Defendants to stand behind it, that cannot sensibly be regarded as weighty prejudice, at least on the facts of this case. The anticipatory nature of the BLO does not of itself make it unjust or inequitable, even in circumstances where making such an order has a negative financial impact on the BLO Defendants.

G7. Relevance of the underlying issues and knowledge [G(v), G(vii), H(vii), H(viii)]

99. Mr Hughes KC submits that the question of whether it is just and equitable to make a BLO must involve a consideration of the culpability or blameworthiness of the different parties, and that that will not be known until the conclusion of the trial on liability.
100. Initially, this submission extended to a contention that until the Court had assessed the relative contribution of any and all third parties, whether or not part of the Proceedings, it would not be able to determine whether it was just and equitable to make a BLO against the BLO Defendants. However, Mr Hughes KC accepted during argument that the Court will determine the relative contributions of those third parties who share responsibility for the defects during the course of the Proceedings and this would be reflected in the finding of relevant liability which ultimately attaches to the BLO. So, if ultimately ACL were only to be found 50% responsible as between it and other defendants/third parties then, subject to joint and several liability, the BLO Defendants would only be required to stand behind ACL to the extent of that determined liability. The fact that the extent of this relative liability is as yet unquantified is not a reason why it would not be just and equitable to grant an Anticipatory BLO now. It is essentially just another facet of the uncertainty around quantum. The possible responsibility of other third parties, not part of the Proceedings, should similarly not weigh against the making of such an order. There is nothing to stop the BLO Defendants bringing other parties into the litigation and their

contribution can be weighed in due course. Ultimately, Mr Hughes KC did not pursue the argument that the potential liability or responsibility of third parties for building safety defects in the Development impacted the ability of the Court to make a just and equitable anticipatory BLO.

101. Mr Hughes KC did, however, pursue his submission that a factor in whether it is just and equitable to grant a BLO is the blameworthiness of Crest. The BLO Defendants plead:

“Crest is not a ‘truly innocent’ party. Crest was (or ought) itself to have been a knowledgeable developer, which owed its own duties and obligations to PNBC, including a duty under section 1 of the DPA. Crest engaged consultants, including Wintech, to review, inspect and approve the design and the Works. It is likely that Wintech and other consultants would have provided reports to Crest. Crest is required to prove, and disclose documents showing, its involvement in and/or knowledge of the elements of the design which it now alleges are defective during the Works.”

102. Crest deny any knowledge of the relevant defects, and plead, in addition, reliance upon contractual provisions which stipulate that any approval shall in no way reduce ACL’s obligations under the terms of the Design and Build Contract.
103. In contrast to the position in respect of third parties, it is not alleged that Crest caused the defects or that its conduct amounted to anything giving rise to legal responsibility for the losses (e.g. contributory negligence) resulting from the defects, or a break in the chain of causation, which would serve to reduce or eliminate the liability of ACL as between it and Crest. If this had been pleaded, then as with third parties, the extent to which that allegation succeeds will simply reduce the amount to which the BLO ultimately attaches. It would be a matter that resolves itself in due course, and is not a reason why it would not be just and equitable to make an anticipatory BLO which would attach to whatever the ultimate relevant liability is determined to be.
104. It is nevertheless said by Mr Hughes KC that Crest’s ‘fault’ by way, through its consultants, of approval of the design and the works, is a factor which should be taken into account (when the facts are known) in considering whether it would be just and equitable to issue a BLO, irrespective of the fact that the ‘fault’ does not sound legally in a reduction of liability. In parallel to this contention, Mr Hughes KC argues that another relevant factor in the exercise of discretion should be the nature and extent of ACL’s ‘fault’, irrespective of the extent of ACL’s legal liability e.g. a failure to have carried out the works with reasonable skill and care may mean that ACL is more at ‘fault’ than if its liability arises out of a technical breach. Both points give rise to the same issue: to what extent it is just and equitable to make an anticipatory BLO in circumstances where what may be described as ‘relative factual blameworthiness’ as between Crest and ACL has not been considered (and could not be determined on this Application).
105. In this context, both Counsel advanced submissions as to whether or how the Court could take relative factual blameworthiness into account when making a BLO. Could, for example, the Court order, in its discretion, a BLO in relation to a proportion of the

relevant liability which reflected, justly and equitably, the relative factual blameworthiness?

106. Mr Hughes KC contends that this would be possible in principle, but that the Court could only do so in a single unitary exercise after trial. As such, it would not be possible, as a matter of jurisdiction under the BSA, to order an anticipatory BLO which left to the trial judge the question of whether or to what extent the relevant liability could be reduced to reflect relative factual blameworthiness. Mr Hughes KC also contended that it would not be pragmatic to do so, even if he were wrong about jurisdiction.
107. Mr Selby KC contended that there was no power at all, when making a BLO, to reduce the relevant liability when that liability is transmitted to the associated company. In support of this, he placed reliance upon Edwin Johnson J's description of section 130 in Edgewater, in which (at [127]), he stated:

"Section 130 is engaged where a body corporate has a relevant liability, of a kind described in Section 130(3). That liability can then be made transmissible from the original body to a specified body corporate, or it can be made transmissible as the joint and several liability of two or more specified bodies corporate. The transmission of liability takes place pursuant to paragraph (a) or paragraph (b) of subsection (2), depending upon whether a building liability order is sought against one specified body corporate or two or more specified bodies corporate, and provided, in each case, that there is the required association with the original body."

108. As to whether a judge can reduce the relevant liability upon transmission (to use Edwin Johnson J's phrase), I agree with Mr Hughes KC. Edwin Johnson J was providing a generalised description, and certainly not considering whether a Court may specify that only part of a relevant liability may be transmitted, if the Court considered that it was just and equitable to do so. The purpose of the statute is to enable the Court to pass the liability for a building safety risk to those responsible for the defects only if it is just and equitable to do so. There is nothing in the language of the statute which requires such a binary outcome as would result from Mr Selby KC's construction. A BLO "*is an order providing that any relevant liability (or any relevant liability of a specified description)*" is transmitted to the associate. Section 130(6)(b) provides that "*specified means specified in the building liability order*". There are no express restrictions on what or how the Court may provide a specified description, but as a matter of language, the words convey the ability to specify some part of a relevant liability which is to be transmitted, and by implication leave some part or parts of a relevant liability which are not being transmitted. In a joint note from counsel following the hearing, they confirmed that there was no material in the authorities, parliamentary debates, explanatory notes or briefing papers that shed particular light on what "*any liability of a specified description*" was intended to mean. It is possible that the phrase, construed narrowly, encompasses no more than the ability to specify that the BLO attaches to a relevant liability for some specified defects and not others i.e. definable and separately identifiable elements of a relevant liability (as opposed to a *proportion* of a relevant liability). However, this is not a distinction necessitated by the language. The question of statutory interpretation is whether, considering the purpose of the BSA, the Court may, in ordering '*a specified*

description of a relevant liability’ to be subject to a BLO, specify a proportion of that relevant liability if it considers just and equitable to do so. I consider that it would be consistent with the purpose of the BSA to construe the phrase broadly so as to permit such an Order, if justice and equity demand it. A broad construction is also preferable as it allows the Court, to the extent it is just and equitable to do so, a way to limit the potential exposure of associate companies to the erosion and elision of corporate identity which the BSA entails.

109. The next question is whether the Court can make an Anticipatory BLO now, leaving to trial the question of whether any relevant liability would be the subject of reduction by way of specified description on account of relative factual blameworthiness. I do not consider that the language of the statute prevents this approach as a matter of what Mr Hughes KC describes as ‘jurisdiction’. It is inherent in the making of an Anticipatory BLO, which power has been vested in the Courts, that the determination of a relevant liability, or relevant liability of a specified description, follows the making of the BLO. Turning an Anticipatory BLO into a BLO which is ultimately enforceable rather than contingent is inherently a two-stage process. If a lack of certainty as to the outcome of the second stage means that it is not just and equitable to make an Anticipatory BLO (which is the argument advanced as a separate ground of objection under ‘*the extent of the BLO*’ at paragraphs 138-143 of his written submissions) it would mean in practical terms that the power vested in the Court could rarely, if ever, be exercised in practice.
110. Click St Andrews makes clear that the Court can grant an unspecific BLO following findings of liability in advance of quantifying those liabilities or providing a specified description of which defects the BLO applies to. There is similarly no reason in principle not to apply this two-stage process, inherent in an anticipatory BLO, to the future possibility of a reduction in a relevant liability upon its transmission when identifying the relevant liability or, as may be required, a specified description of the relevant liability, providing it is just and equitable to adopt this approach when the anticipatory BLO is made.
111. This is not to say that if there was a situation where the potential factual investigation of relative factual blameworthiness might go to whether it was just and equitable to make a BLO *at all*, then the Court should not do so in advance of the outcome of that factual investigation. However, such cases are likely to be rare, and this is not one of them. This is because the effect of Mr Hughes KC’s contention is that, after trial, a Court may conclude that the relative factual blameworthiness is such that, upon transmission to the BLO Defendants, the relevant (legal) liability should be reduced. In turn, this would only serve to *increase* the ability of the BLO Defendants to pay. If the Court determines in all the circumstances that it would be just and equitable to grant an Anticipatory BLO assuming *no* reduction will ultimately be made out (i.e. the worst case for the BLO Defendants), then the fact that the relevant liability might be reduced following trial is plainly not a factor which weighs against that determination. The point is, in substance, similar to Mr Hughes KC’s arguments, which I have rejected, that uncertainty around the quantification of liability should preclude an Anticipatory BLO. There is no reason for it to do so providing the Court assesses whether such an order is just and equitable assuming the worst-case scenario for the BLO Defendants.
112. If I am wrong about the ability of the Court to reduce the relevant liability when providing a specified description insofar as it considers it just and equitable to do so,

this does not alter the outcome on the facts of this case. Even taking the BLO Defendants' claim as to relative factual blameworthiness at its highest, in circumstances where the only choice open to the Court at the end of trial (as Mr Selby KC contends) was to transmit the legal liability in full, or not at all, I regard it as fanciful that the Court would conclude that the issue was of such significance (when weighed against actual legal responsibility) that it was not just and equitable to make a BLO.

G8. Building Safety Funding [G(ix), H(xi)]

113. The BLO Defendants, in their Defence, require Crest to prove if it or AQPM, the management company for the Development, received any funding from the Building Safety Fund for the remedial works, the amount of funding it received and the terms on which it did so. Mr Dawtrey's evidence on the Application is that Crest has not been the recipient of any funding from the Building Safety Fund or the Waking Watch Replacement Fund. There appears to be no dispute that APQM was the recipient of £2.2m in funding to cover pre-tender support works. Mr Hughes KC contends in his written submission that whether there is an overlap between the sums for which AQPM has received funding and the sums claimed by Crest is a factual dispute which requires proper disclosure and evidence at trial. It is said that this would be relevant because if AQPM has been paid for the same costs, then it would not be just and equitable to grant a BLO against the BLO Defendants for them. This was not a submission that was developed orally.
114. Mr Selby KC argues that as a matter of law, like tax benefits, public funds are collateral and do not normally operate to reduce damages and that, in any event any recipient of funding is obliged to pursue third parties in respect of the funds advanced. He denies that Crest would be required to give credit for a benefit which Crest has not received.
115. Whether or to what extent, following the factual investigation envisaged by the BLO Defendants, and legal argument, Crest must give a credit against its claim will primarily affect the quantum of its claim against ACL. This point is analogous to Mr Hughes KC's arguments on the uncertainty of quantum. If (although it is not clear), the BLO Defendants' case is that there may be a circumstance where funding has been received by Crest but which would not legally impact its claim but may nevertheless impact the just and equitable test, the point is analogous to the relative factual blameworthiness issue. Either way, providing the assessment by the Court is carried out at this stage assuming the worst case for the BLO Defendants, the fact that this investigation is yet to come does not affect the ability to make an Anticipatory BLO. It is fanciful to suggest that the Court would conclude following trial that Crest could not benefit from a BLO at all on account of this issue.

G9. Insurance [G(viii), H(ix)]

116. The BLO Defendants plead that Crest may have the benefit of insurance in respect of PNB's claim and the remedial works, and require Crest to prove what sums it has recovered or may recover by way of insurance in respect of the claims and costs pursued in these proceedings. In his written submissions (albeit not developed orally), Mr Hughes KC argues that Crest has refused to provide sufficient explanation or evidence as to the amount of its insurance policy or the status of its insurance claim for the Court or the BLO Defendants to understand its position and likely recovery. It

is said that it is therefore too early for the Court to decide the impact of Crest's insurance position on whether it is just and equitable to grant a BLO against the BLO Defendants.

117. The BLO Defendants accept that in terms of ACL's relevant liability, Crest's insurance position is irrelevant. However, it is argued that it is relevant to whether to grant a BLO against the BLO Defendants because in the context of a 'hierarchy of liability', a claim for recovery against an insurer should come above a claim which depends on a BLO on the basis that (a) Crest's insurer knowingly contracted with Crest, for financial benefit, and thereby voluntarily assumed a risk. When an insurer provides an insurance policy, they know that there is a risk that they may face a claim under that policy and have to pay out and (b) in contrast, the BLO Defendants did not contract with Crest or voluntarily assume a risk because the BLO regime has been imposed.
118. Mr Selby KC makes the point that this ignores the purpose of a BLO, which is to hold those directly responsible for historical building safety defects to account, and not their respective insurers. Moreover, were Crest's insurers to meet any policy claims, those insurers would be subrogated to any claims that Crest has against the BLO Defendants.
119. The fact of Crest's insurance position should be given no or little weight in the exercise of discretion. Even if I am wrong about this, the position is analogous to the relative factual blameworthiness issue. It is fanciful to suggest that the Court would conclude following trial that Crest (or its subrogated insurers) could not benefit from a BLO at all on account of this issue.

G10. Other Factual Disputes [G(x)]

120. Mr Hughes KC contends in his written submissions, but not developed orally, that there were a number of factual disputes between the parties which were relevant to the question of whether it is just and equitable to grant a BLO. These are summarised in Appendix C to the written submissions, under the following heads: (1) whether the BLO Defendants obtained tax relief for remediation cost provisions made by ACL; (2) Crest's knowledge of the defects; (3) third-party responsibility for the defects; (4) Crest's insurance position; (5) the motivation behind the decision of the directors of ACL to put ACL into administration; and (6) Crest's financial position. These have either been addressed above in the context of other arguments or are not matters to which any or any material weight should be given in the exercise of discretion. Their outstanding resolution are not reasons why it would be unjust or inequitable to make an Anticipatory BLO.

G11. Crest's alleged failure to provide adequate disclosure/RFI [G(xi), G(xii)]

121. By the order dated 27 October 2025, the Court permitted the BLO Defendants to request with their Defence the documents or categories of documents which they contended were relevant for the determination of the BLO Application and which Crest should disclose. Crest was required to "*put up, or shut up*", either disclose the documents requested or run the risk that the Court decides that, without providing the disclosure, it is not entitled to a BLO.

122. Mr Hughes KC's written submissions argued that the disclosure was inadequate and insufficient for the Court to be in a position to decide it is just and equitable to grant a BLO or to exercise its discretion to do so. The topics which were pressed as being those in respect of which inadequate disclosure affected the just and equitable test were (1) Crest's profit; (2) Crest's insurance position; and (3) Crest's claims against third parties. A further complaint has been made about the inadequacy of an RFI in relation to (1) and (2); and additionally in relation to the nature of remedial works. None of these matters are of relevance to the making of an Anticipatory BLO for the reasons already dealt with.

G12. Overall contribution to fire safety remedial works [H(xiv)]

123. Mr Hughes KC argues that since January 2018, the Ardmore group of companies has, collectively, incurred (up to 31 November 2025) overall costs of c.£100m in relation to fire safety defects and associated claims across 49 projects since the Grenfell Tower fire plus £15m for one project with both fire safety and non-fire safety defects. Mr Selby KC points out, as appears from the accounts, that (a) c£75m of this seems to have come from insurers and (b) the £15m referred to, to the extent it relates (as it seems to) to the judgment in BDW v Ardmore, was only paid after considerable legal wrangling in an effort to avoid paying it. However, putting Mr Selby KC's forensic point aside and taking the statement at face value, it is of no weight to the exercise of discretion on the Application before me, which relates to liabilities relating to the Development. It is, in any event, a fact stated now and can be taken account of now, and is not a point which militates in any way, as submitted, against the anticipatory nature of the order sought.

G13. ACL's Administration [H(xv)]

124. Mr Hughes KC pushes back on Crest's contention that ACL's administration was a cynical move, possibly timed to coincide with the Adjudicator's Decision. I make no determination that that characterisation is correct. The extent of the facts which I have weighed in my exercise of discretion relevant to the issue is as set out in Sections C and D above.

G14. Conclusion on Anticipatory BLO

125. Having weighed all relevant factors, I consider that it is just and equitable to order that any liability or any liability of a specified description that the First Defendant may have to the Claimants under section 1 of the Defective Premises Act 1972 or as a result of a building safety risk is also the joint and several liability of each of the BLO Defendants.

H. The Adjudication BLO

H1. Is the enforcement of the Adjudicator's Decision Procedurally Before the Court?

126. Mr Frampton, junior counsel for the BLO Defendants, argues first that, procedurally, the question as to whether to enforce the Adjudicator's Decision is not before the Court on the Application. He submits:

- (1) Crest's entitlement to claim sums under the Adjudicator's Decision has not been properly pleaded as it would be in standard enforcement proceedings.
 - (2) the more fundamental point is that the question of whether Crest is entitled to sums under the Adjudicator's Decision is a disputed matter for trial. It is not procedurally before the Court on this Application where there has been no application for summary judgment (or a preliminary issue) in respect of enforcement of the Adjudicator's Decision.
 - (3) the BLO Application cannot be the appropriate vehicle for determination where (1) it did not state that it was an application for summary judgment, as required by CPR 24.5(1), and (2) per CPR 24.4(1), Crest was not entitled to apply for summary judgment at the time of its BLO Application on 5 September 2025 because the BLO Defendants had not filed their acknowledgement of service (filed on 6 October 2025).
127. Mr Selby KC accepts that he has not brought a summary judgment application to enforce the Adjudicator's Decision. He contends he does not need to: Crest rely upon the Adjudicator's Decision as a binding determination of ACL's liability under the DPA unless and until challenged by the Joint Administrators. The application Crest makes is under section 130 of the BSA. It must, on evidence, satisfy the Court on this Application of the constituent elements of the BLO, as against the respondents to the Application, i.e. the BLO Defendants.
128. I consider that, assuming that the Adjudicator's Decision is capable in principle of being a 'relevant liability' (which is the BLO Defendants' next substantive point), the Court is capable, on an application brought pursuant to section 130, of determining the existence of such liability when ordering (should it be just and equitable) its transmission to an associate.
129. If I am wrong about this, the substance of the enforceability of the Adjudicator's Decision is, in any event, in issue between the parties. Had it been necessary, I would have granted permission for Crest to amend its application to bring a summary judgment application against ACL, granting such relief as necessary pursuant to CPR3.10(a). For the reasons set out in Section H3, I would have summarily determined that the Adjudicator's Decision should be enforced against ACL.
- H2. Is the obligation to comply with an adjudicator's decision a relevant liability?*
130. It is said by the BLO Defendants that the temporarily binding nature of an adjudication decision means that, in principle, it cannot constitute a 'relevant liability' for the purposes of the BSA.
131. Mr Frampton relies on the fact, if summary judgment proceedings to enforce the Adjudicator's Decision had been brought against ACL, the liability summarily determined would be the failure to comply with the obligation to pay the sum awarded by the Adjudicator; the Court would not (and not be able to) summarily determine the substantive claim against ACL which had been considered by the Adjudicator. Plainly, findings on the substantive issues may be, at trial, determined differently. He argues that in making a BLO, which is a final order, the Court would on this Application need to be satisfied that there was in fact a liability under the DPA or as a

result of a building safety risk. This is not the same as determining that an adjudicator had decided that there was a liability under the DPA. Put another way, Mr Frampton contends that in circumstances where the Court may determine following trial that no such liability exists, or that it exists in a more limited amount, such a later finding would, in effect, be a finding that the Court did not have the jurisdiction to have made the BLO in the first place.

132. Mr Frampton also submitted that standing back, Parliament cannot be taken to have intended that this ‘extraordinary’ power to grant BLOs would be exercised in respect of an adjudicator’s decision, which is by its nature “*rough justice*” and an “*interim remedy*” as between contracting entities. If it had so intended, he submitted, one would expect it to have been expressly identified within the definition of “relevant liability” in section 130 of the BSA or otherwise addressed in section 130.
133. Noting that BDW Trading Ltd v Ardmore Construction Ltd [2025] 1.W.L.R. 3101 at [29] the Court stated that “*there is no difficulty if the relevant liability has been established by judgment, arbitration award, adjudication decision or admission.*” Mr Frampton, correctly, identified that HHJ Keyser’s comments were concerned with the jurisdiction threshold in section 132(3)(a), which is whether “*it appears to the court*” that there is a relevant liability. Whilst an adjudicator’s decision is likely to be sufficient evidence for it to appear to the Court that there is a relevant liability in that context, Mr Frampton submits, with justification, that that is different to being satisfied that there *is* a liability. I accept that this case is not of direct assistance to the point on this Application.
134. Mr Frampton additionally argues that the Court should consider by analogy the position in respect of guarantors. In Beck Interiors Limited v Dr Mario Luca Russo [2009] EWHC 3861 (TCC), [2010] BLR 37, Ramsey J held at [49] and [50] that general words of a guarantee do not bind a guarantor to an adjudicator’s decision against the primary party:

“49. In The Vasso Goff J (as he then was) said this, at page 418-419:

‘It is well-established that general words of guarantee, guaranteeing the due performance of all the obligations of the principal debtor do not, of themselves, have the effect of the surety as bound by the arbitration award in an arbitration between the principal debtor and the creditor. This was established by the case of Re Kitchin [1881] 17 ChD 668, a decision of the Court of Appeal which had stood unchallenged for nearly 100 years and is still cited in leading text books as good authority today. As was pointed out in that case, if the law was otherwise, serious injustice might occur ... Again, to take a more extreme example, the principal debtor might take no part in the arbitration whatsoever ...’

50. Whilst Mr Mort sought to draw a distinction between a temporarily binding adjudication decision and an arbitration award, I consider that the principle derived from the cases

concerned with arbitration awards is equally applicable to any dispute resolution method which involve a decision on what sum is due or what damages are payable. This is made clear by Lush LJ in the passage from *Re Kitchen* cited above. The underlying rationale for that principle is that a party might neglect to defend itself properly; might make admissions or might otherwise conduct the case in the dispute resolution differently from the guarantor. Therefore, to overcome that difficulty, what is required is an agreement by the guarantor to be bound by the decision of an adjudicator, arbitrator or the court as between the parties to the contract or other means under which underlying dispute arises.”

135. The short answer to each of these submissions is that the Adjudicator’s Decision is binding until the dispute is finally determined by the Court. Its interim status does not mean that, pending any trial, it somehow does not create a liability. It plainly does. If the decision is not challenged in Court, it constitutes a binding determination of a party’s liability for all time. The determination of the existence of a liability is additional to the contractual obligation to comply with any determination. The fact that the standard method of summarily enforcing an adjudicator’s decision is through a cause of action arising out of the obligation to pay does not mean that an adjudicator has not also determined the existence of a substantive liability which may constitute a relevant liability.
136. The fact that an adjudicator’s decision may determine the existence of a ‘relevant liability’ for the purposes of section 130 plainly does no particular injustice, in itself. The BLO Defendants can claim (or more accurately given the extant proceedings, counterclaim) in restitution for return of the moneys ordered to have been paid subject to the BLO (see by analogy Lord Mance’s comments (with whom the other Justices of the Supreme Court agreed) in Aspect Contracts (Asbestos) Limited v Higgins Construction Plc [2015] UKSC 38 at paragraph 24). Crest were also willing to give an undertaking in respect of any such overpayment, insofar as necessary. The extent to which, in any particular case, there may be injustice in attaching a BLO to the (potentially temporary) liability can be considered explicitly as part of the just and equitable test. The analogy to the principle that the general words of a guarantee do not bind a guarantor to an adjudicator’s decision is not directly apposite to the statutory construction of the meaning of ‘liability’ in the BSA. As Mr Selby KC points out, the potential injustice lying behind the guarantor principle is directly met by the requirement on the part of the Court explicitly to consider whether it *is* just and equitable to impose a BLO in respect of any particular, established liability. Given that safety valve, there is no imperative to construe the word ‘liability’ other than naturally.
137. Contrary to the submissions advanced by Mr Frampton, it cannot be presumed that the BSA would or should have expressly made clear that the word ‘liability’ would include the binding but interim liability created by adjudication. Rather the contrary: liability is an ordinary word, and it is Mr Frampton’s argument that seeks to carve out a particular type of liability, the existence of which is well known and, indeed, central to the very industry most closely associated with the BSA. If Parliamentary intention had been that the two regimes – the statutory scheme for adjudication, and the statutory scheme created by the BSA – were mutually exclusive, it is this that one might have assumed would be spelt out.

138. The Adjudication determined (at paragraph [50]) that the extent of the fire safety defects in the external walls is such to render certain dwellings unfit for habitation. It was determined that ACL is in breach of its duty owed to CNR and/or CNO pursuant to Section 1 (1) (a) of the DPA. That is a finding of liability which is presently binding on Crest and ACL. The liability created by the Adjudicator's Decision is a liability under the DPA, as the Adjudicator determined in terms.
139. I reject the contention that, because the Adjudicator did not say '*there is a building safety risk*' in terms, that the Court is precluded from looking at the substance of the decision and asking whether the determined liability was incurred as a result of a building safety risk. The Court can plainly look at the substance of the liability. Mr Frampton did not attempt to argue the point as a matter of substance. Building safety risk means a risk to the safety of people in or about the building arising from the spread of fire or structural failure. Liability for '*fire safety defects in the external walls is such to render certain dwellings unfit for habitation*' as determined falls squarely as one incurred as a result of (a) and/or (b) of section 130(3).
140. Finally, I also agree with the alternative way in which Mr Selby KC puts the case: the failure to comply with the Adjudicator's Decision is itself a liability which is capable of being a 'relevant liability' for the purposes of the BSA. It is a liability that was 'incurred as a result of a building safety risk', by reason of a sufficient causal nexus between the substantive liability (determined by the Adjudication) and the consequent liability (created by non-payment).
- H3. *Do the BLO Defendants have a better than merely arguable case that the Adjudicator lacked jurisdiction?*
141. The BLO Defendants argue that the Adjudicator lacked jurisdiction on three grounds. If these grounds are reasonably arguable as jurisdictional points (i.e. the summary judgment test) it is common ground that the Court should not summarily determine that there is a relevant liability.
142. The grounds are (1) the Adjudicator decided that ACL was liable under the DPA. However, the Adjudicator did not have jurisdiction to determine such a claim. A claim under the DPA is not a dispute arising under the D&B Contract; (2) the Adjudicator awarded sums to CNO who was not a party to the Contract; and (3) even if it was a party to the D&B Contract, CNO was not owed a duty under section 1(1)(a) of the DPA.

H3.1 Is a claim under the DPA a dispute 'under' the D&B Contract?

143. The standard Article 5 of the D&B Contract states that:
- "If any dispute or difference arises under this Contract either Party may refer it to adjudication in accordance with clause 39A."
144. This provision was deleted by the parties and replaced with:

“Any dispute which by virtue of Part II of the Housing Grants, Construction and Regeneration Act 1996 is to be referred to adjudication shall be referred to adjudication in accordance with the Technology and Construction Solicitors Association Adjudication Rules (TeCSA Adjudication Rules) current at the time of reference.”

145. Section 108 of the HGCRA states that:

“A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.”

146. Mr Frampton contrasted this wording with Article 6A which referred, in the context of arbitration, to “*any dispute or different as to any matter or thing of whatsoever nature arising under this Contract or in connection therewith...*”. This clause was, in fact, deleted. Clause 6B, relating to the Court’s jurisdiction, used the phrase, ‘*all matters touching upon or concerning this Contract*’.

147. The BLO Defendants accept that Joanna Smith J decided in BDW Trading v Ardmore Construction Limited [2024] EWHC 3235 (TCC) that a similarly worded clause (and which similarly could be contrasted with different language in an arbitration clause) provided jurisdiction over a claim under the DPA. By an order dated 11 February 2025, Coulson LJ granted permission to appeal that judgment on the point. Following ACL’s administration, the administrators decided not to continue with the appeal which was on condition that ACL pay the costs of the appeal. Mr Frampton submitted that the Court should, on this Application, reach a different view to that reached by Joanna Smith J.

148. Mr Frampton started his analysis by focussing on the construction of the clause (which in effect is the language of the statute imported into the D&B Contract) from first principles, and in particular the word ‘*dispute*’. He contended that, in the context of adjudication, ‘a dispute’ is a claim which is not admitted. He then submitted that, in reading Article 5/Section 108, the right to refer to adjudication can be effectively read as, ‘A party has the right to refer any claim arising under the D&B Contract which is not admitted for adjudication...’ Reworded in this way, Mr Frampton says it becomes clear that a claim under the DPA would not be included.

149. Mr Selby KC starts with the language of the DPA. Section 1 states:

‘A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—

(a) if the dwelling is provided to the order of any person, to that person; and

(b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;

to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.’

150. The duty under the DPA relates to work that a person takes on. It is, submitted Mr Selby KC, the D&B Contract which defines the work which ACL took on; put another way, it was the D&B Contract which created the obligations giving rise to the DPA duty. In this context, a claim brought pursuant to the DPA would be a claim ‘under the Contract’ even before the decision of the House of Lords in Fiona Trust & Holding Corporation and Ors v Privalov & Ors [2007] UKHL 40. Whilst Mr Frampton was right to point out that an express clause relating to the DPA was deleted from the standard form underlying the D&B Contract, there was included a bespoke contractual obligation in Clause 2.5.2.5 to comply with Statutory Requirements, broadly defined by clause 6.1.1.2.
151. Mr Selby KC then relied upon Fillite (Runcorn) Limited v Acqu-Lift (Runcorn) Ltd (1989) 26 ConLR 66, in which the phrase ‘under a contract’ in an arbitration clause was held insufficiently broad to include claims for negligent misrepresentation, for misrepresentation under the Misrepresentation Act 1967, or a claim based upon an express oral guarantee or a collateral contract. Slade LJ said:

‘In my judgment, the parties, by including in the heads of agreement the arbitration clause in the narrow form which it took, demonstrated their intention to refer to arbitration any disputes which might arise regarding the rights and obligations created by or incorporated in the heads of agreement themselves...’

152. The nature of the distinction being drawn in earlier cases is explained in similar terms in Fiona Trust by Lord Hoffman at [11]:

Your Lordships were referred to a number of cases in which various forms of words in arbitration clauses have been considered. Some of them draw a distinction between disputes ‘arising under’ and ‘arising out of’ the agreement. In Heyman v Darwins Ltd [1942] 1 All ER 337 at 360, [1942] AC 356 at 399 Lord Porter said that the former had a narrower meaning than the latter but in Union of India v E B Aaby’s Rederi A/S, The Evje [1974] 2 All ER 874, [1975] AC 797 Viscount Dihorne ([1974] 2 All ER 874 at 885, [1975] AC 797 at 814), and Lord Salmon ([1974] 2 All ER 874 at 887, [1975] AC 797 at 817) said that they could not see the difference between them. Nevertheless, in Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd [1988] 2 Lloyd’s Rep 63 at 67, Evans J said that there was a broad distinction between clauses which referred ‘only those disputes which may arise regarding the rights and obligations which are created by the contract itself’ and those which ‘show an intention to refer some wider class or classes of disputes.’ The former may be said to arise ‘under’ the contract while the latter would arise ‘in relation to’ or ‘in connection with’ the contract. In Fillite (Runcorn) Ltd v Aqua-Lift (1989) 26 ConLR 66 at 76 Slade LJ said that the phrase ‘under a contract’ was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract. Nourse LJ gave a judgment to the same effect. The court does not seem to have been referred to Mackender v Feldia AG [1966] 3 All ER 847, [1967] 2 QB 590, in which a court which included Lord Denning MR and Diplock LJ decided that

a clause in an insurance policy submitting disputes ‘arising thereunder’ to a foreign jurisdiction was wide enough to cover the question of whether the contract could be avoided for non-disclosure.’

153. Mr Selby KC submits, in my view correctly, that the obligation to comply with the DPA was created, at least indirectly, by the D&B Contract, through which ACL took on the works to which (both explicitly by clause 2.5.2.5 and in any event) the DPA applied. A construction which meant that a claim for breach of clause 2.5.2.5 was included within the agreed dispute resolution framework but the identical claim for a direct breach of the DPA was not, is the sort of distinction which would not accord with the reasonable commercial expectations of the parties referred to by Lord Hoffman (even if the clause were otherwise construed ‘narrowly’ pursuant to the Fiona Trust distinction). Mr Frampton’s contention that matters become clearer when considering the fact that a dispute is a ‘claim which is not admitted’ does not add to the analysis. Similarly, his point that a duty under section 1 of the DPA can arise other than coterminously with the contract, whilst correct, is not relevant where of course those others who may be owed a duty will not be people who benefit from an adjudication provision.
154. Notwithstanding this conclusion, I proceed to consider both Fiona Trust and the arguments articulated forcefully by Mr Frampton that, as had previously been advanced before Joanna Smith J, and indeed canvassed in at least two other first instance decisions, the reasoning in Fiona Trust is inapplicable to adjudication. As noted by Lord Briggs in Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Limited [2020] UKSC 25; [2021] 1 All Eng LR 697 at [40], the two first instance decisions (prior to the decision of Joanna Smith J) were Hillcrest Homes Ltd v Beresford and Curbishley Ltd [2014] EWHC 280 (TCC), (2014) 153 ConLR 179 in which HHJ Raynor QC saw ‘*considerable force*’ in the submission that the reasoning in Fiona Trust was inapplicable to construction adjudication because the provision for adjudication was the consequence of statutory intervention (at [50]); and J Murphy & Sons Ltd v W Maher and Sons Ltd [2016] EWHC 1148 (TCC), (2016) 166 ConLR 228, [2017] Bus LR 916 in which Akenhead J reached the opposite conclusion, treating the learning about arbitration in Fiona Trust as a useful analogy at para [23]. Lord Briggs also noted that differing views are also expressed in the leading practitioner texts: the editors of *Hudson’s Building and Engineering Contracts* (14th edn, 2019) prefer Judge Raynor’s view, at para 11–022, while the editors of *Keating on Construction Contracts* (Supplement to 10th edn, 2019), para 18–077 appear to veer toward recognising the force of Fiona Trust by analogy.
155. Although the point was not decided by Lord Briggs, it is clear that whilst recognising that ‘*there are plainly points to be made on both sides*’, a fair characterisation of the view then expressed is one which appears to see more force in the application of Fiona Trust:

“There are obvious differences between arbitration and adjudication, but they are both types of dispute resolution procedures for which provision is made by a contract between the parties, in which recourse to that procedure is conferred by way of contractual right. I am not persuaded that the statutory compulsion lying behind the conferral of the contractual right to adjudicate points at all towards giving the phrase ‘a dispute arising under the contract’ a narrow meaning, by comparison

with a similar phrase in a contract freely negotiated. The fact that, after due consideration of the Latham Report, Parliament considered that construction adjudication was such a good thing that all parties to such contracts should have the right to go to adjudication points if anything in the opposite direction. Indeed, the fact that the right to adjudicate is statutorily guaranteed is a powerful consideration favourable both to its recognition as a matter of construction, and to the caution which the court ought to employ before preventing its exercise by injunction.”

156. Support at the highest level, albeit obiter and as such not a binding determination, can also be derived from Aspect Contracts (Asbestos) Ltd v Higgins Construction plc [2015] Bus LR 830, in which Lord Mance concluded that he was “*very content*” and, later, “*prepared*” to proceed on the basis that a conterminous tort claim can fall within the language of section 108(1) of the HGCRA.
157. The key passage from Lord Hoffman’s judgment in Fiona Trust is found in paragraphs [12] and [13]:

“[12] I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law. It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsman of so widely used a standard form as Shelltime 4 obviously regarded the expressions ‘arising under this charter’ in cl 41(b) and ‘arisen out of this charter’ in cl 41(c)(1)(a)(i) as mutually interchangeable. So I applaud the opinion expressed by Longmore LJ in the Court of Appeal (at [17]) that the time has come to draw a line under the authorities to date and make a fresh start. I think that a fresh start is justified by the developments which have occurred in this branch of the law in recent years and in particular by the adoption of the principle of separability by Parliament in s 7 of the 1996 Act. That section was obviously intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration. But s 7 will not achieve its purpose if the courts adopt an approach to construction which is likely in many cases to defeat those expectations. The approach to construction therefore needs to be re-examined.

[13] In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction. As Longmore LJ remarked, at [17]: ‘[i]f any businessman did want to exclude

disputes about the validity of a contract, it would be comparatively easy to say so.”

158. Mr Frampton fairly reminded the Court that what Fiona Trust decided was that, as set out in the first sentence of [13] above, the construction of an arbitration clause should start from the assumption that parties are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. This was said to be a key point of distinction: the right (/obligation to submit) to adjudicate relates to a single dispute, and in practice there is every chance that where different disputes are referred at different times then a different adjudicator may be appointed. The necessary consistency of a single tribunal does not apply.
159. The other points of distinction were submitted to be: (1) adjudication is not generally consensual (cf. Lord Hoffman at [5]). Even where expressed or implied into a contract, this is through the imposition of a statutory scheme which is mandatory; (2) the emphasis upon the parties agreeing arbitration on the grounds of “*neutrality, expertise, privacy, the availability of legal services at the seat of arbitration and the unobtrusive efficiency of its supervisory law*” (Lord Hoffman at [6]) does not apply to adjudication; (3) the distinction between arbitration and court (Lord Hoffman at [7]) is different in the context of adjudication, which does not displace or oust the jurisdiction of the Court, and the related point that there remain questions which adjudicators cannot determine (e.g. whether there is a valid contract); and (4) the fact that the invalidity of a contract does not necessitate the invalidity of the arbitration clause (Lord Hoffman at [9]).
160. Mr Frampton also argued that:
- (1) The Court should place considerable weight on the distinction between the broader words used in Article 6A and the words relating to adjudication;
 - (2) the D&B Contract was agreed, and the HGCRA was enacted, before the decision in Fiona Trust and thus the relevant factual matrix at the time would involve consideration of the pre-Fiona Trust distinction.
161. Each of these points was dealt with by Joanna Smith J in a lengthy and detailed analysis from paragraphs 41 to 80 of her judgment, which included consideration not just of the points of principle but the previous decisions of Hillcrest and Murphy, and the observations of Lord Briggs in Bresco, and Lord Mance in Aspect. The judge also considered the content of the practitioner texts referred to above, as well as *Coulson on Construction Adjudication* 4th Edn, published after Aspect but before Bresco, which stated [at 7.129] that whilst the conclusion in Hillcrest ‘may well be right’, the point ‘remains open for clarification’.
162. I do not consider that the reasoning of Joanna Smith J can be improved upon. I respectfully endorse and adopt it in answer to Mr Frampton’s points which were, in all but one respect which I consider further below (namely Hansard), in substance the same as those advanced in BDW. The following is therefore a summary of my conclusions:
- (1) I agree with Joanna Smith J, and Sir Robert Akenhead in Murphy, that Fiona Trust confirms a “strongly signposted” departure from previous linguistic

distinctions between disputes arising on the one hand “under” and, on the other hand, “arising out of” or “in connection with” the underlying contract between the parties, which “reflect no credit upon English commercial law”;

- (2) whilst HHJ Raynor QC in Hillcrest seemed principally persuaded by the distinction between a wholly consensual relationship in arbitration and the adjudication regime having been imposed by statute, I rely upon the observations of Lord Briggs in Bresco which substantially undermine this argument: indeed, Joanna Smith J records that, in light of these comments, the statutory origin argument was conceded as one upon which no weight could be placed;
- (3) when the statutory origin argument is removed, both are types of resolution procedures for which provision is made by a contract between the parties, in which recourse to that procedure is conferred by way of contractual right. It might be apt to note (albeit as, I accept, a purely anecdotal point and one which may be of no real weight in the issue of statutory construction) that, 30 years on from the enactment of the HGCRA, adjudication has been so thoroughly adopted with success by the construction industry that were the statutory imposition of adjudication to be removed, it is highly likely that it would continue as a widespread dispute resolution process by consent;
- (4) Joanna Smith J’s analysis, with which I agree, at [64] deals directly with the argument that the matters raised by Lord Hoffman at [6] of Fiona Trust do not apply to adjudication. In short, in broad terms they do, and even if some of the issues are not directly transmissible (e.g. convenience of seat of the arbitration), the absence of that point does not of itself explain why the application of Fiona Trust to the construction of adjudication clauses is somehow inappropriate;
- (5) the fact that there may be a number of different adjudicators to which a number of different disputes between the same parties may be referred is a potential point of distinction between arbitration and adjudication, but not a necessary or conceptual one. As pointed out by Joanna Smith J at [63], parties may by agreement appoint the same adjudicator for all disputes. It would be odd if the phrase ‘under the contract’ were to be construed differently depending upon whether the parties have in fact exercised their right to so agree. I also agree with Joanna Smith J’s observation that the fact there may be different people appointed for different disputes does not detract from the general proposition that business people are likely to want their existing (live) disputes to be determined by an adjudicator of their choice, as the most commercially efficient and cost effective means of dispute resolution: see also the concurring remarks of Akenhead J at paragraph 31(c) of Murphy.
- (6) This applies equally to the remaining differences e.g. that adjudication does not oust the jurisdiction of the Court. Whilst these may be so, the fact of such distinctions does not of itself explain why the application of Fiona Trust would be unprincipled or inapposite.
- (7) Mr Frampton’s point about the factual matrix at the time of the D&B Contract and the enactment of the HGCRA also arose in BDW, and was dealt with at [68] – [69]. The short answer is that, as pointed out by Lord Hoffman in the

passage at [11] quoted at 152 above, there was no particular clarity or consistency prior to Fiona Trust which itself could inform the proper construction of the phrase.

163. As to reliance upon the wording of clause 6A, this is difficult for Mr Frampton in circumstances where the clause was deleted. Looking within the four corners of the D&B Contract as executed, no such contradistinction exists. Whilst the words applying to the jurisdiction of the Courts were extremely broad (“*all matters touching upon or concerning this Contract*”), there is considerably less force in the comparison with what is in any event a somewhat otiose clause in circumstances where the Court would have jurisdiction in any event. The point was stronger for Ardmore in BDW, in circumstances where the arbitration clause had not been deleted. Yet, the point was regarded as of no material significance by Joanna Smith J for the reasons given at paragraphs [78] and [79], and I take a similar view (particularly where the point is of less force in the present case).
164. It is necessary to deal in more detail with Mr Frampton’s reliance upon Hansard. This was only dealt with briefly by Joanna Smith J at [66], in circumstances where the argument before her relied upon no more than the reference to Hansard in *Hudson*, and had not otherwise been foreshadowed in Ardmore’s evidence nor (beyond the passing reference to the Hudson’s Supplement) had it been developed in any detail in its skeleton. A more thorough approach has been adopted by Mr Frampton before me.
165. Reliance is placed upon the following extract from Hansard for the debate in the House of Commons on 8 July 1996 (Volume 281) in which the Minister of State for Construction, Planning and Energy Efficiency (Robert Jones) made the following comments in response to a proposed amendment by Mr Raynsford to add the words “*or in connection with*” after “*under*” to section 108 of the Bill which became the Housing Grants, Construction and Regeneration Act 1996. The full exchange is as follows:

Mr Raynsford

“Amendment No. 133 relates to a small point, but one that may have considerable significance. It simply seeks to insert the words ‘or in connection with’ after the reference to construction contracts in clause 108.

The technical issue that has prompted the amendment was raised by a barrister with considerable experience in construction matters, who regularly writes for one of the best-read magazines in the industry. He has written to me - he also wrote to the Minister - to express concern that the Bill’s wording might leave a loophole. He said in his letter:

‘The reason is that the words “arising under a contract” have been held by the Court of Appeal’— ‘he quotes the case of Fillite Runcorn Ltd. v. Aqua-Lift in 1992—might be construed “to exclude jurisdiction for such matters as negligent misstatement and misrepresentation.”

‘Arising under a contract’ is not an all-encompassing phrase.’

If there is a risk that the wording of the legislation is defective and it is necessary to include the words ‘or in connection with’ in order to remedy that defect - as the barrister recommends - that is a modest change that will ensure that the purposes of Parliament are not frustrated. I hope that the Minister can give a response to the matter, as he has also received the letter to which I referred.

Mr Robert B. Jones

“I distinctly remember the hon. Member for Greenwich beginning his speeches on this part of the Bill in Committee by saying that he wanted to keep lawyers out of the matter, but he is now citing barristers in support of his argument.

Amendment No. 133 would widen the scope of adjudication from disputes under the contract to disputes under or in connection with the contract, which would be a huge step. The adjudicator is appointed under the contract and must be guided by its terms. He cannot turn his attention to matters that are not covered by the contract or that are the subject of other contracts, even between the same parties. The amendment would give the adjudicator an horizon different from the one that has been subject to debate in the past few months, and we cannot even begin to consider such a change at this stage. Even if we could be persuaded that such a dramatic adjustment were necessary, it would be a major task to give him the new powers to tackle his new role. He would need statutory powers, and he might ultimately become almost an arbitrator. The industry is keen to avoid that, so I hope that the hon. Member for Greenwich will think again. The hon. Gentleman should be happy with the Government amendments in the group, and I commend them to the House.”

166. The first question is, of course, the circumstances in which the Court should have regard to this material at all. The leading authority is the House of Lords decision in Pepper v Hart [1993] 1 All ER 42. Lord Browne-Wilkinson articulated the limits of the relaxation of what, up to then, was a restriction of reference to Parliamentary material for statutory interpretation. Reference is permissible only where: (a) legislation was ambiguous or obscure, or led to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together, if necessary, with such other Parliamentary material as might be necessary to understand such statements and their effect; and (c) the effect of such statements was clear (see 631, 634, 640; and the distillation by Lord Bingham in R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme [2001] 1 All ER 195 at [211]).
167. In his concurring judgment, Lord Bridge indicated (at [49g]) that it should only be in the rare cases where the very issue of interpretation which the courts are called on to resolve has been addressed in Parliamentary debate and “*where the promoter of the legislation has made a clear statement directed to that very issue*”, that reference to

Hansard should be permitted. Lord Oliver used similar language, and also warned that ingenuity can sometimes suggest ambiguity or obscurity where none exists in fact.

168. Mr Frampton contends that the phrase “under the contract” within the statute is ambiguous. The fact that parties, in argument, advance two different constructions of a word or phrase does not, of itself, mean that the requirement for ambiguity for the purposes of Pepper v Hart is met. Were it otherwise, recourse to Parliamentary material would be commonplace, rather than rare (see also the fear expressed by Lord Bingham at [211d] of Spathe Holme). If the Court can determine the meaning of the words according to ordinary principles of statutory construction, the meaning is not ambiguous. If it is right that, analogous to Fiona Trust, the phrase ‘under the Contract’ in the HGCRA should be construed broadly pursuant to the ordinary principles of construction adopted in that case, then there in fact is no ambiguity.
169. If I am wrong and the ambiguity threshold is met in circumstances where, as I have already noted, there were at least more than one view prior to Fiona Trust, it is necessary to consider the other threshold criteria. I am content to conclude that the statement relied upon was made by a relevant Minister. The remaining critical question is whether the meaning has been unambiguously clarified by the parliamentary material. As pointed out by Lord Bingham in Spathe Holme:
- “(3) Unless parliamentary statements are indeed clear and unequivocal (or, as Lord Reid put it in Warner v Metropolitan Police Comr [1968] 2 All ER 356 at 367, [1969] 2 AC 256 at 279, such as ‘would almost certainly settle the matter immediately one way or the other’), the court is likely to be drawn into comparing one statement with another, appraising the meaning and effect of what was said and considering what was left unsaid and why. In the course of such an exercise the court would come uncomfortably close to questioning the proceedings in Parliament contrary to art 9 of the Bill of Rights 1689 and might even violate that important constitutional prohibition.”
170. The very issue of interpretation which the court has been called upon to resolve in the present case is whether the phrase “under the contract” can apply to a claim under the DPA. This issue is not referred to nor clarified in any way by the Minister. The context for the question and proposed amendment was “*for such matters as negligent misstatement and misrepresentation*”. The rejection of the amendment in this context therefore implies nothing about the breadth of the statutory phrase in its application to a claim made under the DPA, and falls far short of an unequivocal clarification of the point in dispute before me for the purposes of admissible material pursuant to Pepper v Hart. It would be pure speculation if an informed question (which itself reflected properly the distinction to which it existed pre-Fiona Trust insofar as it related to issues arising out of obligations created by the contract) specific to the DPA had been posed to the Minister, and what, if any, clear answer would have been given on the very issue in this case.
171. It follows from this that I do not agree that this material can or should alter my conclusion that the phrase “under the contract” within the HGCRA (and therefore within the D&B Contract) includes the jurisdiction to consider a claim brought under the DPA for works carried out pursuant to a construction contract.

172. Mr Frampton submits, uncontroversially, that only a party to the D&B Contract has a right to refer a dispute to adjudication: see Paragon Group Limited v FK Facades Limited [2026] EWHC 78 (TCC). It is common ground that CNR was the named Employer under the D&B Contract. The Adjudication was started by both CNO and CNR. CNO's case is that it was acting as the undisclosed principal, and Mr Frampton says that the BLO Defendants have at least a better than merely arguable case that CNO was not acting as an undisclosed principal given:
- (1) Crest has not provided sufficient evidence that CNR was acting as an agent for CNO in entering the D&B Contract and any evidence would need to be tested at trial.
 - (2) the BLO Defendants have a reasonable estoppel case (either estoppel by deed, or by representation or common assumption) that Crest has represented that CNR was the counterparty. There are documents in which Crest represented that CNR was the employing entity, including the collateral warranty by ACL in favour of PNBC: (a) only CNR, not CNO, was a party to that collateral warranty, and (b) Recital 1 stated that CNR was the Employer.
173. In terms of the evidence provided, Mr Selby KC relies, as CNO and CNR did in the adjudication, upon what he says are the clear and unequivocal terms of the CNO/CNR Agency Agreement. By clause 2.1, CNO appointed CNS/CNR (as the case may be) as its agent to manage on a day-to-day basis and carry on and conduct CNO's property development business in the name of CNS/CNR "*as agent for and on behalf of [CNO] and for the account of [CNO] ...*". By clause 2.6, CNS/CNR were to pay all monies received in connection with CNO's property development business into a designated account(s) and was to debit from such account(s) (amongst other matters) "any sums which [CNO] may from time to time require to be paid to it out of such account or accounts". By clause 2.7, CNS/CNR were to hold to the order and account of CNO: (a) all real and other property and any estate or interest in any rights in over or connected with such property acquired by CNS/CNR; (b) the benefit of all contracts entered into by CNS/CNR; (c) all sums standing to the credit of any bank account maintained by CNS/CNR in its conduct of CNS'/CNR's property development business.
174. The nature of the relation is confirmed by Mr Neil Dawtrey in his first statement at paragraph 8.2. Mr Selby KC also relies upon CNR's accounts for the year ended 31 October 2006 (the period in which the D&B Contract was concluded) which state on page 1 that "The Company did not trade during the year but acted as an undisclosed agent of Crest Nicholson Operations Limited" and on page 5 that "During the financial year and preceding financial year the Company... acted only as an undisclosed agent of Crest Nicholson Operations Limited".
175. In neither his written nor oral submissions did Mr Frampton indicate the basis upon which the BLO Defendants would seek to "test" this by cross-examination – how would a factual witness's answers in evidence likely affect the proper construction of the various instruments? It can only be assumed that the documents that might be deployed are those documents by which it is said, for the purposes of an estoppel, that Crest represented that CNR was the employing party. One of these brought to the Court's attention during oral submissions was a Standstill Agreement, in which the recitals referred to CNO only as the immediate parent company. Even if that

document were the basis of giving rise to an estoppel, there is no explanation as to how that affects the actual underlying legal analysis of whether CNO was a party to the D&B Contract as an undisclosed principal. Without even a cursory explanation of how the documents referred to by Mr Frampton impact the legal analysis, it is not possible to conclude that there is a real prospect of establishing that Crest is wrong on this point.

176. Even assuming that the estoppel argument is one which gives rise, through the lens of the summary judgment test, to a triable issue, this was not a point which ACL made in the Adjudication. As Mr Selby KC submitted (and this was not challenged by Mr Frampton in his oral submissions), it is not generally open to a party to challenge jurisdiction on a basis not raised during the adjudication Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd (in Liquidation) [2019] EWCA Civ 27; [2019] Bus LR 3051 at [92]. No particular facts were advanced to justify why this general position is not applicable in the present case.
177. Therefore, I conclude that this jurisdictional challenge fails. If I am wrong about this, I deal with Mr Selby KC's further submission about severance below.

H3.3 Was CNO owed a duty under section 1(1)(a) of the DPA?

178. Although this was raised as a jurisdictional issue, it is not. If CNO was a party to the D&B Contract such that they were entitled to adjudicate against ACL, the question of whether a duty was, or was not, owed was merely an issue in the adjudication. It was not a jurisdictional issue. Even if the BLO Defendants are right in relation to this, therefore, it does not affect the enforceability of the Adjudicator's Decision.
179. Again, however, even if I am wrong about this, the objection is met by Mr Selby KC's point about severance.

H3.4. Severance

180. Mr Selby KC submits that insofar as the Adjudicator did not have jurisdiction to make the order that he did in favour of CNO, for either the reasons dealt with in the immediately preceding sections, the Adjudicator's Decision can be severed to enable enforcement in favour of CNR (there being a "core nucleus of the decision that can be safely enforced"): see Pepperall J in Willow Corp S.A.R.L v MTD Contractors Limited [2019] EWHC 1591 (TCC) at [74]:

"I agree with Edwards-Stuart J that in the context of a single dispute or difference it can often be difficult to divorce any significant flaw in the adjudication from the balance of the decision. Indeed, significant breaches of natural justice are particularly prone to infect and therefore undermine the entire decision. In my judgment, the proper question is not, however, to focus on whether there was a single dispute or difference but upon whether it is clear that there is anything left that can be safely enforced once one disregards that part of the adjudicator's reasoning that has been found to be obviously flawed. Such analysis need not be detailed and, in many cases, it may remain the position that the entire enforcement application should fail. It would, however, further the statutory

aim of supporting the enforcement of adjudication decisions pending final resolution by litigation or arbitration if the TCC were rather more willing to order severance where one can clearly identify a core nucleus of the decision that can be safely enforced.”

181. Mr Selby KC therefore says that, even if the objections to recovery made by CNO were reasonably arguable, the Court could enforce the Adjudicator’s Decision insofar as it determined a claim in CNR’s favour.
182. Mr Frampton’s first objection was that where two parties appointed the Adjudicator, that this effectively infected the whole adjudication and severance is, in principle, not possible. I do not agree. If there are two parties who refer a matter to adjudication and it transpires that the adjudicator lacked jurisdiction to determine one of the two parties’ rights but had jurisdiction in relation to the other, it would generally be possible to apply the principle of severance providing of course that it is possible to disregard that part of the adjudicator’s reasoning that has been found to be flawed. That may or may not be the case on the facts of any particular decision, but the fact the error lay in the determination of jurisdiction in respect of one out of two referring parties does not of itself preclude severance.
183. Mr Frampton’s second argument was, more specifically, that a core part of the reasoning in relation to the recovery by CNR was infused with the flawed conclusion as to the status of CNO. In the Adjudication, ACL contended that CNR was not entitled to any damages as any costs incurred or to be incurred remediating the fire safety defects and making the dwellings habitable will not be incurred by CNR, i.e. as CNR will suffer “no loss” it is not entitled to damages. Crest contended that ACL’s “no loss” argument was misconceived, on the basis that CNR was both CNO’s agent and trustee of the benefit of the D&B Contract such that CNR can sue for and recover CNO’s losses in this adjudication. CNR’s measure of loss for ACL’s defective performance of the D&B Contract would be the same as the quantum of CNO’s losses.
184. The Adjudicator rejected the argument:

“In support of its position regarding the ability of an agent to sue under a contract to recover losses of its undisclosed principal (or of a trustee in respect of a beneficiary), Crest has referred me to Darlington BC v Wiltshier Northern Limited [1995] 1 WLR 68 and Alfred McAlpine Construction Limited v Panatown Limited [2001] 1 A.C. 518 (HL). Based on these authorities I agree with Crest that, as a matter of principle, CNR is entitled to advance a claim on behalf of CNO for breach of the duty owed by Ardmore under Section 1 (1) (a) of the DPA, and it therefore follows that the fact that CNR may not have actually incurred and/or be incurring the cost of remedial work does not preclude it from recovering losses incurred or to be incurred by CNO as its principal and/or beneficiary. I therefore reject Ardmore’s ‘no loss’ argument in respect of CNR such that, to the extent that CNO is entitled to recover losses against Ardmore pursuant to Section 1 (1) (a) of

the DPA, then CNR is entitled to recover those losses on behalf of CNO. However, having found that CNO is entitled to advance a claim for its losses pursuant to Section 1 (1) (a) via adjudication, this may be an academic point as for present purposes it follows that both parties are entitled to recover the losses on a joint and several basis.”

185. Mr Frampton argued that the Adjudicator did not consider who suffered what loss as between CNO and CNR because of his finding that CNR was agent for an undisclosed principal. Mr Selby KC sought to dismiss this point because paragraph 55 was about the quantification of CNR’s claim, and not related to CNO’s entitlement to sue. Whilst it is right that the same agency/undisclosed principal argument lies behind both the jurisdictional question (whether CNO was a party to the D&B Contract and/or had an entitlement to bring an adjudication claim) and the substantive question (could CNR recover for losses on CNO’s behalf), in the context of severance, the jurisdictional point is a separate and severable one from the substantive one. Even if it were open to ACL to challenge the enforceability of the Adjudicator’s Decision to require payment to CNO, there is no dispute about the ability of the Adjudicator to have determined the claim brought by CNR. In the latter context, an erroneous determination of the “no loss” argument because of a possible debate about the agency relationship (if that is what it was) would not be jurisdictional nor give rise to a basis to challenge the decision to make payment to CNR. Put another way, had CNR been the only party to the adjudication, seeking to recover CNO’s losses as agent, and ACL had taken the same no loss point, the Adjudicator would have rejected the point for the same reason. There would be no basis to challenge enforcement. The core nucleus of the decision in respect of CNR’s substantive entitlement stands separately to the question of whether CNO had jurisdiction to be part of the adjudication alongside CNR. It is therefore entirely possible to sever the determination that CNR is entitled to payment from the determination that he had jurisdiction to determine loss claimed by CNO.
186. Finally, Mr Frampton, in oral submissions, referred the Court to the decision of Henshaw J in HDR Global Trading Limited v Shulev and Nexo Capital Inc [2022] EWHC 1685 (Comm), in support of a general proposition that “*the right of an agent of an undisclosed principal to sue on the contract is brought to an end by the principal’s intervention*”. He contended that if Crest wanted to argue that CNR can enforce today they would have to abandon any claim by CNO as undisclosed principal. Not least because of the manner in which the point was raised, this was subject to little elaboration or, indeed, response, save for the obvious concession that on any view, the involvement of both CNR and CNO could not result in the recovery of the same damages twice. I did not take this as more than a submission from Mr Frampton that there may be consequences to CNO’s claim if CNR is able to enforce the decision. In the circumstances, to the extent that there is a dispute about what those consequences are, that ought to be a matter of proper argument, with due notice to both Mr Selby KC and the Court as to the point being advanced and the basis upon which it is made.
187. Subject to the question of whether it is just and equitable to do so, I therefore consider that the Adjudicator’s Decision is enforceable and determined a ‘relevant liability’ for the purposes of section 130 of the BSA.

H4. Is making the Adjudication BLO just and equitable?

188. The BLO Defendants raise the following matters to contend that it is not just and equitable. There is, of course, considerable overlap with the matters canvassed in the context of the Anticipatory BLO.

H4.1 Adjudication is an interim solution

189. Mr Hughes KC argued that adjudication is designed to provide an “*interim solution*” to meet the “*cash flow requirements of contractors and their sub-contractors*” in which “*The need to have the right answer has been subordinated to the need to have an answer quickly...*”: per Chadwick LJ in Carillion Construction Ltd v Devonport Royal Dockyard Limited [2005] EWCA Civ 1358, [2006] BLR 15 at [85] to [87]. He argues that adjudication has been routinely described as “*rough justice*”. Whilst the BLO Defendants acknowledge the policy that Parliament expects parties to comply with an adjudicator’s decision, Mr Hughes KC argues that the expectation and obligation to comply with an adjudicator’s decision is an obligation of the counterparty to the contract, who was involved in the adjudication. The analogy to a guarantor is repeated.
190. Ultimately, Mr Hughes KC’s submission is that adjudication is fundamentally incompatible with the ‘extraordinary’ remedy of a BLO.
191. For the reasons considered in relation to whether an adjudicator’s decision can give rise to a relevant liability, I do not agree. There is no necessary incompatibility between the regime for construction adjudication and section 130 (or related provisions) of the BSA. This is particularly so given that a BLO can only be ordered when it is just and equitable to do so. The fact that an adjudication may give rise to a temporarily binding decision (interim only to the extent that it is subject to challenge) following a short determination process is not of itself sufficient to mean that it is unjust or inequitable for an associate to be required to stand behind the original party.
192. Indeed, a conclusion that adjudication is fundamentally incompatible with the application of BLOs would deprive the construction industry of the use of one of the most important dispute resolution tools from which it has benefited significantly over the last 30 years. As pointed out in a passage from Meadowside Building Developments Ltd (in liq) v 12–18 Hill Street Management Co Ltd [2019] EWHC 2651 (TCC), (2019) 186 ConLR 148, [2020] Bus LR 917, adopted by Lord Briggs in Bresco, it would in my view be wrong to restrict the utility of adjudication, in light of the breadth of the statutory scheme and its practical use within the industry, as being solely about short-term cashflow:

“Adjudication is often about achieving a quicker and cheaper resolution to the parties’ disputes. Where one party regards an adjudicator’s decision as a real miscarriage of justice, it has the right to take the dispute to litigation or arbitration to have that decision effectively overturned; where, as is so often the case, the parties regard the decision as a decent attempt to arrive at a fair resolution of the competing positions, the parties generally

treat the decision as binding or negotiate a settlement around it. This is good for the overall administration of justice and no doubt many cases which would otherwise end up in the TCC are resolved without burdening public resources as a result of the practical utility of adjudication, notwithstanding its temporary nature.”

193. It is well known to all practitioners that building safety matters, in the wake of Grenfell Tower, have given rise to what is probably the single largest area of construction disputes in recent history, if not ever. There is no principled justification to limit or significantly de-incentivise the use of such an effective tool for resolving such disputes from the industry, which would be the practical effect of Mr Hughes KC’s submission. If a BLO cannot, as a matter of principle, attach to the liability created by an Adjudicator’s Decision and/or non-compliance with that Decision, there is considerably less purpose to a party wasting costs in obtaining an unenforceable determination of liability against the original body. Mr Hughes KC’s submission leads to the outcome in which the only way to obtain a BLO from the original body’s associates is following the establishment of a relevant liability after a full High Court trial. There is nothing in the BSA, nor inherent in the concept of justice and equity, that necessitates this conclusion. This is particularly so where there is no danger that the tools created by the combination of the construction adjudication regime and the BSA can ever be used oppressively or unfairly: the High Court remains the guardian to ensure that any order against an associate is only made if it is just and equitable to do so. There may be many reasons for which it may be unjust to transmit the temporarily binding liability determined by an adjudicator’s decision to an associate. One such reason *might* be where the effect of granting the BLO would be to make the adjudicator’s decision *de facto* final, in view of the financial standing of the applicant. Whether that is the case will always be fact sensitive and I certainly do not (indeed, could not) suggest that that would inevitably be the case. I raise the example only to illustrate that, in contradistinction to the example, Mr Hughes KC’s arguments in this case points to no equivalent case-specific injustice arising out of the temporary nature of the decision; he points to a supposed injustice which exists as a matter of principle.
194. Such injustice does not exist as a matter of principle. Whether it is just and equitable to order a BLO in respect of relevant liability created through adjudication should be determined, according to the statutory test, on a case-by-case basis, and not because to do so would be inherently unjust or inequitable.

H4.2 There is no cash flow need for Crest

195. As set out above, the benefit and purposes of the construction adjudication scheme go beyond short-term cashflow. Whilst it may be that a cash flow need to fund remediation weighs in favour of making an order, there is no reason why it makes it, in any given case, inequitable to order a BLO if there is no such need. I have already referred at [39] to the observations of Nugee LJ about the statutory purposes of the BSA in the context of the argument then advanced that no RCOs were needed as the works were being adequately funded and were being carried out at [87]: one purpose is to deal with the ‘who pays’ question.

H4.3 BLO by the back door

196. Mr Hughes KC argues that, considering the two preceding factors, it appears that Crest is seeking to subvert and avoid the requirements necessary to establish a BLO.
197. This is circular. If I am correct that, as a matter of statutory interpretation, an adjudicator's decision is capable of constituting a relevant liability for the purposes of the BSA, there is, by definition, no such subversion. It is a right available to Crest. The question is whether it is just and equitable to make an order, and this submission does not advance the BLO Defendants' arguments in this respect.
198. In the context of this argument, Mr Hughes KC's written arguments make reference to repayment, should it be established at trial that an entitlement to the sums ordered by the Adjudicator have not been made out. He does not dispute that the BLO Defendants would have a legal entitlement to repayment under restitution, as posited by Lord Mance in Aspect. He does contend, however, that there is no concept in the statute of an interim BLO or that a BLO can be reversed (save for appeal), contending that if the Court subsequently decided that Crest was not entitled to a BLO on the underlying claim, it does not follow that the BLO Defendants would be entitled to recover the sums paid out under the Adjudication BLO. This was not elaborated upon, but it would be very surprising if correct. The Court has the power pursuant to CPR 3.1(7) to vary or revoke an order, including a final order (even though the instances of doing so with a final order may be rare). There could be little doubt that the final determination of matters at trial would constitute materially changed circumstances for the purposes of the exercise of discretion and, in the context of the two statutory regimes, would not in substance offend against the general principles of finality which usually militates against interference in a final order.

H4.4 BLO Defendants's financial position

199. The BLO Defendants rely upon the evidence of Mr Horne. The paragraphs of central relevance are as follows:

“34. As part of the BLO Application, Crest seeks an order that the Fourth to Tenth Defendants pay the sum of £14,990,690.40 which it says is due under the Adjudicator's Decision (£14,928,320.40 main sum plus £62,370.00 for the Adjudicator's fees) within 14 days of the date of such an order (paragraph 172.1 of the Particulars of Claim). I have been asked to explain the current financial position of the Fourth to Tenth Defendants in the context of setting out the likely consequences in the event of an order to pay such a sum in the next few months. It is important that I emphasise, at the outset, that the view which senior management of the group takes, and has taken, in conjunction with close work with its auditors and advisors, is that the group, and the Fourth to Tenth Defendants in particular, are and continue to be, a viable and strong set of business enterprises. Cash flows, asset position and potential liabilities must, however, be carefully managed, as with any business.

35. AGL has recently finalised its consolidated accounts for year ended 30 September 2024 for Companies House. On

(Friday) 30 January 2026, the board approved the financial statements and the representation letter and authorised these to be returned to the auditors for signature. I exhibit these accounts at [MJH1/414-457]. I was involved in the preparation of these accounts and the discussions with auditors in relation to the various provisions.

36. The overall position based on the accounts which have been finalised is as follows:

36.1 The group made a net loss of c.£41.3 million in the year to September 2024.

36.2 The net asset position as at 30 September 2024 was £23.4 million. This figure factors in a provision for liabilities of £117 million but this provision does not include for the present claim by Crest for a BLO.

36.3 It should also be noted that the £23.4m figure includes, in part, fixed assets which are the subject of first charges. The sums, based on these accounts, which would be liquid and available for the discharge of any judgment would be less than £15m. I explain this further below based upon the 'cashflow' model that we use within the business.

36.4 I have reviewed the cashflow model prepared with the auditors as part of the going concern exercise for our current audited accounts. Based on a snapshot of the Base Case model at, say, 30 April 2026 we forecast the following:

Cash Balance: £2.90m

Total Property: £59.4m

of which unencumbered: £11.6m (assume this could be mortgaged at 65% LTV - £7.54m)

Balance: £10.44m

37. For these reasons, a BLO in the sum of £15 million would present profound problems for the group."

200. Mr Selby KC's written submissions included numerous criticisms of the points made by Mr Horne. Some of these were addressed in a further witness statement, and were not pursued in oral argument.
201. However, a number of submissions continued to be pressed. First, Mr Selby KC made the forensic point that the plea that an order to pay £15m in spring/summer 2026 is likely to present profound problems for the BLO Defendants was a late plea introduced by amendment. More substantively, he contends that the plea is not made out by the contemporaneous documents. As to this:

- (1) the 2024 Report to which Mr Horne refers contains the statement,

“In view of the assessment performed, [Cormac Byrne] is satisfied that sufficient financial resources will be generated to enable the Group and Company to meet its liabilities as they fall due for the period to 3 February 2027.”

- (2) Note 26 recorded:

“Recent developments in government legislation, notably the Building Safety Act and the introduction of Building Liability Orders ("Orders"), have created significant uncertainty both for the Group and the broader industry, particularly in relation to historic contracts. The Group actively manages these risks wherever possible.

...

The merit, likely outcome and potential impact of these claims is subject to a number of significant uncertainties and, therefore, the Group cannot make any assessment of the likely outcome or quantum of any such litigation as at 30 September 2024. The uncertainties relate to the vague nature of these claims, a lack of supporting evidence from claimants, and the lengthy timeframes involved before a reliable estimate of financial cost can be determined. Factors affecting this include the age and complexity of projects, the judgement required in determining if claims relate to relevant liabilities, the developing interpretation of legislation, particularly regarding the judgement of the claim being fair and equitable, and issues relating to the supply chain and onward claims.

Nonetheless, the Group believes it holds strong positions on many claims. However, given the ongoing evolution of legislation and guidance, it remains difficult to determine outcomes with sufficient certainty. Where claims are successful, the financial impact is likely to be partially mitigated through subsequent claims on the supply chain and/or other parties.”

- (3) Mr Horne’s statement sheds no light on the relationship between AGL and AGHL, the ultimate parent company, and deals only with cash flow from AGL and below.
- (4) In this specific context, Mr Selby KC made the point in his opening written submissions that AGHL was incorporated on 27 June 2024 and therefore accounts information is not yet available at Companies House. No financial information has been volunteered, notwithstanding its likely relevance in the context of the BLO Defendants’ own plea. Mr Selby KC submitted that it seems likely that AGHL has vast amounts of wealth in its own right. AGL’s company accounts (Notes 4 and 5, page 44) appear to show that between y/e

2023 and y/e 2024 a substantial loan was made by AGL to AGHL (as AGL's parent company) in the sum of c.£26.26m. They also appear to show further loans in the sum of c.£1.5m in the same period to Cormac Byrne (as AGL's sole director).

- (5) In contrast to other points relating to financial matters to which Mr Horne responded in his second witness statement, Mr Horne did not respond in any way to explain the substantial loan to AGHL (in itself, nearly double the amount of the Adjudicator's Decision), or the inference drawn by Mr Selby KC that it is likely that AGHL has vast amounts of wealth in its own right.
 - (6) An extract from the Ardmore Group Forecast Model, appended to Mr Horne's second statement, showed that as at 31 January 2026, property assets were stated to be £59.4m. The total *net* assets were significantly reduced by reference to the line item, "*Other net assets and liabilities*" of £55.3m. Mr Selby KC cross-referenced this to the accounts. At Note 21, there is a "provision for loss on contracts" of a nearly equivalent £55m. This is stated in the accounts as relating to live contracts where the director, Cormac Byrne, estimates that costs will exceed revenue on a construction contract. The provision reflects the expected loss and is recognized immediately. The obligation is stated to be likely to crystallise more than one year after the balance sheet date. It can be also seen that the sum for "*Remedial Work Provision*" at Note 21 is some £62.9m, but has been reduced to £537k in the Forecast Model. The provision of £55m is reduced in the Forecast Model by about £2m a month. This, without specific explanation, appears to depress the net assets;
 - (7) One of the charges over property is "predicted", rather than actual, in the sum of £25.3m on the basis, as Mr Horne explains in his second statement, the BLO Defendants have "*good reason to believe it is close to securing a several hundred million pound contract that will require a £25m-£26m bond*".
202. The short point made by Mr Selby KC is that the documents provided by the BLO Defendants do not support the proposition that ordering the Adjudication BLO would "present profound problems". I conclude on the basis of the documentary evidence that there is considerable reason to be sceptical of this evidence by Mr Horne. This is particularly so in light of the complete absence of transparency about the financial status of AGHL, together with the intercompany loans. The BLO Defendants have chosen not to provide obviously relevant financial information pertaining to AGHL (and notwithstanding notice of the concerns provided in respect of this lack of transparency in advance of the hearing). It is also notable that the language chosen by Mr Horne does not suggest that making the Adjudication BLO would cause an existential threat to the Group. Taking the evidence at its highest, the BLO is likely at most to impact short-term decisions about entering new contracts (the detail of which is exceptionally vague) and only to the extent that entering such contracts require a performance bond (rather than, for example, a parent guarantee from AGHL). It is also surprising that Mr Byrne has not chosen to put his name to any equivalent assertion, given his centrality to important issues in dispute and, as Mr Selby KC submitted, all roads ultimately lead back to him.
203. However, I nevertheless take Mr Horne's statement at face value for the purpose of the Application. On the facts of the present case, I consider for the reasons already

explained in the context of the Anticipatory BLO that it will be an unusual case in which the source or extent of a respondent's assets or liabilities will carry much weight when deciding whether it is just and equitable to order it to bear the cost of remediation, which is ultimately what the costs ordered to be paid by the Adjudicator represent (see Click St Andrews and Triathlon). There are no particular facts which make this one such an unusual case.

H4.5 Remedial Scheme

204. Mr Hughes KC submits that a related factor to Crest's lack of cash flow need, is that the BLO Defendants consider that there is a far cheaper remedial scheme which should be adopted. If Crest receives £15m now either it may be substantially overcompensated if it adopts that scheme, or it may be motivated to proceed with a disproportionate scheme.
205. Little weight should attach to this point. The reasonableness of Crest's remedial scheme will be determined should the Proceedings continue to judgment, and if the BLO Defendants wish to argue that Crest effectively over-spent because of receipt of adjudication moneys, it will be open to them to do so. If they establish that remedial costs should have been lower and that Crest has been overpaid, there is no suggestion on the facts of this case that any overpayment will not be returned.

H4.6 Inequality of Arms

206. Mr Hughes KC's written submissions contended that ACL was compromised in its ability to defend the Adjudication given the short timetable which it faced in producing its Response (in contrast to the time taken by Crest to launch the Adjudication at the time of its choosing). Mr Hughes KC submitted that ACL had dis-instructed its experts in March 2025, and despite attempting to re-instruct them, ACL's experts, most importantly its fire engineering expert, Dr Crowder, was not available during the Adjudication and the lack of specific fire engineering evidence supporting ACL's case was crucial to the outcome. Whilst Crest criticised ACL for dis-instructing its experts, the BLO Defendants relied upon the evidence of Mr Horne who explained that it proved too difficult to instruct an alternative expert given the accelerated timetable and the high demand for fire safety engineering experts at that time. As such, ACL was limited to relying on a FRAEW report produced by Dr Crowder in November 2023. This limited ACL's defence given it was out of date, not responsive to Crest's expert evidence in the Adjudication and the Adjudicator found that "*the purpose of a FRAEW is not to prescribe what remedial works are required.*" Mr Horne also explained that ACL's senior management were focused on the administration process, not the Adjudication.
207. Mr Hughes KC therefore submitted that it would be unjust to require the BLO Defendants to meet an Adjudicator's Decision reached against ACL in those circumstances.
208. The short answer to the point is that I am satisfied of facts (8) to (10), as explained above. The BLO Defendants have long been aware of the matters in dispute, and took a decision at a certain point to focus on ringfencing the potential liabilities of ACL from the wider group rather than continue to 'invest' in substantive engagement on the underlying dispute, even if one consequence of this was that it may not have been as ready for an adjudication as it may otherwise have been. That was a commercial

decision made, no doubt ultimately, by Mr Byrne and/or his advisors. The BLO Defendants engaged as fully in the adjudication process as their own commercial interests allowed or dictated. If (assuming the BLO Defendants' case at its highest) this was not as fully as might in different circumstances have been the case, it does not make it unjust or inequitable to permit Crest to exercise its statutory ability to require the BLO Defendants to stand by the liability created by the Adjudicator's Decision.

H4.7 The Decision does not reflect the claim

209. Mr Hughes KC contends that the sums awarded by the Adjudicator do not reflect the claim now made by Crest or the likely cost of the works it seeks. This is because it is said that:

- (1) the sums awarded by the Adjudicator were based on a Contract Sum Analysis provided by Crest which (a) was a budget cost, and (b) did not reflect Crest's expert evidence or the FRAEWs from Artec as to the remedial works required. The BLO Defendants contend that Crest unreasonably refused to answer a request as to whether it accepted that its proposed remedial scheme goes beyond the FRAEW which Crest had obtained from Artec at Responses 12 to 14 of its RFI Response.
- (2) The Adjudicator included £724,173 in the sums he decided were due in respect of timber balconies. However, Crest has not pleaded any claim in respect of timber balconies in these proceedings. Crest says it is reasonable to replace the timber balconies because the necessary work was identified in Artec's PAS 9980, but Mr Hughes KC says that that is no answer to the point that Crest does not pursue a claim in these proceedings that it is necessary to replace the balconies or that the need to do so arose from a breach by ACL.
- (3) The Adjudicator decided at paragraph 125 of his Decision that Crest should have installed a fire alarm earlier and its failure to do so was a failure to mitigate. However, he only deducted £231,078.33 from the waking watch costs which was an insufficient deduction.

210. It is not suggested that any of these issues go to the enforceability of the Adjudicator's Decision. The points do not materially touch on whether it is just and equitable that the relevant liability determined by the Adjudicator and/or arising out of non-payment of an Adjudicator's Decision is met by an associate.

H4.8 The Building Safety Fund

211. This has been dealt with in the context of the Anticipatory BLO.

H4.9 Recovery from DRP

212. Mr Hughes KC repeats, in the context of the Adjudication BLO, that Crest has already recovered £563,395.16 from DRP, and contends that this was not factored into the Adjudicator's Decision. It is not suggested that this goes to the enforceability of the Adjudicator's Decision. It is a point that may go to the eventual quantum of the claim

should the Proceedings be determined at trial. At least on the facts of this case, it is not a matter which materially touches on the just and equitable test.

H4.10 Uncertainty for contribution claims

213. This point was not developed orally. In his written submissions, Mr Hughes KC argues that it is not clear if the BLO Defendants would be able to pursue contribution claims under the Contribution Act 1978 in respect of any sums paid pursuant to the Adjudicator's Decision on an interim basis. This is not further explained. In particular, there is no articulation on how recovery against other wrongdoers will be *prevented* (which seems improbable) rather than, at best, complicated. It is difficult not to conclude that any such complication as may have arisen is not the unjust application of the statutory regimes but the manner in which the Ardmore Group has (as it is entitled to do) structured itself in the wake of ACL's liabilities. At least as advanced on this Application, this is not a matter to which any material weight can be placed.

H4.11 Conclusion on the Adjudication BLO

214. Weighing all the factors relevant to the exercise of the statutory test, I conclude that it is just and equitable that each of the BLO Defendants is jointly and severally liable for the sums owed by ACL to the First and Third Claimants under the Adjudicator's Decision.



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

Case reference : **LON/00AT/BSB/2025/0608**

Property : **Pieris House, High Street, Feltham
TW13 4GD**

Applicants : **A2Dominion South Limited**

Representative : **Mr James Frampton (counsel)**
Instructed by A2 Dominion Legal Services (Mr
Christopher Last)

Respondent : **BDW Trading Limited**

Representative : **Mr Robert Bowker (counsel)**
Instructed by Osbourne Clarke (Mr Daniel
Wilkins)

Type of application : **Application for Remediation
Contribution Order** section 124 Building
Safety Act 2022

**Tribunal
member(s)** : **Deputy Regional Judge Nikki Carr
Regional Surveyor Mrs Elizabeth
Ratcliff MRICS
Mr Andrew Gee RIBA**

Date of decision : **2 April 2026**

PRELIMINARY ISSUE DECISION

Decision

1. Flats 29 – 40 Pieris House, High Street, Feltham TW13 4GD form part of the “relevant building” at 1 – 40 Pieris House, High Street, Feltham TW13 4GD in respect of which a remediation contribution order may be made.

Reasons

- (1) This decision is concerned with whether the premises in which Flats 29 – 40 Pieris House, High Street, Feltham TW13 4GD are situated is a separate building, or separate part of a building. If the answer is yes, the Applicant may not recover a contribution from the Respondent in respect of Flats 29 – 40 because they do not form part of a ‘relevant building’ for part 5 of the Building Safety Act 2022.

Background

- (2) By application dated 18 June 2025, the Applicant seeks a remediation contribution order (‘RCO’) in respect of a number of alleged relevant defects in the Flats at 29 – 40 Pieris House, High Street, Feltham TW13 4 GD (‘Flats 29-40’). It is the Applicant’s case that Flats 29 – 40 form part of the wider building at 1-40 Pieris House (‘the wider building’), in reliance on section 117(2)(a) of the Building Safety Act 2022 (‘the 2022 Act’). The Respondent’s case is that Flats 29 – 40 do not qualifying as a ‘relevant building’ under section 177 of the 2022 Act as they are within a structurally detached building, or alternatively a separate part of the wider building.
- (3) In light of the absence of any previous consideration of the issue regarding ‘separate structure’, and the interplay between parts 4 and 5 of the Act and Higher Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023 (‘the Regs’) at a Case Management Hearing (‘CMH’) on 6 August 2025, I set the question down for preliminary issue determination, it appearing to be the most proportionate approach taking into consideration the substantial expert evidence that may be required on the question of relevant defects (which might be rendered unnecessary by the conclusion on the relevant building question).

Expert evidence

Structural configuration

- (4) The wider building was redeveloped by the Respondent (formerly known as Barratt Homes Limited) between approximately 2000 and 2005. It is located on the west side of Feltham High Street, opposite Feltham Green Park and Duck Pond on the east side. We inspected the wider building on 7th January 2026, in the company of the representatives for the parties, Ms Jessica Ward (Head of Building Projects, A2Dominion South Limited (‘A2D’)), Ms Kaitlyn Gibbons (Resident Liaison Officer A2D) and Mr Mohammed Mahbub (Project Manager A2D), and the parties’ structural engineering and services engineering experts.
- (5) Situated in the southern end of the wider building are Flats 1 – 28 Pieris House (‘Flats 1 – 28’) which, together with ground floor commercial units, comprise seven stories (together ‘the higher rise part’). It is common ground that the higher rise part meets the requirements of part 5 of the

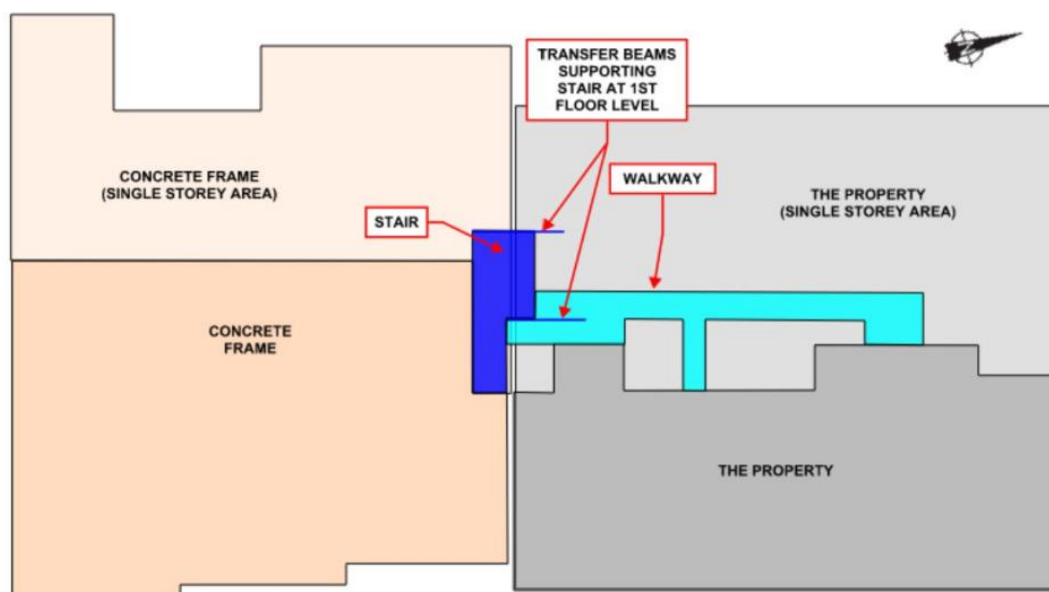
2022 Act. At its highest, the higher rise part rises circa 21 metres from ground level.

- (6) Flats 29 – 40 are situated at the northern end of the wider building, and comprise 12 flats over three stories (1st – 3rd). They were redeveloped from an existing terraced building, and are situated over the remains of the pre-existing commercial premises at ground floor (together ‘the lower rise premises’). During the construction, the previous terraced building was truncated at both ends to reduce its footprint. It is agreed that this part of 1 – 40 Pieris House is not at least 11 metres high, and has insufficient storeys to qualify in its own right as a relevant building for the Part 5 protections.
- (7) The ground floor (sole) entrance to 1-40 Pieris House is within eastern end of the higher rise part, giving access to a primary stair core (‘stair A’) and lift (which is also the sole fire-fighting lift). Each serve the entirety of the wider building. To get to Flats 29 – 40 one must use the sole entrance and either take stair A or the lift to one of the other storeys, and walk through the corridor to a second stair core (‘stair B’), through which one accesses external unenclosed steel-framed walkways at each storey first to third.
- (8) Stair B is an enclosed steel-framed construction, positioned at the North-west extremity of the taller South building. It is affixed to the reinforced concrete frame of the taller building and relies on it for vertical and lateral support. It runs full height to the sixth residential floor and serves not just as access to Flats 29-40, but as a fire escape for all flats 1 - 40. Each floor is accessible by all tenants of the wider building.
- (9) To the enclosed stair B tower are affixed external unenclosed steel-framed walkways at each storey first to third, overflying the ground floor commercial properties in the lower rise part. Those are the only means of access to and between the three stories on which Flats 29-40 are located. There is no access to Flats 29 - 40 other than via stair B besides the external steel walkways, and no fire-escape or exit from the wider building other than via stairs A and/or B.
- (10) The commercial units at ground floor in the lower rise part have a more extensive footprint than the residential stories above, with flat roofs and masonry parapet walls extending in some cases most of the way back from the rear wall of Flats 29-40 to a boundary wall at the wider development.

Expert Evidence

- (11) The structural surveyors Mr Mark Moppett BSc CEng FISTructE (for the Respondent) and Mr William Davies MEng CEng MICE (for the Applicant) agree that the external steel walkways are structurally connected with stair B in ten locations, and that they are given vertical and lateral support by the structural frame of stair B, without which the walkways would collapse. The experts therefore agree that Flats 29 – 40 are not structurally detached from stair B.

- (12) Mr Davies and Mr Moppett also agreed that, in addition to that structural connection, while there is no *direct* structural connection between the four storey and seven storey sections of 1-40 Pieris House, Flats 29 – 40 are *indirectly* structurally connected to Flats 1-28 by stair B.
- (13) The indirect structural connection arises from the fact that stair B is directly supported, both vertically and horizontally, by both the reinforced concrete frame of the higher part of the construction at the south end of 1 – 40 Pieris House incorporating Flats 1 – 28, and by steel transfer beams spanning across the flat-roofed rear extensions of commercial units 5 and 6, and bearing upon the masonry walls enclosing those units at ground floor level directly below Flats 29-40 Pieris House. It was Mr Moppett's evidence and experience that it is highly unusual to support part of such a structure on top of apparently 70-80 years old, single storey, brickwork walls on original shallow foundations via transfer beams.
- (14) In their joint statement the experts illustrated the arrangement as below, though by the hearing (after further viewing the site at the inspection) they agreed that the westernmost transfer beam (at the top blue line of the depiction) extended further than illustrated and extended equally with the easternmost transfer beam (at the lower blue line), and that the latter was structurally incorporated into the walkway at first floor level.



- (15) This complex arrangement appears to have been designed to avoid taking two columns of Stair B's steel structure (on its north-east and north-west corners) down through the pre-existing ground floor commercial space. Part of the overall structural load of stair B, including (for its full height) its steel frame, glazed envelope and the stairs and landings, is therefore transferred across to bear onto single storey masonry walls positioned several metres away horizontally north from the stair tower, rather than directly and vertically down to foundations through columns. The transfer

beam carrying the north-east columns also forms part of the walkway structure at first floor level.

- (16) On that basis, from a structural engineering perspective, the experts agree that the high-rise south part of 1-40 Pieris House incorporating Flats 1 – 28 is not structurally detached from the low-rise, north part incorporating Flats 29 – 40.
- (17) The experts also largely agree in respect of two matters: whether the seven stories comprising Flats 1-28 and four stories comprising Flats 29 - 40 are vertically divisible, so that they could each be considered separate parts of a building; and whether any such part could be independently redeveloped. They differ only slightly.
- (18) Mr Moppett's evidence is that there could be a vertical division either at the site of the external door onto the external walkways from stair B at each level, or (as a secondary case) hypothetically through the middle of stair B itself. In terms of redevelopment, provided stair B was closed for safety and new elements of structure were added to it to replace the current structural reliance on the transfer beams to ensure stair B's structural stability (for the benefit of the south part of the building only), independent redevelopment would be workable. He opines that "*some work is always required when two buildings or two parts of a building are separated and one is redeveloped*". He relied on an analogy of waterproofing, insulating and temporarily propping/strengthening a neighbouring wall adjoining a demolished terraced house while redevelopment was carried out, to provide protection from elemental forces.
- (19) Mr Davies could not identify a point of vertical division that would leave the structures stable on both sides, unless the second stair core and/or walkway structures were removed. The work would require temporary then permanent structural reconfiguration of elements, outside of the four stories including Flats 29 – 40 to be redeveloped. They therefore could not be independently redeveloped.

Services supply and separation

Expert Evidence

- (20) The building services engineers instructed by the parties, Mr Neil McDonald BEng CEng MCIBSE (for the Respondent) and Mr Andrew Dellow BEng CEng FCIBSE (for the Applicant), are also largely in agreement.
- (21) The experts agreed that the list of relevant services to be considered is:
 - a) Electricity supplies

- b) Water supplies
 - c) Telecommunications
 - d) Access control
 - e) TV aerial
 - f) Foul and waste drainage
 - g) Communal area lighting, which includes lighting to the walkways allowing access to the Property.
 - h) Communal area fire safety systems associated with the Development, which include fire detection and alarm, smoke ventilators, dry riser and
- (22) Save for identifying that the power supply for them is from the North Services Riser and Central Services Riser, and that there are dry risers on each floor of the high-rise part of the building, it is noted that the building services engineers each said they did not have sufficient expertise in fire safety systems to opine on them. Neither party requested permission to rely on expert evidence in that regard, or provided any evidence on the degree of integration or inter-reliance of the fire safety systems or strategies for the wider building or how they might be separated.
- (23) Electricity for the wider building is provided by electricity utility distribution boards ('EUDB') in the higher rise part. For Flats 29 – 40's internal supply, the EUDB is located in the North Services Riser cupboard, itself found on the second floor within the south concrete frame wall to which stair B is structurally attached. The cutouts and meters for Flats 29-40 are located individually within hallway cupboards in each flat.
- (24) Cables are passed from the EUDB vertically and through horizontal voids in the high-rise, and beneath and above the steel walkways outside Flats 29 – 40, with supply cables entering the first and second storey flats above, and third storey flats below, their entrance doors. The communal supply is located in the wider building entrance lobby, by stair A.
- (25) Fire safety systems run via the central electrical services riser on the ground floor by stair A, to a first floor EUDB located next to (flat number) in the higher rise part. There is an external electricity sub-station adjacent to the end of the boundary wall of the lower rise part.
- (26) A water tank and booster pump are located in a cupboard, accessed via the bin-store, at ground floor at the southern-most rear western corner beneath the higher rise part, adjacent a party wall with the next development. Water pipes pass through a vertical service shaft, with those pipes serving Flats 29-40 branching off in common corridor service cupboards before passing through horizontal ceiling voids at first and second floors within the high-rise and then on beneath the steel walkways, the supply entering Flats 29-40 at the same point as the electricity supply.

- (27) Telecommunication cables for Flats 29 – 40 also originate in the North Services Riser within stair B, and utilise voids in the floor and ceiling to make their way to the walkways, gaining access to the flats via the same inlets as the electrics and water supply.
- (28) Access to Flats in the wider building is via voice-only entry door phone, the electrics for which are behind the wider building entrance door leading to stair A. The wiring is routed via the service risers, gaining entry to Flats 29 – 40 by the same means as the electrics, water and telecoms.
- (29) The television aerial for the wider building is located on the roof of the higher rise part, the wiring for which routes through the Central and North Services Risers to Flats 29 – 40 similarly to above. The antenna and distribution equipment are in the Central Electrical Service Riser within the higher rise part.
- (30) Flats 29 – 40 are served by soil vent pipes, bypassing the commercial units at ground floor to connect to the sewer network below.
- (31) The power source for general lighting and emergency lighting for the lobby, corridors and stairwells in the higher rise part and for the lighting above the walkways to Flats 29 – 40 is at the first floor of the higher rise part via the Central Services Riser. Isolation switches for the walkway lighting are found in the North Services Riser.
- (32) The experts agreed that only the sewerage is currently provided separately. They further agreed that it would be possible to separate the services. Broadly speaking the written evidence was limited to what could be done to disconnect Flats 1 – 28, rather than to reinstate/reconnect services to Flats 29 – 40.
- (33) Mr McDonald's oral evidence was that a minimum of four days interruption to the supply throughout the wider building would be required for the necessary separation of the water supply, factoring in the essential testing and flushing of systems. Electrical supplies would need to be disconnected for around 24 hours. Telecom, access control, TV and lighting separation would take up to half a day each, though a carefully planned and executed set of works could result in all of these measures being carried out simultaneously.
- (34) He conceded that these time estimates could well be affected by an inability to gain access to any one flat in the course of execution of the works, and that such a scenario was not uncommon.

Law

Statutory interpretation

- (35) When tasked to construe a statute, the starting point is the plain and ordinary meaning of the wording of the provision, both of itself and within the scheme of the statute, informed by external material as an aid to construction (e.g. explanatory notes) if necessary. In ***R (The Good Law Project) v Electoral Commission*** [2018] EWHC 2414 (Admin), giving the judgment of the court, Lord Justice Leggatt sets out the following:

Statutory interpretation

33. Save for one point, there is no dispute about the principles of statutory interpretation. The basic principles are that the words of the statute should be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the purposes of the legislation. It is generally reasonable to assume that language has been used consistently by the legislature so that the same phrase when used in different places in a statute will bear the same meaning on each occasion – all the more so where the phrase has been expressly defined.

34. It is also generally reasonable to assume that Parliament intended to observe what *Bennion on Statutory Interpretation* (7th Edn, 2017) in section 27.1 calls the “principle against doubtful penalisation”. This is the principle that a person should not be subjected to a penalty – particularly a criminal penalty – except on the basis of clear law. As noted earlier, incurring referendum expenses in excess of the prescribed limit and, in the case of a permitted participant, failing to report referendum expenses correctly are potentially criminal offences. In these circumstances counsel for the Electoral Commission and Vote Leave both submitted that the definition of “referendum expenses” should be construed strictly and any ambiguity or doubt about its meaning resolved in favour of the narrower interpretation so as to avoid doubtful penalisation.

35. In response, counsel for the claimant cited *R (Junttan Oy) v Bristol Magistrates’ Court* [2003] UKHL 55; [2003] ICR 1475, para 84, where Lord Steyn described this principle of statutory interpretation as one of last resort. Other authorities confirm, however, that that description of the principle understates its continued vitality: see e.g. *R v Dowds* [2012] EWCA Crim 281; [2012] 1 WLR 2576, paras 37-38. We think the position was fairly stated by Sales J in *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB), para 48, when he said:

“The principle of strict interpretation of penal legislation is one among many indicators of the meaning to be given to a legislative provision. It is capable of being outweighed by other objective indications of legislative intention, albeit it is itself an indicator of great weight.”

- (36) ***R (on the application of O (a minor, by her litigation friend AO)) et ors v Secretary of State for the Home***

Department [2022] UKSC 3 sets out at paragraphs 29 – 32 the weight to be given to external aids to construction, and the primacy to be given to the words of a statute themselves. Lord Hodge set out the judgment (with which the other Supreme Court Lord- and Ladyships agreed):

28. Having regard to the way in which both parties presented their cases, it is opportune to say something about the process of statutory interpretation.
29. The courts in conducting statutory interpretation are “seeking the meaning of the words which Parliament used”: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:

“Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.”

(*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397:

“Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.”

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do

not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme*, 396, in an important passage stated:

“The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the ‘intention of Parliament’ is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. ... Thus, when courts say that such-and-such a meaning ‘cannot be what Parliament intended’, they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.”

- (37) It is only if, having undertaken that task, giving the words their natural meaning would lead to ambiguity or obscurity, or result in absurdity, the Tribunal might be permitted to go to *Hansard* (***Pepper v Hart*** [1993] AC 593). Neither party invited us to do so.

The 2022 Act, 2023 Regs, explanatory notes and caselaw on/for construction

- (38) The Building Safety Act 2022 (**‘the 2022 Act’**) **section 117** sets out the meaning of a “relevant building” for the purposes of **Part 5** of the 2022 Act:

117 Meaning of “relevant building”

(1) This section applies for the purposes of sections 119 to [\[F1124\]](#) and [Schedule 8](#).

(2) “Relevant building” means a self-contained building, or self-contained part of a building, in England that contains at least two dwellings and—

(a) is at least 11 metres high, or

(b) has at least 5 storeys.

This is subject to subsection (3).

(3) “Relevant building” does not include a self-contained building or self-contained part of a building—

(a) in relation to which a right under Part 1 of the Landlord and Tenant Act 1987 (tenants’ right of first refusal) or Part 3 of that Act (compulsory acquisition by tenants of landlord’s interest) has been exercised,

(b) in relation to which the right to collective enfranchisement (within the meaning of Chapter 1 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993) has been exercised,

(c) if the freehold estate in the building or part of the building is leaseholder owned (within the meaning of regulations made by the Secretary of State), or

(d) which is on commonhold land.

(4) For the purposes of this section a building is “self-contained” if it is structurally detached.

(5) For the purposes of this section a part of a building is “self-contained” if—

(a) the part constitutes a vertical division of the building,

(b) the structure of the building is such that the part could be redeveloped independently of the remainder of the building, and

(c) the relevant services provided for occupiers of that part—

(i) are provided independently of the relevant services provided for occupiers of the remainder of the building, or

(ii) could be so provided without involving the carrying out of any works likely to result in a significant interruption in the provision of any such services for occupiers of the remainder of the building.

(6) In subsection (5) “relevant services” means services provided by means of pipes, cables or other fixed installations.

(39) The parties provided the **Explanatory Note** to section 117. So far as material to the Preliminary Issue, the Explanatory Note states as follows:

Section 117 — Meaning of "relevant building"

Effect

919. This section defines a "relevant building" for the purposes of section 119 to 125 and Schedule 8; it defines the types of building to which the leaseholder protections apply.

920. A "relevant building" is defined as a self-contained building or part of a building containing at least two dwellings which is at least 11 metres in height, or which has at least five storeys.

921. Subsection (3) sets out that leaseholder-owned buildings are not included in the definition of "relevant building" . Those types of buildings that are not included in the definition are those in which the building has undergone collective enfranchisement, or which are on commonhold land.

922. Subsections (3)(a) and (3)(b) capture the statutory routes by which a building can undergo collective enfranchisement. These are under Parts 1 or 3 of the Landlord and Tenant Act 1987, and under Chapter 1 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993. Subsection (3)(c) provides a power for the Secretary of State to specify, by regulations, other routes by which a building can become leaseholder owned, and which will also not be included in the definition of "relevant building" . Subsection (3)(d) captures buildings which are on commonhold land, which has the same meaning as in the Commonhold and Leasehold Reform Act 2002.

923. Subsections (4), (5), and (6) set out the meaning of "self-contained". A building is self contained if one part of it could be redeveloped independently of the rest of the building.

Background

924. The problems associated with historical building safety defects in multi-occupied residential buildings are concentrated in medium-and high-rise buildings. There is a greater risk to life in taller buildings when fire does spread, and so defects in taller buildings are more likely to need to be remediated, and it is leaseholders in those buildings that have found themselves more likely to face significant remediation costs. Section 117 defines a relevant building (one that is within scope of the protections) as a building containing at least two or more dwellings and which is at least 11 metres in height or has at least five storeys.

925. Buildings which are below 11 metres in height, and which have fewer than five storeys are not within the scope of the leaseholder protections as evidence shows that there is no systemic issue with historical fire safety defects in these buildings. Costly remediation is unlikely to be needed, and there are likely to be more proportionate mitigations, such as the installation of fire alarms. It is not, therefore, necessary for low-rise buildings to be included within the definition of relevant building.

926. The ownership structures of multi-occupied residential buildings are discussed in the explanatory note for section 116 and set out that (in simple terms) in most cases the building and the land on which it sits is owned by the freeholder, and the long leases of the individual dwellings are owned by the leaseholders. The freeholder (that is, the owner of the freehold) can be, for example, a private company, an individual, a local authority, or a charity.

927. It is also possible for some or all of the leaseholders to purchase their building's freehold; this is known as collective enfranchisement. Where enfranchisement occurs, the leaseholders become the owner of the freehold. There are several statutory routes to collective enfranchisement. The statutory routes are under Parts 1 or 3 of the Landlord and Tenant Act 1987, and under Chapter 1 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993. It is also possible for leaseholders to purchase the freehold of their building through non-statutory means.

928. An alternative to the leasehold model of ownership of multi-occupied residential buildings is commonhold. When a building is on commonhold land, each unit-holder (owner of a dwelling) within the building also owns the freehold of the unit. Commonhold is a different model of ownership to leasehold, but commonhold buildings are similar to those which have collectively enfranchised in the sense that the building, and the land which the building is on, are collectively owned by 928. An alternative to the leasehold the owners of the dwellings contained within the building in both circumstances. The legal framework which governs commonhold is the Commonhold and Leasehold Reform Act 2002. There are far fewer commonhold buildings in England than multi-occupied leasehold buildings.

929. The leaseholder protections measures work at a fundamental level by limiting or preventing the costs that can be passed through the service charge to leaseholders by the freeholder. When costs cannot be passed on through the service charge, the freeholder, who is responsible for undertaking works to maintain the building, becomes liable for these costs. In situations where the building is collectively owned by the leaseholders, there is no separate entity to bear the costs — the leaseholders are the freeholder. Consequently, the definition of "relevant building" does not include leaseholder-owned buildings.

Proposed use of power

930. The power at subsection (6)(c) will be used to make regulations setting out other circumstances (other than those set out in subsections (6)(a) and (6)(b)) where a building can be leaseholder owned.

- (40) The definition of "Relevant Building" was introduced as a Lords Amendment before the 2022 Act was passed; the **Lords Explanatory Note** for amendment 94 says no more than:

69 Lords Amendment 94 inserts a new clause that defines “relevant building” as a self-contained building (or self-contained part of a building) in England containing at least two dwellings.

(41) The Respondent also relies on *Adriatic Land 5 Limited v Long Leaseholders of Hippersley Point* [2025] EWCA Civ 856 for what is said to be the principle that Part 5 of the 2022 Act is concerned with money, *i.e.* who is liable to pay for relevant defects. Though we were not taken to a particular passage. Given that *Hippersley Point* was concerned with the effect of the ‘waterfall’ in schedule 8 on recoverability of incurred service charges pre-dating the coming into force of the 2022 Act, that is no doubt correct so far as the case goes.

(42) **Section 65** of the 2022 Act sets out what is a “higher risk building” for the purposes of **Part 4** of the 2022 Act:

65 Meaning of “higher-risk building” etc

(1) In [this Part](#) “higher-risk building” means a building in England that—

(a) is at least 18 metres in height or has at least 7 storeys, and

(b) contains at least 2 residential units.

(2) The Secretary of State may by regulations make provision supplementing this section.

(3) The regulations may in particular—

(a) define “building” or “storey” for the purposes of this section;

(b) make provision about how the height of a building is to be determined for those purposes;

(c) provide that “higher-risk building” does not include a building of a prescribed description.

(4) Regulations made by virtue of [subsection \(3\)\(a\)](#) may in particular define “building” so as to provide that it includes—

(a) any other structure or erection of any kind (whether temporary or permanent);

(b) any vehicle, vessel or other movable object of any kind, in such circumstances as may be prescribed.

(5) The Secretary of State may by regulations amend this section (other than [subsection \(2\)](#) or [this subsection](#)).

(6) For the meaning of “residential unit” see section 115.

(43) So far as material to section 65, the Explanatory Note states as follows:

Meaning of "higher-risk building"

Section 65: Meaning of "higher-risk building" etc and Section 66: Regulations under section 65: procedure and Section 67: Regulations under section 65: additional procedure in certain cases

Effect

578. The new regulatory regime will regulate building safety risks in "higher-risk buildings" in England. Section 65 defines the "higher-risk buildings", which will be regulated by the new occupation regime, as at least 18 metres in height or having at least 7 storeys and containing at least two residential units. Residential units are either a dwelling or any other unit of living accommodation, for example student accommodation where basic amenities, such as cooking facilities, a toilet and personal washing facilities are shared with others in the building.

579. Section 65 gives the Secretary of State the power, by regulations, to supplement this definition (subsections (2) and (3)), for example by defining building, storey and technical details such as the method for measuring the height of a building. Subsection (4) provides that the definition of "building" in regulations may include other structures, erections or movable objects. The ability to have a broad definition aligns with section 121 of the Building Act 1984. Regulations made under this power are subject to the negative resolution procedure.

580. Section 65 also gives the Secretary of State the power (used in the way described in (3) (c), by regulations, to exclude classifications of building from the definition of "higher-risk building". This means a building may be caught by the definition in this section but then excluded through regulations made under this power and therefore not defined as a "higher-risk building". Regulations made under this power are subject to the affirmative resolution procedure, i.e. they must be laid in draft, debated and approved in both Houses of Parliament before they can be made.

581. Section 65 gives the Secretary of State the power to amend section 65, apart from subsections (2) and (5). This power could be used to amend the definition of "higher-risk building". Regulations made under this power are subject to the affirmative resolution procedure, i.e. they must be laid in draft, debated and approved in both Houses of Parliament before they can be made.

582. When making regulations to amend the definition of "higher-risk building", this can be done by reference to a building's size, design, use, purpose or other characteristic (section 166).

583. Section 66 stipulates that the Secretary of State must consult the Building Safety Regulator and any other appropriate persons before making regulations. It also states that the Secretary of State does not need to repeat this consultation with the Building Safety Regulator if they have received a recommendation or requested advice. This includes when the

Secretary of State proposes to make regulations to remove a category of building from the definition of higher-risk building.

584. Section 67 further stipulates the requirements at when the Secretary of State must meet when they proposes to make regulations which would result in a description of building being added to the definition of "higher-risk building" , and therefore subject to the new occupation regulatory regime., They must have received a recommendation from the Regulator (section 69) or request advice from the Regulator (section 70) and they must undertake and publish a cost benefit analysis. If the costs or benefits cannot be reasonably or practicably estimated, then the Secretary of State must provide an explanation of this

Proposed use of power

585. At the start of the new regulatory regime, it is proposed to supplement the definition of "higher risk building"

- (44) The Explanatory Note to the 2022 Act was written after the 2022 Act was passed into law. We observe, as stated in *Hippersley Point*, that for the notes to both Parts 4 and 5, there is distinction to be drawn between explanatory notes that were available when the legislation was making its passage through the legislative process, and those that came into existence sometime later:

66. ... A passage from the judgment of Lord Sales (with whom Lords Reed, Leggatt and Stephens agreed) in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594 ("PACCAR") is relevant in this context. Lord Sales said in paragraph 42:

"It is legitimate to refer to Explanatory Notes *which accompanied a Bill in its passage through Parliament* and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be ascertained Reference to the Explanatory Notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen" (emphasis added).

67. Where explanatory notes have "accompanied a Bill in its passage through Parliament", there is sense in regarding them as capable of shedding light on what Parliament intended. Where, on the other hand, explanatory notes in respect of a statute did not exist when it was being passed, there is less reason to see them as a guide to Parliament's intentions. They may, of course, show what the Department which

promoted the Act understands it to mean, and possibly what it wished it to mean, but the materials plainly cannot have informed Parliamentary decision-making.

68. It is to be remembered in this context that, as Lord Reed said in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 (“SC”), at paragraph 166, “the Government is separate from Parliament, notwithstanding the many connections between the two institutions”. Thus, “[t]he reasons which the Government gives for promoting legislation cannot ... be treated as necessarily explaining why Parliament chose to enact it”: see SC, at paragraph 166, per Lord Reed.

69. In *Chief Constable of Cumbria v Wright* [2006] EWHC 3574 (Admin), [2007] 1 WLR 1407, Lloyd Jones J, with whom Keene LJ agreed, said in paragraph 17:

“It is, of course, for the courts and not the executive to interpret legislation. However, in general, official statements by government departments administering an Act, or by any other authority concerned with an Act, may be taken into account as persuasive authority on the legal meaning of its provisions In the present case we are concerned with guidance published by the Home Office, which is the government department which had responsibility for the enactment and operation of the legislation in question. In any given case, it may be helpful for a court to refer to the guidance in the interpretation of the legislation. It may be of some persuasive authority. However, to my mind that is the limit of its influence. It does not differ in that regard from a statement by an academic author in a textbook or an article. It does not enjoy any particular legal status. There seems to me to be no satisfactory basis for the submission that it gives rise to a presumption that the views it contains are correct and should be rejected only for good reason.”

70. In my view, the position is similar where explanatory notes have been published only after a statute has already been enacted. The notes may be of persuasive authority, but they do not enjoy any particular legal status and can be compared with academic writings.

71. *Bennion* says this in section 24.14 about explanatory notes:

“The rationale for using explanatory notes in the way discussed above appears to be that they form part of the background material available to the legislature at the time at which legislation is passed and may therefore help to inform its interpretation in the same way as other pre-enactment materials. It seems to follow that only the explanatory notes published during the Bill’s passage through the legislature can be used in this way.

The explanatory notes for the Act itself post-date its enactment and therefore cannot be viewed as part of the context against which it is enacted. Those notes should be given no more weight than other

post-enactment expressions of opinion by the government as to the meaning of legislation In other words, the weight to be given to them should depend on the cogency of any reasoning contained in them.

... It should be acknowledged that, in practice, it will not always make a difference since changes between different versions of the notes are often relatively minor”

72. I agree with those observations.

- (45) The Higher Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023 (**‘the 2023 Regs’**) further define “building” for the purposes of section 65:

4. Meaning of “building”

(1) Subject to paragraph (2), where a structure is not attached to any other structure, that structure is a “building”.

(2) Subject to paragraph (5), where a structure that is not attached to any other structure contains one or more independent sections, each independent section is a “building”.

(3) Subject to paragraph (4), where two or more structures are attached, that set of structures are a “building”.

(4) Subject to paragraph (5), where two or more structures that are attached contains one or more independent sections, each independent section is a “building”.

(5) Paragraphs (2) and (4) do not apply while a building is being constructed or proposed to be constructed.

(6) An “independent section” is a section that—

(a) has access, which can be reached from anywhere in the section, for persons to enter and exit the wider building; and

(b) either—

(i) has no access to any other section of the wider building;
or

(ii) only has access to another section of the wider building which does not contain a residential unit.

(7) “Access” means a doorway, archway or similar opening but does not include a doorway, archway or similar opening intended for exceptional use including emergency use or use for the purpose of maintenance.

(8) The “wider building” means—

(a) in relation to a section of a structure that is not attached to any other structure, that structure;

(b) in relation to a section within two or more structures that are attached, that set of structures.

(9) Where a section is a “building” pursuant to paragraphs (2) or (4), any plant room containing equipment for the provision of services to that section is to be considered as part of that building.

(10) The rule in paragraph (9) does not apply to the reference to “building” in sub-paragraphs (i) and (ii) of section 73(1) of the 2022 Act and in section 73(2) of that Act.

(46) The Explanatory Note accompanying the 2023 Regs regulation 4 says as follows:

Regulation 4 defines “*building*”. It sets out the circumstances in which structures that are joined will be considered one “building” and also the circumstances in which a section of a wider structure or set of structures will be considered a “building” for the purpose of the new regime.

Caselaw – the meaning of ‘structural detachment’, ‘self-contained part’ and separation of services etc

(47) The parties cited a number of authorities in what they submitted are the analogous jurisdictions relating to enfranchisement (under the Leasehold and Freehold Reform Act 1967 (‘the 1967 Act’) and Leasehold Reform, Housing and Urban Development Act 1993 (‘the 1993 Act’)) and right to manage (pursuant to the Commonhold and Leasehold Reform Act 2002 (‘the 2002 Act’)). Although there are some minor (though, particularly regarding the 1967 Act, in some ways significant) differences in the two enfranchisement jurisdictions, it is right to say that section 117(4) – (6) is, saving some editorial choices, identical to the test set out in section 72(2) – (5) of the 2002 Act. We set out the relevant principles to be derived from each chronologically so that one can see the evolutionary process of the principles.

(48) In ***Oakwood Court (Holland Park) Limited v Daejan Properties Limited*** (2026) Central London Civil Justice Centre 18 December 2006, Her Honour Judge Hazell Marshall QC was concerned with a dispute in which the separation of services was key to the determination of whether there was a separate part of a building over which the right to collectively enfranchise arose:

81. In my judgment, the [1993] Act is looking, not at the possibility of the supply of independent relevant services in the abstract, but at the possibility of the separation of the existing relevant services as “provided to the occupiers of that part” from those “provided to the occupiers of the remainder of the building” with minimal disruption to the latter. The works in the present case do not fall within that concept...

...

84. ... in my judgment it is not sufficient for the Claimant to say that could be done in principle; the Claimant would at least have to demonstrate that it could, in fact, be done. At present the evidence is purely theoretical and speculative, and in my judgment insufficient to satisfy subs 3(2)(b)(i).

....

94. The burden of proof is on the Claimant to prove positively that the relevant services can be provided independently to Nos 1 – 14 without the necessary works being likely to cause significant interruption to the services to the remainder of the building...

...

96. ... I find ... that the separation of the water services could only be effected with resulting periods of disturbance to water supplies to the flats, totalling 42 hours.

...

117. The test of “significant” is a matter of fact and degree... I am satisfied that the availability of central heating [the experts agreed a disruption of 8 hours] of mains cold water and of domestic cold water [48 hours] to Nos 15-30 would each individually be subject to a “significant” interruption... if the test is applied cumulatively, the conclusion is even stronger. It is also fortified by the fact that the test in the [1993] Act is not even that the services “would” be so subject, but only whether they would be “likely” to be so subject....

118. I would add that I would have reached this conclusion in relation to the interruption [agreed 8 hours] to the central heating system alone, and, in respect of the water systems even if I had concluded that the fitting of back flow devices was not necessary, as the difference made by this would not materially affect the degree of interruption.

- (49) In ***Re: Holding and Management (Solitaire) Limited*** [2008] EG 158, [2008] L&TR 16, the President of the (then) Lands Chamber George Barlett QC considered the meaning of “vertical division” in a right to manage claim under the 2002 Act, in order to establish whether there was

a self-contained part of a building. In upholding the Landlord's appeal, he found as follows:

8. ... The requirement that, to be a self-contained part of a building, a part of a building must constitute "a vertical division of the building" is unqualified. Deviations from the vertical that are de minimis could no doubt be ignored for this purpose. The LVT concluded that the area within the deviation, as it put it, was approximately 2 per cent of the floor area subject to the notice of claim, that this seemed minimal in the context of the notice and was not material for the purpose of the Act. The question, however, it seems to me, is, not whether the area outside of a line drawn vertically through the building is minimal in the context of the notice, or very small in relation to the total floor area, but whether, including the area in question, the part of the building was, physically, a vertical division of the building. Moreover, in importing a test of materiality by reference to the provisions of the 1967 Act, the LVT was in my judgment in error....

9. ... no such qualification appears in s.72 of the 2002 Act (or in the provision that is effectively in the same terms in s.3 of [the 1993 Act]), and the proper conclusion from this is that no such qualification, which could have been included but was not, is to be implied. The LVT was in error, therefore, in asking itself whether deviation from the vertical was material and basing its decision on the conclusion that it was not material.

(50) In ***No.1 Deansgate (Residential) Limited v No.1 Deansgate RTM Company Limited*** [2013] UKUT 0580 (LC), His Honour Judge Huskisson was concerned with the meaning of "self contained" building and structural attachment. In upholding the Landlord's appeal against the (then) LVT's decision, he found as follows:

28. I accept that the two sentences in Lord Wilberforce's judgment [in *Parsons v Gage (Trustees of Henry Smith's Charity)* [1974] 1 WLR 435, itself a case concerning the 1967 Act] upon which Mr Bates particularly relies, if they are to be applied literally and in all circumstances, could be taken to indicate that a building is only structurally detached if it does not touch and is in no way attached to any other structure. The two sentences are these:

"As a matter of ordinary English, I should regard the meaning as reasonably plain. "Structurally detached" means detached from any other structure."

However I am unable to accept that Lord Wilberforce was intending to lay down the words "structurally detached" should always be construed in precisely this manner in all statutes irrespective of the subject matter and intent of the statute and the context in which the words are used... The meaning of the words "structurally detached" in the 1967 Act as

construed by Lord Wilberforce cannot be determinative of the meaning of those words in section 72(2) of the 2002 Act.

29. I agree with the LVT's observation... that the purpose of this part of the 2002 Act is to permit a RTM company to manage premises which are self-contained and which are in consequence susceptible to being managed as a discrete unit. Section 72(2), which provides that a building is a self-contained building if it is structurally detached, should be construed in that context.

30. I accept Mr Dray's argument that to construe "structurally detached" as requiring the absence of any attachment or touching between the subject building and some other structure is to construe section 72(2) as though it said "detached" or "wholly detached" rather than "structurally detached". What is required is that there should be no structural attachment (as opposed to non-structural attachment) between the building and some other structure.

31. I consider the extracts from the Oxford English Dictionary to be helpful. In particular I note the definition of the word "structurally" as meaning: in structural respects; with regard to the structure. It is attachment of this sort which prevents a building being structurally detached.

...

33. I accept Mr Dray's argument that if Mr Bates' arguments are correct then there would indeed be absurd results such as those Mr Dray gave by way of example. It may be that the example of the string of bunting or the washing line could be accommodated (supposing Mr Bates's arguments were correct) on the basis the attachment there was *de minimis*. However, a more substantial connection such as the hypothetical triumphal metalwork arch connecting two otherwise entirely self-standing and separate buildings could not, so I would have thought, be dealt with on a *de minimis* basis. If such an attachment meant... that neither building was structurally detached, the result would be that neither building would be a self-contained building within section 72(2)...

...

35. ...the LVT examined the correct question, namely whether there was any attachment of a structural nature.

- (51) In ***Albion Residential Limited & Ors v Albion Riverside Residents RTM Company Limited*** [2014] UKUT 0006 (LC), another case involving a claim for the right to manage, Martin Rodger KC, Deputy President of the Upper Tribunal Lands Chamber, further examined the question of self-containment. Agreeing with Judge Huskinson regarding

the inapplicability of Lord Wilberforce's dictum in *Parsons*, he analysed the appeal as follows:

38. For premises to come within the right to manage provisions of the 2002 Act they must consist of a self-contained building or part of a building with or without appurtenant property. In most cases the application of the statutory condition is likely to produce an obvious answer, but in cases involving complex or unusual buildings ... the issue may require systematic consideration which begins by identifying the premises which are said to constitute the building or part of a building to which the claim relates, before considering whether those premises are self-contained in the sense that they are structurally detached....

- (52) Deputy President Rodger KC was further seized of the question of whether a building was a “self-contained part of a building” for the purposes of the claim to a right to manage **in *St Stephens Mansions RTM Company Limited v (1) Fairhold NW Management and (2) OM Property Management Limited* [2014] UKUT 0541 (LC)**, and in particular by reference to the provision of separate services. Doubting the Landlord's criticism of Judge Marshall's approach in *Oakwood Court*, but observing the necessity of ensuring careful attention to the statutory wording, Judge Rodger KC identified the following approach:

83. Section 72(4)(b) contemplates “the carrying out of works” to render the supply of services independently to the different parts of the building. Satisfaction of that test cannot therefore be restricted to situations in which separate service provision can be achieved simply by closing isolation valves or flicking switches. I agree with Mr Howells' submission that the provision of new components or installations cannot be ruled out, and that the only scale of measurement the [2002] Act provides for deciding whether work is too substantial is by reference to the degree of interruption it will inflict on occupiers of the remainder of the building.

...

88. ...In order to give the statute a sensible effect it is ... necessary to disregard the question of entitlement to carry out the necessary work. The purpose of section 72 is to identify premises to which the Act applies, and it is appropriate to consider that question on a purely practical level, focussing on the construction and configuration of the premises, rather than on the rights of their occupiers.

- (53) In ***West End Investments (Cowell Group) Limited v Birchlea* [2015] EWHC 3381 (Ch)**, Mr Justice Henry Carr considered the effect of ownership of a party wall on the structural division question for the 1967 Act section 2(2). He found, on the basis of consideration of *Parsons*, *Malekshad v Howard De Walden Estates Limited* [2002] UKHL 49, and

Hosebay Limited v Day [2012] UKSC 41, that where there was a ‘dog leg’ or ‘kink’ in a vertical division, such as an overhang or under-hang, that would exclude a house from enfranchisement unless such a deviation was only trivial or *de minimis*.

(54) In ***CQN RTM CO Limited v Broad Quay North Block Freehold Limited*** [2018] UKUT 183 (LC), His Honour Judge Hodge KC determined that whether or not premises comprise of a self-contained building for the purposes of section 72 of the 2002 is a question of fact and degree that depends on the nature and degree of attachment between the building and adjoining structures. Judge Hodge KC followed the decision in *No1 Deansgate* and subsequent Upper Tribunal authorities, and suggested a series of propositions:

(1) The expressions 'building' and 'structurally detached' are not defined in the 2002 Act and should be given their ordinary and natural meaning.

(2) The statutory language speaks for itself and it is neither necessary nor helpful for a tribunal which is considering whether premises are 'structurally detached' to reframe the question in different terms. Thus, it is not helpful to substitute a test of 'structurally independent' or 'having no load-bearing connection' for that of 'structurally detached'.

(3) Nevertheless, some explanation of when a building can properly be characterized as 'structurally detached' is clearly called for.

(4) What is required is that there should be no 'structural' attachment (as opposed to non-structural attachment) between the building and some other structure. The word 'structurally' qualifies the word 'attached' in some significant manner.

(5) Thus, a building may be 'structurally detached' even though it touches, or is attached to, another building, provided the attachment is not 'structural'.

(6) 'Structural' in this context should be taken as meaning 'appertaining or relating to the essential or core fabric of the building'.

(7) A building will not be 'structurally detached' from another building if the latter bears part of the load of the former building or there is some other structural inter-dependence between them.

(8) So long as a building is 'structurally detached', it does not matter what shape it is or whether part of it overhangs an access road serving some other building.

(9) A building can be 'structurally detached' even though it cannot function independently.

(10) Adjoining buildings may be 'structurally detached' even though a decorative façade runs across the frontage of both buildings.

(11) The question whether or not premises in respect of which a right to manage is claimed comprises a self-contained building is an issue of fact and degree which depends on the nature and degree of attachment between the subject building and any other adjoining structures.

(12) In determining whether a building is 'structurally detached', it is first necessary (a) to identify the premises to which the claim relates, then (b) to identify which parts of those premises are attached to some other building, and finally (c) to decide whether, having regard to the nature and degree of that attachment, the premises are 'structurally detached'.

(13) If a structural part of the premises is attached to a structural part of another building, the premises are unlikely to be 'structurally detached'.

(55) At paragraph 62 he decided as follows:

... The FTT clearly regarded the car park ceiling and its floor, or base, as doing more than merely touching. Reading the decision as a whole, it is clear the FTT regarded them as a single and indivisible structure which straddled both buildings and meant that they could not properly be regarded as “structurally detached”. It is implicit in the FTT’s decision that they rejected the need for there to be any load-bearing connection between the two buildings..., but in my judgment they were right to do so; while mutual structural reliance, or interdependency, may indicate structural attachment, its absence does not, in my judgment, necessarily connote structural detachment, provided some part of the essential core fabric of the subject premises is attached to some part of the essential or core fabric of another building.

(56) In ***Consensus Business Group (Ground Rents) Limited v Palgrave Gardens Freehold Co Ltd*** [2020] EWHC 920 (Ch), Mr Justice Falk was called on to consider the issue of structural detachment for the purposes of a 1993 Act enfranchisement claim, in which he determined that multiple blocks of flats connected by a single basement carpark constituted a single building (which building included the carpark even though it extended beyond the footprint of the ground level of the blocks above). In so doing, he found:

111. I do not agree with the submission that the question of structural detachment is simply one for structural engineers, and dependent solely on the existence or otherwise of structural interdependence or load bearing connection. That is not the statutory test. While it is hard to see that structural detachment could exist if there is no structural interdependence... that does not mean that structural dependence is essential.

...

121. As already indicated, structural detachment does not necessarily require structural independence in the engineering sense of an absence of structural support. Rather, I prefer the approach of HHJ Huskinson in *Deansgate*, which posits the question simply in terms of whether there is a structural attachment, as opposed to non-structural attachment. Overall I found this more helpful than Judge Hodge KC's suggestion at proposition (6) in CQN which refers to the "essential or core fabric" of the building, which (while it is intended to capture a distinction between structural features and others such as the merely decorative) may risk too much of a gloss on the statutory language.

122. I would also add that design and function play some part in determining whether structural detachment exists. So in this case it is not irrelevant that the blocks were designed to be constructed together, not as discrete individual buildings but as part of a single development connected by a common basement which functions as the car park for all the blocks and which is accessible directly to and from each of them...

- (57) In its decision in ***Eveline Road RTM Co Limited v Assehold Limited*** [2024] EWCA Civ 187, in the context of consideration of whether an RTM company was confined to asserting its claim to the smallest possible part of a wider building, their lordships held (paragraph 36) that the question of whether premises satisfy the definition of a self-contained building or self-contained part of a building is a purely physical test, "concerned only with the structure of the built envelope, its internal structure, and the separability of services."
- (58) Deputy President Rodger KC further considered the question of self-containment after the *Eveline Road* decision, in ***Courtyard RTM Co Ltd v Rockwell Ltd*** [2025] UKUT 39 (LC). Much of the above caselaw was addressed in his decision. Observing that the question was one of physical possibility, not contractual or legal permissibility (paragraph 9), he addressed the self-containment question thus:

Vertical division – discussion

41. I begin with two preliminary points.

42. First, each of the conditions in [section 72\(3\)](#) describes a different aspect of the self-containment required for premises to be a self-contained part of a building. The few cases in which the definition has been considered have tended to focus on one or other of the conditions, but in interpreting each of them it is relevant to keep in mind that they are collectively intended to describe a single thing, "a self-contained part of a building". The label which the statute applies to that thing is an important point of reference when trying to understand what the individual conditions mean. As Lord Hoffmann explained in [Chartbrook Ltd v Persimmon Homes Ltd \[2009\] AC 1101](#) (although there speaking of a contractual rather than a statutory label):

"The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition. In such cases the language of the defined expression may help to elucidate ambiguities in the definition or other parts of the agreement."

43. Secondly, in *Crafrule [Limited v 41-60 Albert Palace Mansions (Freehold) Limited]* [2011] L&TR 13], Smith LJ commented on the 'rather odd' expression 'vertical division' and implied that the natural meaning of 'division' was 'a line of no thickness'. While that is one meaning of 'division', the word has a number of related meanings. A division is also one of the parts into which an object can be divided; a portion, or section. It can therefore refer both to the plane through which something is divided, and to the segments produced by the act of dividing it. Smith LJ explained that in this context the expression means that "the premises must be a vertical slice of the building". But "slice" has the same dual meaning as "division"; it can be either a cut, or, the piece which is cut from something larger. In [section 72\(3\)\(a\)](#) the sentence as a whole indicates that the word "division" is there being used to refer to a part of a building, with substance and dimensions, rather than to a line of no thickness drawn through a building: it is the whole slice of cake, not just the line along which the cake is cut.

44. Although [section 72\(3\)\(a\)](#) might appear rather odd, its purpose and effect are clear. A self-contained part of a building must be a part of the building divided vertically, not horizontally. The effect is to limit the acquisition of the right to manage (or collective enfranchisement in the case of the [1993 Act](#)) to premises which do not overlap or underlap the remainder of the building of which they form part.

45. In the case of the [1993 Act](#) the requirement of vertical division has been said by the Law Commission to be important to prevent the creation of flying freeholds (Law Commission, Leasehold home ownership: exercising the right to manage, No 243, January 2019 at paragraph 2.74). The particular vice of flying freeholds is that they give rise to practical problems in relation to maintenance and support, which cannot be dealt with by covenant since the burden of a positive covenant does not run with freehold land. Under the right to manage, no ownership passes so the specific issues which may have been a concern to the drafters of the [1993 Act](#) do not arise directly. Nevertheless, the statutory context and language are so closely aligned that it seems unlikely, though not impossible, that the test of self-containment should be different as between the 1993 and [2002 Act](#) s. For the purpose of the [2002 Act](#) it must have been considered important to avoid the creation of separate management responsibilities for overlapping parts of the same building.

46. Taken together, these preliminary points lead to a general observation about how the issue of vertical division might usefully be approached. In the course of argument in the appeals, and in the decisions of the FTT, attention was focussed exclusively on the location and features of one or more notional lines drawn through the relevant

building either where it abutted its neighbour or on each of its sides. In Mr Bates KC's submission these lines had to be straight and had to be capable of being drawn 'from the earth to the sky'. I do not disagree that the boundaries between the premises and the rest of the building must be considered carefully, but the statutory language identifies a single wider question. That is, whether the premises as a whole are a vertical division of the larger building of which they are part, which I take to mean a vertical division rather than a horizontal division or any other configuration. That is the question to be determined, not whether a particular boundary line deviates from the vertical plane.

...

49. ... There is no requirement that, to constitute a self-contained part of a building, premises must not overhang land which is not part of the larger building of which the premises form part. There is no requirement that the facades of the premises be free of projections, or bays or overhangs; what is required is that the part of the building over which the right to manage is claimed must "constitute a vertical division *of the building*". The only boundaries of the premises which are relevant to this requirement are those which are connected to the rest of the building.

...

60. Standing back and considering whether the premises as a whole constitute a vertical division of the building as a whole, the precise route of the notional dividing line between the premises and the rest of the building risks becoming a distraction and should not be taken to the extremes that have featured in these cases. In my judgment the FTT which decided the Park Crescent case was correct on this issue and the fact that a notional dividing line between the premises and the remainder of the building (wherever precisely it may be drawn) would have to pass through a solid structure running perpendicular to that line is no obstacle to the premises constituting a vertical division of the building. That is because the line is a notional one.

...

71. ... At basement level the car park beneath the individual blocks is not part of self-contained premises in the ordinary sense; it is open-plan and undivided. It is only by drawing a notional line on a plan that a division is achieved, but this is an instance where focussing on a notional dividing line is liable to distract from the real question. To achieve a vertical division the premises must incorporate part of the car park because otherwise the footprint of the buildings at basement level would be smaller than at higher levels, creating an impermissible overhang. But by bringing in part of the car park the premises cease to be a division of the building. There is no division at that point. It does not seem to me to be an apt description of the part of the car park beneath the individual

blocks to say that they each form part of a vertical division of the building otherwise consisting of the block above them.

...

Boundaries deviating from a straight line

76. The remaining vertical division issue in the Park Crescent appeal arises out of the configuration of the boundaries of No.14. A notional vertical division between No.14 and its neighbours would not be a completely straight line but would deviate in places, particularly at the rear, turning 90° to the left or the right, to go round the projecting balcony of No.98. These dog-legs were said by Mr Bates KC to be fatal to the vertical division of the premises. He advanced a number of reasons why that was so, none of which I found convincing.

77. First, he submitted that the requirement is for "a" vertical division between the premises and its neighbour, and that there is no reference to "dog legs" in [the Act](#). But that is not what [section 72\(3\)\(a\)](#) requires; what it requires is that the premises constitute a vertical division of the building. That division will usually have four walls, with those at the front and back usually being at right angles to the party walls separating the premises from its immediate neighbours. Nothing in that configuration prevents the premises from constituting a vertical division of the building and I can see no reason why twists and turns in the party walls themselves should do so.

78. Secondly, Mr Bates KC suggested that "multiple vertical divisions" would create uncertainty about the extent of the RTM company's repairing responsibilities. I do not see why that should be, as those multiple vertical divisions do not create any uncertainty about where No.14 ends and its neighbours begin.

79. Thirdly, Mr Bates KC argued that the vertical division test must have been intended to exclude some properties from the right to manage and he asked rhetorically, if multiple vertical lines, dog legs etc are permissible, then what properties are excluded? The answer is simply that premises which do not constitute a vertical division of the building because they lie immediately above or below a part of the building which is not included in the claim are excluded.

80. In summary, [section 72\(3\)\(a\)](#) says nothing about the need for a perfectly straight boundary between the premises and its neighbour and no such requirement can be read into it.

- (59) In terms of the separation of services, Judge Rodger KC confirmed (para 15) a marginally adapted approach to that taken by Judge Marshall QC on Oakwood Court:

(1) First, .. identify the services provided to occupiers of the part of the building of which RTM is claimed ("the RTM part") which are in issue because they are not provided independently.

(2) Consider whether those services can be provided independently to the RTM part independently of their provision to the remainder of the building.

(3) Ascertain the works required to separate the respective parts of the services supplying the RTM part and the remainder of the building, so that such services would thereafter be supplied to each part independently of the other.

(4) Assess the interruption to the services provided to the remainder of the building which would be caused by carrying out the works.

(5) Decide whether that interruption would be "significant".

(60) He further found as follows:

99. It was common ground between the parties that it had been for the RTM company to prove that the final condition was satisfied. Ms Rai submitted that the company had led no evidence before the FTT on that issue and had failed to show that the fire alarm system could be "de-linked", as she put it. It should therefore have dismissed the application on that additional ground as well.

100. There was very little evidence before the FTT of exactly what the fire alarm system comprised, but it was satisfied that a fire alarm was a "relevant service" within the meaning of section 72(5). There has been no challenge to that starting point, which is clearly correct; warning residents of a fire by means of a fire alarm, however it is connected or powered, is a service provided by means of a fixed installation.

(61) The parties provided the following other decisions in the authorities bundle, which do not require separate consideration given the material derived from the above:

Stamford Hill Mansions RTM Company Limited v Daejan Properties Limited LON/00AM/LRM/2007/007

23 Cannon Place RTM Company Limited v Ambrose
LON/00AG/LRM/2019/0007

LM Homes Ltd v Queen Court Freehold Company Limited [2020]
EWCA Civ 371

Re: 77 Newbridge Road RTM Co Ltd (missing landlord)
CHI/00HA/LOA/2021/0001

Settlers Court RTM Co Ltd & Ors v FirstPort Property Services Ltd
[2022] UKSC 1

29 – 67 Carpathia Drive RTM Co Ltd v Trinity (Estates) Property Management Ltd CHI/00MS/LRM/2023/0002

GUV Harborough & Saltley House RTM Co Ltd v Adriatic Land 3 Ltd & Ors [2024] UKUT 109 (LC)

14 Park Crescent RTM Co Ltd v 14 Park Crescent and Others LON/00BK/LRM/2023/0022

Discussion

Is the “relevant building” with which Part 5 concerned different from the “building” with which Part 4 is concerned?

- (62) The Applicant’s reliance on the Part 4 and (particularly) regulation 4 of the 2023 Regs was reframed at the hearing, inasmuch as Mr Frampton relied on Part 4 and the 2023 Regs only as an additional lens through which section 117 should be construed.
- (63) Neither party therefore dwelt on the question of whether the wider building met the definition in regulation 4, though it would appear on at least an initial view that it would be a “higher risk building” for the purposes of part 4 because it appears not to be an ‘independent section’ for regulation 4 of the 2023 Regs.
- (64) That is consistent with the wider building’s single registration with the Building Safety Regulator, though nothing much turns on that fact since registration is in accordance with the Applicant’s assessment.
- (65) We are satisfied that this is not now a case in which we consider that the outcome for the Respondent would turn on the construction of section 117 through the lens of the 2023 Regs, given our findings below. We have had no cause to consider whether the ‘independent section’ test in the 2023 Regs would necessarily impact on the ‘self-contained part’ test in section 117, or the reference to archways and access in the former’s impact on the latter in particular. We will therefore only deal with the matter briefly.
- (66) Our starting position is that where, as in this case, Parliament has seen fit to incorporate into a new statute a set of words in identical terms (save for some, it seems to us inconsequential, editorial choices) to a pre-existing statutory provision which has itself been tried and tested (albeit, as can be seen from the law section above, not entirely satisfactorily resolved), the most likely inference to be drawn is that the words themselves should bear the same meaning. Where, as here, in another part of a statute (or regulations thereunder) a different definitive choice has been made, the natural starting point is that is because there is something different with which that part/regulation is concerned.

- (67) While that may occasionally result in a direct and irresolvable conflict between the two, so that the statute becomes inoperable on its natural construction, a purposive approach to the offending passages might be permitted.
- (68) One must never lose sight, however, of the *context* of the Act in which those words are used. Here, the context of the 2022 Act (broadly) is the safety of people in and about buildings, and in particular in and about higher-risk buildings. We consider that words used must be viewed through that broad lens.
- (69) We must also view the words used through a separate, narrower lens, and that is what each of the Parts of the 2022 Act seek to do to achieve the safety of people in and about buildings, particularly higher-risk buildings.
- (70) We were taken to the particular wording of section 116 of the 2022 Act, which says this as an introduction to Part 5:
- (1) Section 117 to 124 and schedule 8 make provision in connection with the remediation of relevant defects in relevant buildings
 - (2) In those sections -
 - (a) Sections 117 to 121 define “relevant building”, “qualifying lease”, “the qualifying time”, “relevant defect” and “associate”...
- (71) We were taken to the particular wording of section 117, in which it is stated:
- (1) This section applies for the purposes of section 119 to 124 and schedule 8...
- (72) We were taken to the wording of section 61, in which the overview of Part 4 indicates:
- (1) This Part contains provisions about the management of building safety risks as regards higher-risk buildings.
 - (2) In this Part –
 - (a) Sections 62 to 64 define “building safety risk” and make related provision;
 - (b) Sections 65 – 70 define “higher risk building, make related provision, and confer power to modify this Part as it applies in relation to any description of higher-risk building
- (73) We were taken to section 65, in which the wording is:
- (1) In this Part, “higher risk building” means...

(74) Finally, we were referred to the introduction to the 2023 Regs in which it is stated “The Secretary of State makes these Regulations in exercise of the powers conferred by sections... 65(2) and (3)...”, and regulation 3 which states:

3. Regulations 4, 5 and 6 apply for the purposes of ... section 65 of the 2002 Act.

(75) All of those passages are indicators that the definitions in the separate Parts are to be confined to those Parts rather than to be “read across” the Parts.

(76) Is doing so consistent with the purposes of the separate Parts?

(77) Though we disagree with Mr Bowker that the *sole* purpose behind Part 5 is the question of payment for remediation of relevant defects (a remediation order under section 123 is remedy of those defects directly by a responsible person, by quasi-injunction, which goes directly to the safety of the building), we accept that the dominant construction of the wider Part is about who pays to make a building safe (whether through direct action or indirectly by financial contribution). That construction is supported by the Explanatory Note paragraphs 924 – 926 and 929, albeit that they are *ex post facto* and post-rationalisation.

(78) We agree, also, that Part 4 and the 2023 Regs are about safety, especially in higher-risk buildings. That is substantially supported in the Explanatory Note paragraphs. It is therefore surprising that a separate way to assess what a higher-risk building has been set in Part 4 to that which has been provided in Part 5, which could leave one treating one part of a building as a low-risk building for the purposes of remediation but a higher-risk building for the purposes of management.

(79) Many of the submissions in the hearing asked us to approach this case as if we were thinking about an RTM claim. In effect Mr Bowker’s submission was that we would be on dangerous ground were we to consider the lower rise part was not a self-contained part that was prone to the exercise of the right to manage.

(80) We must bear in mind that the two Acts are made for very different purposes: as the Supreme Court found in ***A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd*** [2024] UKSC 27 (paragraph 25), the general statement of the purpose of the 2002 Act was stated in the Consultation Paper (at section 3.10):

“The main objective is to grant residential long leaseholders of flats the right to take over the management of their building collectively without having either to prove fault on the part of the landlord or to pay any compensation. The procedures should be as simple as possible to reduce the potential for challenge by an obstructive landlord. The allocation of responsibilities should be clear-cut, and the body through which the leaseholders take on management responsibility should enjoy all

necessary powers to properly discharge its functions. At the same time, the legitimate interest of the landlord in the property should be properly recognised and safeguarded.”

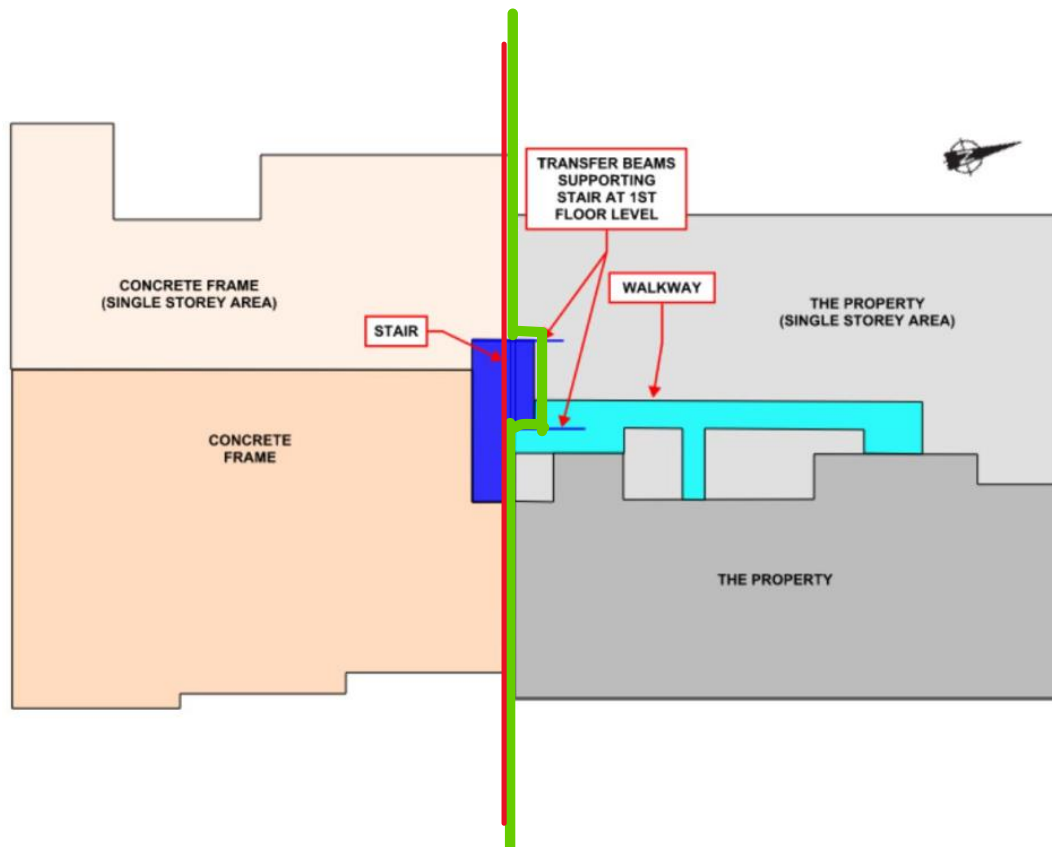
Construction of the 2002 should give effect to that aim.

- (81) It is important specifically to avoid construction of the Part 5 of the 2022 Act as in some way part of that regime. It must be construed within the legislation of which it is part.
- (82) In section 1 of the 2022 Act, the overall objective is that it is “intended to secure the safety of people in or about buildings and to improve the standard of buildings”, consistently with the preamble to the Act (“to make provision about the safety of people in or about buildings and the standard of buildings”). Safety is central to the construction of the provisions.
- (83) There is nevertheless some force in Mr Bowker’s submission that Parliament has enacted the legislation in Part 5 with only the question of the costs of remediation (whether direct or indirect) in mind for that part, and so has chosen to impose a rule (arbitrary or otherwise) for reasons it was entitled to consider.
- (84) We think that the tension is only likely to arise in circumstances in which the subject property is a ‘self-contained part’ but not an ‘independent section’. That is not the case here, as we find below. It may be that the tension is resolved by the consideration of the provision of the building safety services at the building. As Judge Rodger KC has already observed in *Courtyard v Rockwell*, those services already form part of the question of self-containment for an RTM claim (as they must to section 117).
- (85) On balance, on the facts of this case and doing our best with the arguments made, we find that the ‘relevant building’ for Part 5 purposes and ‘independent section’ with which Part 4 is concerned are two separate tests to be considered separately on the plain wording of the statute. In the particular circumstances of this case, however, that does not result in a conflicting outcome and so we need not go further.

What is “the building”?

- (86) It is the Respondent’s primary case that there are two buildings, and that for the purposes of section 116 and 117 of the 2022 Act, the lower rise part (ending at the external north-face of stair B, where the external steel-framed unenclosed walkways are attached to stair B), is structurally detached and not a ‘relevant building’. Drawing the line there, Mr Bowker submits, results a minimal deviation in the line one would draw to separate the two buildings, stepping in and back out again to circumnavigate stair B.

- (87) In the alternative, it is the Respondent's case that the division would bisect stair B.
- (88) Depicted on the experts' image contained in their joint report, we indicate the Respondent's primary and secondary cases in green and red respectively below (hereafter 'the green line division' and 'the red line division' respectively):



- (89) The same divisions are relied on for 'part of a building' in the alternative.

Is the lower rise part structurally detached from the higher rise part?

- (90) We find as a fact that the lower rise part is not structurally detached from the higher rise part of the wider building. It is not self-contained for that reason.
- (91) We empathise with Mr Moppett's unfortunate position; we were told the Respondent provided him with copies of section 117 of the 2022 Act, *Oakwood Court, St Stephens Mansions v Fairhold, Courtyard v Rockwell*, and an extract from *Service Charges and Management: Tanfield Chambers* (5th Edn, December 2021, Sweet and Maxwell paras 23-01 – 23-15) (it appears Mr McDonald was provided with the same material). That material that ought not to have been provided to him in

the course of the simple question of his expert opinion as a structural engineer, it being outside of his role to interpret the legislation and caselaw. As can be seen at in the Law section of this decision, certainly there is more nuance to interpretation of the test that as is contained in the three decisions with which Mr Moppett was provided.

- (92) He had also not initially been provided with plans and drawings that Mr Davies had access to, and therefore appears initially to have been unaware of the peculiarities of the construction until a joint site-visit was undertaken and the drawings shared.
- (93) It is therefore unsurprising that in his initial report he sought to provide his opinion on his reading of the caselaw as opposed to as a matter of his expertise, and on the basis of a misunderstanding of the interpretation to be derived from that caselaw. In an addendum report, he changed his expert opinion as to structural connection and opined that the lower rise part is not structurally detached from the higher rise part, in agreement with Mr Davies.
- (94) At the hearing, he conceded that his reading of the caselaw had influenced his initial opinion. In the hearing his confusion persisted until we asked him to give his simple opinion as a structural engineer as regards the structural attachments or lack of them. He confirmed his opinion as a structural engineer was that Flats 29-40 were structurally attached directly to stair B, and indirectly to the concrete frame of the higher rise part via the transfer beams. The walkways would collapse without that attachment. The transfer beams were designed to take the load of the stair, and were attached to both the flat-roofs of the commercial premises beneath Flats 29 – 40 and to the concrete frame of the higher rise part. Removal of the transfer beams would have a direct impact on stair B, and an indirect impact on lateral and vertical loads on both the lower rise and higher rise parts. He confirmed that the building was not, in his opinion, structurally detached. In this he agreed with Mr Davies.
- (95) Mr Bowker's submission was that, although he was not treating Mr Moppett as a hostile witness, we should be very careful before accepting his evidence. The question of structural detachment was not a purely expert question (no doubt relying on *Consensus v Palgrave*). He asked us to envisage a tightrope between two buildings, which be 'attached' to the buildings but not structurally, at one end of the spectrum. He posited that a wall between two buildings, that touched each building at each end separated by some kind of movement joint or filler, would be further up the spectrum but would still result in structural detachment. He conjured an image of a carpark with two cores, joined by a pedestrian access bridge. He maintained that although the buildings would be attached to and by the bridge, that attachment would not be structural attachment – even though the two buildings would no doubt exercise some forces on each other as a consequence of that attachment and therefore would 'feel' the removal of the bridge.

- (96) We note that in *No 1 Deansgate*, *CQN v Broad Quay*, and *Palgrave Gardens*, each of the Judges agreed that there does not need to be structural interdependence in order for there to be structural attachment; the question is one simply of structural attachment as opposed to non-structural attachment. In each case the question is one of fact and degree.
- (97) We find that in respect of the higher and lower rise parts, there is structural interdependence.
- (98) Firstly, the structural experts agree that the lower-rise part is not structurally detached from stair B. The external walkways take their full support from that steel construction and would otherwise collapse. Stair B also takes part of its support from the transfer beams, without which it would collapse, leaving one of the two fire-exits unusable.
- (99) We are satisfied that that direct structural attachment is sufficient. We do not accept Mr Bowker's submission that this is directly comparable to the carpark pedestrian bridge. That fundamentally diminishes the importance of stair B, reducing it to nothing more than an extractable part in the complicated construction that was developed by the Respondent. Its wider significance within the wider building is, we find, reflected in the fact that the Respondent did not propose a third alternative by which the stair would form part of the lower rise part.
- (100) We are satisfied that, additionally, the indirect structural attachment between the higher rise concrete frame and the commercial premises' rooftops in the lower rise are sufficient to amount to a 'structural connection' for the purposes of the test. The attachment to both the higher and lower rise parts serves a structural function for the benefit of stair B, upon which's structural integrity the external walkways rely, regardless of whether it is termed direct or indirect. It is not, in Mr Bowker's words, a 'mere connection'. It is not a tightrope, or a privacy wall, or a pedestrian bridge (which type of attachment, we observe, may in fact be structurally attached or not, depending on the particular arrangement of the particular construction). It is not alike the rainscreen cladding in *No 1 Deansgate*, or putty cushioning movement between two separate structures (*Palgrave*).
- (101) We reject Mr Bowker's submission, tantamount to 'it's not that much load going through the indirect connections', as irrelevant to the point. Firstly, we did not have comprehensive evidence on the loads save for a comment in evidence from Mr Moppett that 16% of the vertical load of stair B was likely carried by the transfer beams. That calculation appears, however, to have been made on the basis of there being a shorter north-western transfer beam (as depicted in the sketch), which we identified at the inspection was not in fact the physical layout – the transfer beams were coextensive.
- (102) Secondly, and regardless, as the caselaw makes clear, structural interdependence is not fundamental to the test. Where, as here, there is structural interdependence we find that is a clear indicator that there is

not structural detachment, regardless of how major or minor the forces exerted on or by that interdependence might be.

Is the lower rise part a ‘self-contained part’ of the wider building?

(a) Vertical division

(103) We deal with the Respondent’s alternative (red line) vertical division first, it being relatively easily disposed of. We are satisfied that the red line division would not result in a ‘self-contained part’ of the wider building. Each of the higher and lower rise parts would have unseparated use (and need) of stair B. As in *Courtyard v Rockwell*, bringing in part of stair B would result in the lower rise ceasing to be a self-contained part of the wider building.

(104) The Respondent’s green line division is more complex.

(105) Drawing together the thread from the caselaw, we derive the following development of the meaning of “vertical division”:

- (a) For the 2002 Act, “[t]he question... is, not whether the area outside of a line drawn vertically through the building is minimal in the context of the notice, or very small in relation to the total floor area, but whether, including the area in question, the part of the building was, physically, a vertical division of the building.” There is no materiality qualification in the 2002 Act and therefore whether such a deviation would make little difference is not a relevant consideration (the Lands Chamber President George Barlett QC in *Holding and Management (Solitaire)*);
- (b) For the 1967 Act, a ‘dog leg’ or ‘kink’ in a vertical division, such as an overhang or under-hang, would exclude a house from enfranchisement unless such a deviation was only trivial or *de minimis* (Mr Justice Carr in *West End Investments v Birchlea*);
- (c) whether premises satisfy the definition of a self-contained building or self-contained part of a building for the 2002 Act is a purely physical test, “concerned only with the structure of the built envelope, its internal structure, and the separability of services” (Court of Appeal, *Eveline Road*)
- (d) the question is one of physical possibility, not contractual or legal permissibility (Deputy President Rodger KC, *Courtyard v Rockwell*);
- (e) each of the conditions in [section 72\(3\)](#) describes a different aspect of the self-containment; they collectively describe a single thing (*ibid*);
- (f) a vertical division of a building is a slice of a building, “with substance and dimensions, rather than to a line of no thickness drawn through a

building". "The effect is to limit the acquisition of the right to manage (or collective enfranchisement in the case of the [1993 Act](#)) to premises which do not overlap or underlap the remainder of the building of which they form part." (ibid);

- (g) "the boundaries between the premises and the rest of the building must be considered carefully, but the statutory language identifies a single wider question. That is, whether the premises as a whole are a vertical division of the larger building of which they are part, which I take to mean a vertical division rather than a horizontal division or any other configuration. That is the question to be determined, not whether a particular boundary line deviates from the vertical plane." (ibid);
- (h) "the part of the building over which the right to manage is claimed must "constitute a vertical division *of the building*". The only boundaries of the premises which are relevant to this requirement are those which are connected to the rest of the building." (ibid)
- (i) "what [section 72\(3\)\(a\)](#) requires... is that the premises constitute a vertical division of the building. That division will usually have four walls, with those at the front and back usually being at right angles to the party walls separating the premises from its immediate neighbours. Nothing in that configuration prevents the premises from constituting a vertical division of the building and I can see no reason why twists and turns in the party walls themselves should do so.... if multiple vertical lines, dog legs etc are permissible, then what properties are excluded? The answer is simply that premises which do not constitute a vertical division of the building because they lie immediately above or below a part of the building which is not included in the claim are excluded.... [section 72\(3\)\(a\)](#) says nothing about the need for a perfectly straight boundary between the premises and its neighbour and no such requirement can be read into it."

(106) The parties did not agree what the 'part' concerned is. Mr Frampton's submission is that the part is only the three residential storeys, and that therefore the Respondent's argument falls at the first hurdle. Mr Bowker's submission was that it was far from unusual for an RTM company to include commercial premises in an RTM claim, on grounds otherwise those claims would automatically fail.

(107) We consider that it is the physical building that dictates the part concerned. Flats 29 – 40 are part of the lower rise building – they are not structurally independent of the commercial storey. We find that what we must look at is the whole of the lower rise part over the four storeys concerned.

(108) Nevertheless, we are satisfied that the lower rise part is not a vertical division of the wider building.

- (109) Stair B, as identified in the experts' sketch, overhangs the commercial storey of the lower rise building, and is connected to the lower rise building both by the connections with the external walkways, and by the transfer beams. The stair is therefore connected at both north east and north west corners. That is no doubt why the Applicant draws the line with a "notch". From above, that is reflected in the plan relied on by the structural experts (which accords with the as-built drawings which may be seen at page 395 of the bundle).
- (110) Beneath that notch lies part of the commercial premises of the lower rise building, as acknowledged by the Respondent. Mr Moppett's evidence was that it amounted to only a very small percentage of the total and Mr Bowker therefore argues that it is *de minimis*. However, we find that *Holding and Management (Solitaire)* is of persuasive force for the 2022 Act, given that the legislation is framed in the same way as the 2002 Act save for inconsequential editorial choices, and not (as it could have been) as is the equivalent provision in the 1967 Act. Based on Judge Bartlett QC's judgment, we do not consider the question is one of whether the overlap is *de minimis*.
- (111) That is not, however, where the consideration ends. We have carefully considered Deputy President Rodger KC's recent consideration of the issue in *Courtyard v Rockwell* at paragraph 102(d) – (i) above.
- (112) Firstly, were one thinking in terms of an RTM, we would be satisfied that the notch would have no impact on the internal management of the configuration of the lower rise building.
- (113) Through the vertical plane from above, we do not see why in principle the line has to be straight. As long as one could cut the cake down a vertical plane, we do not think it would matter if the knife were shaped otherwise than straight.
- (114) The difficulty is that the knife would meet, on the horizontal plane, the commercial premises of the lower rise building three layers into the four-layer delicacy. Dropping the line vertically would take part of the Applicant's slice of cake. It is not possible to form a knife that will deviate back through a horizontal plane beneath the vertical to bring that part back into the slice.
- (115) Does it matter? Standing back and thinking practically, as we believe is Judge Rodger KC's main guiding principle, we do not believe there would be any degree of confusion simply by the fact that stair B overhangs the lower rise building. No-one would be in any doubt that the lower rise building also incorporated the commercial storey. So far as Judge Rodger's KC reasoning in (g) above, so arguable the Respondent's case.
- (116) However, Judge Rodger KC's reasoning did not stop there. In (i) above, when Mr Bates KC posited the rhetorical question "if multiple vertical lines, dog legs etc are permissible, then what properties are excluded?", Judge Rodger KC reasoned that "The answer is simply that premises

which do not constitute a vertical division of the building because they lie immediately above or below a part of the building which is not included in the claim are excluded.... [section 72\(3\)\(a\)](#) says nothing about the need for a perfectly straight boundary between the premises and its neighbour and no such requirement can be read into it.”

- (117) We find that the external configuration, i.e. the positioning of stair B directly above the commercial premises on the ground floor of the lower rise part, is an example of the ‘impermissible overhang’ (or in this case, under-hang) with which the latter paragraph is concerned.
- (118) That is not just because of the under-hang, but further because of the transfer beams horizontally connecting what the Respondent says are the two divided parts. The hypothetical vertical ‘cut’ would be straight through the transfer beams. The southern boundary of it is not easily identifiable, but even if it is at the external face of the north west corner of stair B, at the beam’s northerly end, it terminates much further north than the stair, well onto the flat roof of the commercial units. It, and stair B, are positioned directly on, and reliant on, the structure of the lower rise part.
- (119) We therefore do not accept that there can be vertical division where the Respondent places its green line division.
- (120) Looking at it from the perspective of who the obligation would fall on for maintenance (as one would if this were an RTM claim):
- (a) If the transfer beams lie on both sides of the figurative green line (i.e. do not terminate at the external north face of stair B, as is understood to be the case) they would be ‘common parts’ subject to indivisible responsibility for the maintenance and repair of a fundamental structural element;
 - (b) Alternatively, if the transfer beams do terminate at the external north corners of stair B, they nevertheless are part of and for the sole benefit of the higher-rise part (i.e. the stair the Respondent seeks to exclude from the vertical division), and their existence results in a further impermissible under-hang by the commercial premises of the lower rise part to whose flat roofs they are directly attached.
- (121) On either case, we find that this would result in an equivalent want of vertical separation as in the undivided car park exemplar (albeit through a physical element rather than a void). The result would be separate management responsibilities for overlapping parts of the same building. The existence of the transfer beams means that the external face of stair B is not the boundary between the higher rise part and the lower rise part.
- (122) We therefore find that the lower rise part is not vertically divided from the higher rise part of the wider building.
- (123) However, even if we are wrong in that, the Respondent fails on the remainder of the necessary elements of the test.

(b) Independent redevelopment

(124) Mr Moppett opined that the lower rise part could be independently redeveloped of the higher rise part, on the basis that there is always that “*some work is always required when two buildings or two parts of a building are separated and one is redeveloped*”.

(125) While we do not disagree with that proposition, the question is one of fact and degree.

(126) Mr Moppett put forward a number of structural solutions by which the problem of stair B’s fundamental support might be addressed, including installing new raking props at an angle so as to be placed on the higher-rise part’s footprint, or (it seemed preferably) re-siting the support on the lower rise part once that part had been redeveloped. Mr Davies broadly agreed that there were such solutions as proposed by Mr Moppett, but that they were of a nature and degree as to be more than merely temporary, and fundamentally would require the higher rise part (including stair B) to be redeveloped. Until it was, stair B would have to be put out of use for safety. Therefore, the lower rise part could not be independently redeveloped.

(127) We prefer Mr Davies’ evidence that, although there may be a number of solutions to disentangle stair B from the construction identified above, more than mere propping would be required. A permanent solution that would require closure of stair B for an undefined period, and which would require stair B to be structurally redeveloped in order to be safe and operational, we find, is so substantial that the natural conclusion is that the lower rise part cannot be independently redeveloped.

(128) In other words, the only way in which the lower rise building could be redeveloped is if there was a redevelopment of the higher rise part, in particular stair B.

(129) We would add that from a functional point of view, leaving the higher rise part without one of the two essential fire escapes, and no doubt potentially therefore resulting in the need for a new fire strategy and potentially a move to simultaneous evacuation with or without a waking watch, seems to us to be an indicator of itself that independent redevelopment is not possible.

(c) Independent provision of relevant services

(130) Insofar as the M&E experts have addressed what the relevant services are, they are fully in agreement. The only one provided independently as the wider building currently stands is the sewerage to Flats 29 – 40. All other services will require separation.

- (131) The M&E experts have stated in their joint report that fire safety services are a relevant service to be considered, and that is supported by Judge Rodger's findings in *Courtyard v Rockwell*.
- (132) Each of the M&E experts has made it clear they do not have the relevant expertise to opine on the safety services.
- (133) We have not been provided with any evidence about provision of the safety services (in particular fire safety and smoke ventilation). We do not know whether they are provided independently or not. Considering that we must address the test in section 117 of the 2022 Act within the broader context of the Act – i.e. to ensure the safety of people in and about buildings, particularly higher risk buildings – and in the context of the section itself being about relevant defects arising from the risk of the spread of fire, we consider that is a fundamental evidential gap.
- (134) There was a disagreement between the parties in respect of who had the burden of proof in that respect. It being the Respondent's case that the services could be so separated, and that as a consequence the lower rise part is not part of the 'relevant building'; for the purposes of Part 5, it seems to us the evidential burden was on the Respondent.
- (135) Doing the best with the evidence that we were provided with, the wider building is registered with the BSR as a single building. As a single building, it is more likely than not that it is required to have a single fire strategy. It is more likely than not that strategy would be reliant on a single service provision covering the wider building, particularly given that the evidence establishes that all other services in the building (save for sewerage) are not undivided (including entry comms, TV aerials etc).
- (136) We find it is permissible to draw the inference from that evidence that the fire safety services are not currently separate. This is supported by (and is the only force in) the submission later made by Mr Bowker that fire safety services are a simple matter of electrical services (with which we disagree). The electrical services, through which the fire safety services are likely operated, are not separated, and are found in the North Electrical Service Riser and Central Electrical Service Riser.
- (137) The next question is therefore whether the services that are not provided independently could be separated.
- (138) We had some difficulty with the evidence in this regard.
- (139) The Respondent wholly failed to address the safety systems regarding fire and smoke. We do not accept Mr Bowker's submission that this is a pure and simple question of turning the electricity back on once it has been cut off for the electricity services to be separated out for the higher rise and lower rise parts. Our experience as a Tribunal is that systems are designed with zoning, differing required coverage, and differing sensitivity between areas in a building. We have no evidence that the wider building is any different. We have been provided no evidence of what needs to happen to address those issues, and whether it can be done and with what level of

interference with the quiet enjoyment of the occupants of the higher rise part of the building. Given that lacuna, we cannot be satisfied that the services can be separated, or separated without substantial disruption to the occupants of the higher rise part. The Respondent fails at this point.

(140) In case we are wrong in that, we move to consider the other services.

(141) There was a paucity of evidence of how the services the M&E Experts were able to opine on could be separated and reinstated, and the evidence had not realistically addressed the question beyond a theoretical. However, the M&E experts agreed that the services could be separated in each case. We therefore accept that evidence, scant though the details, and move on to the third part of the question.

(142) The third part of the question is whether the services that have been identified as being capable of separate provision could be so provided “without involving the carrying out of any works likely to result in a significant interruption in the provision of any such services for occupiers of the remainder of the building”. The remainder of the building in this case is the higher rise part (incorporating stair B).

(143) From the caselaw we derive the following principles:

- (a) “significant interruption” is a question of fact and degree (Judge Marshall QC in Oakwood);
- (b) The test of whether the works are “likely” to result in a significant interruption is a lower threshold than “would” so result (*ibid*);
- (c) 8 hours might, in an appropriate case, be a significant interruption (*ibid*);
- (d) The likely interruption can be assessed individually or cumulatively (*ibid*);
- (e) A systematic approach is required (Judge Rodger KC, *Courtyard v Rockwell*).

(144) The experts agreed that the water supply serving Flats 29 – 40 originates in the tank room at the most south western corner of the wider development, passes through a vertical service shaft in the higher rise part and on through horizontal voids at ceiling level until exiting through horizontal voids at ceiling level below the second and third floor external walkways outside of Flats 29 – 40 before dividing off for individual supply to each flat. The water supply for Flats 1 – 28 was fed from the same tank and pipe system.

(145) Mr McDonald opined in his written report that “significant interruption” to the services would result if works resulted in (a) a breach of building regulations/other health and safety guidance, or (b) an “unnecessarily long” period of interruption to normal service. In the same way as Mr Moppett had, he appeared to have incorrectly thought he was being asked to opine on the legal test because the Respondent had provided him with the caselaw.

(146) In his report, Mr McDonald said this regarding the separation of the water supply:

WATER SUPPLIES

3.4.4 The water supplies to the Property and the Development are more integrated than any other 'relevant service'. It will not be possible to perform the work to separate the water supply system without causing disruption to the occupants of the Development.

3.4.5 Work must be performed in the Mains Water Service Risers at second and third floors of the Development. Because there are no isolation valves fitted to the main water supply pipes to the Property, it will be necessary to isolate and drain the boosted water system which serves the Property and the Development. Once the pipes are drained, the pipes serving the Property should be disconnected and the 'headers' made good in a manner that does not leave any pockets where stagnant water can collect.

3.4.6 When returning the boosted water system to service, the guidance relative to maintenance, modification and disinfection of cold water pipe systems given in Sections 9 and 8.5 of British Standard publication PD 855468:2015, should be followed. I estimate that work may up to 48 Hours, with careful planning and execution and without unplanned incident during the work. The works should be planned and performed by the Developments incumbent water hygiene contractor. I assume that such a contractor is in place so as to comply with the Health and Safety Executive water hygiene guidance.

(147) Mr McDonald estimated that electricity disconnection, separation and reconnection would take one day. For telecoms it would take half a day, as it would for access control, the TV aerial, and separation of the walkway lighting. If properly planned and ideally executed, all of these could be undertaken simultaneously. Mr Dellow and he agreed these timings in their joint report.

(148) At the hearing, Mr McDonald was cross examined in respect of the separation of the water supply in particular, it being stated in his report to be the most integrated of the systems. He clarified that 48 hours meant 4 working days, and accepted that was a minimum estimate and dependent on, for example, the lab results testing the reconnected supply coming back timeously and free from any identified problem. He accepted, when it was put to him by Mr Frampton, that it could take as long as a week, and accepted (quite properly) that the timetable could be disrupted by any issues with gaining access to any individual flat.

(149) We are satisfied that the work needed to separate the water supply alone would be likely to result in significant interruption to the occupants of the higher rise part, even on the experts' lowest estimate. Regardless of the working hours required, the lowest estimate is 96 hours without a water

supply in either part of the building (though the only relevant part is the higher rise part, for the purposes of the test).

(150) It is perhaps unfortunate for the Respondent that at the same time as the hearing was taking place, the government declared an emergency in respect of 30,000 people being left without water in Kent and Sussex, at that stage for three days (though estimates were that the emergency would endure for five days).

(151) We nevertheless consider, regardless of the press coverage, four days interruption in people's ability to use their own facilities for bathing, drinking, washing or any other of the day to day basic functions of peoples' lives requiring a water supply would be a significant interruption, even if it could be "carefully planned and executed", hitch-free. That single interruption is decisive of the third part of the test, which we find is answered in the negative.

(152) We are also satisfied that a 1 day (whether that be 24 hours, or 8 working hours) interruption to the electrical supply in the higher rise part, again even if "carefully planned and executed" without a hitch, would on its own be a significant interruption to the higher rise part, in particular to people requiring the use of the lift service due to disability (of whom Ms Ward's evidence was there is at least one individual), working in home-based remote roles, or simply trying to cook, wash or clean going about their daily lives.

(153) Cumulatively we find that that the separation of services would, on the balance of probabilities, likely result in a significant interruption.

(154) We do not agree that compliance with building regulations/health and safety codes is part of that consideration separately; though that compliance is essential and must be factored into the time estimate for the necessary interruption for the separation of services.

Conclusion

(155) For all of the reasons set out above, we find that the lower rise part is not structurally detached, or a self-contained part of the wider building at 1 – 40 Pieris House. It is therefore part of the wider building and to be considered as comprised in the "relevant building" for section 117 of the 2022 Act.

Name: Judge N Carr **Date:** 2 April 2026



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

Case Reference : HAV/00HQ/BSA/2025/0002

Property : 1-31 Oyster Bay Apartments, Sterte, Poole
BH15 2FN

Applicant : Bournemouth, Christchurch and Poole
Council

Representative : BCPC Legal Department

Respondent : Sovereign Network Group

Representative : Capsticks Solicitors LLP

Type of Application : Application for a Remediation Order
Section 123 Building Safety Act 2022.

Tribunal Member(s) : Judge J Dobson

Date of Order : 10th April 2026

REMEDIATION ORDER

UPON the Applicant's application for a remediation order under section 123 of the Building Safety Act 2022 (the "Act") in respect of the property known as 1-31 Oyster Bay Apartments, Sterte, Poole BH15 2FN ("the Property")

AND UPON the Respondent consenting to a remediation order being made on the terms set out below (the "Remediation Order")

AND UPON the Respondent admitting that the defects (the "Relevant Defects") set out in the schedule hereto (the "Schedule") are relevant defects within the meaning of the Act

AND UPON the Tribunal making the Remediation Order on the terms agreed between the parties

AND UPON the following expert evidence having been provided to the parties in these proceedings:

- (1) report of Steven Cooper dated 24 November 2025
- (2) report of Simon Garrard dated 12 February 2026
- (3) report of Christan Brett Marrett dated 13 February 2026
- (4) joint statement of Mr Garrard and Mr Merrett dated 13 March 2026

THE TRIBUNAL ORDERS THAT:

1. The Respondent shall remedy the Relevant Defects by the time specified in paragraph 3 below.
2. The Respondent shall do so in accordance with the works (the "Agreed Works") contained in the Schedule

or

such other means (the "Alternative Works") as shall effectively ensure the remediation of the Relevant Defects to the Property.
3. The Respondent shall complete the Agreed Works and/or any Alternative Works (collectively the "Works") by no later than 14th August 2030.
4. The Respondent shall do so in compliance with the Building Regulations applicable at the time the Works are undertaken so that the Relevant Defects are remedied. The Respondent shall obtain a post-Works Fire Risk Appraisal of External Walls (FRAEW) pursuant to PAS 9980:2022.
5. The parties have permission to apply in relation to paragraphs 1 and 3 and the Schedule. In particular, the Respondent has permission to apply to extend the time for compliance with this Order.

6. Any application must:
 - i) be made using the Tribunal's Form "Order 1";
 - ii) be supported by detailed evidence explaining the reason for the application and a proposed draft order setting out the variation sought;
 - iii) be served on the lessees of the residential apartments in the Building and
 - iv) include a realistic time estimate for the application to be heard.
7. The parties may rely on relevant expert evidence in support of the application.
8. The Respondent must notify the Tribunal and the Applicant, that it considers it has complied with this Order, within one month of the certified date of practical completion of the Works.

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

SCHEDULE

- 1-31 Oyster Bay Apartments, Sterte, Poole BH15 2FN

Relevant Defect	Agreed Works
<u>External wall defects</u>	
Wall Type 1 contains combustible thermal insulation.	Remove and replace with panels having insulation of Class A2, s1-d0 or better.
Wall Types 2 and 3 contain combustible thermal insulation.	Remove and replace with thermal insulation of Class A2-s1, d0 or better.
Wall Type 1 cladding panels installed with fixed to timber battens.	Remove and replace with non-combustible alternative.
Wall Type 1 panels penetrated by services and balcony/balustrade fixings with no cavity barriers provided.	Where penetrations are open to the wall cavities, install suitable cavity barriers. In those locations where the services, fittings etc are not steel (at least 0.5mm thick) and penetration communicates with the wall cavity.
Cavity barriers omitted from around windows and other openings services penetrations in Wall Type 2.	Install suitable cavity barriers in all locations specified in current edition of Approved Document B.
No proprietary cavity barriers in Wall Type 1 and steel sections that could fulfil the role have unsealed perforations and penetrations.	Install proprietary cavity barriers in relevant locations or correctly and adequately fire stop the perforations and penetrations in the existing steel channels.
Omitted or inadequate fire compartment and/or fire resisting walls and valleys of trapezoidal roof / floor	Install suitable fire stopping in the valleys of the trapezoidal decks where they run perpendicular to the fire separating walls.

decking.	
<u>Internal defects</u>	
Inadequately installed mineral fibre as fire stopping where services penetrate fire separating walls within flats.	Install suitable fire stopping wherever fire separating walls are penetrated by services etc.
Fire compartment wall between services cupboard (top floor) and adjacent flat incomplete.	Repair gap between plasterboard lining to fire compartment wall.
Steel roof/floor beams passing through fire compartment walls not adequately fire stopped.	Remove inadequate fire stopping and install suitable fire stopping product/method.
Fire stopping missing from plastic back boxes of electrical sockets in fire separating walls.	Install adequate fire stopping to sockets, such as “putty pads” or similar.
Soil vent pipe in bathroom of flats on topmost floor of Property inadequately fire stopped.	Install suitable and adequate fire stopping.
Combustible timber decking on balconies.	Remove and replace with suitable non-combustible alternative.
Inadequate stair core compartmentation.	Remove inadequate fire stopping and install suitable fire stopping product/method.
Inadequate fire compartmentation.	Commission a competent person to carry out an intrusive survey of the Property and then remedy all relevant defects identified in the survey.



Neutral Citation Number: [2026] EWHC 1069 (TCC)

Case No: HT-2022-000295

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 08/05/2026

Before:

MR JUSTICE CONSTABLE

Between:

- (1) CREST NICHOLSON REGENERATION LIMITED
(2) CREST NICHOLSON (SOUTH) LIMITED
(3) CREST NICHOLSON OPERATIONS LIMITED
(4) CREST NICHOLSON PLC

Claimants

- and -

- (1) ARDMORE CONSTRUCTION LIMITED (IN
ADMINISTRATION)
(2) DAVID RICHMOND AND PARTNERS LIMITED
(3) YUANDA (UK) CO. LIMITED
(4) ARDMORE CONSTRUCTION GROUP LIMITED
(5) ARDMORE GROUP LIMITED
(6) ARDMORE GROUP HOLDINGS LIMITED
(7) PADDINGTON CONSTRUCTION LIMITED
(8) ARDMORE FITOUT LIMITED
(9) CELEBRATION HOMES LIMITED
(10) BYRNE PROPERTIES LIMITED

Defendants

Jonathan Selby KC and Harriet Di Francesco (instructed by Gateley Legal) for the Claimant
Simon Hughes KC, James Frampton and Connie Trendle (instructed by Rosenblatt Law)
for the Fourth to Tenth Defendants

Hearing date: 28 April 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 8th May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CONSTABLE

Mr Justice Constable:

A. Introduction

1. This judgment deals with matters consequential upon the determination of an application ('the Application') brought by the Claimants, Crest Nicholson Regeneration Ltd and associated group companies ('Crest') for building liability orders ('BLOs') pursuant to sections 130-131 of the Building Safety Act 2022 ('BSA') against the Fourth to Tenth Defendants ('the BLO Defendants'). By a judgment handed down on 1 April 2026 [2026] EWHC 789 (TCC) ('the Judgment'), the Court determined that it was just and equitable to order that (1) any liability or any liability of a specified description that the First Defendant ('ACL') may have to Crest under section 1 of the Defective Premises Act 1972 or as a result of a building safety risk is also the joint and several liability of each of the BLO Defendants ('the Anticipatory BLO'); and (2) each of the BLO Defendants is jointly and severally liable for the sums owed by ACL to Crest under an adjudicator's decision dated 29 August 2025 requiring ACL to pay Crest approximately £14.9m ('the Adjudication BLO').
2. The matters in issue are:
 - i) permission to appeal, including certification for leapfrog to the Supreme Court;
 - ii) the BLO Defendants' application pursuant to CPR 83.7(4)(a) and (b) and/or CPR 52.16 for a stay of execution, alternatively pursuant to CPR 40.11 that additional time is given to satisfy payment of the Adjudication BLO;
 - iii) whether Crest are entitled to claim interest;
 - iv) whether there should be a deduction in the costs recoverable by Crest.

B. Permission to Appeal

3. The relevant test is set out in CPR 52.6. Permission to appeal may be given where:

“(a) the court considers that the appeal would have a real prospect of success; or

(b) there is some other compelling reason for the appeal to be heard.”
4. The BLO Defendants rely upon both limbs, in respect of both the Anticipatory BLO and the Adjudication BLO on the following Grounds:

Ground 1: the Court was wrong to decide that it was just and equitable to grant an anticipatory BLO (now).

Ground 2: the Court was wrong to make an anticipatory BLO now while leaving to trial the question of what (if any) of the specified description of the relevant liability would be subject to a BLO.

Ground 3: the Court was wrong to decide that the Adjudicator's Decision gave rise to a relevant liability which could be subject to a BLO.

Ground 4: the Court was wrong to decide that the BLO Defendants did not have a better than merely arguable case that the Adjudicator lacked jurisdiction. In particular, the Adjudicator did not have jurisdiction to decide that ACL was liable under the Defective Premises Act 1972 (the "DPA").

Ground 5: the Court was wrong to decide that it was just and equitable to grant a BLO in respect of the Adjudicator's Decision.

Ground 1

5. The BLO Defendants have no realistic prospect of success that the Court was wrong to grant an anticipatory BLO now because the threshold criteria that it was just and equitable to grant a BLO was not met. The grant of a BLO arises from the exercise of a broad discretion. It is well-established that there are limited circumstances in which an appellate court will interfere with the lower court's exercise of discretion and the hurdle is a high one. The principles were summarised by Saini J in Azam v University Hospital Birmingham NHS Foundation Trust [2020] EWHC 3384 (QB); 178 BMLR 38 at [50] to [52], and adopted by the Court of Appeal in ABP Technology Ltd v Voyetra Turtle Beach Inc [2022] EWCA Civ 594; [2022] ETMR 33 at [21]. Saini J stated:

"50. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the follows [sic] errors:

- (i) a misdirection in law;
- (ii) some procedural unfairness or irregularity;
- (iii) that the Judge took into account irrelevant matters;
- (iv) that the Judge failed to take account of relevant matters;
- or
- (v) that the Judge made a decision which was 'plainly wrong'.

51. Error type (v) requires some elaboration. This means a decision which has exceeded the generous ambit within which reasonable disagreement is possible.

52. So, even if the appeal court would have preferred a different answer, unless the judge's decision was plainly wrong, it will be left undisturbed. Using terms such as 'perversity' or 'irrationality' are merely likely to cause confusion. What is clear is that the hurdle for an appellant is a high one whenever a challenge is made to the outcome of a discretionary balancing exercise. The appellate court's role is to police a very wide perimeter and it will be rare that a judge

who has exercised a discretion having regard to relevant considerations will have come to a conclusion outside that perimeter. I would add that an appellate court is unlikely to be assisted in such challenges by a simple re-argument of the points made to the judge below. It needs to be underlined that an appellate court in an appeal such as the present is exercising a CPR 52.21(1) 'review' power. It is also well-established that the weight to be given to specific factors is a matter for the trial judge and absent some wholly unjustifiable attribution of weight, an appellate court must defer to the trial judge."

6. As stated in terms in the BLO Defendants' written submissions, they essentially repeat the factors and arguments they relied on at first instance. They do so without generally engaging in the reasoning of the Court or seeking to justify a submission that an attribution of weight was "*wholly unjustifiable*". Taking the sub-points argued in writing at paragraph 26 of the written submissions:
- i) [26.1] The Court was not arguably wrong to take into account that it had "a high degree of confidence" that ACL is liable for a building safety risk in circumstances where (as made clear at [68] of the Judgment) key facts (6) ("*there can be no real dispute that the Development contains building safety risks within the meaning of section 131(6) of the BSA*") and (7) ("*there can be no real doubt that ACL will be liable for those building safety risks*") were explicit propositions advanced by Crest and not disputed by Mr Hughes KC in argument. The Court relied upon the conclusions of ACL's own erstwhile expert, and the absence of any other evidence advanced (either in the Adjudication or the Application) to gainsay those conclusions;
 - ii) [26.2] The BLO Defendants merely repeat their submission that the specific purpose of the BSA was focussed on SPVs, notwithstanding the explicit acceptance in oral argument by Mr Hughes KC for the BLO Defendants that this was an overstatement and that "the policy intention was better described as one to allow those directly responsible for defective work to be pursued" (see paragraph [58] of the Judgment). The remainder of paragraph 26.2 does not address 'purpose' but elides argument with the 'factual blameworthiness' issue and, in substance, Ground 2;
 - iii) [26.3] The BLO Defendants do not explain why the Court's approach to the fact that Crest was a commercial developer was wholly unjustifiable, or, in particular, engage with the analysis of the 'twin regimes' set out at paragraph 87 of the Judgment from which it is clear that it is regularly going to be a (commercial) landlord or developer who has, either itself or through an associate, funded the remedial work and who will seek redress from the contractors, designers or others who caused building safety defects. The argument that Crest should not be entitled to a BLO because they are liable under the DPA in respect of the same defects was not advanced during argument. It is in any event wrong and contrary to the purpose of the BSA which is to provide "*effective routes to redress against those responsible for historical building safety defects that have only recently come to light, whatever level of the supply chain they operated at*" (see the words of Lords Hamblen and Burrows in BDW Trading Limited v URS Corporation Ltd

[2025] UKSC 21; [2025] 2 WLR 1095 quoted at [42] of the Judgment). At best this is a restatement of the ‘factual blameworthiness’ point and, in substance, Ground 2.

- iv) [26.4] This is a repeat of the new point re the DPA folded into a repetition of the comparative profits point. The BLO Defendants do not engage with the Judgment’s identification of the bizarre outcome which follows from their argument, namely that commercially unsuccessful builders would be able to avoid the application of the BSA, whilst commercially successful ones would not.
 - v) [26.5] The point about uncertainty of the amount of the BLO directly challenges in substance not just the Judgment, but also the decision of Jefford J in Click St Andrews. If correct, it has the practical effect that – notwithstanding the BLO Defendants’ acceptance that the Court has jurisdiction to order an anticipatory BLO – there can never be a BLO prior to the establishment of liability and quantum after a full trial. Reliance on *Hansard* was not argued during the application, and the BLO Defendants do not attempt to justify its admissibility by reference to Pepper v Hart [1993] 1 All ER 42. In any event, the BLO Defendants simply do not engage with the process adopted by the Court which was to consider the just and equitable test at the point of making the order on an assumed worst case outcome following trial (i.e. facts which gave the BLO Defendants their ‘best’ case to argue that an order was not just and equitable), which deals squarely with what boils down to a prematurity point. It is notable that there is no appeal against the Court’s adoption of the reasoning of the FTT in Triathlon, upheld by the Court of Appeal, that it will be an unusual case in which the source or extent of a respondent’s assets or liabilities will carry much weight (then in the context of a remediation contribution order).
 - vi) [26.6-26.8] The complaints about taking account of factual blameworthiness and other equivalent points comes down to Ground 2.
 - vii) [26.9-26.10] The complaints about the factual disputes and/or allegedly inadequate disclosure ignore the explanation that in substance these did not add to the other grounds which had been considered (e.g. factual blameworthiness etc).
 - viii) [26.11] As with its initial submissions, the BLO Defendants do not explain why their liability on other projects would be relevant to its liability for this project, and therefore do not engage with the conclusion of the Court.
7. There is therefore no real prospect of demonstrating that the exercise of discretion was plainly wrong.

Ground 2

8. The BLO Defendants contend that they have a realistic prospect in arguing that the Court has no jurisdiction to make a two-stage BLO order. It was accepted by Mr Hughes KC that this amounted to a challenge to the approach of Jefford J in Click St Andrews as well as the Judgment. Mr Hughes KC also accepted that his argument

meant in practice that there would never be such a thing as an Anticipatory BLO, even though he does not appeal the Court's adoption of HHJ Keyser KC's analysis in BDW Trading Ltd v Ardmore Construction Ltd [2025] 1.W.L.R. 3101 that the Court has jurisdiction to make such an order. There is no real prospect in arguing that the statute gave jurisdiction to the Court to make an order that, in practical terms, could never amount to a just and equitable one. It is also notable in this context that Mr Hughes KC does not seek to appeal the conclusion of the Court (building upon HHJ Keyser KC's analysis in BDW Trading Ltd) that there is good reason why the statute provides jurisdiction for the making of an anticipatory BLO. The burden of proof point argued at paragraph 30.2 was not argued before the Court, but is not in any event a necessary consequence of the approach.

9. Moreover, the point would not (if allowed) upset the making of the Anticipatory BLO, as the Court explicitly recognised at [112] of the Judgment (a decision which Ardmore does not seek to appeal).

Ground 3

10. It is not reasonably arguable that the Court was wrong to decide that the Adjudicator's Decision gave rise to a relevant liability. The submissions appear to accept that the Adjudicator's Decision created a liability upon ACL, the original body. The submission does not therefore engage with the fact that such liability is the trigger for the transmission of that liability (providing it is just and equitable) to the associate. That the liability may cease to be a liability at some later stage does not arguably negate the fact that such a liability exists at the point of making the BLO, thus satisfying the statutory jurisdiction to make such an order (if just and equitable to do so). Its 'interim' status may be a factor in the exercise of discretion but does not deprive the Court of the jurisdiction. The BLO Defendants do not engage with the Court's reasoning as to why it would be surprising if the statutory schemes for BLOs and adjudication were mutually exclusive, without this being expressly determined by defining the word 'liability' accordingly (and more narrowly than its natural meaning) within the BSA.

Ground 4

11. There is not a real prospect of success in arguing that the Adjudicator did not have jurisdiction to decide that ACL was liable under the DPA. The Court recognises that the Court agreed with the reasoning of Joanna Smith J in BDW Trading v Ardmore Construction Limited [2024] EWHC 3235 (TCC), but in addition it dealt fully with the 'Hansard' point that was, potentially, left hanging in that case. It also recognises that by an order dated 11 February 2025, Coulson LJ granted permission to appeal the judgment in BDW Trading v Ardmore Construction Limited (although it is noted that Coulson LJ said "*the judge may well have been right to reach the conclusion that she did. That would, I think, have been my instinctive answer to the question.*")
12. However, this issue has now been determined in the same way by two High Court Judges. This weighs against granting permission. Whilst recognising that the Court of Appeal may remain of the view expressed, that is a matter best left to the Court of Appeal.

Ground 5

13. This ground again seeks to challenge the exercise of discretion and has no real prospect for the equivalent reasons stated for Ground 1.

Compelling Reasons

14. This Court is plainly aware of the potential significance of both the Anticipatory BLO and Adjudication BLO points this case has given rise to. However, whether that amounts to a compelling reason for the appeal in circumstances where, for the reasons given, there is no real prospect of success is a matter best considered by the Court of Appeal. In these circumstances, and for the same reasons, it would not be appropriate to certify this as a matter suitable for appeal direct to the Supreme Court. This is particularly so in circumstances where in Triathlon, the Supreme Court refused permission to appeal in relation to the application of the just and equitable test (in the context of remediation contribution orders).

C. The Application for a Stay

15. In the circumstances set out above, the relevant application made by the BLO Defendants falls to be considered under CPR 83.7. The Court can exercise its discretion to grant a stay if the applicant is unable from any reason to pay the money.

The Law

16. As to stays of execution generally, the White Book states at paragraph 83.7.1 on page 2471:

“In any application for a stay of execution the starting point is that there has to be a good reason to deny the judgment creditor the immediate fruits of the judgment (Winchester Cigarette Machinery Ltd v Payne (No.2), The Times, 15 December 1993). A case much relied upon is that of Alliance & Leicester Building Society v Slayford [2000] EWCA Civ 257, which deals with the balance to be struck between creditor and debtor, effectively concluding that any deferred period of payment must be reasonable.”

17. Where the judgment sum relates to an adjudicator’s decision, relevant guidance is provided in Wimbledon Construction Co 2000 Ltd v Vago [2005] EWHC 1086 (TCC); [2005] BLR 374 at [26]:

“a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

b) In consequence, adjudicators’ decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

c) In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind...”

18. It might be noted that Wimbledon v Vago and many other authorities dealing with stays in the context of adjudication enforcement relate to the potential injustice that may arise from the potentially interim nature of an adjudication decision and the ability of the receiving party to repay sums if required to at a later stage. No such issue arises in the present case.
19. In Andrew v Flywheel IT Services Ltd [2021] EWHC 2746 (Comm) (a case concerning an application for a stay of execution under CPR 83.7(4)(b) albeit not in relation to the payment of an adjudicator’s decision), HHJ Pelling QC (sitting as a Judge of the High Court) confirmed by reference to the relevant authorities that:

“(1) The burden is on an applicant to show that it is unable to pay, including that no funds would be made available to it including by its owner (at paragraph [11]):

“...where this ground is relied on the onus rests firmly on the applying party, here the Defendant, to make good that case. Further, it was not in dispute that Lord Wilson JSC's dictum in Goldtrail Travel Limited (in liquidation) v Onur Air Tasimacilik AS [2017] UKSC 57, [2017] 1 WLR 3014, at [23] to [24] applies by analogy. As Lord Wilson JSC said in those paragraphs:

“In this context the criterion is: ‘Has the appellant company established on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested condition?’

“... In cases ... in which the respondent to the appeal suggests that the necessary funds would be made available to the company by, say, its owner, the court can expect to receive an emphatic refutation of the suggestion both by the company and, perhaps in particular, by the owner. The court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company’s financial position; and by reference to all aspects of its relationship its owner with, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms.”

(2) Even if the Court is satisfied that the applicant is unable to pay, it must still consider its discretion as to whether to grant the stay sought (at paragraph [12]).

(3) A no-set off clause is a strong factor in the discretionary exercise.”

20. In Bewley Homes plc v CNM Estates (Surbiton) Ltd [2010] EWHC 2619 (TCC); [2011] BLR 67 where the claimant was seeking to obtain summary judgment (and enforcement of such judgment) in respect of a settlement agreement settling, inter alia, liability of sums due under an adjudication decision, Akenhead J, having granted summary judgment then had to consider an application for a stay of execution of that judgment. He said, at paragraph [33]:

“It is then suggested that the Court can exercise its discretion under RSC Order 47 to stay execution where, in this case, CNM can not pay. In commercial cases, such as this, it must be rare and exceptional for the Court to stay execution of a judgement sum because the defendant cannot pay. If it was at all common, impecunious defendants, who defaulted on their payment obligations, could always avoid having to pay through the exercise of this discretion and defendants would never go into liquidation.”

21. J&B Hopkins Ltd v A&V Building Solution Ltd [2023] EWHC 2475 (TCC) concerned an application for a stay of execution by the defendant (A&V) in respect of an adjudicator’s decision in favour of the claimant (J&BH). Having referred to the relevant authorities (including the passages in Andrew v Flywheel and Bewley Homes referred to above), Roger Ter Haar KC, sitting as a Deputy High Court Judge, drew a number of conclusions including the following:

“(4) Once summary judgment has been granted, there is a strong presumption against a stay of execution being granted, not only as a matter of general policy in all cases where judgment has been entered, but particularly in judgments enforcing adjudicators’ decisions where the policy of the Courts, giving effect to the intention of Parliament, is to apply the principle “pay now, argue later”;

(5) That presumption is, if anything, stronger where the disputing parties are commercial entities;

(6) However, the Court has a discretionary power to order a stay of execution of judgments enforcing adjudicators’ decisions in cases falling within CPR 83.7 particularly where the enforcement of the summary judgment might or would cause manifest injustice.

(7) An applicant for a stay of execution relying upon its parlous financial situation so as to fall within CPR 83.7(b) does not have to establish that its financial situation is the result of any act or omission on the part of the judgment creditor, but, it seems to me, its position will be stronger if it does demonstrate that link, particularly if it can be shown that that act or omission was a breach of contract.”

22. J&B Hopkins Ltd was, in the words of the learned Deputy, “*one of those cases where the Court should, exceptionally, grant a stay of execution*”. The Judge had found it “*clear beyond doubt that A&V itself cannot afford to pay*”, and then turned, in accordance with the authorities, to look at those standing behind the company. He concluded that family and friends had made loans to A&V, which source had dried up, and that the owner had exhausted all other obvious sources of finance. There was therefore an inability to pay. Matters then specifically weighing in favour of the exceptional exercise of discretion in that case included that (1) it had been ruled by the Court of Appeal that J&BH, in breach of contract, had failed to pay A&V in respect of an earlier adjudicator’s decision, (2) that such non-payment by J&BH had exacerbated A&V’s financial difficulties; (3) thus, that J&BH was seeking to insist upon a ‘pay now, argue later’ which J&BH itself had refused to honour; (4) it was arguable that the second adjudicator’s decision was wrong and (5) the consequence of execution of the judgment would probably be an order winding up A&V, effectively preventing it from pursuing its claim which he had held to be arguable.

Inability to pay

23. Applying these principles, the first question is whether the BLO Defendants have established an inability to pay, not just by reason of funds available to it but whether by their ultimate owner or by some other closely associated person.
24. The financial position of the BLO Defendants was considered as part of the Application, by reference to the information made available to the Court. At paragraph [202] of the Judgment, which is set out here for convenience, the Court concluded:

“The short point made by Mr Selby KC is that the documents provided by the BLO Defendants do not support the proposition that ordering the Adjudication BLO would ‘present profound problems’. I conclude on the basis of the documentary evidence that there is considerable reason to be sceptical of this evidence by Mr Horne. This is particularly so in light of the complete absence of transparency about the financial status of AGHL, together with the intercompany loans. The BLO Defendants have chosen not to provide obviously relevant financial information pertaining to AGHL (and notwithstanding notice of the concerns provided in respect of this lack of transparency in advance of the hearing). It is also notable that the language chosen by Mr Horne does not suggest that making the Adjudication BLO would cause an existential threat to the Group. Taking the evidence at its highest, the BLO is likely at most to impact short-term decisions about entering new contracts (the detail of which is exceptionally vague) and only to the extent that entering such contracts require a performance bond (rather than, for example, a parent guarantee from AGHL). It is also surprising that Mr Byrne has not chosen to put his name to any equivalent assertion, given his centrality to important issues in dispute and, as Mr Selby KC submitted, all roads ultimately lead back to him.”

25. In support of the application to stay, the BLO Defendants served two further statements from Mr Horne.
26. In his Third Witness Statement, dated 10 April 2026, Mr Horne explained that, by reference to the Q1 management accounts for the Ardmore Group (consolidated for AGL and those companies below, as per the group structure at paragraph [22] of the Judgment), that the Group made a net profit of £5.149m in the period from 1 October 2025 to 31 December 2025. The Group owns commercial and residential properties with an aggregate carrying value of c. £59m. 31 of the 47 properties are subject to charges in the sum of c. £25m, so there is around £34m in unencumbered net property. The group's net asset position was stated to be, as at the end of December 2025, £38.9m, including a provision for non-current liabilities of £34.4m in relation, it is said, for future loss-making contracts. The net position excluding non-current liabilities therefore significantly exceeds the current liability in respect of the judgment sum.
27. Mr Horne appends to his Third Witness Statement an updated cash flow, dated 6 April 2026 which fluctuates between £1.3m and £31.3m. The figures are markedly different to the cashflow forecast dated approximately a month earlier, dated 27 February 2026, which had been appended to Mr Horne's Second Witness Statement, and from the figures used in the management accounts, dated 13 March 2026, appended to the Third Statement. By way of example the position at the end of March 2026 (either 30 or 31) was said to be £13.5m in the 27 February 2026 forecast, £1.5m in the March Management Accounts, and £31.2m in the 6 April forecast. There is no explanation of how the forecasts are made or why there is such considerable variation from one set of figures to the next. Given the extent of variability and lack of explanation, they provide little substantiation on their own for the asserted inability to pay.
28. In his Third Witness Statement Mr Horne described a (then) anticipated £10m loan to be secured against circa £16m worth of property, representing a loan to value ('LTV') of 62.5%. Mr Horne asserted that this £10m was included in the forecast figures and required to meet its cashflow requirements over the next 3 to 4 months. There was no transparency as to where in the forecast the anticipated £10m was factored in, and Mr Hughes KC was unable to help. On its face, this would suggest a further £18m of unencumbered property, which would if subjected to a charge at the same LTV might raise a loan of £11.25m, a very considerable proportion of the judgment sum.
29. Mr Horne's Fourth Witness Statement was dated 22 April 2026, just 12 days later. The position had changed significantly, it being asserted (with no supporting documents) that the Group had secured a provisional term sheet for a facility of £18.3m but secured against "all property assets", said now to have a book value of £43m. It is not clear how this value relates to the £59m valuation of all properties referred to in the Third Witness Statement. Both statements appear to refer to 'all' properties, yet the value has plummeted by £16m. In any event, Mr Horne asserts that the facility is based on the lender's own valuation (not evidenced) of £35m at an LTV of 65%. He does not explain why the facility is for only £18.3m when 65% of £35m is £22.75m, a difference of £4.45m. Mr Hughes KC's skeleton suggests that the delta may be the result of interest retention and fees, but there is no evidence (a) to this effect or (b) as to why negotiating a loan with an interest retention requirement is

appropriate or necessary. Mr Horne then explains that £4.6m is required to release an existing charge, so it reflects in reality a loan available to use of £13.7m.

30. What is left wholly unexplained is how or why the Group has, seemingly, negotiated a significantly worse facility than that which he anticipated just 12 days earlier (i.e. obtaining £10m cash charged against £16m of property, leaving £18m of property unencumbered versus obtaining just £13.7m cash charged on all property, whether valued at £35m, £43m or £59m, leaving nothing unencumbered). Moreover, the cash forecast position referred to by Mr Horne in his First and Second Witness statements (as at 27 February 2026) was always positive (between £2.9m and £8.3m) throughout (ending 31 July) without the inclusion of a £10m loan Mr Horne now says is now required for general working capital. He does not explain how or why the working capital requirements of the business have apparently deteriorated so fundamentally in the space of a few weeks. On the assumption that they have not, then a loan of the type anticipated by Mr Horne in his Third Statement on 10 April 2026, but charged against all property then said to be unencumbered (i.e. a facility of 62.5% of £34m) would generate a sum significantly in excess of the judgment sum. Indeed, this is consistent with the fact that in his Second Witness Statement, Mr Horne then identified a predicted charge of £25.3m against property in order to facilitate a bond in relation to a project which has not, in fact, come to pass (no reference to the need for such a facility is referred to in the Third and Fourth Statements). Repurposing that predicted charge would of itself be more than enough to pay the judgment sum.
31. Mr Horne then refers in his Fourth Statement to an ‘updated cashflow’ at paragraph 9. The updated cashflow itself is not provided. It is said on the basis of the updated cashflow that ‘the top line’ of what the BLO Defendants could afford to pay was an initial lump sum of £2m and £500,000 per month. Even this on its face makes little sense: 12 days earlier only £10m (more) was required for working capital, and the cashflow forecast consistently showed a cash position significantly in excess of £500,000 each month. On the basis of the ‘new’ facility, there would be at least an additional £3.7m immediately (£13.7m v. £10m), with £500,000 payment readily accommodated within the existing cashflow forecasts (indeed, £1m a month could be accommodated on the face of the 6 April 2026 cashflow forecast without becoming negative at any point).
32. The very significant variation in what Mr Horne has asserted from one statement to another in terms of working capital requirements, cashflow, property valuations and the extent to which a facility would be available is deeply unsatisfactory and leaves the Court, once again, entirely sceptical about his evidence. I am left in no doubt that the financial information, changing explanations and lack of supporting documentation fall significantly below the robust and coherent financial picture required to evidence Mr Horne’s assertions that the Group has no immediate ability to pay or that in the event that the Group is ordered to pay the amount of the Adjudication BLO, ‘*it is almost inevitable that the BLO Defendants will have to enter insolvency proceedings*’.
33. However, even if I were wrong about that, there is no evidence at all from ‘*some other closely associated person*’ i.e. Cormac Byrne. Whilst a short statement from a Mr Murphy deals briefly with what he describes as ‘the Byrne Settlement’, this does not begin to meet the point that Cormac Byrne is the common denominator across the Group, and his own reported (and not refuted) personal fortune (a) is the fruit of the

Ardmore Group and such other investments Mr Byrne has thereby been able to make and (b) is (significantly) more than sufficient to enable the Group to continue trading notwithstanding the BLO Defendants' obligation to pay the judgment sum. This is, alone, sufficient to answer in the negative the critical question, namely whether the BLO Defendants have established on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the Judgment.

Discretion

34. The question of discretion does not arise in circumstances where the BLO Defendants have failed to establish that they are unable to pay.
35. However, even if I had considered otherwise, I would not order a stay of execution. There are simply no additional factors (such as there were in J&B Hopkins Ltd) to make the present case one of the exceptional ones where the ordinary position should be departed from.

D. Time to Pay

The Law

36. The general rule pursuant to CPR r. 40.11 is that a party "*must comply with a judgment or order for the payment of an amount of money (including costs) within 14 days of the date of the judgment or order*".
37. The Court has a discretion to order otherwise (including by specifying payment by instalments: CPR r. 40.11(a)).
38. As to the exercise of that discretion, the principles which apply are summarised in two judgments of Akenhead J. In Gipping Construction Limited v Eaves Limited [2008] EWHC 3134 (TCC) at [11] he said:

"It is unlikely that mere inability to pay will suffice to justify the extension of the normal fourteen day period; usually, inability to pay is no defence and an insolvent debtor must take the usual consequences of its insolvency."

39. In Yoram Amsalem (trading as MRE Building Contractors) v Hugh Mark Raivid & Anor [2008] EWHC 3226 (TCC) at [6] to [7], Akenhead J said:

"6. ...The introductory notes to CPR Part 70 say this: 'It is a feature of civil justice that the court does not automatically enforce its judgments, nor even decide how they should be enforced. It is up to the judgment creditor.' In broad terms, that does reflect the law and the practice. Part 70, and those provisions of the Rules of the Supreme Court which were retained by that Part, give a wide variety of different methods to a successful party to litigation for enforcing judgments. That can include the appointment of a Receiver, third party debt orders, charging orders, stop orders, stop notices, and other writs of execution such as a writ of *fiери facias*. ...

7. Parliament has given a successful judgment creditor those rights and it should be an exceptional case, it seems to me, where the court interferes with those rights given by Parliament.”

40. Akenhead J’s judgments were cited with approval by Field J in Gulf International Bank v Al Ittefaq Steel Products Co & Ors [2010] EWHC 2601 (QB) at [17] and [19]. At [22] to [24], Field J stated:

“22. In my opinion, Akenhead J’s observation that inability to pay will usually not justify a pre-execution extension of time, with an insolvent debtor having to take the usual consequences of his or its insolvency, applies *a fortiori* where the parties are business entities.

23. Where the debtor is in a parlous financial situation, the interests of other creditors of the debtor and possibly those of the debtor’s workforce and suppliers will be engaged. But since this country’s bankruptcy and winding-up regimes are designed to take account of these interests, and are supervised by specialist courts, these third party interests will, in my opinion, only very rarely, if at all, be a justification for an extension of time under CPR 14.10 or 40.11 where the debtor is liable to be wound up or made bankrupt within the jurisdiction.

24. It follows that, in the ordinary way, this court will only exceptionally extend time under CPR 14.10 and 40.11 and then only where the judgment debtor is solvent and for relatively short periods of time and after which the whole judgment debt will become payable. Further, in reaching its decision, the court will give careful consideration as to whether some provision in respect of interest ought to be made in light of the fact that the judgment debtor will be being kept out of his money for the period of the extension.”

Application

41. Had I been persuaded by Mr Horne’s evidence, this would not on the basis of the authorities have been a basis to permit time to pay other than in accordance with the usual 14 days. Were insolvency impending, the debtor must face the usual consequences of that impending fact.
42. For reasons I have explained in the context of the application for a stay of execution, I do not consider that the BLO Defendants have demonstrated any inability to pay. For the same reasons, I am unpersuaded that there are any exceptional facts which might render it appropriate to permit the BLO Defendants additional time to pay, let alone to sanction their unrealistic proposal based upon an unsecured monthly payment regime stretching long into the future. This is not the sort of ‘time to pay’ contemplated as appropriate in the authorities.

Conclusion

43. In the circumstances, there should be no stay of execution nor an extended time to pay. Whilst it is right that by virtue of the date of the hearing of consequentialia and the reservation of this judgment, the BLO Defendants have already had more than the ordinary 14 days, it would not be right to abridge that ordinary period from the date of order, as Mr Selby KC requested. The BLO Defendants must pay in accordance with the Adjudication BLO within 14 days from the date this judgment is formally handed down.

E. Interest

44. Crest seeks interest on the sums awarded in respect of the Adjudicator's Decision at 5% from 5 September 2025 to date. Mr Frampton, on behalf of the BLO Defendants, argued that Crest is not entitled to interest on the basis that:
- i) the application for a BLO did not seek any interest (although he accepted that there is a pleaded claim for interest);
 - ii) more fundamentally, there was nothing due from the BLO Defendants until a BLO was made. If Crest was to seek interest from 5 September 2025 it would effectively be interest due from ACL on which Crest would need to apply for a BLO. Crest has not done so.
45. As to the first point, it is not fatal to Crest's claim for interest that it was not included in the application as originally issued. It is not suggested that there was any prejudice caused by, in effect, applying for interest as part of the consequentialia. If authority were needed for such an orthodox analysis, that may, as identified by Ms Di Francesco for Crest, be found at least by analogy in the judgment of HHJ Stephen Davies in Zagora Management Ltd v Zurich Insurance plc [2019] EWHC 205 (TCC); 182 ConLR 240 at [29] to [31]. In that case, the Court allowed a claim for interest even though it had not been properly pleaded or pursued at trial.
46. As to the substantive objection, the submission ignores the fact that the purpose of interest is to compensate a claimant for being kept out of their money: see Tate & Lyle v Greater London Council [1982] 1 WLR 149 at page 154. Any of the BLO Defendants could have paid Crest money at any time from the production of the Adjudicator's Decision (and the BLO Defendants were aware of Crest's intention to claim against them if ACL were not able to pay since March 2025 i.e. before the Adjudication). A separate BLO is not required to claim interest: the BLO attaches to the liability of ACL and that liability includes interest arising out of the non-payment of the Adjudicator's decision.
47. Alternatively, Mr Frampton argued that, as part of the Court's discretion, it should only award interest for sums which have shown to be incurred. It is said that Crest has provided no evidence of its incurred costs (either the substantive cost of the remedial works or that it has paid the Adjudicator's fees), and that as such there is no reason for the Court to exercise its discretionary power to order payment of interest for sums which have not been (or not been shown to be) incurred. Such interest would amount to an unjustified windfall for Crest. However, as submitted by Ms Di Francesco, and not disputed by Mr Frampton, on the Court's findings, the sum due under the BLO is a debt, not damages: see [130] to [139] of the Judgment. On this basis, whether costs were incurred would not be relevant. In any event, whilst the question of the

incurrence of costs may have been relevant to the Adjudicator in respect of the period up to the Adjudication itself, the interest sought by Crest now is to compensate having not been paid the money to which it was undoubtedly entitled by reason of the Adjudicator's Decision. Whether the principal sum represents previously incurred costs, or costs to be incurred, is not relevant to whether Crest should be entitled to interest in light of ACL's (and/or the BLO Defendants') non-payment of the Adjudication Decision. They should.

48. There is no dispute about the rate.

F. Costs

49. Mr Frampton, unsurprisingly, accepts that the general rule is that costs should follow the event (see CPR 44.2(2)) and that Crest was successful. He argues, however, that Crest's costs should be subject to a reduction of 10% to reflect the BLO Defendants' success on the "specified description" dealt with by the Court at [105] to [112] of the Judgment. However, his characterisation of success is, in my judgment, overstated in circumstances where Mr Hughes KC argued that the Court could not or should not make an order which left to trial the question of what (if any) of the specified description of the relevant liability should be subject to a BLO (indeed, this point is Ground 2 of the application for permission to appeal). The only point upon which the BLO Defendants succeeded was whether in principle a Court may transmit some, rather than all, liability when making a BLO. In the context of the Application as a whole, victory on this minor (at least in terms of time consumed) point should not displace the general rule that costs follow the event. Accordingly, Crest should be awarded 100% of their costs, to be assessed if not agreed.



Neutral Citation Number: [2026] EWHC 1833 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Case No. **HT-2024-000441**
HT-2024-000439
HT-2024-000433

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Before:
Mr Justice Moody

Between:

(1) HB (WM) LIMITED & OTHERS	<u>Claimants</u>
-and-	
(1) STO LIMITED	
(2) STO SE & CO KGaA	
(3) STOTMEISTER BETEILIGUNGS GMBH	
	<u>Defendants</u>

Ms K Grange KC, Mr Hossain KC, Mr B Doherty and Ms C Ter Haar (instructed by
Ashurst Perkins Coie UK LLP) for the **Claimants**

Ms F Parkin KC, Ms K Powell, Mr P Harty and Mr S Khan
(instructed by **Macfarlanes LLP**) for the **Second and Third Defendants**

Hearing Dates: 12-14 May 2026

APPROVED JUDGMENT

Mr Justice Moody:

A. INTRODUCTION

1. These are applications to set aside service out of the jurisdiction. There is also an application to set aside an extension of time for service of the claim form. The underlying dispute gives rise to novel issues arising under sections 130 and 149 of the Building Safety Act 2022 (“the BSA”).
2. There are three related sets of proceedings. They arise from the use of cladding products installed on 18 different high-rise buildings. The overall value of the three claims is put at about £90 million. The Claimants are all developers. After the Grenfell Tower fire, the Claimants carried out inspections of certain developments and they established the existence of allegedly defective cladding which is said to give rise to fire risks. The Claimants have carried out or are carrying out remedial works to those buildings. The works are funded in the first instance via the government’s Building Safety Fund, but the Claimants say that they are liable to fund the remedial works. These claims are brought to recover the costs of those remedial works from parties who are alleged to be responsible for the defective cladding. The three Defendants are the same in each case and they are related entities. The Second and Third Defendants are domiciled in Germany, and these applications to set aside service are brought on their behalf. The First Defendant has taken no part in these proceedings. (Where I refer to the Defendants below, I refer to the Second and Third Defendants.)
3. The Defendants took a very large number of points in support of their applications to set aside. The issues are of some legal and factual complexity. Regrettably the parties did not agree on the scope of the hearing, and it was necessary for me to rule on that at the outset.

B. THE PARTIES AND THE PROCEEDINGS

4. There are three sets of proceedings.

- a. Claim HT-2024-000441 (the “Redrow claim”): this is a claim brought by the First Claimant, HB(WM) Limited, the Second Claimant, Redrow Homes Limited and the Third Claimant, Redrow Limited, which are all companies who are now part of the Barratt Redrow group. The First Claimant was the developer of the relevant building, and is a subsidiary of the Third Claimant; the Second Claimant was responsible for undertaking snagging works to the building and is a subsidiary of the Third Claimant. The Third Claimant is described in the Particulars of Claim as the “top company” in the Redrow Group and a nationwide developer of homes. I refer to these companies compendiously as Redrow unless the context requires me to distinguish between them. In much of the analysis which follows, I take this as the lead claim.
 - b. Claim HT-2024-000433 (the “Lendlease claim”): this is a claim brought by Lendlease Residential (CG) Limited and Lendlease Residential (BH) Limited, being companies which are now part of the Lendlease group of companies. The immediate parent company is Lendlease Residential Group (Europe) Limited, which in turn is owned by Lendlease Europe Holdings Limited. The ultimate parent company of the Lendlease group of companies is Lendlease Corporation Limited, a company registered in Australia.
 - c. Claim HT-2024-000439 (the “Barratt claim”): this claim is brought by three companies who are all companies within the Barratt Redrow group: Barratt Redrow PLC, the ultimate parent company of the Barratt Group; BDW Trading Limited, and Barratt London Limited.
5. In each claim the First Defendant is Sto Limited (“Sto”) which was incorporated in Scotland and was previously known as C.C.S. (Scotseal) Limited. It is described by the Claimants as the UK designer, manufacturer, supplier, distributor, seller and/or installer of external wall insulation systems and was the manufacturer of the StoTherm Classic System described below. The Second Defendant acquired all the shares in Sto in 2004. In December 2024 the Second Defendant petitioned the Scottish Court to wind up Sto. It is in administration and this has resulted in a moratorium on proceedings against it; the proceedings are stayed.

6. The Second Defendant is Sto SE & Co KGaA (“Sto Germany”). It is a leading manufacturer of building coating and wall insulation systems. It does not trade in the UK but it did supply wholesale quantities of wall system components in bulk to Sto.
7. The Third Defendant is Stotmeister Beteiligungs GMBH (“SBG”). According to the evidence served by the Defendants, it was established in 2005 to hold the shares of the descendants of the Stotmeister families in Germany and its predecessors. It is a non-trading entity and has never manufactured, marketed or supplied any goods or carried out any other form of commercial activity. It is the majority shareholder in Sto Germany but unable to influence its management as a matter of German law. This is addressed further in section K below.

C. THE CLAIMS

8. As I have indicated, the Claimant developers seek to recover the costs of remedial works from the Defendants. In each case, the claim is advanced as a claim under the Civil Liability (Contribution) Act 1978 (“the Contribution Act”), but the precise formulation of the claims is one of some complexity. This may be demonstrated by reference to the pleading in the Redrow case which pleads the claims as follows:

3. Claims are made against the First and/or Second Defendant under the Civil Liability (Contribution) Act 1978 (“the Contribution Act 1978”) in that both the Claimants and the First and/or Second Defendant are liable to the same people, namely the legal and/or equitable owners of the Building, for the same damage, namely the costs associated with the remedial works to the Building and interim fire protection measures. The Claimants are liable pursuant to section 1 of the Defective Premises Act 1972 (“the DPA 1972”) and sections 124 and 130 of the Building Safety Act 2022 (“the BSA 2022”). The First and/or Second Defendant are liable pursuant to section 149 of the BSA 2022¹.

¹ In the Lendlease and Barratt claims it is also alleged that Sto is liable to the Claimants under section 1 of the DPA. This is not a contribution claim.

4. Building Liability Orders are sought against the Second and/or Third Defendants under section 130 of the BSA 2022 because it would be "just and equitable" for the liabilities of the First Defendant to also be the liabilities of the Second and/or Third Defendants and/or for the liabilities of the Second Defendant to also be the liabilities of the Third Defendant.

...

98. The Claimants claim against Sto Limited and also Sto SE in contribution under section 1 of the Contribution Act 1978...

100. Sto Limited and/or Sto SE are liable to anyone who holds a legal or equitable interest in the building pursuant to section 149 of the BSA 2022....

102. Accordingly, the Claimants are entitled to an indemnity, alternatively a contribution from Sto Limited and/or Sto SE.

...

111. Further and/or alternatively the Court is invited to make a Building Liability Order (or Orders) under section 130 of the BSA 2022 on the basis that it is just and equitable for the liability of Sto Limited to the owners and/or leaseholders of the Building under the DPA 1972 and/or section 149 of the BSA 2022 to be treated as a liability of Sto SE (the liability of Sto Limited to the owners and/or leaseholders of the Building being a relevant liability within the meaning of section 130(3) of the BSA 2022).

112. On that basis, the Claimants are entitled to an indemnity or alternatively a contribution from Sto SE under section 1 of the Contribution Act 1978, because Sto SE is liable to the owners and/or leaseholders of the Building (by operation of section 130 of the BSA 2022). That liability is liability in respect of the same damage as that for which the Claimants are liable to the owners and/or leaseholders of the Building, including under section 130 of the BSA 2022,

namely the fire safety defects and the costs associated with the remedial works to make the Building fit for habitation.

...

113.6 Further and/or alternatively the High Court is invited to make a Building Liability Order (or Orders) under section 130 of the BSA 2022 on the basis that it is just and equitable for the liability of Sto Limited to the owners and/or leaseholders of the Building under the DPA 1972 and/or section 149 of the BSA 2022 in relation to the Building to be treated as a liability of Sto GmbH (the liability of Sto Limited to the owners and/or leaseholders of the Building being a relevant liability within the meaning of section 130(3) of the BSA 2022).

113.7 On that basis, the Claimants are entitled to an indemnity or alternatively a contribution from Sto GmbH under section 1 of the Contribution Act 1978, because Sto GmbH are liable to the owners and/or leaseholders of the Building (by operation of section 130 of the BSA 2022). That liability is liability in respect of the same damage as that for which the Claimants are liable to the owners and/or leaseholders of the Building namely the fire safety defects and the costs associated with the remedial works to make the Building fit for habitation.

9. Having regard to the present applications and the challenges brought by the Defendants, the salient aspects of these claims are therefore as follows:
 - a. Paragraph 3 sets out a contribution claim against Sto and Sto Germany who are said to be liable to the underlying claimants (i.e. the legal and/or equitable owners of the building) pursuant to section 149. This is expanded upon in paragraphs 98-102;
 - b. Paragraph 4 seeks building liability orders (“BLOs”) against Sto Germany and SBG in respect of the liabilities of Sto, and against SBG in respect of the liabilities of Sto and Sto Germany;

- c. Paragraphs 111 and 112 deal with the liability in contribution of Sto Germany whereas paragraphs 113.6 and 113.7 appear to deal with the liability in contribution of SBG;
 - d. Paragraph 111 repeats the claim for a BLO against Sto Germany in respect of the liability of Sto;
 - e. Paragraph 112 then claims contribution from Sto Germany on the basis that Sto Germany's liability under section 130 (which is a liability transferred from Sto) is a liability in respect of the same damage.
 - f. Paragraph 113.6 seeks a BLO against SBG in respect of Sto's liability.
 - g. Paragraph 113.7 then claims contribution from SBG on the basis that SBG's liability under section 130 (which is a liability transferred from Sto) is a liability in respect of the same damage.
10. The claims for contribution are in respect of the costs of the remedial works, and the underlying liability is said to be to legal or equitable owners of the building. It may be seen, and it is important to note, that the claims for contribution are put on two bases. The first is that Sto and/or Sto Germany have a liability for the same damage as the Claimants because Sto and/or Sto Germany are liable under section 149 ("the section 149 contribution claim"), and the second is that Sto Germany and/or SBG have a liability for the same damage because BLOs should be made against them (in respect of the liability of Sto) pursuant to section 130 ("the section 130 contribution claim").

D. THE ISSUES

11. The Defendants advance two main lines of attack. These relate first to the section 149 contribution claims against Sto Germany, and secondly to the contribution claims more generally.

- a. As to the section 149 contribution claims against Sto Germany, the Defendants submit that on a proper analysis of the applications to serve out, permission was not given in respect of these claims. In the alternative they submit that the Claimants cannot establish that the claims have a real prospect of success on the facts.
- b. As to all the claims for contribution, the Defendants allege that these claims do not have a real prospect of success. A large number of points were taken. These include that the liability of the Defendants was not in respect of the same damage or to the same people. As I have indicated, there was a dispute as to the proper scope of the issues in this respect and I address this below.
- c. In relation to the section 130 contribution claims, the Defendants submit that a BLO cannot be made against SBG because this would entail giving section 130 extra-territorial effect which is impermissible. The Claimants submit that this is the wrong analysis as a matter of law and, in any event, that the claims have a real prospect of success.

E. THE APPROACH TO APPLICATIONS TO SET ASIDE SERVICE OUT OF THE JURISDICTION

12. It is common ground that the test I have to apply to these applications is whether the relevant claim has a real as opposed to fanciful prospect of success. This means that it surmounts the CPR 24.3 summary judgment hurdle. It is also common ground that the burden is on the Claimants.

13. In *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 at [71], Lord Collins commented:

“On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, 453-457. First, the claimant must satisfy the court that in relation to the foreign defendant there is

a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. *Carvill America Inc v Camperdown UK Ltd* [2005] 2 Lloyd's Rep 457, para 24.”

14. In *Vedanta Resources v Lungowe* [2019] UKSC 20 at [9] Lord Briggs commented:

“Jurisdiction challenges frequently raise questions about whether the claim against one or more of the defendants raises a triable issue. As is now common ground, this broadly replicates the summary judgment test. Issues of this kind are, regardless whether contained within jurisdiction disputes, subject to a similar requirement for proportionality, the avoidance of mini-trials and the exercise of judicial restraint, in particular in complex cases ...”

15. In *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3, the Supreme Court considered “the real prospect of success” test in the context of a jurisdiction challenge and there were a number of significant conclusions:

- a. “...it is important to observe judicial restraint and to avoid mini-trials, in accordance with the well-known guidance set out by Lord Hope of Craighead in *Three Rivers District Council*.” [21]
- b. It is generally appropriate to proceed on the basis that the facts in the Particulars of Claim are true. “Save in cases where allegations of fact are demonstrably untrue or unsupportable, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue.” [22]
- c. It was held that the Courts below had been drawn into the error of conducting a mini-trial. “The result is that instead of focusing on the pleaded case and whether that discloses an arguable claim, the court is drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on that evidence. That is not its task at this interlocutory stage. The factual averments

made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable.” [107]

- d. The Court at this stage should remain alive to the fact that disclosure may alter the picture. “... [A]re there reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success?” [128]

16. The Courts have made clear that it will not generally be appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact – see *Farah v British Airways* The Times 26 January 2000 per Lord Woolf MR at [35] and Chadwick LJ at [42]-[43]. At [42] Chadwick LJ summarised the law as follows:

“As Lord Browne–Wilkinson observed in *Barrett v LB Islington* [1999] 3 WLR 83, unless it is possible to give a certain and affirmative answer to the question whether the claim would be bound to fail, the case is not one in which it was appropriate to strike out the claim in advance of trial. Lord Browne–Wilkinson went on to point out that in an area of the law which was uncertain and developing, it could not normally be appropriate to strike out. He emphasised the importance of the principle that the development of the law should be on the basis of actual facts found at trial and not on the basis of hypothetical facts assumed (possibly wrongly) to be true on the hearing of the application to strike out. There are observations to the like effect in Lord Browne–Wilkinson's speech *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at pages 741 and 741; and in the judgment of Sir Thomas Bingham, MR in *E (A Minor) v Dorset County Council* at page 694 in the same report.”

17. I bear all this in mind as I approach the issues in this case. I observe that the Court has been supplied with 7,000 pages of evidence (equivalent to over 15 lever arch files), skeleton arguments for the Claimants and Defendants running to 84 and 91 pages respectively, and 120 authorities. I consider that there has been a failure by the Defendants to observe the requirements of proportionality and to focus on the threshold test of a real prospect of success. Furthermore, to a large extent these applications

address sections 130 and 149 of the BSA. These are new provisions and their scope and application remain to be worked out by the Courts. To the extent that the Defendants seek decisions on these new provisions at this very preliminary stage, I proceed cautiously. I made clear to the parties at the outset of the hearing that I would not be conducting a mini-trial. I reminded them of the need for proportionality and to direct their submissions to the threshold issue, namely whether there was a real prospect of success in relation to the relevant issue or claim.

F. THE FACTUAL BACKGROUND

18. The buildings in issue were all identified following the Grenfell Tower fire as having combustible materials in their external wall systems and they have required or will require remediation to address the fire safety risks posed as a result. According to the Particulars of Claim, all the buildings have the StoTherm Classic External Wall System (“the Sto system”) forming all or part of their external walls.
19. It is alleged that the Sto system was designed, manufactured and supplied by Sto and Sto Germany. The Claimants’ case is that the Sto system is an external insulated render system which contains expanded polystyrene (“EPS”) insulation boards fixed behind the external render. They allege that EPS will typically soften and melt in the early stages of a fire and that once ignition of the material occurs, rapid fire spread can be observed. Owing to the relatively low softening and melting point of EPS, damage can occur to the insulation well away from the seat of the fire. I did not understand the Defendants to challenge that EPS cladding systems pose a fire risk.
20. The Claimants allege that, as well as the presence of combustible EPS insulation, the Sto system contained common detailing – the “Sto detailing” – which was defective because cavity barriers were bypassed by a layer of EPS insulation which rendered the cavity barriers ineffective. The Claimants further allege that there are misleading statements in the British Board of Agrément (BBA) certificates and in the technical and marketing literature which was issued in the names of both Sto and Sto Germany.

21. I deal with the further facts by reference to the Redrow Particulars of Claim which I take as the lead claim. It is not necessary to refer to the specific facts in the other claims since the matters in issue are common across the claims. The Redrow claim concerns a residential building known as the Hemisphere in Edgbaston, Birmingham. As described above, HB(WM) was the developer, Redrow Homes Limited was responsible for snagging remedial works to the building. Redrow Limited was a signatory to the Self-Remediation Terms Contract (the “SRT Contract”) described below.
22. After the Grenfell Tower fire, a fire safety and cladding assessment was carried out and an EWS1 (external wall safety) report was obtained. This recorded that cavity barriers were missing, a fire could spread rapidly through the EPS cladding and combustible materials were present in the external walls. A waking watch and concierge were recommended.
23. On about 5th April 2022, Redrow Limited signed a pledge with the Department for Levelling Up and Housing and Communities (now the Ministry of Housing, Communities and Local Government, “MHCLG” or “the Ministry”) committing to the principle that leaseholders should not have to pay for any costs associated with life-critical fire safety remediation work. On about 26th August 2022, the building was accepted into the Building Safety Fund.
24. The precise manner in which the remediation works were funded and the way in which the money flowed is not in evidence and was not gone into in detail in the hearing. Briefly the position seems to be as follows. The leaseholders or residents’ management company entered into a Grant Funding Agreement with the Ministry. This provided that funds could be paid to the residents subject to them using “all reasonable endeavours to pursue reasonable remedies available... including... claims against... relevant contractors and manufacturers” (clause 5.4.1); and “promptly to pay back any amounts recovered from those claims” (clause 5.4.3); and “upon request to assign their rights to MHCLG to enable MHCLG to make such claims” (clause 5.4.4).
25. MHCLG deemed the building suitable for funding for the remediation of the Sto system. MHCLG stated in their decision that “In accordance with the terms of the pledge, the Department expects Redrow to reimburse the Department for all funds paid

out under the terms of the GFA [Grant Funding Agreement] where those are not reimbursed by the applicant in accordance with the GFA.”

26. The Claimants say that, on 13th March 2023, in recognition of its liabilities under the BSA and the DPA 1972, the Third Claimant, Redrow Limited entered into the SRT Contract with the Ministry pursuant to which it committed to investigate and remedy fire safety defects in the buildings which its group companies had developed between 1992 and 2022. The relevant works commenced in January 2025 and were due to be completed by December 2025. The total sum paid out from the Building Safety Fund was £27.32 million. It is alleged in the Particulars of Claim that all three Redrow Claimants are liable to reimburse MHCLG for the cost of the remedial works, but this depends upon MHCLG issuing a Reimbursement Statement, and this has not yet been issued.

27. Thus, whilst the detail of the GFA and SRT arrangements was not analysed at the hearing, the general thrust of the scheme is reasonably clear. The key components are as follows. Leaseholders should not have to bear the costs of remediating defective cladding. It is expected that the relevant developer should meet these costs. The Building Safety Fund is a government backed fund which provides the means whereby the works can be funded. The developer is bound via the SRT to reimburse the Ministry for sums expended via the Building Safety Fund.

G. THE PROCEDURAL BACKGROUND

28. By application notices issued in each of the claims on 23 December 2024, the Claimants sought permission pursuant to CPR 6.36 and 6.37 to serve the Claim Forms on Sto Germany and SBG in Germany. In each case, the application was supported by a witness statement dated 23 December 2024 from Thomas Duncan, of Ashurst Perkins Coie UK LLP (“Ashurst”), the Claimants’ solicitors. The Court granted the permission sought by Orders in each claim dated 15 January 2025. Each of the Claimants issued applications dated 15 April 2025 to extend the time for the service of the Claim Form and Particulars of Claim until 8 August 2025. Those applications were supported by a

witness statement of Jonathan Gale of the same date. The Court granted the extensions sought by its Orders dated 29 April 2025.

29. It is common ground that all relevant documents were in fact served on Sto Germany and SBG in the Lendlease and Barratt Claims by 10 April 2025 such that the Lendlease and Barratt Claimants did not need to avail themselves of the service extensions granted by the Court. In the Redrow Claim however, whilst Sto Germany was served with the relevant documents on 11 April 2025, service was not then effected on SBG. The Redrow Parties made a further application to extend time for the service of proceedings. That application, dated 19 June 2025, was supported by a second witness statement from Thomas Duncan. The Court's order dated 19 June 2025 extended the time for service of documents in the Redrow Claim until 18 October 2025. Service was effected on SBG on 1 August 2025. In addition to their applications seeking to set aside the orders for service out, the Redrow Defendants submit that the extension should be set aside as a result of a failure by Redrow to make full and frank disclosure to the Court when seeking extensions of time in April and June 2025 for the service of their claim on SBG and/or because there was no good reason for the extension. I address this at section L below.

30. Sto Germany and SBG filed acknowledgments of service in each of the claims. It was - but is no longer - disputed that these were filed within the extended period of time agreed with each of the Claimants to do so. The parties reached a further agreement that the time for each of Sto Germany and SBG to apply to contest the jurisdiction of the Court to hear the claims made against them be extended to 19 December 2025, with Sto Germany and SBG issuing its applications in this regard on that date.

31. In each case, I have witness statements from Lorna Emson and Christine Volohonsky on behalf of the Defendants and from Thomas Duncan on behalf of the Claimants.

H. THE BUILDING SAFETY ACT 2022

32. The relevant provisions of the BSA which arise in connection with these applications are sections 130, 131 and 149 which provide as follows:

130 Building liability orders

(1) The High Court may make a building liability order if it considers it just and equitable to do so.

(2) A “building liability order” is an order providing that any relevant liability (or any relevant liability of a specified description) of a body corporate (“the original body”) relating to a specified building is also—

(a) a liability of a specified body corporate, or

(b) a joint and several liability of two or more specified bodies corporate.

(3) In this section “relevant liability” means a liability (whether arising before or after commencement) that is incurred—

(a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or

(b) as a result of a building safety risk.

(4) A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body.

(5) A building liability order—

(a) may be made in respect of a liability of a body corporate that has been dissolved (including where dissolution occurred before commencement);

(b) continues to have effect even if the body corporate is dissolved after the making of the order.

(6) In this section—

- “associate”: see section 131;
- “building safety risk”, in relation to a building, means a risk to the safety of people in or about the building arising from the spread of fire or structural failure;
- “commencement” means the time this section comes into force;
- “the relevant period” means the period—

(a) beginning with the beginning of the carrying out of the works in relation to which the relevant liability was incurred, and

(b) ending with the making of the order;

“specified” means specified in the building liability order.

131 Building liability orders: associates

(1) For the purposes of section 130, a body corporate (A) is associated with another body corporate (B) if—

(a) one of them controls the other, or

(b) a third body corporate controls both of them.

Subsections (2) to (4) set out the cases in which a body corporate is regarded as controlling another body corporate.

(2) A body corporate (X) controls a company (Y) if X possesses or is entitled to acquire—

(a) at least half of the issued share capital of Y,

(b) such rights as would entitle X to exercise at least half of the votes exercisable in general meetings of Y,

(c) such part of the issued share capital of Y as would entitle X to at least half of the amount distributed, if the whole of the income of Y were in fact distributed among the shareholders, or

(d) such rights as would, in the event of the winding up of Y or in any other circumstances, entitle it to receive at least half of the assets of Y which would then be available for distribution among the shareholders.

(3) A body corporate (X) controls a limited liability partnership (Y) if X—

(a) holds a majority of the voting rights in Y,

(b) is a member of Y and has a right to appoint or remove a majority of other members, or

(c) is a member of Y and controls alone, or pursuant to an agreement with other members, a majority of the voting rights in Y.

(4) A body corporate (X) controls another body corporate (Y) if X has the power, directly or indirectly, to secure that the affairs of Y are conducted in accordance with X's wishes.

(5) In subsection (3) a reference to "voting rights" is to the rights conferred on members in respect of their interest in a limited liability partnership to vote on those matters which are to be decided on by a vote of the members of the limited liability partnership.

(6) In determining under any of subsections (2) to (4) whether one body corporate (X) controls another, X is treated as possessing—

(a) any rights and powers possessed by a person as nominee for it, and

(b) any rights and powers possessed by a body corporate which it controls (including rights and powers which such a body corporate would be taken to possess by virtue of this paragraph).

(7) For the purposes of section 130 as it applies in relation to a building, where a person's interest in the building is held on trust, a body corporate which is a beneficiary of the trust is to be regarded as associated with the person.

33. Thus, section 130 sets out the Court's power to make a BLO in relation to a relevant liability against a body corporate which is or was associated with the original body corporate which incurred the relevant liability. The meaning of "associate" is set out in section 131. It is not suggested by the Defendants that SBG is or was not an associate of Sto and Sto Germany.

Section 149

Liability for Past Defaults Relating to Cladding Products

(1) This section applies where Conditions A – D are met

(2) Condition A is that, at any time before the coming into force of this section -

(a) A person fails to comply with a cladding product requirement in relation to a cladding product,

(b) A person who markets or supplies a cladding product makes a misleading statement in relation to it, or

(c) A person manufactures a cladding product that is inherently defective

(3) Condition B is that, after Condition A has been met, the cladding product is attached to, or included in, the external wall of a relevant building in the course of works carried out in construction of, or otherwise in relation to, the building

(4) Condition C is that, when those works are completed -

(a) in a case where the relevant building consists of a dwelling, the building is unfit for habitation, or

(b) in a case where the relevant building contains one or more dwellings, a dwelling contained in the building is unfit for habitation.

(5) Condition D is that the facts referred to in subsection (2) (a), (b) or (c) were the cause, or one of the causes, of the building or dwelling being unfit for habitation

(6) The person referred to in subsection (2) (a), (b) or (c) is liable to pay damages to a person with relevant interest in relation to the relevant building for personal injury, damage to property or economic loss suffered by that person as a result of the facts referred to in subsection (4) (a) or (b).

...

(11) In this section “cladding product requirement” means -

(a) in relation to a time before IP completion day, a requirement relating to a cladding product under -

(i) the 1991 Regulations, or

(ii) the 2011 Regulations as it had effect in EU Law at that time,

and

(12) In this section -

“cladding product” means a cladding system or any component of a cladding system;

“Convention rights” has the same meaning as in the Human Rights Act 1998

“external wall”, in relation to a building, includes any part of a roof pitched at an angle of more than 70 degrees to the horizontal if that part of the roof adjoins a space within the building to which persons have access otherwise than for the purpose of carrying out repairs or maintenance.

I. THE SECTION 149 ISSUES

34. As explained above, the Claimants allege that Sto and Sto Germany would have a liability under s149 of the BSA and this is the foundation for the Claimants’ section 149 contribution claims. Two issues arise on this part of the case. First, the Defendants allege that permission was not given for service out in relation to the section 149 claim; and second, and alternatively, it is said that the section 149 claim does not have a real prospect of success.

Did the permission to serve out encompass a claim under section 149 against Sto Germany?

35. The Defendants say that the claim under section 149 was only added later when the Particulars of Claim were served. The Defendants submit that this is a freestanding reason why service on this point should be set aside.
36. It was not suggested that the position varied substantively across the three sets of proceedings, and so I address this issue by reference to the Redrow case. The application to serve out comprised only the claim form and a witness statement from Mr Duncan. The claim form referred to the BSA and to all the Defendants compendiously, but there was no specific reference to section 149. However, the supporting witness statement from Mr Duncan dated 23 December 2024 made references to claims against Sto Germany as follows. He stated that Sto was liable to owners of the building under section 149. At paragraph 34 he said that “to the extent that Sto Germany or SBG were actively involved in the specification, manufacture, marketing or promotion of the system, then some or all of the claims will also be made against them.” At paragraph 44 he referred to Sto Germany and SBG and “any direct liability they may have.” At paragraph 59 he said that the claims against “the Defendants” were made under the Contribution Act on the basis that they are liable to the owners of the building for the same damage under section 149 of the BSA.
37. Looking at the claim form and witness statement objectively, I conclude therefore that a potential claim under section 149 of the BSA against Sto Germany was sufficiently identified and foreshadowed in Mr Duncan's witness statement, and I further conclude that permission was given to serve out in relation to such a claim.
38. That is not however the end of the matter because, if I am wrong on that, it was common ground that I have a discretion to permit the section 149 claim to proceed if I conclude that it stands a real prospect of success, unless the Defendants have been prejudiced. For the Defendants, Ms Parkin KC submitted that this was however subject to the Claimants issuing a formal application. I reject that submission. I can see no purpose in requiring the Claimants to issue an application for the sake of it when the issues are well understood by both parties and have been fully ventilated before the Court. I am satisfied that the Court's case management powers and the need to further the

Overriding Objective are quite sufficient to enable the Court to determine the point without the need for a formal application.

39. Subject to the point about a formal application, the parties were agreed that (upon the assumption that permission had not been given to serve out against Sto Germany in respect of the section 149 claim) the approach to be adopted was analogous to that which the Court would take upon an application to amend. In my judgment that is correct. In this respect Ms Parkin submitted that the claim should not be permitted to proceed because - at the time when permission was granted – the Claimants thought that limitation in the contribution claim would run from the date of the SRT contract, and so the time would now have expired. I reject this. I explain below at [92] the Claimants’ stance on the limitation period at the time. That was not the Claimants’ view of the limitation period then or now, and nor is it the Defendants’ view. Indeed, it is unsurprisingly common ground that the right to recover contribution arises when “(1) damage has been suffered by C for which D1 and D2 each liable and (2) D1 has paid or been ordered or agreed to pay compensation in respect of the damage to C.” (per Lord Leggatt JSC in *BDW Trading Ltd v URS Corporation Ltd* [2025] UKSC at [212]).

40. Ms Parkin complained that she had “no idea” what the Claimants say about when time started to run on the facts, but it is for a defendant to plead and prove a limitation defence. She did not submit that permitting the Claimants to run the section 149 point would deprive the Defendants of an arguable accrued limitation defence. Accordingly if (contrary to my primary view) permission was not granted to serve out in respect of the section 149 point, I would have exercised my discretion so as to permit the claim to proceed, subject to it being shown that it has a real prospect of success.

Does the section 149 claim against Sto Germany have a real prospect of success?

41. I turn then to consider whether the claim against Sto Germany under section 149 of the BSA stands a real prospect of success.

42. I set out section 149 above. It concerns “liability for past defaults relating to cladding products” and is a new statutory tort (with a 30-year retrospective limitation period). Importantly for the purposes of this jurisdictional challenge there has, to date, been no

case which has considered the tests set out in section 149 and so this is a novel and untested area of law. The section provides three alternative routes to liability in sub-section (2). In the evidence of Mr Duncan and in their submissions, the Claimants focussed in particular on sub-section (b) (misleading statements). The Claimants submit that the relevant statements in this case bear a striking similarity to those made by Kingspan and which were uncovered by the Grenfell Tower Inquiry. In summary, the Claimants' make the following points:

- a. Sto Germany described itself as the manufacturer and designer of the Sto system on the face of the 1995 and 2007 BBA certificates. Sto Germany was named on the face of the 1995 certificate as the certificate holder. The certificate stated: "The systems are manufactured and designed by STO AG [Sto Germany] in Germany and are imported and marketed by CCS Scotseal Ltd [Sto]." The 2007 certificate contained the same language but Sto was the holder of the certificate.
- b. The BBA certificates addressed the compliance of the Sto system with the *Building Regulations* in England and Wales.
- c. The 1995 certificate stated that "Guidance may be obtained from Sto AG [Sto Germany]".
- d. The certificates included misleading statements because the system was described as national class 0 which would therefore meet functional requirement B4(1) of the *Building Regulations* for external fire spread. This was misleading because it says nothing about whether the system can resist the spread of fire over the walls.
- e. Given the contents of the certificates, it is not tenable for Sto Germany now to say that it was not the designer, manufacturer or supplier of the system.
- f. The marketing and technical literature which was available in the UK referred to Sto Germany as well as Sto and included data sheets which claimed that the system was of "limited combustibility". This has a technical meaning in

England and was false because EPS has such a poor fire performance that it cannot achieve any European classification except for F which means that it is unclassified.

- g. The buildings which are the subject of these claims included the Sto detailing which included a combustible strip of EPS insulation foam over the face of the non-combustible cavity barriers and which provided a pathway for fire spread along the EPS thereby rendering the cavity barrier ineffective.
- h. One month after the Grenfell Tower fire in June 2017 the BBA certificate was amended to remove the references to class 0 and to add that EPS “is not classified as non-combustible or of limited combustibility.”
- i. In *Martlet Homes Ltd v. Mulalley & Co Limited* [2022] EWHC 1813 (TCC) at [65] HH Judge Stephen Davies noted that “... *it is common ground that the Sto insulation boards were not (and had never otherwise been claimed to be) of limited combustibility in the context of the applicable UK standards.*”

43. The Defendants have mounted a sustained attack on this. They rely upon witness statements from Ms Christine Volohonsky, a German lawyer. She makes a large number of points. These include the following: Sto Germany only supplied components of the system to Sto; Sto Germany never supplied EPS boards; Sto Germany did not manufacture and supply a cladding system directly to the UK; whilst Sto’s marketing materials may have contained information which originated from Sto Germany, Sto Germany did not sign off the materials; and the system was intended for use on external masonry walls and not steel framed buildings as was the case with the buildings in issue.

44. The Claimants submit that Ms Volohonsky does not deny that the statements in the BBA certificate were misleading, does not deny that the UK marketing brochures were based on Sto Germany designs, and does not explain how the BBA certificates came to make misleading claims. The Claimants also note that the Defendants have not pleaded a draft defence and so the arguments relied upon have not thus far been

articulated with precision. The Claimants complain that the Defendants' case has "evolved".

45. In my judgment there is a short answer to the Defendants' objections. Per *Okpabi*, the test I have to apply is whether the section 149 allegation has a real prospect of success. I am to observe judicial restraint and not to conduct a mini-trial. I should proceed on the basis that facts alleged in the Particulars of Claim are true, and I should not be drawn into an evaluation of the weight of the evidence. The points made by Ms Volohonsky and the Defendants' submissions which I have summarised above essentially raise factual points. They are not suitable for summary determination on an application of this sort and should await trial. Indeed, given that this is a new and developing area of law, this strikes me as a paradigm case where these sorts of points should be determined at trial in light of the evidence. As matters appear to me at this stage, the Claimants' pleaded case on these points, if accepted, would be capable of establishing a breach of duty under section 149(2)(b). I consider that the Claimants have a real prospect of success on this point.
46. Whilst the Claimants' focus was on subsection 149(2)(b), the same approach is applicable to the allegations under subsections 149(2)(a) and (c). Sub-section 2(a) relates to a person which fails to comply with a cladding product requirement. In this respect, the Claimants allege that the Sto system did not comply with the *Construction Products Regulations 1991* in that there was no successful test under BS8414-1 or BS8414-2 and/ or that the system should not have been specified for use in high rise blocks and/ or that it did not satisfy the essential requirements set out in Schedule 2. Once again, the Defendants take a large number of detailed points as to how the section should be construed and how a person may be deemed to fail to comply with a relevant requirement, and once again it is clear to me that these are fact sensitive issues relating to the construction of a new provision in a developing area of law, and they are not suited to summary determination. I consider that the Claimants have a real prospect of success on this point.
47. Sub-section 2(c) relates to a person that manufactures a cladding product that is inherently defective. By virtue of subsection 12, a "cladding product" means "a cladding system or any component of a cladding system". The Claimants plead that the

system is inherently defective because it contains combustible materials and would achieve a European classification of Class F and hence is unsuitable for use on tall buildings. They allege further that the Sto detailing is ineffective in preventing the spread of fire. The Defendants say that Sto Germany did not “manufacture” a cladding product; that, even if it was unsuitable for use on tall buildings, this did not make it defective; and that the system was granted European Technical Approval (“ETA”). The Claimants fairly point out that a cladding product includes a “component” (see sub-section 12), and they dispute the relevance of ETA. In my judgment, the position is the same as under sub-sections (a) and (b): these are all points for trial, and I consider that the Claimants have a real prospect of success on this issue.

48. Accordingly, for these reasons I am satisfied that the Claimants stand a real prospect of success in establishing that Sto Germany was in breach of duty owed under section 149.

J. THE CONTRIBUTION ACT ISSUES

49. Section 1(1) of the Contribution Act provides:

Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

50. For the Defendants, Ms Powell took the Court carefully through the leading authorities on the Act including *BDW* and *Royal Brompton Hospital NHS Trust v. Hammond* [2002] 1 WLR 1397. This is not the place for a detailed examination of the caselaw, but I accept that it is of fundamental importance that when looking at a claim for contribution, the damage is clearly identified and the claimant and defendant to a contribution claim should be liable in respect of the same damage.
51. I have explained above at section C above how the contribution claims are formulated in this case. In their skeleton argument the Defendants advanced multiple challenges to these claims. These included that: the Claimants could not bring a claim since (per Lord

Leggatt's dictum in *BDW* above), they had not yet paid or been ordered or agreed to pay a specific sum; that the Claimants and Sto Germany and/or SBG would not be liable in respect of the same damage; that they would not be liable to the same person; whether the SRT terms preclude a contribution claim; and whether the loss was suffered by the Claimant parties bringing the claims. The Claimants objected that they had not been given notice of these points and they had not been foreshadowed in the extensive evidence deployed for the applications or in the pre-action correspondence. The Claimants submitted that they would wish to put in evidence, and I can see that it would be relevant to establish precisely by whom, when and how the losses were sustained, by whom the remedial works were undertaken, which party ultimately bore the costs of them, and how the GFA and SRT contract worked. Unfortunately, the parties failed to co-operate so as to ensure that the issues to be determined at the hearing were agreed, and the Defendants' stance meant that the Claimants were taken by surprise. I was therefore required to rule as to the scope of the hearing at the outset. I acceded to the Claimants' application, giving my reasons in a Ruling on the first morning of the hearing. The result was that the Defendants' challenges to the contribution claims were ruled substantially out of scope. I did however allow the Defendants to argue points at a conceptual level in order to identify whether the claims were flawed in principle, and I address these points below.

52. In relation to the matters which I ruled to be out of scope, I would further observe that the Defendants' arguments invited the Court to enter into a detailed factual analysis. I consider that this would be tantamount to a mini-trial and so, per *Okpabi*, this is a further reason why these points should not be determined in the context of an application to set aside. That said, it is open to the Defendants to renew any objections which I ruled to be out of scope in an application to strike out or for summary judgment.

Is the liability to the same parties and/or in respect of the same damage?

53. The Defendants submitted that the proposed contribution claims were inadmissible because the Claimants on the one hand, and Sto Germany and SBG on the other, were not liable in respect of the same damage. I ruled that to be out of scope because it would

require evidence as to what was paid, when, by whom, to whom and in respect of what the payment was made.

54. For the Claimants Ms Grange KC did however address the point at a conceptual level. She submitted that the Claimants were either liable to the building owners or lessees for the costs of remedial works under section 1 of the DPA (where they were the original developer) or (if they were not the original developer) they could be liable under section 124 as an associate or under section 130 of the BSA. She submitted that all the Claimants therefore had a potential liability either under the DPA or the BSA in respect of the cost of remedial works to the owners/lessees. It followed that the contribution claims against the Defendants were in respect of the same damage, i.e. the cost of remedial works. Furthermore, the liability was to the same people because Sto could be liable to the owners/ lessees in respect of the cost of remedial works via section 149, Sto Germany could be liable via section 149 and section 130, and SBG could be liable via section 130. Looked at in this way, I consider that the claims have a real prospect of success.

Whether the owners/ lessees need to be before the Court

55. The Defendants argued that the Claimants could not seek BLOs so as to underpin the contribution claims in respect of liabilities owed to parties that were not before the Court (i.e. the owners and lessees). No authority was cited for this proposition and I consider it to be wrong. It is contrary to common practice in contribution claims. In such a claim of course the damage needs to be identified, but there is no need for the party that suffered the original damage to be before the Court any more than there is a need for a party in receipt of a settlement to be before the court when a party having made a settlement seeks contribution from a third party.

Which Claimant suffered the loss?

56. The Defendants also sought to raise an argument as to which of the Claimants in each claim had suffered or was liable for the loss in each case. On any view, this would require a detailed examination of the facts surrounding the agreements to remediate the

defects and the SRT contracts. This was met with the objection that it was unheralded and would require evidence and so I ruled it out of scope. I would note however that Ms Grange's submission that the SRT was essentially a "funding arrangement" and did not alter which party had suffered the damage for the purposes of the Contribution Act appeared to be well-founded.

The need for payment or an agreement to pay; whether proceedings may be issued before the cause of action has accrued

57. The Defendants argued that there has been no payment or order or agreement to pay and thus (per Lord Leggatt's dictum cited at [39] above), the Claimants cannot bring contribution claims. As to whether this was or was not the case on the facts in any specific case, I ruled that this was not within scope because it will require evidence as to what was paid, when and by whom. The Claimants did not adduce evidence on this on the basis that it did not appear to be in issue. The point will have to be worked through on the facts.

58. However, there is a wider conceptual issue which was argued, which is whether it is open to a party claiming contribution to issue proceedings before the cause of action has accrued. This is hypothetical on the facts as they stand since there is no evidence before the Court as to whether the cause of action has accrued in the sense identified by Lord Leggatt in *BDW* at [212] (See [39] above.). However, since the point was argued I will state my conclusions. In my judgment that is permissible. In *BDW* Lord Leggatt held:

"[216] In *Kazakhstan Kagazy v Zhunus* [2014] 4 WLR 86, para 65, I distinguished three questions which may be asked in relation to the accrual of a cause (or right) of action: (1) when does a right to obtain a particular remedy from a court arise; (2) when is a claimant entitled to commence proceedings claiming that remedy; and; (3) when does time to begin to run for the purpose of calculating the time limit for commencing such proceedings?

[217] In general, a claimant will not be entitled to commence proceedings claiming a remedy unless and until the right to obtain that remedy from a court

has arisen; and that is also when time begins to run for the purpose of calculating the time limit for commencing such proceedings. A cause of action, in the sense of a right to obtain a remedy, arises when all the elements of the claim (i.e. the facts on which the existence of the right to obtain the remedy depends) are capable of being proved because the events which establish those facts have occurred.

...

[238] There is one more point to mention about the date when proceedings for claiming contribution can be commenced. Suppose that C chooses only to sue D1, although D2 is also arguably liable in respect of the same damage. If D1 fights C's claim, then, on the interpretation of the law that I have just outlined, D1 has no right to recover contribution from D2 before a judgment is given against D1. It would be very inconvenient if D1 had to wait until then before it could take any proceedings against D2. It is usually more efficient and avoids the risk of inconsistent decisions, for questions of contribution to be decided in the same litigation as C's claim against D1 (and D2 is C also sues D2). What are now CPR rr 20.6 and 20.7 create procedural machinery which make this possible. These rules enable D1, when defending a claim for compensation brought against it by C, to make a claim for contribution against a co-defendant or a third party. Such a claim may be initiated before the cause of action in the other two senses discussed above has accrued: that is, before the right to obtain an order for contribution has arisen and before the limitation period has started to run." [underlining added]

59. As I observed in argument, it is a matter of routine in this Court for a defendant to claim contribution from a third party whilst denying the primary claim. Ms Grange submitted that it would be "insane" if a developer had to wait until the final sum crystallised before they could bring a claim.

60. Ms Powell accepted that a defendant claiming contribution against a third party or a co-defendant could bring a claim in the manner outlined by Lord Leggatt, but she submitted that it was not open to a claimant claiming contribution to bring a claim before the cause of action had accrued. I do not agree. CPR 20.6 and 20.7, which were

referred to by Lord Leggatt, are rules of procedure and not substantive law. I can see no logical reason why a claimant should have to wait until it has paid or been ordered to pay the underlying sum before claiming contribution, but a defendant need not do so; indeed that may be procedurally very inconvenient. The present cases are illustrative of this point. Indeed, in the Lendlease and Barratt claims, the Claimants have freestanding claims under the DPA 1972. If the Defendants' submission is right, then a second later set of proceedings for contribution (covering the same facts) would be required. That would be contrary to CPR 1.4(2)(i) which requires the court to deal with as many aspects of the case as it can on the same occasion and, in my judgment, it cannot be right.

61. I note that a similar submission was made by the Defendants in *BDW* in the Court of Appeal [2023] EWCA Civ 772 at [194] and rejected by Coulson LJ at [199] et seq.
62. In my view Lord Leggatt's dictum at [238] should not be as narrowly construed as the Defendants submit. Indeed, the decision in *BDW* supports this conclusion. In that case *BDW* was the claimant. It had carried out remedial works voluntarily, and it appears that it had not been ordered to pay or agreed to pay anyone. The ground of appeal was framed at [17] as: "Is *BDW* entitled to bring a claim against *URS* pursuant to section 1 of the Contribution Act, notwithstanding that there has been no judgment or settlement between *BDW* and any third party and no third party has ever asserted any claim against *BDW*?" Lord Leggatt's conclusion at [266] was that "...It is sufficient that *BDW* has made a payment in kind (by performing remedial works) in compensation for the damage suffered by the homeowners." That seems to be the position (or at least the Claimants have a real prospect of establishing that this is the position) in the instant claims.

Paragraph 95(2) of the Defendants' skeleton

63. The Claimants accepted that they had come prepared to deal with one specific argument in the Defendants' skeleton argument at paragraphs 95(2), 100(2) and 116(3). This is the same point but addressed to the three separate cases. (Paragraph 116(3) relates to a building which is no longer in issue.) These paragraphs addressed the second basis on

which the Contribution Act claim was put, that is via a BLO under section 130 of the BSA: see paragraphs 111 and 112 of the Redrow Particulars of Claim extracted at section C above.

64. Looking at paragraph 95(2) of the Defendants' skeleton argument (which addresses the Redrow claims) it advances two arguments: (1) that no payment, order to pay or agreement to pay has been made by or against HBWM; and (2) the liability of Sto Germany and/or SBG under a hypothetical BLO would be either (i) a liability to a person who has an interest in the dwelling for damage resulting from breach of the DPA or (ii), a liability for personal injury, damage to property or economic loss to those with a legal or equitable interest in the building, and this cannot be the same damage or liability to the same person or entity as the alleged liability on the part of HBWM under the SRT contract. As to the first point, and the question as to whether there has been any payment etc, this is a point which was in fact ruled out of scope since there is no evidence before the Court as to whether HBWM has made any relevant payments, and I consider that this is a matter which will have to be investigated on the facts.

65. As to the question of the same damage, and whether a liability under a BLO can amount (even conceptually) to the same damage and/or a liability to the same person, this is another example of an issue arising under new and developing law, which should be determined against actual findings of fact. The Defendants' arguments in this respect raise issues of law which are dependent on findings of fact as to (for example) what was paid when, to whom, by whom and what any payment related to. These issues are not suitable for summary determination on an application such as this. That said, since any liability under a BLO is likely to be ultimately a liability in respect of the cost of repairs, I consider that the Claimants at least have a real (not fanciful) prospect of success on this point.

K. EXTRA-TERRITORIALITY

66. I turn now to deal with the Defendants' extra-territoriality challenge. The issue is whether claims under the BSA have what has been described as extra-territorial effect, in other words whether the provisions of the Act can bite on Sto Germany and SBG,

both of whom are domiciled in Germany. Extraterritoriality is a principle of statutory interpretation involving a presumption that statutes are intended to have effect only within territorial limits. *Dicey* (at [1-037]) summarises it thus:

“It has often been said that there is a presumption that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom. Whether an English statute applies extraterritorially depends upon its construction. The presumption against extraterritorial application is more or less strong, depending on the subject matter.”

67. In *Competition and Markets Authority (Volkswagen)* [2023] EWCA Civ 1506, the Court of Appeal summarised the factors relevant when considering whether it was intended that a statute would apply extraterritorially:

“*Relevant policy considerations:* The following considerations might be relevant in determining intention: (i) the purpose, scheme, context and subject matter of the legislation...(ii) the practicability of enforcement.... (iii) whether the purpose of the legislation could be effectually achieved without extraterritorial effect... (iv) the legislative history of the statute as indicating whether Parliament intended that the extra territorial purpose of the legislation could be achieved by other legislative means... (v) the impact upon comity; and (vi) the nature of the law being enforced and whether it was criminal or civil. There can be overlap between these considerations on the facts of any given case...”

68. The Defendants have not pleaded a defence, even in draft, and so their position has not yet been articulated with precision. As originally framed, the Defendants’ argument applied to the claims advanced under both section 149 and section 130. By the time Mr Harty made his oral submissions for the Defendants the argument was not pursued insofar as it applied to the section 149 and section 130 contribution claims advanced against Sto Germany. The position at the hearing was that it was accepted by the Defendants that if (as I have found above at section I above) the Claimants have a real prospect of success against Sto Germany in relation to the section 149 contribution claim, then the Defendants did not advance an argument that either the section 149 or

section 130 contribution claims were in some way barred on the basis of extra-territorial effect. The logical inference is that the Defendants therefore accept that in relation to those claims, an orthodox applicable law analysis may be undertaken. I did not understand the Defendants to suggest that the applicable law would be anything other than the law of England.

69. It is thus first necessary to identify and frame the residual issue that the Court must decide on this part of the case. The question is whether the Claimants can establish at this stage that they have a real (not fanciful) prospect of establishing that the section 130 contribution claim against SBG is not barred by the principle of extra-territoriality. The Claimants' position is, in effect, that the Defendants' arguments are misconceived and that extra-territoriality is irrelevant; rather this is a case where an orthodox applicable law analysis should be undertaken. The Claimants submit that on an applicable law analysis it is clear that the law of England is the applicable law and so extraterritoriality does not arise. In the alternative, the Claimants say that questions of extraterritoriality would be fact sensitive and so could not be determined in the context of these applications.

The underlying facts

70. The factual material available to the Court relating to the involvement of SBG is sparse. The Particulars of Claim in the Redrow case plead [8.6] that SBG "is the parent company of Sto SE" and [113.1.2] that SBG "...is the ultimate parent company of Sto SE, which is the 100% shareholder of Sto Limited (the UK branch of the company). Sto SE is the producer of the Sto Therm Classic system." It is then said [113.1.4] that "... there are good policy reasons why the Claimants should be able to recover their resulting losses from Sto Limited's ultimate parent company, which is entirely consistent with the purpose and intention of the BSA 2022."
71. In support of the Defendants' application in the Redrow case, Ms Volohonsky's witness statement deals with SBG thus:

“43. SBG... was established on 27th April 2005 with share capital of EUR 25,000.00. On 28 September 2006, the share capital of SBG was increased to EUR 1,000,000.00...

44. The business purpose of SBG is (in English translation): ‘The management of the entrepreneurial assets of the Stotmeister families, in particular, through the acquisition, holding, management and sale of shares (ordinary shares and preference shares) in Sto Aktiengesellschaft... and, if applicable., the holdings in other companies and organisations.’ SBG holds 3,887,996 ordinary shares in [Sto Germany] and is the sole shareholder of Sto Management SE.

45. SBG is a non-trading entity which acts as a corporate vehicle to hold the family shares of four members of the Stotmeister family.

46. At no time since its incorporation has SBG conducted any activities of marketing, supply or manufacture of goods under the Sto brand or carried out any other form of commercial activity.

47. It is incorrect for the claimants to allege that SBG is the ‘parent company of Sto SE’. SBG is a major shareholder of the hybrid corporate entity, which I refer to in this statement as Sto Germany, but it is not its parent company... SBG is excluded by law from the management of the affairs of Sto Germany. The management and representation of [Sto SE] is carried out by Sto Management SE, whose management board is effectively shielded from any shareholder influence.”

72. The Claimants do not accept the Defendants’ characterisation of the role of SBG. They complain that the Defendants have failed to provide voluntarily documents and information on the extent of SBG's connections to the jurisdiction, have blocked access to Sto’s documents, and limited themselves to responding to specific points only once raised by the Claimants. They draw attention to the fact that Ms Volohonsky does not provide the source of her information.

73. For the Defendants, Mr Harty submitted that section 130 could not have extra-territorial effect against SBG for the following reasons.

- a. It is impossible to undertake a conventional applicable law analysis since the law of the underlying liability could be in tort (i.e. by virtue of the claim based upon section 149) or in contribution, and the applicable laws could be different.
- b. Section 130 did not amount to a “liability”; rather it was a means of transferring the liability of one entity to another. There was no German equivalent. It was therefore meaningless to ask what the applicable law might be.
- c. *R (KBR), Paramount* and *Al-Skeini* (which I address below) were examples of cases where the Court had gone straight to the question of extra-territorial effect without first determining the underlying applicable law. That approach should be adopted in this case.
- d. On the facts, it was quite clear that SBG had no presence within the jurisdiction and no connection to the underlying liability,
- e. The Court could and should determine the point of law now since it cannot have been the intention of Parliament that section 130 should apply to an entity such as SBG, and it would not be just for SBG to have potentially huge new liabilities arising from historic contracts hanging over it.

74. For the Claimants, Mr Hossain KC submitted that extra-territoriality was a red-herring. An orthodox applicable law analysis could and should be carried out. The fact that it might be difficult or that there might be more than one underlying liability did not mean that the analysis should not be attempted. The Defendants had not pleaded that a law other than English law applied.

Discussion

75. I am satisfied that the Claimants have a real prospect of establishing that their approach is correct. The starting point is the judgment of Lord Sumption in *Cox v Ergo*

Versicherung. At [28] he explained the basic distinction between an applicable law analysis and the question of extraterritoriality.

“It is, however, important to understand what is meant when we talk of the extra territorial application of an English statute. There are two distinct questions, which are not always distinguished in the case law. The first question is what is the proper law of the relevant liability. The answer will usually depend on the extent of any connection between the facts giving rise to liability and England or English law. If the proper law of the liability is English law, no question of extra territorial application arises. In principle, the exercise is no different from that which the court performs when it identifies the proper law of a non-statutory tort, by reference to the connection between the facts and the various alternative systems of law. This is what Lord Hodson (at p380) and Lord Wilberforce (at pp390-392) did in *Boys v Chaplin* [1971] AC 356, when they held that liability in respect of a road accident in Malta, in which only English parties were involved, was governed by English law. The same basic principles applied under sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995 since that Act came into force. The second question is one of extraterritorial application, properly so-called. This is a question posed by section 14(3)(a)(i)(4) of the Private International Law (Miscellaneous Provisions) Act 1995, which had its counterpart in the common law, namely, whether the choice of law arrived at in accordance with sections 11 and 12 is displaced by some mandatory rule of the forum. This is not a choice of law principle at all, but turns on the overriding rules of policy of the forum.”

76. *Soldiers, Sailors, Airmen and Families Association v Allegemeines Krankenhaus Viersen GmbH* [2022] UKSC 29 is a later Supreme Court decision illustrating the approach taken in *Cox*. The statute under consideration was the *Civil Liability Contribution Act 1978*. The applicable law was German and accordingly the *Contribution Act* was not applicable. The process for selection of the applicable law was summarised at [27]:

“The identification of the appropriate law at common law involves a three stage process: (1) characterisation of the relevant issue; (2) selection of the rule of

private international law, which lays down a connecting factor for that issue; and (3) identification of the system of law which is tied by that connecting factor to that issue.”

77. I see no reason why the same reasoning should not apply in this case. If the applicable law is English, the English statute governing the liability will apply. *Dicey* at [1-037] confirms the basic principle: “Where the applicable law is English law, no question of extra territorial application arises.”

78. In this respect it was common ground that section 149 of the BSA created a liability in tort. The Claimants submitted that choice of law would therefore fall to be determined by reference to section 9 of the of the 1995 Act and that this would lead to the result that the applicable law was English law. The Claimants also submitted (relying upon the analysis in *Soldiers, Sailors*) that the proper law of the contribution claim would be English law. I did not understand the Defendants to dispute this; rather, their argument was that determining the applicable law was the wrong approach.

79. The Defendants did not really engage with the approach set out in *Cox* and *Soldiers, Sailors*. They submitted that the Court should skip the applicable law analysis and go straight to questions of extra-territoriality. I am satisfied that (per Lord Sumption) the correct approach in this case would be to start with an applicable law analysis, and only then to ask whether there is a mandatory rule of the forum which displaces the applicable law identified by this process. It is true that the applicable law analysis may be difficult because there may be more than one underlying liability (viz. tort or contribution or – in another case – contract) but that is not a reason not to undertake the analysis. Applicable law analyses are often difficult.

80. As I have noted, the Defendants have not pleaded or relied upon an alternative applicable law (for example German law) or adduced any materials which would enable the Court to undertake a comparative law analysis. I see no reason not to conclude that the Claimants have a real prospect of establishing that the applicable law in this case would be the law of England.

81. The construction industry is international. The Grenfell Tower Inquiry established that foreign companies could be responsible for building defects identified in England. Section 130 and the “just and equitable” test is framed in wide terms. Stepping back and looking broadly at the purpose of section 130, it would be odd if it was not intended to apply to foreign entities who would otherwise fall within section 131, but that would be the consequence of the Defendants’ extra-territoriality argument.

82. The Defendants placed some reliance on the fact that section 130 does not in itself give rise to a liability as such, rather it is a means of making one party liable for the wrong of another. That is true, but I do not see how this leads to a conclusion that an applicable law analysis is in some way excluded, or that it supports an extra-territoriality approach. Section 130 of the BSA may perhaps be likened to vicarious liability, since it is a mechanism whereby one party can be made liable for the wrong of another for reasons of policy: see *Various Claimants v. Catholic Child Welfare Society* [2012] UKSC 56 at [34]:

“The policy objective underlying vicarious liability is to ensure, insofar as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim.”

83. The fact that a claim is based upon vicarious liability is not a bar to an applicable law approach. In *Sophocleous v. Secretary of State for the Foreign and Commonwealth Office* [2018] EWHC 19(QB), Kerr J was required to consider “where in substance the cause of action arose in so far as the right of action is founded on vicarious liability of the defendants.” The liability in question arose from assaults said to have taken place in Cyprus. He held:

“I accept Mr Chamberlain's submission that vicarious liability is not, conceptually, a tort. It is the description of a legal rule which imposes liability for someone else's tort. I therefore do not see how the party vicariously liable, wherever located in the world, can be taken to have incurred vicarious liability other than in the place where the primary tort is committed.”

84. At the heart of Mr Harty's submissions on extra-territoriality were three cases where an applicable law analysis was not undertaken, and the Court went straight to questions of extra-territoriality. In light of the conclusions I have already reached, this is not the

place for an exhaustive analysis of the caselaw, but I consider that, taken together, they cannot bear the weight that the Defendants seek to impose upon them. *Paramount Airways Ltd [1993]* Ch 223 concerned issues under the Insolvency Act 1986. The administrators of an English company sought declarations against the Jersey registered bank that transfers to the bank were at an undervalue within the meaning of section 238 of the Insolvency Act 1986. Insolvency in the United Kingdom does not form part of the general law of civil liability. It is in that sense *sui generis*. As Mr Hossain pointed out, among the differences to a claim based on civil liability is that an English court dealing with an insolvency governed by the Insolvency Act is generally obliged to apply English law. There is no prior choice of law process in the usual sense of ascertaining substantial connection with a particular territory. Rather, it is simply the application of a universal rule based on where the insolvency proceedings are instituted.

85. The Defendants also relied on *R (KBR Inc) v Director of Serious Fraud Office* [2021] UKSC 2 and *Al-Skeini v. Secretary of State for Defence* [2007] UKHL 26 but these did not raise questions of civil liability so as to make choice of law a relevant step in the analysis. They were both concerned with public law rights and remedies that are not subject to determination of applicable law through the usual concepts of private international law. *KBR* was concerned with a criminal matter, namely the power of the Serious Fraud Office under section 2(3) of the Criminal Justice Act 1987 to require production of documents held by a foreign company. *Al-Skeini* was a judicial review of a refusal by the Secretary of State to conduct inquiries into deaths in Iraq and the question was whether the procedural duties under Articles 2 and 3 of the ECHR extended to events in Iraq.
86. For all these reasons I am satisfied that the Claimants have a real prospect of success in establishing that the correct approach is to identify the applicable law, per *Cox*, and that concepts of extra-territoriality have no application to the matters in issue. I have considered whether in light of the arguments that have been deployed and my conclusions thus far I should extract this issue as a point of law for final determination at this stage, but I remind myself that the BSA is a new and developing jurisdiction, the underlying facts have not been established, and the parties' positions have not been pleaded out. Indeed, the Defendants' stance on the applicable law approach as it applies to *Sto Germany* underwent a late change before the hearing. In light of the principles

set out at section E above I consider that it would be better for a final determination of this issue to be based on pleaded cases and clear findings of fact (or at least agreed facts).

87. Furthermore, if contrary to my primary conclusion, I accepted the submission that in principle the issue of extra-territoriality is engaged, I conclude that the Claimants would still have a real prospect of showing on the facts of this case that Parliament intended section 130 to apply to foreign defendants whether or not they had a presence within or connection to the jurisdiction. The test under section 130 is framed in the broadest possible terms (“just and equitable”). If the principle of extra-territoriality is engaged, its application would turn upon the principles set out in *Competition and Markets Authority* (see above) and the activities and connections of SBG, in other words, a factual inquiry that this Court cannot undertake on the present material. It is certainly not a pure point of law.

88. As to the points which are made by Ms Volohonsky regarding the involvement of SBG in the affairs of Sto and Sto Germany the material is, as I have indicated, sparse, and it is not accepted by the Claimants. As Constable J observed at [61] in *Crest Nicholson v Ardmore* [2026] EWHC 789, the assessment of whether it is just and equitable to grant a BLO is a broad test and necessarily fact specific. Even if SBG is not the parent company of Sto Germany, it is accepted that it is a major shareholder. Whether it would be just and equitable to impose a BLO on SBG must await a closer analysis of the facts, but I am satisfied that the Claimants have a real (not fanciful) prospect of establishing that they will be entitled to a BLO against SBG.

L. THE APPLICATION TO EXTEND TIME FOR SERVICE IN THE REDROW CLAIM

89. The Defendants seek to set aside an extension for service of the claim form in the Redrow claim as against SBG. This is put on the basis that when Redrow sought and obtained an extension of time for service, it breached its duty of full and frank disclosure, in that it failed to make reference to an arguable limitation defence. In the alternative, the Defendants seek to set aside the extension on the ground that there was

no good reason for the extension. Redrow denies that there were any such failures and seeks insofar as it may be necessary (by way of a rehearing) permission to extend time for service of the claim form.

90. The relevant procedural history is as follows. The claim form in the Redrow claim was issued on 20 December 2024. Permission was sought to serve out of the jurisdiction by an ex parte application of 23 December 2024. The application was supported by a witness statement of Mr Duncan of the same date. He noted that Ashurst had only recently been instructed and that the need to issue and apply quickly was because Sto Germany had on 11 December 2024 petitioned the Scottish Court to wind up Sto and the Claimants were concerned that delay might be prejudicial to the prospect of recovery. The order for service out was made by Jefford J on 15 January 2025. It was to be served within six months of the date of issue, i.e. by 20th June 2025. The particulars of claim were signed on 10 March 2025. The particulars of claim (along with the claim form and other documents necessary for Hague Convention service) were translated into German and not delivered to the Foreign Process Section until 28 March 2025. The Foreign Process Section advised that it could take 4 months for service which would have taken the claim form beyond its period of validity for service.
91. On 15 April 2025, an application was made for an extension of time for service from 20 June 2025 to 8 August 2025. The application was supported by a witness statement of Mr Gale of the same date explaining the position. On 29 April 2025, O'Farrell J made an order extending time to 8 August 2025. On 19 June 2025, Redrow applied for a further extension of time for service from 8 August 2025 to 19 October 2025. The application was supported by a witness statement from Mr Duncan of the same date, his second statement. Mr Duncan explained that the Foreign Process Section had informed Ashurst on 3 June 2025 that service had been unsuccessful as against SBG and the documents had been returned by the UK Customs office despite being checked and stamped for service and that the Foreign Process Section advised there was no error in the documents, with the likely error being in the UK Customs office. A further attempt to effect service on SBG was initiated by the Foreign Process Section, but it confirmed to Ashurst that service was unlikely to be effected before 8 August 2025. On 23 June 2025, an order extending time for service until 19 October 2025 was made by

Waksman J. Service on SBG was in fact effected on 1 August 2025, so within the period of the first extension granted by O'Farrell J.

Full and frank disclosure

92. The challenge is put on the basis of an alleged failure to make full and frank disclosure of a limitation defence. There is an air of unreality about the Defendants' stance here. Their primary position is that - by reference to the dictum of Lord Leggatt in *BDW* at [212] - no cause of action in contribution has yet arisen. Indeed, that is also the Claimants' position. The basis for the application is that on 18th February 2025 the Claimants' solicitors wrote to the Defendants stating:

“Although we do not consider that the limitation period for Contribution Act claims is near expiry... it could be argued, on a conservative basis, that the earliest date that Barratt/ Redrow's right of action accrued is the date their SRT Contract was signed, being 13 March 2023.

Notwithstanding that we do not consider entry into the SRT Contract to be when our clients' rights of action accrued, Barratt and Redrow are not prepared to take any risks in relation to limitation arguments that could be raised by you, not least because of the unnecessary time and costs involved in addressing them. They are therefore adopting a cautious approach in treating 13 March 2025 as the date by which limitation might expire in respect of its claims under the Contribution Act...”

93. The Defendants submit that where the Claimants' solicitors themselves considered that there was an arguable limitation defence based on the limitation period expiring on 13th of March 2025, i.e. between the issue of the claim and the expiry of the claim form, that was a matter that should have been drawn to the Court's attention on an ex parte application to extend the validity of the claim form.

94. The Claimants' solicitor, Mr Duncan, summarised the effect of the SRT in relation to Redrow in his first statement (in support of the application to serve out). In signing the

SRT contract with the Secretary of State, Redrow “committed to investigate and where necessary remedy (or procure the remediation of) fire safety defects in the buildings which it and its group of companies developed in the period between 5 April 1992 and 5 April 2022.” He confirmed that Redrow entered the SRT on 13 March 2023 and that his current understanding was that there were approximately 128 buildings within the scope of the SRT. The particulars of claim of 10 March 2025 further state: “The quantum of the claim is currently estimated as being in the region of £27 million. The quantum is to be determined following completion of the remedial works ...” It was indicated that some of the works will not relate to the Sto System. The particulars of claim went on to repeat the point made by Mr Duncan that, pursuant to the SRT, Redrow had agreed to investigate and where necessary remedy defects in relevant buildings. No further information was provided in the witness statement of Mr Gale, which supported the first (and relevant) application for an extension of time.

95. Section 10 of the Limitation Act 1980 sets down a special time limit for claiming contribution under the Contribution Act. Section 10(1) provides that “no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued.” Section 10(2) provides that the date on which the right to recover contribution accrues is to be ascertained as provided in subsections (3) and (4). Section 10(3) relates to a contribution claim arising from a judgment or arbitration award. Section 10(4) then states:

“If, in any case not within subsection (3) above, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made.” (Emphasis added).

96. This is the provision that was analysed by Lord Leggatt in *BDW* and I address this in section J above. (That decision was handed down on 21 May 2025, after the order of O’Farrell J.)

97. The principles relevant to full and frank disclosure were set out by Bryan J in *Libyan Investment Authority v JP Morgan* [2019] EWHC 1452 (Comm) at [92] - [97]. At [92] he referred to the principles restated by Christopher Clarke J in *Re OJSC v Sibir Energy plc* [2008] EWHC 2614 (Ch) which include in particular:

- a. If the Court finds that there have been breaches of the duty of full and frank disclosure on the ex parte application, the general rule is that the Court should discharge the order obtained in breach and refuse to renew the order until trial: *Re OJSC* [102(1)].
- b. Although the Court has jurisdiction to continue the order, that jurisdiction should be exercised sparingly, upholding the administration of justice and the public interest in requiring full and frank disclosure: *Re OJSC* [102(2) and (3)].
- c. The Court must assess the degree and extent of culpability. There is no rule that an innocent breach will not attract discharge: *Re OJSC* [102(4)].
- d. The fact that the Judge might have made the order anyway is of little if any importance: *Re OJSC* [102(5)].
- e. There are no hard and fast rules as to whether the discretion to continue should be exercised, and the Court should take into account all relevant circumstances: *Re OJSC* [102(9)].

98. He went on to note at [94] by reference to *Konameneni & Ors v Rolls Royce Industrial Power (India) Ltd* [2002] 1WLR 1269 that “The duty of full and frank disclosure only extends to those issues which can be said to be material to the decision which the judge had to make on the application.”

99. The Claimants submit, and I accept, that entering into the SRT is a commitment to investigate and where necessary remedy defects in buildings. It is not an agreement as to the “amount to be paid”. It is not the type of step which is capable by itself of starting time running under section 10 of the Limitation Act 1980. Indeed this is the Defendants’ position. The Claimants say that there is no realistic limitation defence based on the SRT and the mere raising of that possibility by the Claimants’ solicitor in correspondence (albeit in the context of denying it) does not create such a defence.

They submit that there is no obligation to raise hopeless points which could have no realistic effect on the decision maker when seeking an extension of time.

100. In exercising my discretion, I identify the following relevant factors:
- a. At no time did the Claimants genuinely consider that SBG had an arguable limitation defence based upon the SRT Contract. Rather, the Claimants' position, as set out in the letter of 18th February 2025 was to the effect that they were concerned that the Defendants might rely upon it as the commencement of the limitation period, albeit the Claimants regarded that as misguided.
 - b. In my judgment, there was no duty to draw to the Court's attention, a defence which, in reality, the Claimants regarded as hopeless, and which the Defendants had not actually articulated. Looked at in that way, it cannot be regarded as something which was material to the decision which O'Farrell J had to make.
 - c. Accordingly, I do not regard this as a breach of the duty of full and frank disclosure.
 - d. If I am wrong about that, then I would regard this as an innocent breach, and I would not regard the Claimants as culpable. Even if the Judge had been told about the potential argument on limitation, I would have expected her to make the same order.
 - e. If I were now to set aside the extension, the Claimants could reissue and the Defendants would (on their own case) not take a limitation point. The entire exercise would be pointless and a waste of costs.
101. Accordingly, exercising my discretion, I refuse the Defendants' application to set aside the extension of time on the basis that there was a breach of the duty of full and frank disclosure.

No good reason

102. In the alternative, the Defendants challenge the extension on the basis that there was no good reason for it.

103. It appears that there were various disputes between the parties relating to service. By a consent order approved by O’Farrell J on 15th December 2025, the parties settled disputes as to (a) late filing of acknowledgment of service by the Defendants and (b) suggestions of defects in service by the Claimants. The allegations on both sides were abandoned, save specifically for the full and frank disclosure allegation. Paragraphs 1 and 2 of the order stated:

“1. The service of the Claim Form and Particulars of Claim was validly effected: 1.1 against the Second Defendant on 11 April 2025; and 1.2 subject to paragraph 2 of this Order, against the Third Defendant on 1 August 2025.

2. The Third Defendant reserves its position that a failure to make full and frank disclosure by the Claimants at the time of seeking extensions of time for service of the Claim Form and Particulars of Claim as set out at paragraphs 16 and 20 of the First Witness Statement of Lorna Rachel Emson dated 10 October 2025 should lead to the setting aside of the Orders dated 29 April 2025 and 19 June 2025 (the "Reserved Grounds").”

104. The position is clear. The reservation is limited and specific. Only the full and frank disclosure point remained open to SBG; other challenges to the validity of service were abandoned as part of a compromise with the Claimants. It is not open to SBG now to argue that service was invalid on the grounds that the extension should not have been granted because there was no good reason for it. Indeed, I did not understand the Defendants to argue to the contrary at the hearing.

105. If it had been necessary to do so, I would have found that the Claimants did not have a good reason for the extension under CPR 7.6(2). Extensions to the validity of a claim form are not lightly granted. Since the period between issue and service of a claim form is an extension of the limitation period, it must be strictly regulated by the Courts: see *Aktas v Adepta* [2010] EWCA Civ 1170 at [91] per Rix LJ.

106. The relevant principles for the exercise of the court’s discretion were set out in *Vauxhall Motors Ltd v DENSO Automotive UK Ltd* [2025] EWHC 213 (Ch) at [42]. Those principles include:

- a. It follows from the overriding objective that civil litigation should be undertaken and pursued with proper expedition. Parties are therefore required to progress their proceedings promptly and within the specified time limits (*Vauxhall* [42(i)]).
 - b. What may be a sufficient reason for an extension of time of the particulars of claim may not necessarily be a sufficient reason for an extension of time for service of the claim form (*Vauxhall* [42(ii)]).
 - c. In general, the reason for seeking an extension of time must be a genuine difficulty in serving within time, rather than the consequences of the claimant's own neglect. The claimant's own delay in preparing its case, such as a delay in drafting the particulars of claim is therefore not a good reason for an extension of time (*Vauxhall* [42(iv)]).
107. In this case the chronology shows that the claim form was issued on the 20th of December 2024. I accept that proceedings were issued at that time because of concerns related to the winding up of Sto, but the particulars of claim were not signed until 10th March 2025. They were then translated into German and not delivered to the Foreign Process Section until 28th March 2025. At that point, the Claimants' solicitors were advised that it could take four months for service. The claim form could have been served without the particulars of claim. The delays in drafting and signing the particulars of claim and in translating the documents into German are effectively unexplained, and so, for these reasons, if it had been necessary to do so, I would have found that the Claimants had not established a good reason for the extension of time.

M. CONCLUSIONS

108. Accordingly, I conclude as follows:
- a. Permission was given to serve out in respect of the BSA section 149 claims;
 - b. The Contribution Act claims have a real prospect of success;
 - c. The Claimants have a real prospect of success in establishing that the correct approach is an applicable law analysis and principles of extra-territoriality are not relevant to the section 130 Contribution Act claim against SBG;

- d. The Claimants were not in breach of the duty of full and frank disclosure when seeking an extension of time for service of the claim form;
- e. There was no good reason for an extension of time for service of the claim form, but this point was conceded by the Defendants as part of a compromise agreement;
- f. The applications to set aside service out of the jurisdiction are dismissed.



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

Case reference	:	LON/00BB/BSB/2024/0011
Property	:	HALLINGS WHARF STUDIOS, CHANNELSEA ROAD, LONDON E15
Applicant	:	SECRETARY OF STATE FOR HOUSING, COMMUNITIES & LOCAL GOVERNMENT
Representative	:	Walker Morris LLP
Respondent	:	EDR BUILDERS LIMITED (1) HOLLYBROOK (UK) LIMITED (2)
Representative	:	Charles Russell Speechlys LLP (for the Second Respondent)
Type of application	:	For a remediation contribution order under section 124 of the Building Safety Act 2022
Tribunal	:	Judge Sheftel Judge Powell Ms H C Bowers
Date of Decision	:	21 May 2026

DECISION

Summary of Decision

The tribunal makes a remediation contribution order as set out in the Order attached to this Decision.

Background and procedural history

1. This is an application for a remediation contribution order pursuant to section 124 of the Building Safety Act 2022 (the “BSA”).

2. The application relates to Hallings Wharf Studios, Channelsea Road, London E15 2SX (the “Property”). The Property comprises two residential blocks connected by balcony deck access walkways - although it is common ground that the Property comprises one ‘relevant building’ for the purposes of s.117 of the BSA.
3. The head leasehold interest in the Property is registered at the Land Registry under title number EGL464502, and the registered proprietor is Hallings Wharf RTM Company Limited. The RTM Company is not a party to these proceedings.
4. The application relates to the costs of remedying alleged fire safety defects at the Property. The Secretary of State (“SoS”) had agreed to provide funding to the RTM Company to enable it to execute remedial works in respect of the alleged defects.
5. At the time the application was first brought, the position was that the *“Remedial Works have not yet been undertaken and their cost (or likely cost) will be a matter of evidence; but at the date of this statement of case the likely cost of the Remedial Works is £3,382,231.43”* However, by the time of the hearing, the works had been completed and the above figure revised slightly to £3,682,997.78. As such, the sum now sought relates to actual costs incurred for works to remediate alleged relevant defects.
6. The SoS is an “interested person” within the meaning of section 124 of the BSA, by reason of section 124(5)(a) of the BSA. The First Respondent (formerly incorporated as Hollybrook Limited) acted as “developer” within the meaning of section 124(5) of the BSA. The Second Respondent is “associated” (as defined in section 121 of the BSA) with the First Respondent.
7. It should be noted that the First Respondent has been in liquidation since 2018 and does not have any continuing involvement with the Property. The tribunal has previously confirmed by order dated 11 April 2025, at the request of the SoS, that the claim against the First Respondent is stayed. In any event, the First Respondent has played no part in these proceedings.

8. At a pre-trial review held on 9 February 2026, the tribunal gave permission to the SoS to amend its claim to include a claim for its legal costs in these proceedings, together with the costs of its experts. Further to that amendment, the SoS has served a summary costs schedule totalling in excess of £1 million.
9. The Second Respondent has sought permission to appeal the tribunal's decision to allow that amendment, albeit suggested that consideration of the application for permission to appeal be deferred until conclusion of the main hearing. For the reasons set out below, we have not allowed the SoS's claim for litigation costs and so it may be that the application for permission to appeal the tribunal's decision to allow the amendment falls away. However, if the Second Respondent nevertheless still requires a decision on its application for permission to appeal, it should notify the tribunal, and we will provide the same.
10. As to the main substantive claim, the Second Respondent opposes the making of an RCO. In essence, the Second Respondent's case is that the project was overengineered. It is said that for various reasons it would not be just and equitable to make an RCO. Alternatively, any RCO should be for a lower sum than that contended for by the SoS.
11. A seven-day hearing took place on 9-17 March 2026. The tribunal carried out an inspection of the property on the first morning.
12. At the hearing, the SoS was represented by Mr Dutton KC and Mr Burrell of counsel and the Second Respondent by Mr Bowker of counsel. We are grateful to all for their assistance.
13. The tribunal heard evidence from the following witnesses and experts:
 - (1) Mr Matthew Missenden of Stiles Harold Williams Partnership LLP ("SHW"), advisers to the RTM Company;
 - (2) Fire safety expert evidence from Mr Al Brown (SoS) and Mr Neal Butterworth (R2);
 - (3) Design expert evidence from Mr Richard Morton (SoS) and Mr Tom Rhys Jones (R2); and

- (4) Quantum expert evidence from Mr Steven Lynch (SoS) and Mr Tom Taylor (R2).

The legislative framework

14. The tribunal's jurisdiction to make a remediation contribution order is set out in section 124 of the BSA:

“(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;

...

“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.”

15. Section 120 defines “relevant defect” for the purposes of sections 122 to 125 and Schedule 8 to the BSA as follows:

“...

*(2) “**Relevant defect**”, in relation to a building, means a defect as regards the building that—*

(a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and

(b) causes a building safety risk.

(3) In subsection (2) “relevant works” means any of the following—

(a) works relating to the construction or conversion of the building, if the construction or conversion was completed in the relevant period;

(b) works undertaken or commissioned by or on behalf of a relevant landlord or management company, if the works were completed in the relevant period;

(c) works undertaken after the end of the relevant period to remedy a relevant defect (including a defect that is a relevant defect by virtue of this paragraph).

“The relevant period” here means the period of 30 years ending with the time this section comes into force.

(4) In subsection (2) the reference to anything done (or not done) in connection with relevant works includes anything done (or not done) in the provision of professional services in connection with such works.

(4A) “Relevant steps”, in relation to a relevant defect, means steps which have as their purpose—

(a) preventing or reducing the likelihood of a fire or collapse of the building (or any part of it) occurring as a result of the relevant defect,

(b) reducing the severity of any such incident, or

(c) preventing or reducing harm to people in or about the building that could result from such an incident.

(5) For the purposes of this section—

*“**building safety risk**”, in relation to a building, means a risk to the safety of people in or about the building arising from—*

(a) the spread of fire, or

(b) the collapse of the building or any part of it;

“conversion” means the conversion of the building for use (wholly or partly) for residential purposes;

“relevant landlord or management company” means a landlord under a lease of the building or any part of it or any person who is party to such a lease otherwise than as landlord or tenant.”

The tribunal’s jurisdiction to make an RCO

16. The parties were not agreed as to the framing of the tribunal’s jurisdiction to make an RCO.

17. The SoS’s analysis of the jurisdiction can be summarised as follows:

(1) Section 124(2) identifies the objective of an RCO as being (either on its own or, possibly in conjunction with other RCOs or putative RCOs) to “*meet*” the costs identified in that subsection.

(2) Once the Tribunal has identified the relevant defects in relation to which an RCO is to be made, the quantum of the costs which are to be “met” is dictated by the terms of s.124(2) itself which identifies those costs by reference to two criteria:

(i) Costs which are (or will be) incurred “*in remedying*” those relevant defects; and

(ii) Costs which are (or will be) incurred “*otherwise in connection with*” those relevant defects;

(3) The question whether particular costs satisfy these criteria may involve a dispute about the correct interpretation of the expressions “*in remedying*” and/or “*otherwise in connection with*”, and will require the Tribunal to make findings of fact; but the quantification of the costs which are to be “met” under s.124(2) does not include any discretionary element. However, it should also be said that in submissions, it was suggested on

behalf of the SoS that such costs will only be recoverable to the extent that they are ‘reasonable’;

- (4) The Tribunal has a discretion to make an RCO “*if it considers it just and equitable to do so*”. According to the SoS, while the just and equitable discretion is undoubtedly a wide one, it should not be exercised so as to defeat the purpose of the legislation and further, should not involve re-opening matters that have already been considered at the earlier stage (3).

18. In contrast, the Second Respondent submitted that the just and equitable discretion is wider than the SoS has argued and features in the evaluation of the remedial works undertaken. In particular, it was contended that the quantification of costs to be ‘met’ under section 124(2) does involve an element of discretion. This is consistent with the Second Respondent’s broader position that determination of an RCO claim is to a large extent backward looking – scrutinising the decision taken by the party that carried out works for which an RCO is now being sought.

19. These matters are addressed further below.

Existence of relevant defects

20. The parties prepared a Scott Schedule setting out the alleged various relevant defects, categorised by reference to the various wall types at the Property. The wall types in respect of which it was contended relevant defects existed were as follows:

- (1) Wall Type 1A – EPS Render (General);
- (2) Wall Type 1B – EPS Render (Picture Frame);
- (3) Wall Type 1C – EPS Render (Metal Spandrels);
- (4) Wall Type 1D – EPS Render (Top Storey);
- (5) Wall Type 2A – Timber (adjacent render);
- (6) Wall Type 2B – Timber (adjacent metal spandrels);
- (7) Wall Type 2C – Timber (continuous);

- (8) Wall Type 3 – Walkways;
 - (9) Wall Type 4 – Metal Spandrels.
21. In advance of the hearing, it had been agreed that relevant defects existed in relation to many of the wall types above. The Second Respondent's pleaded position had, however, been to dispute the existence of relevant defects for several wall types:
- (1) Wall Type 1D (EPS render (top storey)); and
 - (2) Wall Types 2A (timber (adjacent render)) and 2C (Timber (continuous)).
22. As to Wall Type 1, Mr Brown's contention was that the EPS render contained the following relevant defects, which provided a medium for fire spread:
- (1) The use of a thin (3mm) polymeric render coat (BR135 1988);
 - (2) The use of EPS insulation, which is combustible (ADB (2003));
 - (3) The lack of additional mechanical (steel) fixings for the EPS insulation and render mesh to prevent the render from bowing outwards in a fire (BR 135 DAS 132);
 - (4) unprotected penetrations (e.g. vent ducts and flues) through the EPS insulation;
 - (5) Omission of Horizontal Fire Barriers at junctions with internal compartment floors;
 - (6) Omission of Vertical Fire Barriers at junctions with internal compartment walls;
 - (7) Omission of Cavity Barriers at cavity edges (including at windows); and
 - (8) The installation of an external wall system which did not satisfy the performance criteria in BR 135 (2003) based on full-scale fire testing.
23. In relation to the timber, Mr Brown's evidence was that Wall Type 2 generally contained numerous relevant defects, including:

- (1) installation of timber cladding panels, which are combustible;
- (2) installation of combustible insulation;
- (3) installation of a combustible timber framework;
- (4) installation of CP boards with gaps between the sheets and cavities behind;
- (5) omission of horizontal and vertical fire barriers; and
- (6) omission of cavity barriers.

24. The term ‘relevant defect’ is defined in section 120 of the BSA:

“(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.*

“(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.”*

25. As such, it must have arisen in connection with relevant works and must cause a risk to the safety of people in or about the building arising from the spread of fire and/or the collapse of the building. It will be noted that there is nothing in the BSA specifying or quantifying the level of risk that must exist for something to be a building safety risk, and consequently a relevant defect.

26. The assessment of whether a risk is a ‘Building Safety Risk’, was addressed by the Upper Tribunal in *Edgewater (Stevenage) Limited & Ors v Grey GR Limited Partnership (Vista Tower)* [2026] UKUT 18 (LC), in which Edwin Johnson J came to the following conclusion at paragraph 253:

“In my view the reference to “a risk” in Section 120(5) means what it says. It refers to any risk, subject to the point that the relevant risk will only qualify as a building safety risk if it satisfies all the other conditions, which I have identified above, for the risk to qualify as a building safety risk. The reference to “a risk” does not refer to any particular level of risk and is not gradated. It refers to any risk.”

27. Consequently, it was said on behalf of the SoS that the following propositions apply:

- (1) The way in which relevant defects are assessed, is to consider whether there is a Building Safety Risk only (because of something done or not done, or something used or not used, during Relevant Works), not to determine the 'defect' first then assess whether it is a Building Safety Risk, as if a 'thing' gives rise to a 'Building Safety Risk', it will be defective;
- (2) The threshold for finding whether there is a Building Safety Risk is very low, it is 'any risk', there is no 'level of risk' and it is 'not gradated'; and
- (3) Even if a relevant defect is found, this does not mean a RCO would be made. In respect of RCOs there would still be a question over whether it is just and equitable to make an order if the costs were found to be unnecessarily incurred.

28. In contrast, in his report, Mr Butterworth had adopted a different approach to determining the existence of a relevant defect. In essence, the test proffered involved consideration of three criteria:

- (1) The first stage involves assessing the presence of a 'defect', i.e. something had to be done (or not done) that should not have been done (or should have been done), or something had to have been used (or not used) that should not have been used (or should have been used). According to the report, this is to be determined by assessing compliance with the Building Regulations (and associated ADB, 'ADB 2000') relevant at the time of construction;
- (2) Second is an assessment of the possibility of fire-spread from one part of the building to another. According to the report, criterion 2 will be 'satisfied' if fire spreads from one storey to another storey or from one flat to another via the external wall construction in less than around 15 minutes; and

- (3) Finally, the spread of fire must result in the potential to cause a risk to the safety of people in or about the building. This involves an assessment of the wall construction and whether this gives rise to a level of risk which is “intolerable” or “unacceptable”.
29. However, at the start of his evidence, Mr Butterworth accepted that in light of the Upper Tribunal’s decision in *Vista Tower*, on the basis of the law as it currently stands, it was not sustainable to maintain that the disputed elements (Wall Types 1D, 2A and 2C) did not constitute relevant defects for the purposes of the BSA.
30. In the circumstances and for the avoidance of doubt, we find that all of the Wall Types set out in column 3 of the Scott Schedule contained/constituted relevant defects for the purposes of the BSA.
31. It should be noted, however, that the Second Respondent sought to preserve its position on an appeal that *Vista Tower* was wrongly decided by the Upper Tribunal. In the circumstances, we would add briefly that even aside from the Upper Tribunal’s decision in *Vista Tower*, we would not have accepted the test for determining a relevant defect as advanced by Mr Butterworth.
32. First, we do not accept that whether something is a ‘defect’ is to be assessed by reference to Building Regulations in existence as at the time of construction. There may be situations where Building Regulations (applicable at construction) were complied with, but there is still deemed to be a ‘risk’ to the health of people in or around the building. As the FTT stated in *Vista Tower* at first instance (CAM/26UH/HYI/2023/0003) at paragraph 68:

“if “defect” meant only non-compliance with building regulations, the Act would say so...It would be surprising if the Act limited “defect” to non-compliance with the pre-Grenfell version of the building regulations, which the independent review by Dame Judith Hackitt (published in December 2017) had found not to be fit for purpose...we consider that non-compliance with those building regulations is merely one way, not the only way, in which something can be a “defect” for these purposes.”

33. Secondly, notwithstanding that Mr Butterworth was able to point to various references, particularly in previous Building Regulations, to delaying the spread of fire over 15 minutes, it would be extremely odd if a case where fire could spread in, say, 20 minutes, meant that there was not a building safety risk. Indeed, in cross examination, Mr Butterworth accepted that although something might not be classed as a relevant defect, this did not mean that a building is sufficiently safe (for example if a PAS:9980 assessment were undertaken) or that work did not need to be done. Further, it was said in evidence that the question whether fire spreads from one storey to another (or from one flat to another) in less than 15 minutes is to be decided on balance of probabilities. In other words, this will only identify the existence of a relevant defect if the risk of fire spread is greater than 50%. In our view, on both points, it would be surprising if the BSA were to be construed in this way.
34. Finally, and more generally, we do not accept the notion that a multi-stage approach is appropriate or correct. Rather, having regard to the wording of s.120 of the BSA, the approach to assessing a relevant defect involves only one stage – i.e. consideration of whether a Building Safety Risk has arisen from Relevant Works. We agree with the SoS that it is not necessary/appropriate to determine the presence of some other ‘defect’ first, before assessing Building Safety Risk.

Approach to remediation

35. At one level, the items of remediation for which the extent of works remained a matter of dispute were relatively narrow:
- (1) Wall Types 2A, 2B and 2C – particularly whether the defects could have been remediated without having to replace the timber cladding;
 - (2) Wall Type 4 - whether the remediation could or should have been done in a different and cheaper way.

36. Focussing solely on the above betrays the much more fundamental dispute between the parties – which ultimately, on the Second Respondent’s case, leads to the argument that no RCO should be made at all.
37. As noted above, the parties approached the case from significantly differing perspectives. The SoS’s case, in essence, is that a margin of appreciation should be allowed to the party carrying out the works, and that on the facts of the present case, the scheme of works undertaken was within the band of reasonable responses. In contrast, the Second Respondent’s position is summarised in Mr Bowker’s skeleton argument at para.51:

“ ... R2’s position does not subvert the hierarchy of responsibility or the legislative purpose of Part 5 and Schedule 8. On the contrary, R2 is simply saying this: it is not fair for the Govt to sponsor an over-engineered project based on a flawed assessment methodology, to withdraw that methodology, to introduce a new methodology, and then seek to recover the cost of the over-engineering. This is why this case is important. It explains precisely why CAN was withdrawn and replaced by PAS:9980. The Govt is hoist with its own petard.”

38. In support of its claim, the Second Respondent invited the tribunal to make three findings:
- (1) That the RTM Company (and by extension, the government, who funded the project) chose not to carry out a risk-based assessment;
 - (2) That the Tennyson Suite reports (the first being the foundational document) were not fit for purpose; and
 - (3) In late 2022, the RTM Company was invited to switch from CAN to PAS:9980 and at the time the government considered PAS:9980 to be a legitimate approach to the project.
39. It should be noted that a fourth finding of fact was sought in relation to the issue of betterment/lifespan. This is addressed further below in relation to the application of the just and equitable test. For the avoidance of doubt, the above three matters are also considered again in relation to that question.

40. Broadly, the SoS's position was that the scheme of remedial works undertaken was within the range of reasonable responses. Further, and in any event, Mr Morton cast doubt on the viability of the Second Respondent's alternative schemes.
41. There are, in essence three questions to consider, which flow from the parties' submissions:
 - (1) Ought the project to have been reviewed/halted so as to carry out a PAS:9980 assessment (or an assessment based on a risk-based approach) prior to works being carried out?
 - (2) If a scheme of works is within the range of reasonable responses, should a RCO nevertheless be limited if and to the extent that works could have been carried out more cheaply?
 - (3) Was the scheme within the range of reasonable responses?

Impact of PAS:9980

42. PAS:9980 was published on 11 January 2022 and came into effect on 31 January 2022. This followed the withdrawal of the Consolidated Advice Note ("CAN") on 10 January 2022.
43. As to the status and importance of PAS:9980, in our determination, we agree with the Second Respondent that PAS:9980 should not be disregarded and is clearly a relevant factor. As Mr Bowker illustrated, there were numerous statements by the government highlighting its importance as a tool for assessing risk – as well as emphasising its difference from its predecessor, the Consolidated Advice Note ("CAN"). For example, in an explanatory speech on 10 January 2022, the Secretary of State said (amongst other things):

"We must also restore common sense to the assessment of building safety overall ... There must be far greater use of sensible mitigations, such as sprinklers and fire alarms, in place of unnecessary and costly remediation work. To achieve that, today I am withdrawing the Government's consolidated advice note. It has been wrongly interpreted and has driven a cautious approach to building safety in buildings that are safe that goes beyond what we consider necessary..."

44. Similarly, a letter from the then Secretary of State to the Chair of the G15 group of London housing associations dated 11 January 2022 (the day after the withdrawal of CAN), contained the following:

“The current position on building safety remediation is not working, as I am sure you would agree. The current market response is not based on a properly granular assessment of the real risk of life-threatening fires in medium and high-rise buildings and is driving an overcautious approach to assessment and remediation. Blameless leaseholders who have worked hard to get on the home ownership ladder, are left trapped with expensive bills and flats they cannot sell.

...

We have withdrawn the Consolidated Advice Note, which has been misinterpreted and thus driven an over-cautious approach to building safety. I have taken steps to provide a clear framework for proportionate risk assessments and we are supporting the Publicly Available Specification 9980 (PAS9980), which will be published by the British Standards Institution later this week. PAS9980 will provide proportionate guidance for those making assessments of external wall systems.”

45. It is not tenable to dismiss it as being irrelevant. At the same time, we accept the argument that PAS:9980 is a methodology and will not of itself provide a qualitative answer to whether a relevant defect exists. We also note Mr Brown’s evidence that in the early days of PAS:9980, its application was not always consistent.
46. However, the question of whether the RTM Company ought to have paused the project to carry out a PAS:9980 assessment (or should the government have insisted on one) is a more nuanced one.
47. It is clear from Mr Missenden’s evidence that the issue of whether to change to PAS:9980 was raised by the Building Safety Fund towards the end of 2022. In cross examination, Mr Missenden recalled the issue of PAS:9980 being raised by the case officer for the BSF in late 2022 and whether this had been considered by the project team. However, his evidence was that this was very much ‘light touch’ and was done by way of an enquiry - and that there was no pressure to switch to a PAS:9980 assessment.

48. In our view, the issue of whether the remediation ought to have been changed so as to proceed under a 'PAS approach' is something that must be considered in the context of the case. In particular, it is important to have regard to the chronology, which does not appear to have been controversial:
- (1) November 2020 – first Tennyson Suite Report concerning fire safety at the Property;
 - (2) May 2021 – schedule of works
 - (3) June 2021 – tender analysis
 - (4) 30 June 2021 – deadline for funding application
 - (5) July 2021 – pre-tender support
 - (6) November 2021 – application for planning permission for the proposed works (approved in August 2022)
 - (7) January 2022 – introduction of PAS:9980 and withdrawal of CAN
 - (8) November 2022 – grant funding agreement signed
 - (9) May 2023 – JCT contract entered into
 - (10) November 2023 – works commenced
49. We are mindful of Mr Brown's evidence that there was some initial uncertainty in the industry following the introduction of PAS:9980 in January 2022 and Mr Butterworth accepted that its application was initially not always consistent – although this of itself would not have been a reason not to adopt PAS:9980. We are, however, conscious of the point that it is not clear that had a PAS:9980 assessment been carried out that it would have made a material difference to the outcome. As both fire safety experts acknowledged, PAS:9980 provides a methodology, but the outcome of assessment will, at least in part, be influenced by subjective opinion. By way of example, in relation to the level of risk presented by Wall Type 1D, Mr Butterworth considered it to be 'medium tolerable', but accepted that others might consider it to be 'medium intolerable'.

50. However, and in any event, by the time PAS:9980 came into effect, the project was well underway: a specification of works had been drawn up and applications for funding and planning permission had been made (planning permission was granted in August 2022). In this regard, it also must be borne in mind that the RTM Company and residents were faced with an unsafe building which required remediation. Moreover, there is no dispute that it acted at all times in accordance with professional advice.
51. Taking everything into account, we accept the SoS's submission that it was not unreasonable for the RTM Company not to start again and re-evaluate the project by reference to PAS:9980 in circumstances where there does not appear to have been any obligation to do so – and to do so would inevitably have resulted in further delay.
52. With regard to the issue of delay, as per Mr Missenden's evidence, in addition to the time taken for obtaining PAS:9980 assessment, this might also have involved drawing up a new specification of works, re-tendering, re-applying to the BSF and possibly the need for further planning permission. We accept Mr Missenden's evidence that there would inevitably have been delay were the project to have been paused to carry out a PAS:9980 assessment. Although Mr Bowker is correct that by late 2022, the door on a PAS:9980 assessment was not closed, it does not follow that the RTM Company (and the government) were wrong in not undertaking one. Although Mr Bowker was able to demonstrate in cross examination that the final compliance report post-works was able to be produced in approximately one month by Tennyson Suite, it does not follow, as Mr Missenden maintained, that the same timescale would have been realistic for the purposes of preparing a PAS:9980 report in late 2022. As Mr Missenden explained, when preparing the post-works compliance report, the representative for Tennyson Suite had been doing assessments for 6 months, they had the majority of the information they needed and no further opening up was required.
53. Each case will turn on its own facts. It may be that in another case, where PAS:9980 came into force at a time when a remediation project was in its infancy or some point less advanced than on the facts of the present case,

that it might not be considered reasonable or appropriate to proceed without first carrying out a PAS:9980 assessment. However, in the present case, for the reasons set out above, we do not consider that failure to obtain a PAS:9980 assessment fatally undermines the SoS's case in these proceedings.

54. We would comment briefly that the Second Respondent was critical of Mr Brown in particular, suggesting that he did not give sufficient prominence of PAS:9980 in his report and treated it very much as a subordinate issue. While PAS:9980 was clearly not central to the SoS's case, we do not consider anything improper in the way that it was addressed in Mr Brown's evidence. In particular, in his Supplemental Report, he specifically sought to answer the question of what remedial works are necessary to remedy any such defects in accordance with the guidance in PAS:9980 (at paragraph 1.13.1) – although as set out in his report, he remained of the view that PAS:9980 was “*not directly relevant to the remedial works that were undertaken*”.

Is it sufficient that for a remediation scheme to fall within the range of reasonable responses?

55. On this issue, we agree with the SoS that the fact that the remediation could have been done more cheaply, does not mean that it should have been. In other words, we take the view that provided the remediation carried out was within the band of reasonable responses, the fact that it could have been done more cheaply is not of itself a basis for reducing the amount of an RCO.
56. In the SoS's submission, where an obligation to pay money is framed by reference to the cost of works done to achieve an objective then, if there is more than one reasonable manner in which that objective might be achieved, the choice between those alternatives is left to the person who does (or commissions) the works. In support of this proposition, reliance was placed on the decision of Scott J (as he then was) in *Plough Investments v. Manchester CC* [1989] 1 EGLR 244 (at 247M):

*“The landlord’s fifth schedule repairing obligation is, although nominally an obligation, in a sense also a right. If it were simply an obligation, then, presumably, the three tenants of the building could choose to release the landlord, in whole or in part, from that obligation. But the provision is not, in my view, simply, or even mainly, for the benefit of the tenants. It is also a provision for the benefit of the landlord. It enables the landlord to keep its building in repair at the tenants’ expense. If the obligation had been imposed on the tenant, the tenant would have been entitled to decide on the manner in which it would be discharged. Provided remedial works were sufficient to discharge the obligation, the landlord could not require a different type of repair to be effected. Under these leases, however, the relevant decisions regarding repairs to the exterior are to be taken by the landlord. **If reasonable remedial works are proposed by the landlord in order to remedy a state of disrepair for the purposes of its fifth schedule obligation, the tenants are not, in my judgment, entitled to insist that cheaper remedial works be undertaken**” (emphasis added).*

57. Reference was also made to Blackburne J in *Fluor Daniel v. Shortlands* [2001] 2 EGLR 103 at 110G

*“I do not accept [counsel’s] submission that where the repairing or other obligation is cast upon the landlord as covenantor but it is the tenant covenantee who has to pay for the works, the normal rule as between covenantor and covenantee (ie that it is for the covenantor to choose the mode of performance provided he acts reasonably), does not apply or that properly understood *Plough Investments v. Manchester City Council* does not so require or, if it does, that it was wrongly decided”.*

58. It is, of course, correct that the above authorities did not concern interpretation of the BSA, but we agree with the SoS that the principle can be applicable here. When considering the purpose referred to in s.124(2) of the BSA, i.e. meeting costs incurred or to be incurred in remedying or otherwise in connection with relevant defects, unless the works in question can properly be branded as unreasonable, it does not matter for the purposes of s.124 whether an alternative scheme might have satisfactorily addressed the fire safety risk at a lower cost. This is consistent with the wider policy of Part V of the BSA given that the works in question are to remedy relevant defects which, by their nature, pose a risk to the safety of people in/about the building, and which, therefore, need to be addressed.

Was the scheme in the present case within the range of reasonable responses?

59. There is no dispute that the Second Respondent has proposed a scheme which was less extensive and, consequently, cheaper than that undertaken by the RTM Company. The differences between the schemes resulted in a difference in overall costs of approximately £1.4 million. The main differences in terms of works were as follows:

- (1) Wall Type 1D (EPS render top storey): the SoS's claim was for approximately £50,000 compared to £20,000 under the Second Respondent's scheme – a difference of approximately £30,000;
- (2) Wall Type 2A (timber adjacent render) - £60,000 against £3,000 (a difference of £57,000);
- (3) Wall Type 2B (timber adjacent metal spandrels) - £300,000 against £6,000 (a difference of £294,000); and
- (4) Wall Type 2C (timber continuous) - £250,000 against £6,000 (a difference of £244,000).

60. In addition, the Second Respondent disputed fire stopping costs of approximately £100,000. There were also differences to below-line costs and several other points on quantum. These matters are addressed further below.

61. In support of the submission that relevant defects could have been remediated more cheaply had a risk-based approach been considered, Mr Bowker gave the example of balconies. The timber balconies were highlighted in the Tennyson Suite reports and were listed as an item for remediation by way of replacement in the initial scope of works. However, it subsequently became apparent that the balconies were within the flat demises and, as a result, fell outside of the scope of funding from the BSF. As a result, there was a change in the proposed works as regards the balconies such that the timber decking remained in place and far less extensive works were ultimately carried out (and apparently were paid for from the reserve fund). The implication of this submission was that if the

programme of works could be varied at a late stage so as to leave the timber decking in place, why not adopt a similar approach for the remaining defects?

62. As noted above, the SoS maintained that the scheme adopted was within the range of reasonable responses and in any event, cast doubt on the viability of the Second Respondent's proposed scheme.
63. Before turning to consider the respective schemes, it is worth pausing to consider the Second Respondent's submissions regarding the adequacy of the Tennyson Suite reports. The fire safety experts joint statement identified 8 deficiencies:
 - (1) It was unclear where the intrusive inspections were carried out;
 - (2) An inadequate number of inspection locations were inspected to provide satisfactory evidence of widespread defects;
 - (3) No Fire Strategy drawings or indications of the location of horizontal or vertical compartmentation were provided in the inspection reports, which would have confirmed where Horizontal and Vertical Fire Barriers or Cavity Barriers would be required;
 - (4) The EPS Render system was only inspected by core samples, which does not provide documentary evidence about additional mechanical fixings required by BRE Defect Action Sheet 132, the presence or absence of cavities behind the EPS, or reliable documentary evidence about Fire Barrier provision;
 - (5) The presence or absence of vertical and horizontal cavity barriers and cavity barriers around windows and doors does not appears to have been investigated;
 - (6) The experts have not been provided with a risk assessment to support the presence of relevant defects or the original remediation proposals;

- (7) The Tennyson Suite Reports do not provide a full suite of photographs of the elevations resulting in gaps in the reporting of the construction materials; and
 - (8) Neither the author of the Tennyson Suite Reports, nor the reviewer were chartered engineers and members of the Institution of Fire Engineers, nor does the report set out the basis of their relevant competence and experience in building construction assessments.
64. Mr Morton confirmed in his evidence that he did not disagree with the list and Mr Brown stated in evidence that he would not have put his name to the Tennyson Suite reports.
65. Nevertheless, it is also fair to say that several of the criticisms related to lack of information/explanation in the report rather than errors or deficiencies in the conclusions themselves.
66. In Mr Bowker's submission, these agreed criticisms were significant. Insofar as the Tennyson Suite report was the 'foundational document' – and Mr Bowker carefully highlighted reference to it in subsequent documents including the schedule of works and tender analysis – this meant that the entire project was tainted.
67. There are several points to make in response to this submission.
- (1) Although Mr Brown accepted that he would not have put his name to the Tennyson Suite report, he also remarked that it was not out of the ordinary for its time. Moreover, he maintained that it captured the key points – albeit other matters might have come to light in due course.
 - (2) The second, and in our finding more significant, point is the evidence of Mr Rhys Jones. While he maintained that the scheme of works undertaken was too extensive and adequate remediation could have been achieved more cheaply, Mr Rhys Jones confirmed in evidence that, subject to two points, the scheme of works undertaken was a reasonable one. The two exceptions were as follows: The first related to horizontal fire

barriers at the EPS/soffit junction. However, it is understood that such works were not actually carried out so this exception does not arise. The second relates to metal spandrel damage. However, for the reasons set out below, we do not consider that the works undertaken were unreasonable.

(3) The intrusive surveys carried out by Tennyson Suite relate to the identification of relevant defects rather than the nature of a remedial scheme. Even if the initial surveys had been more extensive, it does not follow, and has not been demonstrated, that the remedial works undertaken would necessarily have been different,

(4) The RTM Company at all times acted on the basis of professional advice and there is no suggestion that the advice of what works were to be carried out was negligent.

68. Taking all these matters into account, we find that the scheme of works carried out was within the range of reasonable responses.

69. However, before proceeding, it is important to consider the Second Respondent's alternative scheme.

The Second Respondent's alternative scheme(s)

70. The Second Respondent put forward alternative schemes for five different Wall Types: 1D, 2A, 2B, 2C and 4.

71. The issue with regard to Wall Type 1D concerned the EPS render on the top storey at the rear of the building. There is a timber soffit above the external wall and privacy screens between each flat. It had been common ground between the fire safety experts that there were multiple fire safety defects, including the inclusion of thin polymeric render, combustible polystyrene insulation and omission of fire barriers. Further, the EPS Render crossed compartment lines between apartments without Vertical Fire Barriers. The soffit above was formed of timber, which would contribute to horizontal fire spread across party wall lines.

72. Mr. Butterworth considered the defects to Wall Type 1D could be remediated by cutting in vertical Fire Barriers to the EPS render at

compartment lines and upgrades to privacy screens. Further, Mr. Rhys Jones was of the view that the insertion of vertical fire barriers at the junctions of Wall Type 1D with internal compartment walls, and the insertion of Fire Barriers in the overhang canopy, would have been practicable and a reasonable and proportionate means of mitigating the risk presented by this wall type. While Mr Butterworth maintained his position that the risk was ‘tolerable’ he accepted that another expert might regard it as ‘intolerable’.

73. In the SoS’s submission, the scheme was not viable. In particular, EPS render was required to be removed and replaced as part of the complete remediation of Wall Type 1 (including the need to carry out the Party Wall Remedial Works to this wall type), and reinstatement of EPS render after removal would contravene Building Regulation 7(2).
74. Further, Mr Brown considered that the timber soffit running alongside the EPS in Wall Type 1D was a relevant defect and that even if fire barriers and privacy screens were installed, due to the presence of the soffit, a fire on the EPS wall could bypass the fire barriers.
75. Turning to the various Wall Type 2 works, there were various defects with regard to the timber identified by Mr Brown:
 - (1) Installation of timber cladding panels, which are combustible;
 - (2) Installation of combustible insulation;
 - (3) Installation of timber framework, which is combustible, to support the timber cladding;
 - (4) Installation of CP board with gaps between sheets and cavities behind;
 - (5) Omission of horizontal and vertical Fire Barriers; and
 - (6) Omission of Cavity Barriers.
76. While Mr Brown considered the timber itself to be a defect, Mr. Butterworth was of the view that if the timber panels were below 18m, they complied with ADB, whereas if they were over 18m, they would have

complied with ADB if they had been treated (and maintained) with fire retardant.

77. Turning to the specific remediation schemes, with regard to Wall Type 2A, the key point of difference was that Mr. Butterworth suggested that any remediation could have been limited to applying fire retardant to areas of the timber above 18m. Similarly, Mr Rhys Jones considered that it would be possible to apply Thermoguard “Thermoproof” or similar product to the external faces of eight timber panels on the top two floors.

78. In the SoS’s submission this was unworkable for various reasons:

- (1) First, this section of Wall Type 2, as was the case for all sections of Wall Type 2, would require removal of the timber panels which then could not be reinstated as this would contravene Building Regulation 7(2). The timber panels could not be adequately treated with a fire retardant without removing or dismantling all or part of the timber cladding. In any event, the SoS stressed that, such treatment does not affect combustibility, only the propensity to ignition from low-energy sources.
- (2) Further, Mr. Morton’s evidence was that it would have been necessary to remove the timber when the adjacent EPS render was removed, to give certainty of forming a waterproof junction between the two materials. Again, once removed, its reinstatement (or replacement) would contravene Building Regulation 7(2).
- (3) Finally it was said that should any timber panels have needed to be removed, either in a section of Wall Type 2A or in sections of 2B/2C, this would justify removal of all timber panels, as the removed timber panels could not be replaced, resulting in some timber cladding and some alternative materials, leading to a patchwork of different materials which would not satisfy the original design intent. In this regard, it should be noted that it was broadly common ground that that if timber panels were to

be removed, there is a high chance that they would be damaged in the process. In our view, this ground of objection carries less weight as it goes largely to questions of aesthetics as opposed to building safety, although the point is nevertheless noted.

79. Turning to Wall Type 2B, Mr Rhys Jones proposed two alternative remediation schemes: (i) installing compressible mineral wool cavity barriers to seven panels on the northwest elevation; or (ii) if fire barriers were originally installed, no works would be required, just an intrusive survey.
80. However, in the SoS's submission neither alternative was viable as each would require the removal of timber panels, which could then not be replaced as this would contravene Building Regulation 7(2).
81. The position was broadly the same with regard to Wall Type 2C: on the Second Respondent's case, it was proposed to install a new polythene sleeved mineral wool compressible fire barrier at each floor level and vertically at each compartment wall line. Alternatively, no works would be required if fire barriers were originally installed – so all that would be needed would be an intrusive survey.
82. Again, the SoS's position was that neither option was viable. Each would require the removal of timber panels, which could then not be replaced as this would contravene Building Regulation 7(2).
83. The above matters are linked to a wider issue as to whether the timber framing could act as a cavity barrier. This would depend on whether the timber was of sufficient thickness (38mm) so as to comply with ADB. However, Mr Brown considered the timber framing to be 20-25mm and moreover, that the type and size of timber appeared to be inconsistent. While Mr Butterworth's evidence had been that the edges of the cavity are protected by timber battens of at least 38mm thickness, in cross examination he accepted that there was uncertainty and potentially inconsistency. As such, insofar as the thickness is uncertain, the natural conclusion would be that this justifies a more cautious approach to remediation.

84. Finally, as regards Wall Type 4 (metal spandrels), as set out above, this was one of the exceptions identified by Mr Rhys Jones to his conclusion that the scheme of works undertaken was a reasonable one. It was agreed by the parties that combustible insulation within the spandrels needed to be removed.
85. The issue, however, centred around the Second Respondent's proposal which would have involved 're-use' of the metal spandrels following replacement of the insulation. On the SoS's case, the replacement of the panels was necessitated by unavoidable damage during the course of the works. This was explained in the evidence of Mr Missenden: scaffolding fixes were cut into the spandrels on the tall block (whereas on the short block the spandrel was fully removed). Mr Missenden's evidence was that the reason for this is that at the time it was not understood that the spandrels would need remediating themselves, as there was no awareness of the combustible insulation or lack of barriers. In this circumstance, the SoS maintains that cutting these fixes with the intention of a limited repair was reasonable as it would involve less work than removing the spandrel. When it was discovered that there was combustible insulation, this necessitated wider remedial works.
86. In our view, the approach taken, having regard to Mr Missenden's evidence was not unreasonable. In any event, even on Mr Lynch's evidence, the total potential saving would have been £11,563 out of a total spend of £73,830 – in other words, a relatively modest amount.

Building Regulation 7(2)

87. As will be apparent from the matters set out above, a significant issue as to the viability of the alternative scheme(s) proposed by the Second Respondent involved the applicability or otherwise of Building Regulation 7(2) of the 2010 Regulations. The central contention by the SoS was that if timber panels were removed for works to be carried out, they could not then be replaced as this would be in contravention of Regulation 7(2). The Second Respondent did not accept this argument.
88. The relevant parts of the Building Regulations ("BR") provide as follows:

“3. (1) In these Regulations “building work” means—

- (a) the erection or extension of a building;*
- (b) the provision or extension of a controlled service or fitting in or in connection with a building;*
- (c) the material alteration of a building, or a controlled service or fitting, as mentioned in paragraph (2);*
- (d) work required by regulation 6 (requirements relating to material change of use);*
- (e) the insertion of insulating material into the cavity wall of a building;*
- (f) work involving the underpinning of a building;*
- (g) work required by regulation 22 (requirements relating to a change of energy status);*
- (h) work required by regulation 23 (requirements relating to thermal elements);*

(2) An alteration is material for the purposes of these Regulations if the work, or any part of it, would at any stage result—

- (a) in a building or controlled service or fitting not complying with a relevant requirement where previously it did; or*
- (b) in a building or controlled service or fitting which before the work commenced did not comply with a relevant requirement, being more unsatisfactory in relation to such a requirement.*

...

7(2) Subject to paragraph (3), building work must be carried out so that materials which become part of an external wall, or specified attachment, of a relevant building are of a minimum European Classification A2-s1, d0 or A1, classified in accordance with BS EN 13501-1:2018 entitled “Fire classification of construction products and building elements. Classification using test data from reaction to fire tests” (ISBN 978 0 580 95726 0) published by the British Standards Institution on 14th January 2019.

7(3) Paragraph (2) does not apply to—

- (a) cavity trays when used between two leaves of masonry;*
- (b) any part of a roof (other than any part of a roof which falls within paragraph (iv) of regulation 2(6)) if that part is connected to an external wall;*
- (c) door frames and doors;*

...

- (e) insulation and water proofing materials used below ground level F534 or up to 300mm above that level;*
- (f) intumescent and fire stopping materials where the inclusion of the materials is necessary to meet the requirements of Part B of Schedule 1;*
- (g) membranes;*
- (h) seals, gaskets, fixings, sealants and backer rods;*

(ha) components associated with a solar shading device excluding components whose primary function is to provide shade or deflect sunlight such as the awning curtain or slats;

(i) thermal break materials where the inclusion of the materials is necessary to meet the thermal bridging requirements of Part L of Schedule 1;

(j) window frames and glass; or

(k) materials which form the top horizontal floor layer of a balcony which are of European Classification A1fl or A2fl-s1 (classified in accordance with BS EN 13501-1:2018 entitled “Fire classification of construction products and building elements. Classification using test data from reaction to fire tests” (ISBN 978 0 580 95726 0) published by the British Standards Institution on 14th January 2019) provided that the entire layer has an impermeable substrate under it.”

89. Two questions arise from the parties’ respective submissions:

(1) Does the removal of timber panels constitute building works?

(2) What is meant by the phrase ‘become part of an external wall’ for the purposes of Regulation 7(2)?

90. Considering the first question involves assessing whether “building work” means a single item of work or the entirety of the project. In the SoS’s submission, regulation 3(2) in setting out the sub-definition of when an “alteration” is “material” references “...the work, or any part of it...”. If “building work” was broken down into individual areas of work, there would be no need to reference “any part of it”. In other words, this reference indicates that “building work” in Regulation 7(2) is intended to relate to the entirety of the project. Moreover, it was submitted that it would make no practical sense to break down the work into individual items. The application to building control would involve an application for the entirety of a project, and by practical necessity, building control would apply the Building Regulations to the entirety of it. From the contractor perspective there also needs to be certainty on what the Building Regulations applied to, which is only achieved if works are considered one project.

91. As to its applicability to the present case, the SoS noted that regulation 3(1)(c) provides that a “material alteration” is “building work”, and BR 3(2)(b) confirms that an alteration is material if any part of the works at any stage means the building would be more unsatisfactory (than before

the works) in respect of a “*relevant requirement*” (including paragraph B3 and B4 relating to internal and external fire spread). Accordingly,

- (1) given the removal of the EPS wall system, which would expose the combustible EPS insulation, Mr. Brown’s evidence was that this would mean the “*relevant requirements*” of B3/B4 would be more unsatisfactory than before the works had taken place (having regard to BR 3(2)(b) and BR 3(3)). On this basis this would mean the project as a whole would constitute a “*material alteration*” under BR 3(1)(c). As such, even if individual timber panels were being removed as part of the same project, such removal forms part of the same “*building works*” and could not be reinstated; and
 - (2) Even if removal of the timber panels were to be considered separate from the EPS remediation, as this would expose a membrane, which may be more easily ignited than the timber panels, which could themselves then be ignited by the membrane, this may increase the likelihood of fire and mean BR 3(2)(b) and BR 3(3) are not satisfied.
92. It was also confirmed by Mr Rhys Jones that both the works to Wall Type 1 (possibly excluding Wall Type 1D), and any works which required removal of panelling in any of the Wall Type 2 sub-types, would activate Building Regulation 23 (requirements relating to thermal elements). In this circumstance, whether considered together with the remainder of the works, or separately, works removing (and reinstating or replacing) the timber panels, would be considered “*work required by regulation 23*” and be considered “*building work*” pursuant to BR 3(1)(h).
93. Finally, on the question of what is meant by “becomes part of the external wall”, the SoS submitted that:
- (1) if other elements of the external wall are being remediated, the external wall is changing, in this sense, if panelling is removed and sought to be put back on, it would “become” part of that updated external wall; and

(2) it makes no logical sense for this to only apply to new materials. Were it otherwise, this regulation would permit the reinstallation of dangerous ACM cladding, simply because it previously featured as part of the external wall, something which cannot have been the intention of regulation 7(2).

94. Mr Bowker submitted that it would strain the language of Regulation 7(2) to find any concept of ‘whole project’. Works are either fully within the Regulations or not. In the present case, there was simply renewing or replacing: not material alteration.
95. In our view, there is some force in the SoS’s submissions as to the proper interpretation of Regulation 7(2) as set out above. Moreover, from an industry perspective, it appears that at the very least, there is at best uncertainty as to whether replacement of timber panels in a case such as the present would constitute a breach of Regulation 7(2). As agreed by experts on both sides, different local authorities approach the matter differently. As such, at a minimum, there is doubt as to whether the Second Respondent’s scheme would have been viable – and indeed the very real possibility that a local authority might have concluded that it was not. Such a decision could of course be challenged but there would be no guarantee as to the outcome of such litigation.
96. Taking these matters into account – and having regard to the matters raised by the SoS as to the adequacy of the Second Respondent’s proposals – there are clearly doubts as to the adequacy and/or viability of the Second Respondent’s alternative scheme(s). In light of this uncertainty, it would therefore be appropriate to adopt a more cautious approach. Moreover, the key point remains that the SoS’s scheme was of itself a reasonable one in any event.

Quantum

97. The parties were agreed that the costs claimed were incurred. The amount of the expenditure was also agreed.

98. There nevertheless remained several discrete costs, which the Second Respondent maintained should not fall within an RCO, should the tribunal choose to make one, in any event. The disputed costs were as follows:

- (1) The cost of fire stopping service penetrations;
- (2) An invoice raised by London Underground;
- (3) Two invoices raised by Tennyson Suite;
- (4) The cost of installing access panels;
- (5) Costs charged by Bridge Fire and Alarm Services; and
- (6) VAT.

Fire stopping

99. A further element of the remedial works in dispute related to the fire stopping of service penetrations. This matter spanned a number of the Wall Types referred to above. In relation to this, the issue was whether these works are properly to be regarded as being a natural incident of other remedial works – i.e. did they properly fall within section 124(2) of the BSA and/or need to be done to comply with the law and/or good practice.

100. The Second Respondent disputed the costs of fire stopping of service penetrations. The sum in issue is £95,520.50 and concerns the cost of sealing service penetrations following the remedial works.

101. On the SoS's case, Regulation 23 of the Building Regulations would apply to much of Wall Type 1 and all of Wall Type 2 (where panels being removed), and as a result L1(a)(i) of Schedule 1 of the Building Regulations applies, requiring conservation of fuel and power limiting heat gains and losses through thermal elements. Although it was suggested – at least in the course of cross examination – that this requirement concerned environmental health considerations rather than fire safety, Mr Brown's evidence was that these works were necessary to close off all cavities to stop the internal spread of smoke, regardless of adequate compartmentation within the external wall.

102. We are satisfied that the fire stopping of the services through each Wall Type was necessary as part of ‘making good’ works and must be considered a cost incurred in the remedy of the relevant defects within those Wall Types. We also note that Mr Rhys Jones confirmed that any services passing through the external wall would need to be adequately sealed.
103. We therefore determine that such costs should be included within any RCO.

London Underground invoice

104. The dispute concerns invoice 1800056288 for the sum of £2,196.00. This was excluded by Mr Taylor on the basis that there was no supporting information (unlike the position for other London Underground invoices, which were accepted).
105. In cross-examination Mr. Taylor agreed that this invoice must have related to the cladding remediation project (it had the same reference number, 1823432 as other invoices from London Underground)), but he was unable to confirm what the costs related to and as such whether they related to the remedy of relevant defects. In our view, on the balance of probabilities, it is more likely than not that this cost would not have been incurred but for the need to remedy relevant defects. It seems likely that the costs would have related to access or permitting for the works being carried out near their adjoining boundary – Hallings Wharf is adjacent to a number of rail lines. There does not appear to be any other reason why London Underground would issue the RTM Company with an invoice relating to the project.

106. We therefore determine that such costs can be included within any RCO.

Tennyson Suite invoices

107. The Second Respondent challenged these costs (totalling £4,905 plus VAT). The issue was whether such costs were incurred as a result of the relevant defects, given the potential need for such investigations in any event as a result of CAN in the aftermath of the Grenfell Tower fire. In response, the SoS contended that had it been clear that Hallings Wharf

suffered from no relevant defects, these costs would not have needed to be incurred.

108. We agree with the SoS and accordingly consider that the costs were incurred “*in connection with*” the relevant defects they identified. We therefore determine that such costs can be included within any RCO.

Access hatches

109. Mr Taylor challenged this cost (totalling £7,975) as previously there were no access hatches. The SHW funding variation report of May 2024 stated that:

“When the timber soffit cladding was removed, various gas stop cocks and isolation valves were found for flat services.

It is necessary for H&S to provide access to these isolation points so that services can be shut off in the event of an emergency. Failure to provide these access points would mean that the new cladding would be damaged when trying to remove panels etc and could delay the emergency services.

Therefore 55 No. (11 per floor) new aluminium PPC hatches 425 x 425 are required at a cost of £145 + VAT per item.”

110. As such, Mr Taylor could not conclude whether these costs related to the relevant defects, i.e. because the hatches were not originally installed, or whether the requirement to provide these access hatches only arose because the remedial works were being undertaken.
111. On the SoS’s case, the installation of the access hatches would be considered good practice as part of the remedial works. As such, when the remedial works were being carried out, it was reasonable for this cost to be incurred, and it would not have been incurred but for the works remedying of relevant defects. It is a sum incurred in or in connection with the relevant defects.
112. The sum in question is relatively small part of the wider dispute. On balance, and in the absence of further submissions from the Second Respondent, we agree with the SoS’s contention that it was reasonable for these costs to be incurred and that they were incurred in connection with works remedying of relevant defects.

113. We therefore determine that such costs can be included within any RCO.

Bridge fire and alarm services

114. The Second Respondent's stated position had been that the SoS had not led sufficient evidence to substantiate such claim.

115. However, the background to this head of costs was set out in Mr Missenden's second witness statement and the justification for such costs was set out in the Tennyson Suite report:

"The combined fire safety measures are considered to warrant a waking watch in the 'Large' building until such time as a wireless heat detection and warning system is provided adjacent to all openings into the render and timber cladding. The fire evacuation policy should be changed with immediate effect to one of simultaneous evacuation for this block.

A similar automatic fire detection system is required for the 'small block' and the fire evacuation policy should be changed to one of simultaneous evacuation. Three months is considered to be a reasonable time scale for the installation of the system.

Once all the remedial works to the external walls and the internal risers have been completed, the wireless detection system can be removed and re-deployed to other premises and the fire evacuation policy revert to one of defend in place."

116. Further, in cross examination, Mr Butterworth did not dissent from the above advice. He was of the view that there were clearly risks associated with the EPS render that warranted consideration of interim measures and as far as is common practice, an automatic fire detection alarm system would be a way of reducing those risks.

117. In conclusion, we consider that these costs were adequately evidenced and can be included in any RCO.

VAT

118. According to the Scott Schedule, the amount of VAT in question was £624,557.83, based on the figures for the remedial scheme contended for by the SoS. As such, although a small discrete point, it has significant consequences for the total sum claimed.

119. There is no dispute that:

- (1) the costs incurred by the RTM Company included VAT;

- (2) Those costs (including the VAT) were paid to the contractors who would have accounted for that VAT to HMRC in the usual way; and
 - (3) The payment of costs (including the VAT) was funded by the Building Safety Fund.
120. The Second Respondent raised an argument that if a VAT element were included in an RCO, this would lead to double recovery and therefore should not be included within an RCO in these proceedings.
121. This was refuted by the SoS: the BSF has paid out to the RTM Company sums which include the VAT element of the costs. The contractors have in turn accounted to HMRC for that VAT element. The key point, however, is that the net effect of those two payments is neutral. The government has not yet received the VAT element of the costs, to which it is entitled, because it has provided funding for those costs to the RTM Company. As such, it follows that if the RCO requires payment of that VAT element, this will amount to recovery for the government but not double recovery.
122. In the course of cross-examination Mr Taylor suggested that there might be double-recovery if the RTM Company had been registered for VAT. However, there was no evidence to support this and indeed Mr Missenden's evidence that he understood it was *not* VAT-registered.
123. In the circumstances, we consider that these costs can be included in any RCO.
124. Finally, we record that it was also agreed that the costs of balconies should not be included as they had been sourced from the reserve fund. As such, the costs have not been included within the Scott Schedule.

Litigation costs

125. By application dated 6 February 2026, the SoS sought to amend the claim for an RCO to include litigation costs (the fees of its lawyers and experts in these proceedings). The tribunal gave permission for such amendment at the pre-trial review, although making clear that the fact of giving

permission to amend did not amount to acceptance that such costs were recoverable under the provisions of section 124 of the BSA.

126. As well as amending its pleading, the SoS also served a Form N260 (used in court proceedings) outlining the costs claimed. The total sum sought is in excess of £1 million.

127. There are, in essence, two questions of principle before the tribunal:

(1) Does the FTT have jurisdiction to include litigation costs as part of an RCO?

(2) If so, how would the amount of such costs be assessed/determined?

128. Taking the above questions in reverse order, on the question of process, the SoS's submission was as follows.

129. There is no requirement that an RCO must specify how much the respondent is to pay. Section 124(4)(aa) expressly provides that an RCO may "*determine that a specified body corporate or partnership is liable for the reasonable costs of specified things done or to be done*".

130. The legal effect of such an RCO will be that, to the extent the RCO (rather than specifying an amount) determines that a respondent is liable for the reasonable costs of specified things done or to be done, the order will confer a cause of action upon the person who is entitled to payment. Any question of liability thereafter will be *res judicata*. Further, it was submitted that following the making of an RCO in the terms of section 124(4)(aa), the tribunal's jurisdiction is at an end and the assessment of the amount of costs payable will be carried out by the court. This reflects the order that was made by the FTT in *Empire Square* (referred to below).

131. The Second Respondent disagreed with this analysis. It was contended that the SoS had failed to provide details of the costs such that it is not possible for the Tribunal to apply the just and equitable test, let alone assess or determine those costs. The Form N260 does not provide proper basis to do so. Further, the Second Respondent would have no opportunity to conduct full cross examination.

132. We agree that the SoS's suggestion seems wholly impractical. If litigation costs are to be included within an RCO, how can the amount of such costs to be paid be determined in a forum which has no knowledge of the substantive dispute or proceedings. While the FTT's order could in theory address this in part – for example making an order that a respondent pay 50% of the reasonable costs of an application, so as to take into account particular features of outcome of the litigation/parties' conduct – it still begs the question of how a court could determine what the 'reasonable costs' are when it has no knowledge of the underlying proceedings.
133. The uncertainty as to process feeds into the wider question of whether the FTT has jurisdiction to include costs in the first place.
134. As set out above, section 124(2) of the BSA provides as follows:
- “(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.”*
135. Section 124(2A) gives examples of categories of costs falling within section 124(2). It is common ground that the list does not include litigation costs. However, it was also accepted that the list is not exhaustive.
136. In the SoS's submission, the jurisdictional basis for including litigation costs was as follows:
- (1) The costs which are to be taken into account when deciding how much is payable under an RCO are the costs identified in s.124(2) of the BSA, so far as those costs were incurred in connection with the relevant defects identified in the order;
 - (2) The SoS's litigation costs are of the nature identified in s.124(2) because, although they have not been incurred in “remedying” those relevant defects (since these were remedied before the application to this Tribunal was issued), they have clearly been incurred “in connection with” those defects.

137. Further, the SoS made reference to the FTT's decision in *Empire Square* (LON/ooBE/HYI/2023/0013 and LON/ooBE/BSB/2024/0602). In that case, which is not binding on us, litigation costs were included within an RCO. It should be noted that *Empire Square* concerned applications for both a remediation order under section 123 of the BSA and a remediation contribution order under section 124. In reaching its decision, the FTT analysed the jurisdiction to make an RCO under section 124 of the BSA and concluded that it could include legal costs within the RCO (see paragraphs 172-198).
138. The Second Respondent's position is simple: the tribunal does not have jurisdiction to include litigation costs within an RCO.
139. Save for the provisions of rule 13 of the Tribunal Rules (First-tier Tribunal) (Property Chamber) Rules 2013, the FTT is a no-cost jurisdiction. Rule 13 provides instances where costs may be awarded. So far as is relevant here, they are:
- (1) under section 29(4) of the Tribunals, Court and Enforcement Act 2007 (wasted costs) and the costs incurred in applying for such costs; or
 - (2) if a person has acted unreasonably in bringing, defending or conducting proceedings.
140. However, it is common ground that none of the grounds set out in Rule 13 are applicable in the circumstances of the present case.
141. In Mr Bowker's submission, Parliament has prescribed that the jurisdiction to make remediation contribution orders lies with the FTT, ostensibly a no costs jurisdiction. Were it Parliament's intention to include litigation costs this could have easily been spelt out, particularly as Parliament has given examples of costs arising 'in connection with relevant defects' in section 124(2A). Although the list is non-exhaustive, it is striking that it does not include litigation costs. In any event, in Mr Bowker's submission, the words 'in connection with relevant defects' properly construed, do not cover litigation costs.

142. In the alternative, it was submitted that a case such as the present can be distinguished from *Empire Square*. In that case, the FTT made the following observations:

“195 ... it is only this litigation that has driven any progress. ... 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.

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). ... 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.”

In summary, it was a feature of that decision that the costs were incurred in connection with the remediation of the building – it was found that the application had to be made to achieve the appropriate remediation and the litigation costs would not have otherwise been incurred.

143. In Mr Bowker’s submission, the present case is distinguishable as here the costs were not incurred in connection with getting the works done as they have already been completed.
144. Consistent with such analysis, he submitted that when the various examples of costs specified in section 124(2A) are considered, they are principally concerned with getting the works done – the central policy behind Part V of the BSA – and will likely be incurred prior to or in the course of remediation works being carried out.
145. Mr Dutton made the point that it would be odd if such a temporal distinction were to exist. In other words, why should a party be able to recover litigation costs in a case where the works are yet to be carried out,

but not in a case where they have been completed? More generally, why should a party – in some cases this may be a wholly ‘innocent party’ such as an RTM company, which on no view is responsible for the defects – have to incur significant legal costs to obtain an RCO? It was also submitted that if finance costs can be included within an RCO as costs incurred ‘in connection with remedying relevant defects’, why not legal costs?

146. While the above arguments on policy are noted, ultimately the legislation must be construed on its terms as drafted. Having considered the parties’ submissions and having regard to the terms of the legislation, we are doubtful that section 124(2) can be construed so as to include litigation costs. As the Second Respondent submitted, it is striking that while Parliament has chosen to give illustrative examples of the type of costs recoverable – albeit non-exhaustive – it has made no reference to litigation costs in circumstances where the jurisdiction to make an RCO has been given to a body which is for the most part a no costs jurisdiction. While the words ‘in connection with’ in section 124(2) of the BSA undoubtedly allow for a broad range of costs, it seems unlikely that properly construed they could extend to litigation costs of the type now sought. In any event, applying the reasoning in *Empire Square* that costs may be recoverable where it can be said that the proceedings themselves have been brought ‘in connection with’ remediating the building – for example where the building would not have been remediated without the proceedings having been brought – that does not apply on the facts of the present case for the reasons set out above. In the circumstances, on either view, we do not consider that litigation costs are recoverable as part of an RCO in a case such as the present.
147. In the alternative, even if we are wrong as to the tribunal’s jurisdiction to award litigation costs (whether in any RCO application or in an *Empire Square*-type case where it can be said that the proceedings were necessary to achieve the remediation of the building), having regard to the facts of the present case, we would not have considered it just and equitable to include litigation costs within the RCO in any event. This is so

notwithstanding that the SoS has in essence succeeded in the substantive application.

148. In particular, we agree with the Second Respondent's submissions regarding the lateness of the application to include legal costs. As set out in the Second Respondent's re-amended pleading:

- (1) The SoS first informed the Second Respondent that it intended to include in its application for a remediation contribution order its legal and professional costs on 5 February 2026;
- (2) Prior to 5 February 2026, the Applicant had not indicated any such intention;
- (3) during the proceedings, prior to 5 February 2025, the Second Defendant, reasonably, conducted the litigation on the clear understanding that costs recovery was not in issue between the parties;
- (4) even after the FTT's decision in *Empire Square* (dated 5 June 2025), the SoS gave no indication of an intention to seek litigation costs until the pre-trial review – some 7 months later.

149. As such, the parties had conducted the litigation on the basis that there was no adverse costs risk. In the circumstances, we do not consider that it would be just and equitable to award litigation costs in the present case in any event.

Is it just and equitable to make a remediation contribution order?

150. The remaining question is whether it is just and equitable to make an RCO. Pursuant to section 124(1) of the BSA, the tribunal may make an RCO where it "*considers it just and equitable to do so*".

151. The Court of Appeal has recently considered the purpose of the BSA in *Triathlon Homes LLP v Stratford Village Development Partnership & Ors* [2025] EWCA Civ 846.

"9. ... the remediation provisions were designed to deal with a one-off problem, referred to as the building safety crisis, which saw many

leaseholders of flats in high-rise blocks facing unprecedently high, and often unaffordable, service charge bills to pay for the costs of existing fire safety and structural safety defects in their blocks. As explained in more detail in Adriatic, a central purpose of the remediation provisions was to provide a substantial measure of protection against such service charges for leaseholders.”

152. This followed statements by the Supreme Court in *URS Corporation Ltd v BDW Trading Ltd* [2025] UKSC 21:

“84. The BSA is part of the Government’s response to the need to identify and remediate historic building safety defects as quickly as possible, to protect leaseholders from physical and financial risk and to ensure that those responsible are held to account.

104. A central purpose and policy of the BSA in general, and section 135 in particular, was to hold those responsible for building safety defects accountable. As was stated in the Secretary of State’s written submissions, at para 15: “The BSA makes a number of important changes to the law including, at Part 5, several mechanisms that achieve the central aims of the BSA in relation to historical building safety defects. These mechanisms are designed to ensure that ... those responsible for defects can be held to account”

153. In the SoS’s submission the purpose of the RCO regime is to provide the tribunal with the discretion to make orders providing for the recovery and/or reallocation of costs arising from building safety defects. However, the tribunal, when exercising that discretion, is not acting in a vacuum:

- (1) The purpose of an RCO is to arrive at a situation where the costs identified in section 124(2) are “met”;
- (2) In identifying those costs, the tribunal will have gone through a process which involves the following steps:
 - (a) Drawing a distinction between those relevant defects which are sufficiently trivial as not to warrant any remedial steps and those which do warrant such steps, and
 - (b) Identifying whether the costs falling within s.124(2) were reasonably incurred and are reasonable in amount.

154. In these circumstances, it is said that although the “*just and equitable*” discretion is a wide one, its proper application does not involve deciding matters in such a way as to defeat the purpose identified in s.124(2) nor reopening the matters outlined in sub-paragraph (b) above. Rather, in

practice its main role is to ensure that, in cases where more than one person of the type identified in s.124(3) is “in the frame” to be at the wrong end of an RCO, the burden of bearing the s.124(2) costs is shared between those people in a way which is just and equitable as between them.

155. In our view, this is an overly narrow interpretation of the just and equitable test and we are not persuaded that such framing adds to the understanding of how it should be applied. While we agree that, at a broad level, the exercise of the discretion should not be used to defeat the purpose of section 124(2), by its very nature, there will be cases where the tribunal considers that it is not just and equitable to make an RCO for whatever reasons. In those cases, the inevitable consequence of refusing to make an order is that remediation costs will not be ‘met’ by the relevant respondent. Similarly, while we accept that a tribunal will have considered whether costs falling within section 124 are reasonable, that does not mean that is the end of the matter and that just and equitable considerations play no part.
156. Section 124(1) states simply that an RCO may be made where the tribunal “*considers it just and equitable to do so*”. In other words, the tribunal’s discretion is framed by reference to the test of ‘just and equitable’ – it is not clear that it is necessary to limit or redefine it further.
157. Such an approach is also consistent with the Upper Tribunal in *Edgewater (Stevenage) Limited & Ors v Grey GR Limited Partnership (Vista Tower)* [2026] UKUT 18 (LC) at paragraph 180:

“... I do not think that it is either possible or sensible to seek to catalogue the factors upon which the FTT may rely in determining, in any particular case, whether it is just and equitable to make the order sought against any particular respondent. I say this essentially for two reasons. First, the breadth of the discretion conferred upon the FTT, namely whether the FTT “considers it just and equitable” to make the order sought, is very wide. The factors which may be taken into account in any particular case are not limited by the terms of Section 124(1) and are not, in my view, capable of exhaustive classification. Second, and if I was to attempt this task, it seems to me that I would be at risk of committing the basic error of attempting to re-write Section 124(1). In Section 124(1) Parliament has chosen not to list or limit the factors which can be taken into account in the exercise of the just and equitable discretion. In these circumstances it is not appropriate for me to attempt to do so.”

158. Turning to the facts of the present case, there has been no dispute that a remediation contribution order could, in principle, be made against the Second Respondent.
159. As set out in the Second Respondents' statement of case, it was accepted that the Second Respondent was associated with the developer of the building (the First Respondent) within the meaning of s.121(5) and s.124(5) of the BSA.
160. The SoS's pleading sets out, at paragraph 31 of the Re-amended Statement of Case, the basis why it is said to be just and equitable to make an RCO against the Second Respondent. In essence, it was pleaded that at all material times the association between the Second Respondent and the First Respondent has been (and continues to be) a close one, with the companies being owned and controlled by members of the Cox family.
161. In response, the Second Respondent pleaded:
- (1) (at paragraph 30(8)), that "the respective positions of the First and Second Respondents are materially distinguishable"; and
 - (2) (at paragraph 30(11)), that "the Second Respondent does not have any contractual claims that would enable it to pass down any liability."
162. However, no evidence was called in support of the above propositions and no further submissions on these matters were made at the hearing. As such, we are unable to conclude that the two matters pleaded by the Second Respondent provide a basis to negate the SoS's arguments that by virtue of the connection between the First Respondent and Second Respondent, it would be just and equitable to make an RCO against the Second Respondent. For the avoidance of doubt, we therefore determine that it is just and equitable to make an RCO against the Second Respondent having regard to its connection with the First Respondent for the reasons set out in the SoS's statement of case – subject to arguments about why it is said that it would not be just and equitable in the circumstances of the present case.

163. As set out above, we have found that relevant defects existed as argued by the SoS and that the remediation scheme was within the range of reasonable responses. We have also made findings as to the costs incurred.
164. Turning to the Second Respondent's principal arguments, we accept that the RTM Company chose to continue the remediation works under CAN rather than switching to PAS:9980 despite the matter being raised towards the end of 2022. However, for the reasons already given, we have found that this decision was within the band of reasonable responses. Similarly, while we accept that there were limitations with the Tennyson Suite reports, we accept Mr Brown's evidence that it set out the key points. Moreover, we note Mr Rhys Jones's acceptance that, subject to two points that have been addressed above, the remedial scheme undertaken was a reasonable one – notwithstanding that he maintained that it could have been done more cheaply. The fact that it might have been possible to do the project more cheaply does not mean that it would not be just and equitable to make an RCO for the full costs incurred where the scheme adopted was a reasonable one.
165. As such, we do not consider that any of the above matters give rise to a conclusion that it would not be just and equitable to make an RCO against the Second Respondent.
166. This leaves the Second Respondent's argument on betterment.

Betterment

167. Broadly, the Second Respondent has raised the point that the effect of the remedial works has been to postpone the date on which the render will need to be replaced. This gives rise to two questions:
- (1) Is the Second Respondent correct as a matter of fact and if so, by how long?
 - (2) How should this, if at all, be reflected in an RCO?
168. On the first question, the Second Respondent sought a finding of fact that the render and timber had reached the end of their serviceable life. This

in part derived from an article in Mr Missenden's name dated 9 February 2026. This described the remediation project at Hallings Wharf and included the line:

*“The project involved the careful removal of the existing facade elements, **which had reached the end of their serviceable life** and were no longer compliant with current fire safety regulations.”* (emphasis added)

169. In cross examination, Mr Missenden tried to resile from this statement. Although at one point he sought to suggest that it might have come from the PR consultants, he later accepted that he must have been the source for this statement.
170. Mr Bowker submitted that the statement in the article ought to be accepted, noting: Mr Missenden's industry experience, his specific experience on this project and the fact that he had been willing to talk publicly on behalf of himself and his employer.
171. On any view, the article is remarkable, coming shortly before the hearing of the SoS's application, in circumstances where Mr Missenden knew that he was an important witness and has apparently produced a statement at odds with the SoS's position in these proceedings. Nevertheless, a statement in a publicity article cannot of itself be grounds for the tribunal to reach a conclusion as to the lifespan of the render. The difficulty, however, is that there is little authoritative evidence on this point. Publicity from the manufacturer of the render suggests the expected lifespan to be “at least” 30 years (see page 3535 of the trial bundle) but, again, this is not sufficient to reach a conclusion that the render had reached the end of its natural life. Ultimately, we are left with an absence of clear evidence on the point.
172. Turning to the second question, an initial point to note is that the benefit of any betterment has been to the leaseholders, who would have had to pay for replacement of the render in due course. It has not benefited the RTM Company, nor the SoS. Further, the SoS contended that there is no relevant link between the render's lifespan and the need to undertake remediation works. Removal of the existing render was necessary to carry out remediation works and that lack of choice means that it would be

wrong as a matter of principle for any allowance for betterment to be made.

173. A further difficulty goes to the question of how should any betterment be calculated in terms of money value? Mr Taylor produced calculations based on an assumed lifespan of either 30 years or 50 years and. According to his report at paragraph 149):

“My estimate of the cost that would have been incurred for undertaking renewal of the render in Q3 2024 is £731,733.14. To the extent that the Tribunal may require an assessment of the value of this alleged betterment, it seems to me that an appropriate calculation might be $20/XX$ multiplied by the estimated cost of the render renewal, where XX is the number of years before the render would have needed to have been renewed. Using some assumptions to model these figures:

Based on an XX of 30 years, the benefit to the owner of the Building is £487,822.09;

Based on an XX of 50 years, the benefit to the owner of the Building is £292,693.26.”

174. However, this methodology was strongly criticised by Mr Dutton as it did not take into account what effect there would be if the cost of replacing the render were to be deferred by say 20 years, or, for example, whether the obligation to contribute towards the cost of replacing the render and the consequent postponement of such obligation is something that would affect the capital value of flats. Further, no adjustment was made for the fact that it would be a future debt and no capitalisation rate was identified.
175. In our view, we do not suggest that betterment can never be relevant to the application of the just and equitable test. However, on the facts of the present case, there is simply not sufficient evidence to make a finding either as to the extent of any betterment or the value to be attributed to it. We therefore make no deduction for betterment in calculating the amount of the RCO.

Conclusion

176. Taking all of the above matters into account, we consider it just and equitable to make an RCO. For the reasons already given, we have found in favour of the SoS on all issues save for litigation costs.
177. We therefore make the RCO in the sum of **£3,682,997.78** as set out in the 8th column of the Scott Schedule contained at pages 906-907 of the main Trial Bundle. Mr Dutton had advised during the hearing that any RCO should be made in favour of the Ministry for Housing, Communities & Local Government rather than the SoS personally, and this is reflected in the order.
178. A copy of the remediation contribution order is appended to this Decision.

Name: Judge Sheftel

Date: 21 May 2026

Rights of appeal

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

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the Regional Office which has been dealing with the case. The application should be made on Form RP PTA available at <https://www.gov.uk/government/publications/form-rp-pta-application-for-permission-to-appeal-a-decision-to-the-upper-tribunal-lands-chamber>

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

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

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

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

Annex – Remediation Contribution Order



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

Case reference : **LON/00BB/BSB/2024/0011**

Property : **HALLINGS WHARF STUDIOS,
CHANNELSEA ROAD, LONDON E15**

Applicant : **SECRETARY OF STATE FOR HOUSING,
COMMUNITIES & LOCAL
GOVERNMENT**

Representative : **Walker Morris LLP**

Respondent : **EDR BUILDERS LIMITED (1)
HOLLYBROOK (UK) LIMITED (2)**

Representative : **Charles Russell Speechlys LLP (for the
Second Respondent)**

Type of application : **For a remediation contribution order
under section 124 of the Building Safety
Act 2022**

Tribunal : **Judge Sheftel
Judge Powell
Ms H C Bowers**

Date of Order : **21 May 2026**

REMEDICATION CONTRIBUTION ORDER

Section 124 of the Building Safety Act 2022

UPON considering the application, evidence and submissions in this matter at a final hearing held on 9-17 March 2026

AND UPON the Tribunal being satisfied that Hallings Wharf Studios, Channelsea Road, London E15 2SX (the “**Building**”) is a relevant building for the purposes of the Building Safety Act 2022

AND UPON the Tribunal being satisfied that it is just and equitable to make a remediation contribution order against the Second Respondent for the reasons set out in the decision dated 21 May 2026 (the “**Decision**”)

IT IS ORDERED THAT:

1. This is a remediation contribution order made pursuant to section 124 of the Building Safety Act 2022 (as amended by section 116 of the Leasehold and Freehold Reform Act 2024) which applies to the Second Respondent, Hollybrook (UK) Limited.
2. The Second Respondent shall make the payment identified in this Order to the Ministry for Housing, Communities & Local Government for the purpose of meeting the costs incurred in remedying or otherwise in connection with relevant defects relating to the Building.

Payment

3. The Second Respondent shall make payment to the Ministry for Housing, Communities & Local Government, by no later than 4pm on **2 July 2026**, in the sum of **£3,682,997.78** for the purpose of meeting the costs as referred to in paragraph 177 of the Decision and as set out in the 8th column of the Scott Schedule contained at pages 906-907 of the main Trial Bundle.
4. This Order is enforceable under section 27 of the Tribunals, Courts and Enforcement Act 2007 as if the sums were payable under an order of the Court.

Judge Sheftel

21 May 2026



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

Case Reference : **MAN/32UD/BSB/2025/0002**

Property : **One The Brayford, Brayford Wharf N,
Lincoln, LN1 1BN**

Applicant : **City of Lincoln Council**
Representative : **Mr Fisher (Counsel)**

Respondent : **Plantview Limited**
Representative : **Mr Bates KC (Counsel)**

Type of Application : **Remediation Contribution Order -s.124 of
the Building Safety Act 2022**

Tribunal Judge : **Judge S. Westby
Judge J. Hadley**

Date of Hearing : **12 May 2026**

DECISION

DECISION

- 1) The direct costs of providing temporary accommodation are costs of a kind described in section 124(2A)(c) of the Building Safety Act 2022.
- 2) The staff overtime costs do not fall within the definition of “temporary accommodation costs” in section 124(5) and are not costs of a kind described in section 124(2A)(c) of the Building Safety Act 2022.
- 3) The legal costs do not fall within the definition of “temporary accommodation costs” in section 124(5) and are not costs of a kind described in section 124(2A)(c) of the Building Safety Act 2022.
- 4) The fact that the Applicant has incurred, or will incur, the relevant costs pursuant to its statutory duties as a local housing authority does not preclude the recovery under section 124 of the Building Safety Act 2022.

REASONS

Background

1. This application is brought by the City of Lincoln Council (“the Applicant”) for a remediation contribution order (“RCO”) pursuant to section 124 of the Building Safety Act (“the 2022 Act”). The Respondent is Plantview Limited, the current freeholder of a mixed-use building known as One The Brayford, Brayford Wharf North, Lincoln (“the Property”).
2. The Property comprises residential flats held on long leases, together with commercial premises at ground floor level. The residential units were occupied by long leaseholders and, in some instances sub-tenants of those leaseholders.
3. On 25 April 2025, Lincolnshire Fire and Rescue Service (“LFRS”) served a prohibition notice under Article 31 of the Regulatory Reform (Fire Safety) Order 2005. The notice provided that the premises
“...must not be used for sleeping or resting on a permanent and/or temporary basis. Access is permitted for remedial works and collection of belongings (under the supervision and agreement of the responsible person) only.”
4. The prohibition notice was issued following the identification of fire safety deficiencies at the Property. It is not disputed by the parties that those deficiencies constitute “relevant defects” within the meaning of the 2022 Act, although the Respondent disputes their severity and maintains that the Property was safe for occupation.
5. Following the issuance of the prohibition notice, a number of residents left the Property over the period 25 to 29 April 2025. The Applicant contends that this amounted to a decant of the building. The Respondent disputes that characterisation, asserting that residents were not legally required to leave and that some remained in occupation.

6. In response to the displacement of residents, the Applicant arranged and funded emergency accommodation over the weekend of 25 to 29 April 2025. It subsequently secured further temporary accommodation, including hotel accommodation and other short-term housing, for those who had left the Property. The Applicant paid the costs of that accommodation directly.
7. The Applicant's position is that the initial provision of accommodation was undertaken pursuant to its powers under the Civil Contingencies Act 2004. It contends that it thereafter acted pursuant to its duties under the Housing Act 1996 to secure accommodation for persons who were homeless.
8. The costs which the Applicant seeks to recover comprise:
 - (i) Direct costs of re-housing residents; and
 - (ii) associated staff overtime and legal costs said to have been incurred in connection with the re-housing exercise.
9. Although the prohibition notice was appealed by the Respondent, it was not determined by a Court or Tribunal as, on or about 1 October 2025, LFRS withdrew the notice.
10. By directions dated 25 September 2025, the Tribunal identified two preliminary issues in this matter, namely:
 - (i) whether the costs the Applicant is seeking to recover are costs of a kind described in section 124(2A)(c) of the 2022 Act; and
 - (ii) if so, whether the fact that those costs have been (or are to be) incurred pursuant to the Applicant's statutory duties as a local housing authority prevents the Applicant recovering them by means of a RCO.

The Law

11. Section 124 of the 2022 Act states as follows:

“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 on 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.”*

12. Section 124(5) of the 2022 Act states that:

“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;*

“relevant steps”: see section 120;”

13. Section 120(4A) states that:

“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.”*

Submissions, Discussion and Reasons

Approach of the Tribunal

- 14. In the Applicant’s submissions, the Tribunal should adopt an inherently purposive approach to the 2022 Act. Mr Fisher argued that the First-tier Tribunal, Court of Appeal and the Supreme Court have identified a broad policy objective which the Act is designed to address – to protect leaseholders and the public purse.
- 15. Mr Fisher refers to the First-tier Tribunal case of *Triathlon Homes LLP v Stratford Village Development* [2024] UKFTT 26, which was heard by the Upper Tribunal President and Deputy President acting in their capacity as First-tier Tribunal judges. He states that the Tribunal should follow the broad approach taken by the Tribunal in this case and refers, in particular, to paragraph 106 of the First-tier Tribunal’s decision in which the Tribunal discusses the complexity of the subject matter of the 2022 Act and states:

“That complexity seems to us to require an interpretation of section 124 which focuses on the practical outcome of the things which have been

done or are to be done, rather than any interpretation which tends to narrow the scope of the remediation provisions’.

16. We agree that a purposive approach should be adopted to the statute. That much is clear from the *Triathlon* case which was upheld by the Court of Appeal (*Triathlon Homes LLP v Stratford Village Development Partnership & Others* [2025] EWCA Civ 846).
17. Mr Bates, for the Respondent, asserts that the approach of the Tribunal should be similar to that of a debt claim, not an appeal under the Housing Act 2004 where the Tribunal’s starting point is the local authority’s decision. He submits that it is for the Applicant to prove its case, not the Respondent. The prohibition notice shows evidence of LFRS’ view at the time and Mr Bates contends that it would be wrong for the Tribunal to adopt LFRS’ findings and work from that as established fact. We will come to the Tribunal’s views on this later.

Preliminary Issue 1: Are the costs the Applicant is seeking to recover costs of a kind described in section 124(2A)(c) of the 2022 Act

18. Neither party suggested that the costs claimed by the Applicant can be recovered under section 124(2A)(c)(ii-iii) of the 2002 Act. The focus is therefore on whether the costs claimed by the Applicant can be recovered under section 124(2A)(c)(i):
- (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,*
19. In order to answer the question posed in preliminary issue 1, the Tribunal considers that it is helpful to break the wording of the provision down by answering three questions.

Was there a decant?

20. There was a dispute between the parties as to whether a decant for the purposes of section 124(2A)(c) occurred.
21. “Decant” is not defined within the 2022 Act. Mr Fisher, for the Applicant, seeks to rely upon the ordinary meaning of the word and asserts that the meaning is simply a temporary removal or transfer of individuals from a building or property in a construction context. The Applicant contends that there was a decant from the Property following service of the prohibition notice. The notice expressly prohibited residential occupation, and residents left the building as a direct consequence. The Applicant submits that this constitutes a decant for the purposes of the statute, notwithstanding that some residents may have remained in occupation or that the notice was not enforced against individuals.
22. Mr Bates, for the Respondent, contends that there was no “decant” within the meaning of the statute. He states that the ordinary meaning of the word is of

limited use. Rather, Mr Bates relies upon the Ministry of Housing, Communities and Local Government ‘Remediation enforcement: guidance for regulators’ published on 2 December 2024 (“the Guidance”). The Guidance, at paragraph 9.5.4 states that:

‘A decant is the full or partial evacuation of a property. Decants can occur for a number of reasons, such as identification of serious fire safety or structural defects through inspections. During a decant, the government expects landlords to provide and pay for suitable alternative accommodation until residents can return home. Decants can be triggered by landlords, which in this guidance is referred to as a voluntary decant.

Local authorities and fire and rescue authorities also have powers to trigger a decant if a building is not safe for occupation. Local authorities and fire and rescue authorities can issue a prohibition order or prohibition notice respectively, to require the full or partial evacuation of a property, or restrictions in its use.’

23. Mr Bates asserts that there is a difference between a voluntary action and a decant.
24. The Respondent submits that, whilst the fire service issued a prohibition notice, the notice did not require a decant as:
 - (i) The notice was not served on the long leaseholders or their sub-tenants. It was only served upon the Applicant as the freeholder to the building and whose only right to occupy was in relation to the common areas of the building.
 - (ii) LFRS subsequently made it clear that they would not be enforcing the prohibition notice against residents - there was no *requirement* for the residents to leave.
 - (iii) Many residents remained living at the Property.
25. The Respondent characterises the departures of residents as voluntary decisions taken in response to what it describes as a recommendation or advisory position, rather than a legally binding requirement to vacate. It refers to communications from relevant authorities, such as the County Council, which talk about the residents being asked or recommended to leave the Property.
26. Further, Mr Bates asserts that, if the current position was considered a decant, then every owner of an apartment in a high-rise building could move to a hotel and recharge the landlord on that basis. In response to that point, Mr Fisher asserts that it is not possible for everyone to simply move out and seek their costs for doing so; the circumstances where a recoupment of costs is possible are clearly limited in the statute to those in connection with a relevant decant and where there is an imminent threat to life or of personal injury.
27. In the Tribunal’s view, the Respondent places too much reliance on the Guidance, which is non-binding in any event and is not a statement of the law. The Tribunal considers that if Parliament had wanted to define ‘decant’ within the 2022 Act it would have done so. Indeed, section 124(5) of the Act provides definitions of not less than 11 other words used within section 124 alone.

28. The prohibition notice expressly stated that the premises “must not be used for sleeping or resting”. As a matter of substance, that is a prohibition on residential occupation. The fact that it may not have been served upon or enforced against individual leaseholders, or that some residents remained, does not detract from the practical effect: the building was rendered unsuitable for habitation and some residents left the Property as a result of the relevant defects.
29. The Tribunal finds the Respondent’s attempt to characterise some residents’ departures as “voluntary” unpersuasive. Section 124 is concerned with outcomes “in connection with a decant” and in the Tribunal’s opinion should not be construed narrowly, consistent with the approach of the First-tier Tribunal in *Triathlon Homes* (see paragraphs 15 and 16 above).
30. The Tribunal is not persuaded by the Respondent that attributing a broad definition to the word decant would open up the provision of section 124(2A)(c) indefinitely; the circumstances in which it will apply are clearly limited by the rest of that provision.
31. Accordingly, the Tribunal considers that there was a decant for the purposes of section 124(2A)(c) of the 2022 Act.

Was the decant to avoid an imminent threat to life or of personal injury arising from a relevant defect?

32. There is no dispute between the parties that there were relevant defects at the Property for the purposes of the 2022 Act. Equally, the parties agree that the statute requires any threat to life or threat of personal injury to be imminent.
33. What is in dispute between the parties is whether there was, in fact, an imminent threat of either.
34. The Applicant submits that the decant took place in order to avoid an imminent threat and relies in particular on the terms of the prohibition notice itself, which stated that:
“The Fire and Rescue Authority are of the opinion that the risk of injury is imminent and the prohibitions to take effect immediately until the matters specified above have been remedied”.
35. Mr Fisher states that the prohibition notice itself refers to the matters which give rise to such risk, being, in the opinion of LFRS:
- a. Insufficient fire resisting separation and compartmentation between the sleeping accommodation and the means of escape, allowing heat and smoke from a fire to pass from the area of the fire to all floors.
 - b. Insufficient means of detecting a fire and giving adequate warning to occupants meaning they would be unaware of a fire. The occupants would be likely to be overcome by the effects of heat and/or smoke before they could make their escape.
 - c. The external wall systems are combustible and will allow any fire to spread rapidly on the external faces of the building with the potential for the fire to re-enter the building and spread internally.

36. Mr Fisher asserts that this is, on its face, evidence of the imminence of risk and that this risk relates to life or of personal injury. He states that the Tribunal cannot go behind the prohibition notice for the purpose of the preliminary issue and that the Tribunal must assume that the LFRS was correct contemporaneously in reaching its conclusion. The alternative, Mr Fisher argues, is to interrogate the evidential position of the LFRS, which could not be done at the preliminary hearing with no witnesses present and no opportunity to cross-examine.
37. Mr Fisher asserts that the fact that nothing changed at the Property prior to the issue of the prohibition notice is irrelevant; it does not speak of the question of imminence. He contends that many fire risks exist over extended periods before crystallising into an imminent threat.
38. The Applicant further refers to the prohibition notice being withdrawn in October by way of a letter to the Respondent dated 1 October 2025 and which records that:
- “the withdrawal of the Prohibition Notice indicates that the matter which were, in the opinion of the Fire and Rescue Authority, of such serious nature that there was risk to persons on the premises, have now been removed or remedied.”
39. Mr Bates, for the Respondent, submits that the requirement for an “imminent threat to life or of personal injury” is not satisfied. He contends that the Applicant has produced no evidence of that imminent threat, and further that the building was not dangerous and that the prohibition notice was wrongly issued by LFRS and consequently was invalid.
40. The Respondent relies on what it says is expert evidence, contained within the bundle and which was prepared in respect of the Respondent’s appeal of the prohibition notice, to the effect that the building did not present an increased or imminent fire risk, and submits that there was no change in circumstances that would have given rise to such imminence.
41. Mr Bates submits that LFRS’ decision not to enforce the prohibition notice is telling; he states it is difficult for LFRS to maintain the line that there is an imminent threat if it is not prepared to take action to enforce the notice issued.
42. The Respondent also placed weight on the subsequent unilateral withdrawal of the prohibition notice by LFRS which it says occurred because LFRS believed the withdrawal to be preferable to the alternative option of explaining and justifying its decision to issue the prohibition notice before the Magistrates Court. The Respondent states that the withdrawal of the notice a few weeks before the hearing of the Respondent’s appeal supports its position that the LFRS’ concerns were unfounded or overstated, and denied the Respondent the opportunity to vindicate itself.
43. The Tribunal finds that the prohibition notice is prima facie evidence that there was an imminent threat either to life or of personal injury arising from a relevant defect. The LFRS is a competent authority, and it made clear in the prohibition

notice that it considered there was an imminent threat. The Tribunal considers that this is sufficient to meet the jurisdictional gateway of the section 124 claim for the purposes of the preliminary issue which asks us to decide whether the costs claimed *are of a kind* described in section 124(2A)(c) of the 2022 Act.

44. The Tribunal is not determining the truth of the LFRS assessment, only whether the statutory gateway is met on the face of the circumstances.
45. However, the Tribunal does consider that there is a substantive point as to whether there was, in fact, an imminent threat which the Applicant will need to prove at the final hearing. The Respondent had provided evidence to say that there was no imminent threat and that any risk was 'tolerable'. There was no opportunity for this to be properly explored or tested at the preliminary hearing, but it is a fundamental issue that will need to be addressed at the final hearing.

Are all heads of costs recoverable?

46. There is no dispute between the parties that the cost of the temporary accommodation itself falls within section 124(2A)(c)(i) of the 2022 Act. The parties diverge in opinion, however, on the ancillary costs claimed by the Applicant, namely:
- a) the legal costs incurred in relation to the drafting and completion of an agreement between the Applicant and a University for temporary accommodation; and
 - b) overtime payments to the Applicant's staff who were required to work over the weekend to secure accommodation for residents.
47. The Applicant argues that a broader interpretive approach should be taken to section 124. It argues that the phrase 'temporary accommodation costs' include the costs of procuring the accommodation, otherwise there is not full remediation for the Applicant, which defeats the purpose of the Act.
48. Mr Fisher submits that all of the costs claimed by the Applicant fall within subsection (2A)(c) of section 124, but that, in any event, the ancillary costs of securing the accommodation would fall within subsection (2A)(a), although he acknowledges that this is the less apt of the two provisions.
49. Mr Fisher states that it cannot be that the costs of the accommodation itself can be recouped but no other costs as this would leave the Applicant out of pocket which was not the intention of Parliament.
50. Mr Bates, for the Respondent, submits that staff overtime and legal costs cannot properly be characterised as "temporary accommodation costs" within the meaning of section 124(2A)(c), and are not recoverable under that provision.
51. Mr Bates refers to the Upper Tribunal case of Leicester City Council v Morjaria [2023] UKUT 129 (LC) which concerned an appeal against a financial penalty under the Housing Act 2004 and in which the Council sought to add the costs of its investigation to the financial penalty. In that case, the Upper Tribunal refused to add such costs, stating [at paragraph 59]:

“Had it been intended that the cost of investigating offences leading to financial penalties should be recoverable separately a reference to section 249A could have been included in section 49(1) when the rogue landlord regime was introduced in 2016. The fact that it was not suggests that there is no power to collect such a contribution through the penalty charge itself.”

52. The Respondent asserts that Parliament legislates in housing very regularly and, following the UT’s decision in *Morjaria*, the Applicant cannot stretch the words of the 2022 Act to include costs that go beyond what the statute provides for.
53. The Tribunal considers that, whilst a broad interpretation of the 2022 Act is appropriate, that approach cannot dispense with the need to give proper effect to the statutory language chosen by Parliament. The question remains whether the costs claimed fall within the natural and ordinary meaning of “temporary accommodation costs”, read in their statutory context.
54. Section 124(5) provides a definition which is of central importance. It defines “temporary accommodation costs” as including both:
 - 1) “the costs of the accommodation”, and
 - 2) “other costs resulting from the decant, including removal costs, storage costs and reasonable travel costs”.
55. In the Tribunal’s judgment, that definition reflects a structured distinction. The first limb captures the direct cost of providing substitute accommodation. The second limb permits recovery of additional categories of cost, but only where those costs: (a) result from the decant itself; and (b) are of a type analogous to those specified (removal, storage, and travel).
56. Applying ordinary principles of statutory construction, including the principle of *ejusdem generis*, the listed examples are all costs borne by or referable to the displaced occupiers as a consequence of leaving their homes. They are outward facing costs incurred in consequence of relocation. They do not extend naturally to the staffing costs or legal costs of the Applicant in organising that relocation.
57. The Tribunal does not accept the Applicant’s submissions that all costs causally connected to the provision of accommodation fall within the scope of the provision. Section 124(2A)(c) requires a connection with the decant, but section 124(5) provides a limiting definition of the types of costs recoverable. The breadth of the former does not override the specificity of the latter.
58. In respect of the staff overtime costs, these represent internal expenditure incurred by the Applicant in discharging its operational functions. Whilst those costs were incurred in consequence of the events at the Property, they are not properly characterised as costs “of the accommodation” nor as costs analogous to removal, storage or travel. They are, rather, part of the Applicant’s general administrative response to the situation.
59. The Tribunal also considers that to allow recovery of such costs would introduce uncertainty and indeterminacy into the statutory scheme. Internal staffing costs are capable of wide variation depending on how an authority chooses to deploy

its resources. There is nothing in the statutory language to indicate that Parliament intended such costs to be recoverable.

60. In this respect, the Tribunal considers that the Respondent's reliance on *Morjaria* is of assistance by analogy. Whilst the case concerned a different statutory regime, it reflects a consistent approach: where Parliament intends to permit recovery of administrative or enforcement costs, it does so expressly. The absence of such provision here militates against the interpretation advanced by the Applicant.
61. The same analysis applies to the claimed legal costs. The costs incurred in drafting and negotiating arrangements for the provision of accommodation are not, in the Tribunal's judgment, costs of accommodation itself, nor do they fall within the category of costs resulting from the decant as contemplated by section 124(5). They are, again, one step removed from the decant and are more properly characterised as professional or administrative costs incurred in the course of the Applicant's functions.
62. The Tribunal has also considered the Applicant's submissions that, absent any recovery of such costs, it will not achieve "full remediation" of its expenditure. However, that submission cannot override the statutory framework. Section 124 does not provide a general indemnity in respect of all costs arising from relevant defects. It provides a specific mechanism for recovery of defined categories of cost. It is not open to the Tribunal to expand those categories.
63. The Tribunal now turns to the Applicant's submission that, in any event, the ancillary costs are recoverable under section 124(2A)(a). The Tribunal does not accept that submission. Section 124(2A)(a) must be read alongside the definition of "relevant steps" in section 120(4A), which makes clear that such steps are those taken for the purpose of
 - (a) preventing or reducing the likelihood of fire or collapse;
 - (b) reducing the severity of such an incident; or
 - (c) preventing or reducing harm to persons in or about the building.
64. In the Tribunal's judgment, that definition is directed to physical or operational measures taken in respect of the building itself or the risks arising from it. Examples would include remedial works, fire safety measure, interim protections, or investigative steps designed to assess and manage the relevant defect.
65. The provision of temporary accommodation, whilst a response to the consequences of a relevant defect, is not itself a step taken to reduce the likelihood or severity of fire or collapse, nor to mitigate the risk within the building. Rather, it is a measure taken to remove occupants from the consequences of that risk.
66. That distinction is reflected in the structure of section 124(2A) itself. Parliament has made separate and specific provisions in subsection (c) for "temporary accommodation costs".

67. It follows that section 124(2A)(a) cannot be used to expand the scope of recoverable costs by re-characterising accommodation-related or administrative costs as “relevant steps”.

68. In any event, and even if the Tribunal were wrong in that analysis, the ancillary costs claimed by the Applicant – staff overtime and legal costs - would not fall within section 124(2A)(a). Those costs are not incurred in taking steps directed at the relevant defects themselves. They are incurred in organising and implementing the response to the decant of residents.

69. For these reasons, the Tribunal finds that:

- (1) the direct costs of providing temporary accommodation fall within section 124(2A)(c) and section 124(5) of the 2022 Act;
- (2) the staff overtime costs do not fall within the definition of “temporary accommodation costs” in section 124(5) and are not recoverable;
- (3) the legal costs do not fall within that definition and are not recoverable; and
- (4) the staff overtime costs and legal costs cannot be recovered under section 124(2A)(a).

Preliminary Issue 2: If so, whether the fact that those costs have been (or are to be) incurred pursuant to the Applicant’s statutory duties as a local housing authority prevents the Applicant recovering them by means of a RCO

70. As the Tribunal has answered the first preliminary issue in the affirmative, the Tribunal turns to the second preliminary issue, namely whether the fact that the Applicant incurred the relevant costs in the exercise of its statutory duties precludes recovery under section 124 of the 2022 Act.

71. The Applicant states that the initial provision of accommodation, from 25 April 2025 up to and including 22 May 2025, was made pursuant to emergency powers under the Civil Contingencies Act 2004 (“the 2004 Act”), with the Applicant formally accepting that it had a statutory duty to re-house from 23 May 2025 onwards, pursuant to the Housing Act 1996. The Tribunal accepts this assertion which is corroborated by the Applicant’s letter to residents dated 21 May 2025 in which it confirmed that “We have just agreed a minor extension to this provision of accommodation until 12 noon on Friday 23 May 2025. At this point, we consider that our powers under the Civil Contingencies Act will have ended.”

72. The Applicant submits that there is no bar to recovery arising from the fact that the costs were incurred pursuant to statutory powers or duties. It contends that the wording of section 124 does not impose any such limitation, and that the Respondent’s argument seeks to introduce an unwarranted requirement of exclusive causation. That would be a strange outcome given that the s 124(5) defines an interested person (that is, someone who can apply for a RCO) as including a local authority for the area in which the relevant building is situated, and, Mr Fisher asserts, it is difficult to envisage a scenario where a local

authority would seek such an order where its statutory obligations were not engaged.

73. In any event, the Applicant argues that the costs were incurred with the decant, even if they were also incurred in the course of discharging statutory functions. It submits that statutory duties were triggered by the decant and do not displace the causal connection required by section 124.
74. The Applicant further relies on the broader purpose of the 2022 Act, submitting that it is intended to ensure that the financial consequences of building safety defects fall on those connected with the building, rather than on public authorities or leaseholders.
75. Mr Bates, on behalf of the Respondent, submits that the Applicant is not entitled to recover costs incurred in the performance of its statutory functions. It contends that the Applicant provided accommodation pursuant to its duties under the 2004 Act and the Housing Act 1996, both of which contain their own statutory regimes governing the provision and funding of such assistance.
76. The Respondent argues that Parliament has made specific provision as to when and from whom a local authority may recover such costs under those statutory schemes, and that landlords are not amongst the categories of persons liable to be charged. It refers to regulations 4 and 44 in the Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005 which sets out a local authority's power to make a charge which, it submits, is evidence that Parliament has thought about when the right to charge under this Act may arise and submits that section 124 should not be construed so as to cut across those existing statutory frameworks.
77. Mr Bates states that the specific provision in the 2004 Act takes precedence over the more general provisions of the 2022 Act and refers to Bennion on Statutory Interpretation in support of this argument.
78. Mr Bates further submits that the same point can be made in relation to the Housing Act 1996 where Parliament has already decided when and who can be charged for support under the homelessness legislation, and which does not include landlords. Mr Bates submits that it is not for the Tribunal to take the very general powers set out in section 124 of the 2022 Act and cut through the earlier decisions made by Parliament. The Respondent refers to the Case of R (Imam) v London Borough of Croydon [2023] UKSC 45 (paragraph 59) and asserts that the Applicant has no need, let alone the right, to seek these sums under section 124 of the 2022 Act. Such costs are funded by central government, and that there is therefore no justification for permitting recovery under section 124.
79. Finally, the Respondent submits that section 124 is not intended to operate as a general mechanism enabling public authorities to recover the cost of performing statutory functions from third parties. It contends that there is an absence of the necessary causal connection between the decant and the costs, and that the claim falls outside the intended scope of the provision. In terms of the circumstances in which a local authority might seek a RCO (where its statutory duties are not

engaged), Mr Bates asserted that a circumstance might arise where the local authority provided assistance to a person who was not entitled to homelessness assistance, such as a foreign national.

80. In response, Mr Fisher asserted that such circumstances would be extraordinary and Parliament could not conceivably have intended the statutory provision to apply in such limited circumstances. He states that such an interpretation would undermine the purpose of the legislation.
81. Mr Fisher submits that Parliament would have been cognisant of the powers to recharge under the 2004 Act and the Housing Act 1996. He states that a crossover or overlap has not been identified and that the point of section 124 of the 2022 Act is to give local authorities the power, in the limited circumstances of the Act, to charge third parties, specifically landlords and developers, for these costs, and which is not permitted under either the 2004 Act or the Housing Act 1996.
82. Mr Fisher also contends that, even if there is an overlap in charging provisions, whilst the 2004 Act precedes the 2022 Act, it is section 124 of the 2022 Act that is the more specific as it explicitly mentions temporary accommodation costs resulting from relevant defects. He submits that Parliament did this having full knowledge of the 2004 Act.
83. The starting point for the Tribunal is the language of section 124 itself. There is no express limitation excluding costs incurred by public authorities in the exercise of statutory functions. Section 124(2) of the 2022 Act provides that an RCO may be made in respect of “costs incurred... in connection with relevant defects”, and subsection (2A)(c) specifies that such costs include “temporary accommodation costs... in connection with a decant”.
84. The statutory test is therefore whether the costs meet the defined criteria. It does not include, either expressly or by necessary implication, any requirement that the costs must not have been incurred pursuant to statutory duties.
85. In the Tribunal’s judgment, the Respondent’s case requires the implication of a significant limitation into the statutory language. There is no proper case for doing so.
86. Whilst the Tribunal can accept that on a broad, high-level view, there is an overlap - a local authority can re-charge its costs via two separate statutes - this is too high level of a view. The 2022 Act provides a novel mechanism for recovery of costs in specified circumstances: it addresses the question of who should ultimately bear the financial burden of costs arising from relevant defects in a building. The Act is a carefully considered piece of legislation and to the extent that there is any overlap between the Act and the Civil Contingencies Act 2004 and the Housing Act 1996, Parliament must have been aware of it. In the Tribunal’s judgment, Parliament clearly intended to add a string to the bow of local authorities, by widening the class of people/ entities from which it can claim its costs in such circumstances.

87. The Tribunal also rejects the Respondent's reliance on a purported lack of causation. Section 124(2A)(c) requires only that the relevant costs be incurred "in connection with a decant". That language is deliberately broad. It does not require that the decant be the sole, dominant, or proximate cause of the costs.
88. The Tribunal considers that, in most cases, including the present, the provision of temporary accommodation will be both: (a) a response to a decant; and (b) the discharge of statutory duties triggered by that decant.
89. Those two characterisations are not mutually exclusive. The statutory duties arise because of the decant. The connection between the costs and the decant is not displaced by the fact that the authority is under a legal obligation to respond to the situation created.
90. The Tribunal therefore considers that the relevant connection required by section 124 is satisfied, notwithstanding that the Applicant was acting pursuant to its statutory duties.
91. Finally, it is necessary to consider the purpose of the 2022 Act. Section 124 is part of a wider legislative scheme directed at ensuring that the costs associated with building safety defects are borne, so far as it is just and equitable, by those connected with the building, rather than by leaseholders or the public purse. If the Respondent's arguments were correct, it would follow that, in circumstances where a local authority intervenes to protect residents and incurs costs as a result, those costs would only be recoverable as against the residents, even where they arise directly from relevant defects in the building. That would run counter to the evident policy of the legislation.
92. The Tribunal does not consider that Parliament could have intended such an outcome, particularly given the broad language used in section 124 and the absence of any express exclusion.
93. For these reasons, the Tribunal concludes that:
- (1) The fact that the Applicant incurred, or will incur, the relevant costs pursuant to its statutory duties does not preclude the recovery under section 124 of the 2022 Act; and
 - (2) Section 124 operates as a distinct mechanism for allocating the financial consequences of relevant defects, and it is not displaced by the statutory regimes governing the provision of accommodation.

Judge S. Westby
Date: 15 June 2026



Neutral Citation Number: [2026] EWHC 1552 (TCC)

Case No: HT-2024-000427

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 22 June 2026

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

Between :

MULALLEY & CO. LIMITED

Claimant

- and -

(1) STO LIMITED
(2) STO SE & CO. KGaA

Defendants

James Frampton (instructed by **Charles Russell Speechlys LLP**) for the **Claimant**
There being no appearance for or by the Defendants

Hearing date: 1 May 2026

Approved Judgment

This judgment was handed down remotely at 2pm on 22 June 2026
by circulation to the parties by email and by release to the National Archives.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. This judgment concerns the proper quantification of a contractor's contribution claim against the supplier of an unsafe external cladding system in the wake of the tragic fire at Grenfell Tower in June 2017.

BACKGROUND

2. By a contract dated 30 December 2006, Chelmer Housing Partnership Ltd engaged Mulalley & Company Ltd to design and build various refurbishment works at the site of its residential tower block known as Parkside Court in Chelmsford, Essex. In particular, Mulalley was contracted to demolish an existing structure and build a new podium comprising 27 new flats and to refurbish the 54-flat tower block. The works included the design and installation of external cladding.
3. Mulalley subcontracted the cladding works specifying the use of the StoTherm Classic System. Following the Grenfell fire, Chelmer identified that the cladding system was defective. On 22 December 2022, Mulalley entered into a settlement agreement by which it agreed to remove and replace the defective cladding and pay certain sums to Chelmer. By these proceedings, Mulalley seeks to recover the cost of the remedial work and the sums paid to Chelmer. Its action is brought against Sto Limited ["Sto"], the British company that supplied the cladding system, for a contribution arising from its own liability pursuant to s.149 of the Building Safety Act 2022. On 17 January 2025, Sto was placed into administration and Mulalley's claim against it is subject to the statutory moratorium. A claim is therefore also pursued against Sto's German parent company, Sto SE & Co. KGaA ["Sto Germany"], for a building liability order pursuant to s.130 of the Act.
4. Sto Germany has failed to defend this claim and, on 8 December 2025, Waksman J entered judgment in default against the company for damages to be assessed.
5. In preparation for this hearing, Mulalley has served witness statements from Stuart Watson and Stephen Hawkrige, its Commercial Director and Associate Commercial Director respectively, and Steven Carey, its solicitor in respect of costs. In addition, Mulalley relies on an expert report from Tom Taylor, a chartered quantity surveyor. Sto Germany has not filed any evidence and has again failed to take any part in the proceedings.

THE PROPER APPROACH TO THE ASSESSMENT OF DAMAGES

6. In assessing damages in this case, I keep the following principles in mind:
 - 6.1 Mulalley obtains its right to damages from the default judgment and the only live issue is the determination of the amount of the damages that should be awarded: Strachan v. Gleaner Co. Ltd [2005] UKPC 33, [2005] 1 W.L.R. 3204, per Lord Millett, at [16].

- 6.2 Notwithstanding Sto Germany's failure to engage, the assessment is not made by default and Mulalley must prove its loss or damage by evidence: Strachan, at [16].
 - 6.3 It is not open to a defendant on an assessment of damages to take any point that is inconsistent with the liability alleged in the Particulars of Claim: Lunnun v. Singh [1999] CPLR 587, per Clarke LJ; Symes v. St George's Healthcare NHS Trust [2014] EWHC 2505 (QB), Simon Picken QC, at [38].
 - 6.4 The Particulars of Claim are, in effect, "a proxy for the judgment, setting out the basis of liability": New Century Media Ltd v. Makhlay [2013] EWHC 3556 (QB), per Carr J, at [30].
7. It follows that I must assess damages on the basis that Sto Germany is liable to compensate Mulalley for the cost of carrying out the remedial works and for the settlement sum paid to Chelmer insofar as they were caused by the pleaded defects.
 8. The pleaded claim is put at £2,403,846. On this assessment, the live issues are:
 - 8.1 what costs were in fact incurred;
 - 8.2 whether those costs were incurred in relation to the pleaded defects;
 - 8.3 whether the costs incurred were reasonable; and
 - 8.4 what is the just and equitable contribution to such loss and damage that Sto Germany should be ordered to pay.

THE COSTS INCURRED

9. The costs incurred by Mulalley were proved by Mr Hawkrige and then independently analysed by Mr Taylor. In considering the pleaded claim for total gross costs incurred of £3,733,837.96, Mr Taylor reviewed a representative sample of the costs claimed. Over 62% of the total claim concerned Mulalley's subcontractor costs. Mr Taylor reviewed all of the documents in respect of the claimed costs of the six subcontractors who, between them, accounted for nearly 97% of the subcontractor costs. The largest single subcontractor cost was inevitably the cladding subcontractor, PS Fixing Ltd. Mr Taylor was able to confirm the sum claimed in respect of PS but properly deducted the main contractor's discount.
10. Mr Taylor assessed the total costs incurred at £3,431,633.53; a reduction of a little over £302,000 that arose from his reductions in the sums allowed for preliminaries, subcontractor costs, and consultancy and legal fees.
11. I accept this evidence and find that the total costs incurred were £3,431,633.53.

CAUSATION

12. The remedial works extended, however, beyond the work necessary to remedy the defective render system. Mr Taylor therefore considered the costs further in order to strip out those costs that were not caused by Sto's breach of duty. He assessed that the Sto render accounted for 85.83% of the works required to the external walls of the tower and 69.03% of the overall development. Applying these percentages, he calculated that the total remedial costs incurred by reason of the defective Sto system were £2,086,826.65.
13. Mr Frampton very properly invited the court to reduce this sum further to £2,025,499.62 to strip out Mulalley's legal costs incurred in achieving the settlement agreement. Again, I accept Mr Taylor's evidence as further moderated by Mr Frampton's concession.

REASONABLENESS

14. In Martlet v. Mulalley [2022] EWHC 1813 (TCC), His Honour Judge Davies rightly observed, at [422], that the courts are "generally reluctant to criticise, with the benefit of hindsight, the reasonableness of the claimant's expenditure on remedial works." I therefore take the actual costs incurred as my starting point but then also consider the available evidence, and in particular Mr Taylor's expert evidence, as to the reasonableness of such costs.
15. Mr Taylor reported that he could find no evidence that the costs were improperly or unreasonably incurred and that he was not aware of any alternative technical solutions that could have been adopted at less cost. He made the telling point that Mulalley was a contractor rectifying defects pursuant to a settlement agreement. The company plainly had no interest in gold plating the works and indeed had a direct financial interest in ensuring that the works were conducted efficiently and at reasonable cost. Further, he considered that the preliminaries, scaffolding and subcontractor costs were each within the range that he would have expected.
16. Again, I accept Mulalley's evidence and I am satisfied that total costs totalling £2,025,499.62 have been reasonably incurred in carrying out the remedial works caused by the defective cladding works.

CLAIM FOR CONTRIBUTION

17. The claim against Sto is of course for a contribution pursuant to the Civil Liability (Contribution) Act 1978. Section 2(1) of the Act provides that the amount of the recoverable contribution shall be such sum as may be found by the court to be "just and equitable having regard to the extent of that person's responsibility for the damage in question". The assessment requires me to consider both the seriousness of the respective parties' faults and their causative relevance: Downs v. Chappell [1997] 1 W.L.R. 426 at p.445, per Hobhouse LJ.

18. This case involves a contribution claim made by a contractor against the manufacturer and supplier of a defective cladding system. In assessing the contribution, Mr Frampton argues that the court should adopt a similar approach to that between a contractor and an architect on the basis that Sto, like an architect, was responsible for any design defect. He submits that the just and equitable contribution in this case is 90%.
19. I accept Mr Frampton's submission that the court might typically award a contribution against an architect in respect of a design breach of between 67% and 80%. Here, I accept that the liability findings by virtue of the default judgment necessarily include that:
 - 19.1 Sto would have produced or provided a version of its standard specification for the StoTherm Classic System for this project although that document has been lost;
 - 19.2 the specification in this case was for the StoTherm Classic K;
 - 19.3 Sto failed to supply a cladding product that complied with the functional requirement B4(1) and regulation 7 of the Building Regulations;
 - 19.4 Sto made misleading statements about the StoTherm Classic system;
 - 19.5 the system was inherently defective; and
 - 19.6 the misleading statements and the inherently defective nature of the StoTherm Classic system were the causes of the apartments being unfit for habitation.
20. In my judgment, the principal cause of the remedial works was plainly the fact that Sto marketed and supplied an inherently defective product. In its letter of claim, Chelmer also alleged workmanship issues in respect of the fire barriers although I accept that the primary issue with the barriers was that Sto's standard detail included a layer of combustible insulation over the face of the fire barriers. That was the very fault which Judge Davies in the Martlet case, at [188], observed was "fundamentally deficient" and which "would have allowed any fire to bypass the fire barrier in direct contradiction of the design philosophy behind the specification of fire barriers". Accordingly, the fire barriers had to be replaced in any event because of such infill panel defects.
21. Taking matters in the round, I conclude that the just and equitable contribution payable by Sto, and therefore Sto Germany pursuant to the building liability order in this case, is 87.5%.

OUTCOME

22. I therefore give judgment for Mulalley against Sto Germany in the sum of £1,772,312.17, being 87.5% of £2,025,499.62.
23. I award Mulalley interest at 1% over base, being a reasonable commercial rate, from 1 October 2023 (being the midpoint of the major part of the remedial works) until 8 December 2025 when judgment was entered in this case. Sto Germany was then ordered to pay an interim payment of £1,200,000 but failed to do so. Interest has

therefore accrued on the sum of £1,200,000 at the Judgments Act rate of 8% since 8 December 2025. On the balance of the judgment now entered, I award further interest at 1% over base from 8 December 2025 until the date of this judgment.

24. Mulalley is plainly entitled to its costs but I reject Mr Frampton's argument that costs should be assessed on the indemnity basis because of Sto Germany's failure to engage in these proceedings and to pay the interim payment ordered by Waksman J. There is, in my judgment, nothing about Sto Germany's failure to engage with this case that takes the case out of the norm such that indemnity costs should be awarded. Costs will therefore be assessed by detailed assessment on the standard basis if not agreed. Meanwhile, I award the sum of £175,000 on account pursuant to r.44.2(8) of the Civil Procedure Rules 1998.



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

Case Reference	:	HAV/00MW/LSC/2025/0774
Property	:	Princess Court, 41 Castle Street, East Cowes, Isle of Wight PO32 6GG
Applicants	:	The leaseholders as in the attached schedule
Representative	:	Alan Goddard
Respondent 1	:	Captiva Homes Limited
Representative	:	James Pink
Respondent 2	:	ERMC Limited
Representative	:	Glen McGuinness
Type of Application	:	Determination of liability to pay and reasonableness of service charges (Section 27A Landlord and Tenant Act 1985),
Tribunal	:	Judge Tessa Hingston Jane Herrington (Lay member)
Date Decision finalised	:	6th July 2026

DECISION OF THE TRIBUNAL

The Tribunal determines that the fire door remediation costs of £18,705.83 arose from a ‘relevant defect’ in accordance with Section 120 and Schedule 8 of the Building Safety Act 2022, and therefore no service charges are payable by the Applicants in respect of those works.

In the light of this decision, no determination is required as to reasonableness of service charges in 2025.

Orders are made under Section 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 for limitation of the landlord’s costs and administration charges.

No Order for costs is made under Rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

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BACKGROUND

1. The property in question is a purpose-built 5-storey building containing 39 residential apartments under a sheltered scheme for residents over 55 years of age. The units are either one-bedroom or two-bedroom apartments held on long leases.
2. The building was created by the First Respondent company, developers Captiva Homes Limited, which remains the freeholder to date. The building contractors were DN Associates and the first leaseholders moved in in 2018.
3. On the 1st of January 2024 the Second Respondents ERM Limited were appointed as managers of the building.
4. On the 25th of January 2024 a ‘Project Report’ was produced by Wight Fire Doors Limited (Exhibit MH4, Page 82-120 of the bundle), as to remedial measures required to make the building compliant with fire regulations.
5. In the light of the report’s recommendations, ERM Limited conducted the correct statutory consultation procedure with a competitive tender exercise under Section 20 of the Landlord and Tenant Act 1985. In due course A.E.W. Carpentry and Building Limited (A.E.W.) were engaged to carry out the work.

6. On the 7th of April 2025 a new ‘Contractor’s Report - Technical findings from the site remediation at Princess Court’ was submitted by A.E.W. (This report is found at Pages 38 – 79 of the bundle.) In the course of the project, it had been discovered that there were more extensive issues with the fire doors (and their frames and installation) than originally thought, and further remedial works were required.
7. ERMIC instructed the contractors to go ahead with the additional work, but there was no further consultation with leaseholders nor any application for dispensation from the statutory requirements.
8. On the 19th of July 2025 the RTM company formally took on responsibility for financial matters and administration at Princess Court.
9. The original cost of the works to fire doors, as per the quotation of £10,697.30, was paid by direct service charge contributions. The additional £8,008.53 was paid by the RTM Company out of service charge funds.
10. The Applicants made an application for determination of liability to pay and reasonableness of these particular service charges for the year 2025.
11. The application was received by the Tribunal on 16 September 2025. It refers to an ‘£8,008.53 overspend on communal fire door works’, and argues that these costs were incurred without proper Section 20 consultation.
12. The Applicants further seek orders pursuant to Section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.
13. Directions were issued on 18 February 2026, and the parties then attended for a case management (CMH) and dispute resolution hearing on 30 March 2026.
14. At the CMH it was confirmed that the Applicant should be amended from ‘PC (PO32) RTM Company Limited’ to the leaseholders as listed. Mr Goddard was confirmed as the Applicants’ representative.
15. In their Position Statement for the CMH the Applicants raised a question concerning the Building Safety Act 2022 (BSA 2022), and they sought a determination as to whether the costs incurred arose because of ‘**relevant defects**’ under the BSA 2022, thereby rendering all demands in regard to such irrecoverable.
16. Further Directions were issued, and the case was listed for hearing on the 9th of June 2026.
17. A bundle of relevant documents, (including, statements, submissions, correspondence, reports, photographs and other exhibits) numbering 714 pages was produced by the Applicants and sent electronically to the Respondents and to the Tribunal.

[Hereafter all page references are as per the hearing bundle unless stated otherwise.]

RELEVANT LAW

18. See Appendix.

THE LEASES – Relevant provisions

19. A sample Lease (for Apartment 34) was contained in the hearing bundle.

20. The Landlord covenants to provide the services as set out in Clause 6 'Service covenants' (Page 270). Among other things, it is obliged to : -
'clean, repair, decorate and maintain in good and substantial repair and condition and where necessary renew, rebuild, reinstate or replace the 'Retained parts' (as defined in the Lease at Page 261) the 'Structural parts' (Page 262) and the 'Communal areas' (Page 257).

21. At Clause 7 it is provided that: -

'The Landlord may at its reasonable discretion do any of the following acts or things in relation to Princess Court...' including: -

'To employ at the Landlord's discretion the Landlord's Agent to manage Princess Court and discharge all proper fees salaries, charges and expenses payable to such agents and/or such other persons (Including the Landlord) who may be managing Princess Court including the cost of computing, auditing and collecting the service charges in respect of Princess Court'.

22. Under Clause 8 (Page 273) the 'Owner' (leaseholder) covenants to pay service charges to the landlord, in accordance with the provisions of that clause. Payments are made in advance in two equal instalments on 1st January and 1st July each year.

23. Under Schedule 1 Part 1 of the Lease, at Page 279, it is stated that 'The Property' includes: -

*'The internal doors, **including the entrance door(s) to the Property** and their frames but not any external door leading on to the courtyard (if any) and its door frame.'*

HEARING

24. The Hearing took place at Havant Justice Centre on the 9th of June 2026. Mr. Goddard appeared as representative of the Applicants, assisted by Mr. Mark Hopson. Mr. Pink appeared as Director of the company on behalf of the First Respondent Captiva, and Mr. McGuinness (property manager and asset surveyor from ERM Limited) appeared on behalf of the Second Respondent.

25. Mr. Robert Peace attended as a professional witness for the Applicants.

26. Ms. Stephanie Minshull, Ms. Sarah Chapman and Mrs. G Goddard attended as observers.

PRELIMINARY ISSUES

27. The Applicants had raised the point that the 1st Respondent's statement was filed some hours after the deadline on the evening of 6th of May 2026, but at the hearing they conceded that the delay was not significant or detrimental to their case. Nevertheless, they asked the Tribunal to note the Respondents' attitude to the rules and their lack of compliance with the Directions, both as to timing and as to their initial failure to include a 'Statement of Truth' in witness evidence.

28. The Applicants had also objected to the admission of the Respondent's witness statement from Mr. Dean Orchard, at Page 645, on the grounds that he was apparently being introduced as an 'expert witness' without the permission of the Tribunal.

29. In return, the Respondents submitted that they had not been given an opportunity to agree the contents of the hearing bundle, and in particular they objected to the inclusion of 'Without prejudice' correspondence.

30. The Tribunal duly noted the comments from both sides, but were satisfied that none of these matters gave rise to any prejudice to either party, and the case could proceed effectively in spite of them.

31. In respect of the 'Without prejudice' correspondence the Tribunal ruled that all such items in the bundle would be disregarded unless they became relevant to the question of Rule 13 costs.

32. In respect of the introduction of expert witness evidence without permission, it was noted that both the Applicants and Respondents had introduced a witness (Mr. Peace and Mr. Orchard respectively) as to the structural problems with the fire doors, but neither of them had sought permission from the Tribunal.

33. Each party had had an equal opportunity to consider the 'expert' evidence well in advance of the hearing, and both parties had the option to call their witness if they wished.

34. In the case of the Applicant's witness Mr. Peace, the First Respondent Mr. Pink was able to cross-examine him as to his opinion and conclusions. In the case of Mr. Orchard, he was not called to give oral evidence and accordingly his statement was not subject to further challenge or examination.

35. The Tribunal ruled that it was in accordance with the Tribunal's overriding objective, to deal with cases justly and fairly, for the hearing to proceed and for the evidence of both 'experts' to be taken into account.

APPLICANTS' CASE

36. The Applicants' case was set out in their original application forms, in their 'Covering letter' of 06.09.25, in their Statement of Case' (undated, at Page 204), in the 'Amended Position Statement' of 11.03.26 (Page 20), in their 'Introductory Narrative' (dated 6th April - Page 5), in the 'Reply' to the Respondent's statements (dated 12th May - Pages 6 - 16), in their 'Supplemental Statement' as to conduct, Rule 13 Costs etc. (undated, at Page 17) and in their 35-page 'Skeleton Argument' submitted to the Tribunal on the 3rd of June 2026.

37. There were also witness statements from Mr. Goddard (Page 123) and professional witness Mr. Peace (Page 80). Oral submissions were made during the hearing and Mr. Peace gave evidence to the Tribunal in person.

38. Essentially the Applicant's case was based upon a number of separate arguments.

A. Building Safety Act 2022

39. Firstly, the Applicants submitted that the works to doors in the communal areas of Princess Court (including 'riser' doors, store-room doors and laundry doors as well as main fire doors) carried out during 2025 fell into the category of remediation works for 'relevant defects', as defined in Section 120 of the Building Safety Act 2022.

40. It was submitted that the works to these doors were necessitated by flaws in the construction process which created a building safety risk, i.e. a risk to the safety of people in or about the building arising from the spread of fire.

41. Accordingly, if there had been a 'relevant defect' in the construction process, and if the requirements under the Building Safety Act were satisfied (as per Schedule 8), then the following provision was said to apply: -

'No service charge is payable under the lease in respect of a relevant measure relating to a relevant defect if a relevant landlord—is responsible for the relevant defect...'

42. The Applicants argued that the cost of the remediation works (£18,705.83 in total) should not have been paid by the leaseholders in service charges, because of the pre-existing 'relevant defect'.

43. In support of this contention the Applicants referred to a number of documents, notably the exhibit MH4 'Project Report' from Wight Fire Doors of 25th January 2024, and Exhibit MH2, the A.E.W. 'Contractor's Report' of 7th April 2025, which outlined remedial works to 44 internal communal doors in total.

44. The Applicant's witness Mr. Robert Peace also gave evidence that, although he had been unable to inspect personally the underlying structures of the fire doors because the works were complete at the time of his involvement, he was able to provide a technical analysis of the A.E.W. report from an experienced surveyor's point of view.

45. In his written statement Mr. Peace had noted that this report clearly states that the majority of the doors and frames in the common parts of the building required similar remedial works for them to comply with the BS (British Standard). He stated as follows: -

'The most common issue (was) the door sets having excessive shut line gaps between the door and frame, as well as thresholds. When works commenced to alter the frames, the frames were found to be poorly packed, with 45mm of foam fill in some instances. It is essential that Fire door sets remain dimensionally stable to provide the smoke protection to occupants, but the report states 'excessive gaps to all edges' which implies poor installation.

Prior to the remedial works carried out by the contractor in 2025, the doors clearly were not in full working order from a fire safety point of view.'

46. In conclusion, Mr. Peace stated:

'It is my professional opinion that the units were poorly fitted when originally installed, with evidence of systemic faults. The number of doors requiring similar remediation to become compliant cannot be settlement or 'wear and tear', as the excessive gaps were to all edges. The frames being poorly fitted and inadequate door closers added to the scope of the remedial work.'

'The integrity of fire doors prior to remediation is a clear historical safety issue; these are "Relevant Defects" under the BSA 2022. On inspection, there appears no evidence of building settlement or movement apart from flexing to the floors.'

47. The Tribunal was informed that Mr. Peace had an OND in building studies and an HND and Bachelor's degree in building surveying, with over 27 years experience of building construction and fire prevention both in London and elsewhere.

48. In his oral evidence to the Tribunal Mr. Peace confirmed that timber-framed buildings are often subject to some 'shrinkage' and/or 'settlement', but he had seen no site-specific evidence of the same (such as cracking of walls) at Princess Court. He also commented that 'shrinkage' would have led to timbers becoming shorter over time, whereas in this case many of the 'heads' of the doors were found to be too long and had to be shortened.

49. Mr. Peace accepted that fire doors would usually require some routine maintenance and minor repairs over a period of years, but he stated that having to open up the architraves and frames and repack them with different materials was another thing altogether.

50. In terms of the specific kinds of remedial works which were required to make the building compliant with Fire Safety Regulations, Mr. Peace commented as follows:

- **Packing and excess foaming**

i) Mr. Peace explained that in many (10, as confirmed by Mr. Goddard) instances the contractors found that incorrect materials had been used, or inadequate packing installed, between the outer frames of the doors and the structure of the building. In some cases there had been 'over-foaming' to fill gaps wider than the correct 20mm.

ii) In 10 instances the 'packing' had crumbled or deteriorated, and examples of the contractor's descriptions of these inherent problems were as noted below:

-

*Insufficient fixings and packing to all sides of lining
Plasterboard behind lining incorrectly installed and crumbling
Excessive foaming of gaps around lining with gaps showing through
Minimal packing and fixings to both sides of lining and
Packing of lining to hinge side crumbling under door weight, causing door to drop unevenly which caused the doors to drop and thus affected the gaps on all sides.*

Corrective works were required, as below: -

*Pack and realign door lining to correct gaps', and
Re fit door lining to correct widths and plumb'.*

iii) Mr. Peace stressed the importance of effective compartmentation in preventing the spread of fire, and explained that these faults in the packing around the door frames – which were not visible until intrusive investigations began and which therefore had not been picked up in previous Fire Risk Assessments and regular fire door checks – could lead to fire spreading through the gaps. As a result there were compartmentation issues throughout the building, which was particularly relevant in the light of the 'Stay put' policy requiring residents not to leave their apartments in the event of fire.

iv) In terms of materials used as packing, Mr. Peace told the Tribunal that certain types of foam were approved, and plaster-board or Rockall filling could be adequate if broken down and packed correctly, then sealed with mastic and intumescent strips. The packing at Princess Court was not adequate or appropriate in many cases, and he expressed concern that there was no detailed evidence before the Tribunal of certification of the original doors as fitted, nor any independent documentation certifying the remedial works completed in 2025. The ERM assessment of July 2025 was a 'Type 1' visual inspection only, and the works to the top floor were still ongoing at the time of inspection.

v) Mr. Peace stated that the best way of confirming that the fire door construction and fitting was compliant would be for the contractors to have taken photographs showing the packing before frames and architraves were affixed. This had not been done, to his knowledge.

- **Head width of doors**

i) Mr Goddard confirmed that 15 of the doors had to have the 'head width' at the top of the frame reduced in order to make them fit better, with smaller gaps around them.

ii) Mr. Peace commented that the heads must have been too wide in the first instance, when installed. In the worst case the total gap was 90mm, with a 45mm gap on each side. Alterations had to be made to ensure compliance with Regulation 8214 of the British Standard for fire doors.

- **Incorrect signage and door closers**

Both reports referred to a number of doors in the building which had incorrect or missing signage or inadequate door closers. Mr Peace did not make any comment on these additional issues.

51. In conclusion, Mr. Peace expressed the view that the nature and extent of the faults at Princess Court were more consistent with inherent defects than with normal changes and routine maintenance.

52. When Mr. Peace was cross-examined he agreed that fire safety certification had changed considerably in recent years, but his expert opinion was that these structural defects (which could only be revealed by intrusive works) were more serious than the 'normal' adjustments which would be required as a result of reasonable wear and tear.

53. Causation -

There was no evidence to suggest that any third party had, or could have, intervened and changed the packing and the materials around the doors since the original construction, therefore the Applicants submitted that these faults must be defects which arose '*as a result of something done (or not done), and materials used (or not used)*' in the original building process. Mr. Peace stated that they should be categorised as 'relevant defects' under Section 120 of the BSA 2022.

54. Alleged Admissions/wording used by Respondents -

In addition, the Applicants submitted that the Second Respondent managers (ERMC) had effectively admitted that there were 'relevant' defects in the fire door system at Princess Court because, in their Section 20 Notice at Page 215 it was said that: -

'We consider it necessary to carry out the works because:-

- *Fire doors that do not meet the specified design requirements may fail to perform as intended, potentially allowing smoke and fire to spread through rooms and compartments. This compromises the effectiveness of fire-fighting efforts and evacuation procedures during a fire event.'*

Mr. Goddard stated that this was an admission that there were concerns about compartmentation.

55. It was further suggested that the First Respondent Mr. Pink, of Captiva, had admitted (in his Position Statement) that the door structures were non-compliant with fire regulations as follows: -

- *‘During the course of the works additional matters requiring compliance works were identified once intrusive works commenced’* (Page 490) and
- *‘...the works were necessary to ensure compliance with fire safety requirements...’* (Page 492).

56. At Page 552, Mr. Pink had endorsed ERMC’s evidence that: -

- *concealed issues were identified following removal of door sets, architraves, and linings;*
- *further non-compliant conditions became apparent during the progression of the works; and*
- *additional compliance works were therefore required which had not been reasonably foreseeable during the original visual inspection process.*

57. The Applicants commented that: *‘A non-compliant condition hidden inside a sealed structural cavity at the point of construction is an original build defect under Section 120’* (Skeleton Argument Paragraph 154).

58. They go on to state that:

‘If a timber frame is designed and constructed such that normal, predictable structural settling causes building-wide fire doors to become non-compliant and create an urgent risk to safety, then that could be a ‘relevant defect’ in itself.’

59. In conclusion the Applicants argue that:

‘If it were true that standard, predictable environmental settling could destroy a building’s fundamental fire compartmentation system within a few years, this would establish that the block was designed and constructed without an adequate safety margin to remain legally compliant. Such a failure constitutes a classic original defect in design and workmanship under Section 120 of the BSA 2022.’
The Tribunal was urged to find that there was indeed a ‘relevant defect’ in the building.

60. Landlord’s certificate -

The Applicants raised an issue about the landlord’s failure to provide a ‘Landlord’s Certificate’ (under Paragraph 14 of Schedule 8 to the BSA 2022) upon request. They argued that the statutory presumption should then apply, to the effect that the landlord must meet the ‘Contribution Condition’ in Paragraph 3 of the Schedule.

B. Reasonableness under the Landlord & Tenant Act 1985

61. In the alternative, if the Tribunal found that there was no ‘relevant defect’ in the building, the Applicants sought a determination that the fire door costs were not ‘reasonably incurred’ under Section 19 of the Landlord and Tenant Act 1985.

62. Although there was no dispute that the contractors with the most competitive quote had been employed to carry out the works, and although it was agreed that the work had apparently been done to a reasonable standard, the Applicants argued that the total cost of the works was not ‘reasonably incurred’ because of the failures in communication and consultation.

C. Lack of consultation under the Landlord & Tenant Act 1985/Dispensation

63. The Applicants submitted that they were not consulted at all, as required by Section 20 of the 1985 Act, in respect of the extra, unexpected works to the doors which increased the cost by £8,008.53. The need for these additional works only became apparent once the door frames were opened up and structural investigation revealed underlying issues.

64. It was argued by the Applicants that the ‘second tranche’ of works were separate from the original contract, and there should have been a fresh consultation before proceeding. They submitted that they had suffered prejudice (in accordance with the ruling in the case of *Daejan Investments Ltd v Benson [2013] UKSC 14*) as a result of the failure to consult them, because if consulted properly they would have had the opportunity to:

- source competitive, alternative market quotes, potentially securing a significantly lower rate per door than the cost billed by the on-site contractor, and
- see if BSA 2022 applied to the works.

65. It was said that Leaseholders were denied the chance to:

- comment on the true scope and cost of the works.
- challenge the expanded specification and associated costs.
- make an assessment of whether or not it was in their best interests to support ERMIC in a submission for a dispensation or to ask for a new section 20 proposal to be prepared.

66. In the light of the alleged failure to follow the proper consultation process, and in the absence of any timely application from the Respondents for dispensation (under Section 20ZA), the Applicants had argued in their Position statement that their contribution should be limited to £250 per apartment under the statutory cap. They opposed the late application for retrospective dispensation.

D. Management Fee

67. The Applicants also challenged the £1,056 management or agency fee paid to ERMIC Ltd in July 2025 for their conduct of the Section 20 process. The Applicants argued that this was a ‘hidden’ transaction, carried out without consultation or communication with leaseholders, and that it constituted a ‘financial breach of trust.’

68. As the Applicants contended that the Section 20 process was incorrect and/or incomplete, and they considered that there had been ‘systemic mismanagement’ (for example in the separation of costs of works to individual apartment doors from the costs of works to communal doors) it was submitted that this cost was not ‘reasonably incurred.’

[Note: Apartment doors: the Applicants also advanced an argument in respect of liability to pay and invoicing for similar remedial works to individual apartment doors. See below under ‘Findings and Determination’.]

E. Limitation of Costs (Section 20C and Para 5A) and Rule 13 costs

69. The Applicants asked the Tribunal to make an order to the effect that the costs of the proceedings and administration charges could not be recovered from them by way of service charges. It was submitted that it would be punitive to the leaseholders if they were required to pay costs.

70. The Applicants also sought an order for wasted costs under Rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013, on the grounds that the Respondents had acted unreasonably and ‘vexatiously’ in failing to respond to requests for documents and/or information, in failing to reply to offers of settlement, in sending cost warning letters to the Applicants, and in not complying with the Tribunal’s directions.

71. The Applicants submitted that the Tribunal should take account of the power imbalance between the Respondent, a commercial developer, and the Applicants, a volunteer-led company.

FIRST RESPONDENT’S CASE (CAPTIVA.)

72. The First Respondent’s case was set out in their Position Statement dated 11th March 2026 (Page 490), in the Statement of Mr. Pink (Director of Captiva) dated 6th May 2026 (Page 537), and in the ‘Joint Skeleton Argument’ of 3rd June 2026. These documents were supported by relevant exhibits and attachments.

73. Mr. Pink also gave oral evidence to the Tribunal at the hearing and made submissions in support of the First Respondent’s case, dealing with the Applicant’s arguments in the same order as above. He told the Tribunal that he did not have any building or surveying qualifications, but he started Captiva 25 years ago and they are now the largest residential developer on the Isle of Wight, having dealt with over 55 sites.

A. Building Safety Act 2022.

74. At Page 537 the First Respondent states that: -

‘...the works relied upon by the Applicants...’ (as evidence of a ‘relevant defect’) ‘...are properly characterised as inspection-led compliance, maintenance, adjustment, and fire safety management works undertaken over time in response

to evolving inspections, assessments, operational considerations, and regulatory review’ rather than being proof of underlying flaws in the methods and materials used in the original construction.

75. It was submitted that no systemic fire door or compartmentation defect was identified at completion of the building, nor were there any significant concerns at earlier Fire Risk Assessments prior to 2025.

76. The Position Statement argues that the burden rests upon the Applicants to establish, on the balance of probabilities, that: -

- *a defect existed;*
- *the defect arose as a result of the design, construction, or materials used in the construction or refurbishment of the Building (rather than subsequent movement, maintenance, operational configuration, evolving inspection standards, or compliance review); and*
- *that it satisfies the statutory definition of a "relevant defect" under section 120 BSA.*

77. It was argued that the Applicants have failed to establish those elements.

78. On behalf of the First Respondent it was pointed out that the building had been the subject of regular Fire Risk Assessments and Fire Safety Reviews between its first occupation in 2018 and the works in 2025.

79. Mr. Pink told the Tribunal that there was full Building Control oversight and frequent staged inspections during the construction process, as well as a Premier Guarantee warranty review and certification upon completion as exhibited.

80. Whilst the Respondent did not suggest that certification is determinative of the absence of defects, it was said that the existence of such independent oversight, coupled with the absence of identified systemic defects within regular FRA documentation, is inconsistent with the existence of an obvious or widespread construction defect.

81. Mr. Pink referred to the FRA of July 2020 (Page 575), which identified only limited and isolated fire door issues (with the ‘hold-open’ closers to the laundry doors, the refuse/bin store doors, and one lobby door which did not fully close to completion) rather than widespread construction defects. No excessive gapping was noted at that time.

82. However, the Respondent conceded that the 2020 assessment *did* identify a fire-stopping issue in relation to risers and management stores. At Question 45 (Page 590), under the heading: ‘Inspection – Compartmentation’ it is recorded that: -

‘in all risers and management stores...PU expanding foam has been used which there is no certification for.’

83. The recommendation arising from the assessment was: -

"Arrange for a 3rd party accredited passive fire protection company to attend site and resolve all issues by fire stopping correctly to a minimum of 60 minutes."

84. Mr. Pink stated that the Respondent duly arranged for appropriate fire-stopping works to be undertaken at the Respondent's expense as part of the Building's ongoing fire safety compliance and management.

85. He submitted that this demonstrated a responsible and proactive response to matters raised through the FRA process.

86. Whilst it was accepted that the fire door issues discovered in 2025 did amount to a fire safety risk, it was argued that such a risk, as identified through later inspection, does not, without more, establish:

- that the condition existed at the point of construction;
- that it arose from defective workmanship or design; or
- that it constitutes a "relevant defect" under section 120 BSA 2022.

87. The Respondent further relied upon the contemporaneous management records and action log maintained by Freemont Property Managers (as exhibited at CAP2), the previous managing agent of the Building. It was submitted these records demonstrated that the Building was subject to an ongoing programme of inspection, review, monitoring, and maintenance, and that the fire doors were routinely checked.

88. Causation -

Mr. Pink referred the Tribunal to the 'Expert Witness Statement' of Mr. Dean Orchard, Managing Director of Sydenhams Timber Engineering (at Page 645). Mr. Orchard does not state that he has any qualifications as a surveyor, but he confirms that he has over 35 years in the timber frame construction industry and that his company was responsible for the design and manufacture of the timber frame structure at Princess Court.

89. Mr. Orchard states that in a multi-storey timber frame building, vertical shrinkage is cumulative, and each storey contributes incremental movement through:

- shrinkage of timber studs;
- compression of sole plates and head binders;
- bedding-in of connections and fixings.

90. He expresses the view that:

'In a building of approximately five storeys, it is typical to see measurable cumulative vertical movement over time. This movement is not indicative of defect. It is a known and anticipated characteristic of timber frame construction.'

91. As to the impact of structural settlement and shrinkage, Mr Orchard suggests that the movement is transferred to door openings, linings and finishes. He says that the practical effects can include:

- *changes in gap tolerances around doors;*
- *doors becoming misaligned;*

- *linings moving out of plumb or level;*
- *uneven clearances;*
- *reduced closing performance.*

92. He concludes that: *'It is standard industry practice that door-sets in timber frame buildings require adjustment, realignment and, in some cases, localised modification. Such works may include:*

- *re-packing or adjusting linings;*
- *re-aligning door leaves;*
- *adjusting door closers;*
- *modifying gaps (including lipping);*
- *localised making good.*

93. Mr. Pink submitted that the issues found in 2025 could have arisen from:

- subsequent adjustment works;
- re-alignment works and maintenance interventions, or
- ongoing building settlement and movement associated with timber frames.

94. Mr. Pink reminded the Tribunal that a few of the doors (namely 3 laundry and bin store doors) had been adjusted in 2020, between the completion of the building and the remediation report in 2025. Accordingly, when phrases were used such as: - *"Fitted too low in lining at time of installation"* (in relation to the laundry door) caution should be exercised before attributing such conditions to the original construction works.

95. However, Mr. Pink did not produce any evidence to suggest that any other works at all – let alone intrusive works - had been carried out to the fire doors between 2020 and 2025.

96. When questioned by the Applicants, Mr. Pink conceded that he *'did not doubt'* that there was *'some bad workmanship'* in the development, and he agreed that he could not exclude the possibility that deficiencies in the fire doors arose from the original installation and construction.

97. Alleged Admissions/wording used by Respondents –

The Applicants had argued that references to 'compliance' and 'remedial works' acknowledged that there were fire safety issues to be resolved, but it was denied that such phrases implied an acceptance that the issues resulted from any 'relevant defect'.

98. Landlord's Certificate -

Mr. Pink submitted that the statutory scheme does not provide for:

- the provision of general building-wide certificates in the abstract; or
- a free-standing certification exercise divorced from any relevant leaseholder transaction or liability assessment.

99. It was argued that the purpose of the statutory regime is to determine the application of leaseholder protections in relation to specific qualifying leases and individual leaseholder liabilities.

100. The First Respondent's case was that the RTM's request for a certificate was not made in connection with any identified leaseholder transaction, did not relate to any identified qualifying leaseholder liability assessment, and did not constitute a valid statutory notice for the purposes of the 2022 Regulations.

101. Accordingly, the Respondent submitted that no statutory obligation to provide a Landlord's Certificate arose.

B. Reasonableness under the Landlord and Tenant Act 1985.

102. The First Respondent submitted that the works were undertaken following professional fire safety advice, Fire Risk Assessments, inspections, and recommendations, and that it was reasonable for the Respondent and/or the Second Respondent to progress such works in the interests of resident safety and ongoing compliance. All costs were reasonably incurred and the work was done to a reasonable standard.

C. Lack of consultation under the Landlord and Tenant Act 1985/Dispensation

103. In determining whether there had been a lack of appropriate consultation, the First Respondent submitted that the Tribunal should have regard to:

- the evolving nature of the inspections and recommendations;
- the progression of the works over time;
- the safety-critical context in which decisions were being taken; and
- the absence of material prejudice to the leaseholders.

104. It was further argued that the works were urgently required in the interest of resident safety, and it was extremely unlikely that the leaseholders would have been able to source competitive, alternative market quotes at a '*significantly lower rate*' at short notice. It was denied that the Applicants had suffered any prejudice as a result of the failure to consult.

105. Interruption of the works would have: -

- prolonged known fire safety non-compliance;
- delayed necessary compliance works;
- increased contractor and project costs;
- extended disruption to residents; and
- increased overall risk exposure associated with the Building.

106. Overall it was submitted by both Respondents that the works were effectively all one project, that it was neither necessary nor practical to consult leaseholders in the middle of the process, and dispensation should be granted. They applied to the Tribunal for a retrospective Order to that effect.

D. Management Fee

107. On behalf of both Respondents it was submitted that the Management Agreement between Captiva and ERM C expressly excluded Section 20 project work.

108. The £1,056 payment to ERM C in July 2025 was a separate agreed fee for tender preparation and administration of the statutory consultation process. No construction-phase project management or technical supervision fee was charged.

109. This was not a ‘hidden transaction’: the accounting entries were recorded and transferred to the RTM when they took over. The service charge monies, from which the fee was paid, were held in a designated trust fund in accordance with the Landlord and Tenant Act 1987. There was no ‘breach of trust’, and it was submitted that the Tribunal should find that this was a cost ‘reasonably incurred’.

[Note: Apartment doors: the Respondents argued that the individual apartment entrance doors were the responsibility of the leaseholders as per the demise. Any arrangement between the landlord and the occupants for remediation works to these doors was a separate agreement not subject to the service charge legislation, and such works were correctly invoiced and paid for separately]

E. Limitation of Costs and Rule 13 Costs

110. The Respondents jointly submitted that no order should be made as to limitation of costs or administration charges because the issues were substantial and legally complex and the proceedings concerned fire safety, BSA provisions, questions of reasonableness and consultation, and technical building evidence.

111. It was argued that the Respondents had acted reasonably throughout, in the face of serious allegations made by the Applicants against them, and they were entitled to resist the application as they had done.

112. In respect of Rule 13 costs the First Respondent denied that they had failed to provide documents properly and legitimately as requested, and also denied that they had acted unreasonably or ‘vexatiously’ at any time.

SECOND RESPONDENT’S CASE (ERM C)

113. The Second Respondent’s case is set out in their Position Statement of 11th March 2026 (Page 493) in the ‘Initial Statement’ of April (?) 2026 (Page 496), in the ‘2nd Respondent’s Statement of Truth’ in accordance with the Directions of 30th March 2026 (at Page 661), in the ‘Joint Skeleton Argument’ of 3rd June 2026, and in their further Position Statement of 8th June 2026 (not in the bundle).

114. Mr. McGuinness also gave oral evidence and made submissions to the Tribunal during the hearing. He stated that he had no qualifications but that he had experience in estate agency and he had been a property manager for 16 years.

A. Building Safety Act 2022

115. In respect of the BSA argument, Mr. McGuinness confirmed that ERMIC only became managers of Princess Court on 1st January 2024, and they handed over to the RTM on the 19th of July 2025. They were not really involved in the dispute about whether or not there was a 'relevant defect'.

116. However, Mr. McGuinness confirmed that he was the contract administrator for the remedial works in 2025, and he expressed the view that the issues with the fire doors could have been caused by 'settlement'. When questioned as to whether there was any visible evidence of settlement in the building, such as cracks to plaster on the walls, he replied that he had not seen any cracks, but re-decoration of the common parts could have covered it up.

117. Alleged Admissions/wording used by Respondents -

As to the background to the fire door issues, at Page 511 under the heading: - 'Estates Section 20 Fee Proposal -Fire Door Works Princess Court page number 5- APPENDIX 6 - ERMIC Performance – Fire Safety', it is recorded that:-

'It is likely that door defects had existed for several years, predating ERMIC's appointment and not addressed by the previous agent.'

B. Reasonableness under the Landlord and Tenant Act 1985.

118. Mr. McGuinness argued, on behalf of ERMIC, that all the costs of the remedial works to fire doors in 2025 were reasonably incurred.

119. It was submitted that the Section 20 consultation process had been correctly followed from the outset, and essential works were commenced accordingly.

120. Upon removal of door sets, architraves and linings, previously-concealed defects were identified, and certain additional doors were also found to be non-compliant despite not being captured in the initial visual inspection.

121. The additional costs arose only once intrusive works commenced, and these matters were not reasonably foreseeable at the time of consultation.

122. It was said that the Second Respondents' primary position is that the additional works formed part of the same compliance of communal fire doors project and were intrinsically linked to the originally consulted works: i.e. it was all one project.

123. Mr. McGuinness also pointed out that all parties agreed that the works were done to a good standard. The FRA of July 2025 referred (Page 512) to the: -
'...very high standard of apartment door installation and excellent maintenance arrangements...'

C. Lack of consultation under the Landlord and Tenant Act 1985/Dispensation

124. In terms of consultation with residents /leaseholders prior to works commencing, Mr. McGuinness stated that the full Section 20 process of Notices and tendering had been complied with, as set out in the exhibits in the bundle. There was also a meeting with residents on the 16th of October 2024.

125. When questioned as to why there had been no communication with leaseholders after that date, even when the need for extra works was discovered, Mr. McGuinness stated that the development manager was responsible for liaising with residents. He said that stopping the project to undertake a fresh consultation would have:

- Prolonged known fire safety non-compliance,
- Increased contractor costs,
- Extended disruption to residents, and risked regulatory non-compliance.

126. In conclusion it was submitted that ERMIC took the decision that it was reasonable and necessary to continue with the works, because safety was paramount. The works had been done in good faith, at the best price.

127. The Second Respondents conceded that they could have applied for dispensation from the consultation requirements at the time of the AEW report in April 2025, but they endorsed Mr. Pink's arguments (as above) to the effect that the Applicants had suffered no prejudice as a result of that failure.

128. The Tribunal was invited to find that it was reasonable to dispense with the consultation requirements retrospectively and make an order under Section 20ZA.

D. Management Fee

129. It was submitted that ERMIC's annual management fee excluded Section 20 project work, in line with its terms of appointment and standard industry practice.

130. Only the tendering and consultation activity was charged, as notified to the Freeholder on 24 October 2024. No charges were applied for construction phase project management or technical oversight: that work was undertaken as part of the management contract by Stephanie Minshull with back-office support and technical administration.

131. The fee of £1,056 was not taken from the reserve fund: it was invoiced to the service charge fund in the normal way.

[Note: Apartment doors: as above, the Respondents argued that the individual apartment entrance doors were the responsibility of the leaseholders as per the demise. Any arrangement between the landlord and the occupants for remediation works to these doors was a separate agreement not subject to the service charge legislation, and any such works were correctly invoiced and paid for separately]

E. Limitation of Costs and Rule 13 Costs

132. As above (Para.s 112 - 114), the Respondents jointly submitted that there were good reasons for the Tribunal to exercise their discretion and make no orders under Section 20C, Paragraph 5, or Rule 13.

FINDINGS AND DETERMINATION

133. The Tribunal considered all the available evidence, exhibits and submissions and proceeded to make findings as follows.

BUILDING SAFETY ACT 2022('The Act')

134. The Tribunal was asked to rule that none of the fire door remediation costs were recoverable from the Applicant leaseholders because those costs arose from 'relevant defects' in the original construction of the building.

135. In determining whether Section 120 and Schedule 8 of the Act applies, the Tribunal has to be satisfied that:

- a defect existed
- the defect arose as a result of anything done (or not done), or anything used (or not used), in connection with works relating to the construction or conversion of the building, and
- the defect created a building safety risk within the meaning of the Act.

136. Firstly, the Tribunal took account of the fact that certain matters were not in dispute.

137. It was accepted by the parties that Princess Court is a 'relevant building' (as defined in the Act) because of the number of storeys, and it was also accepted that the leases in question are 'qualifying leases'.

138. The freeholders Captiva Homes Limited accepted that they were the developers responsible for the building's construction.

Was there a defect?

139. It is generally accepted by all parties that there were a number of issues with the fire doors at Princess Court, as discovered by intrusive investigation in 2025.

140. The Tribunal found that these issues were correctly categorised as a 'defect' or 'defects'.

Was it a 'Relevant defect':

(i.e. Did the defect arise as a result of anything done (or not done), or anything used (or not used), in connection with works relating to the construction or conversion of the building?)

141. The Tribunal considered in particular two crucial and detailed pieces of evidence: -

- the first 'Wight Fire Doors Project Report' of January 2024 (which is illustrated by photographs of the doors requiring work, and which gives details of the remedial measures required), and
- the second A.E.W. 'Contractor's Report', dated April 2025 (also illustrated with photographs and noting what works were undertaken).

142. In the 2024 Wightfire report, although there was only a visual inspection, it was notable that some 35 of the doors were found to have issues which required remediation. These issues generally consisted of 'gaps' (in 28 cases), with comments to the effect that: -

'The door will need re-lipping or the frame adjusting to achieve compliant gaps')
There were also some doors which had incorrect signage.

143. The Tribunal accepted that it was arguable that minor works such as described in this report could be regarded as arising from normal issues of settlement in timber-framed buildings, and the recommended remedial works could have been seen as 'routine' maintenance and adjustment (as referred to by Mr. Orchard) to ensure compliance with Fire Safety regulations. However, it later became clear that the 'gapping' was indicative of more serious underlying problems in the construction.

144. The Tribunal found that the most significant and compelling piece of evidence was the latter, much more comprehensive A.E.W. 'Contractor's Report' (as analysed and explained by Mr. Peace) because it was prepared by the contractors who actually opened up the door structures and dealt with the fundamental issues.

145. It was noted that, after the intrusive investigation, no less than 44 communal fire doors in the building were identified for remediation in order to make them compliant with the regulations. Of those, the original 28 with 'gapping' required more extensive work than originally anticipated.

146. All parties agreed that the inherent problems with these doors were only discovered once the works began, and it then became apparent that the issues had a number of different causes. As to when, how and why the defects arose, the Tribunal considered the different issues as follows.

Packing and over-foaming.

147. The Tribunal considered the evidence of problematic packing in a large number of the doors, as outlined in the Contractor's report and as dealt with in Mr. Peace's evidence above.

148. The Respondents had argued that this type of problem was caused by settlement and/or normal shrinkage of timber-framed buildings, and they suggested that the packing could not have been flawed from the outset because it had not been picked up by any of the assessments since completion in 2017.

149. The Tribunal took account of the fact that, in respect of the Building Inspector's oversight and sign-off when the development was completed, there was no detailed evidence as to whether or not the doors and frames were inspected in the course of construction and installation, or whether they were fully compliant in every respect.

150. At the time of the first Fire Risk Assessment (FRA) conducted by Wight Fire Co. Ltd. in February 2018, when the construction was nearing completion, there was also no note of any faults or deficiencies with the doors. The Tribunal considered that this was because it was a 'Type 1' assessment by way of a '*visual inspection only*' (of the communal areas) and '*...no destructive tests were made to any part of the fabric of the building*' (Pages 562 and 566). The report at that time consisted mainly of recommendations and requirements rather than in-depth examination.

151. The Tribunal considered that it was not surprising that the issues were again not picked up by the Pyramid Risk Management Systems report of July 2020, just 2 years after the building was completed, because this was another non-intrusive Type 3 visual Fire Risk Assessment of common parts and flats. Any 'gapping' around the doors was apparently not yet obvious, and the problems in the door frames were not visible, so there was no reason to suspect that there were underlying issues.

152. As to the Fire Safety (England) Regulations 2022, which require regular fire door inspections by a competent person, there was evidence that the Princess Court doors were regularly checked by the development manager, but it was common ground between the parties that issues with door 'packing' could not be seen or discovered in the course of a visual inspection.

153. By the time of the Wightfire inspection in 2024, the gapping had become widespread: it just was not clear what was the cause.

154. The full extent of the flaws in the packing was finally discovered when A.E.W. Contractors began dismantling the architraves in 2025. The Tribunal had regard to the phrases and wording used such as:

- '*Insufficient*'
- '*incorrectly installed*', and
- '*Minimal*'.

155. The Tribunal also took note of the fact that many of the remedial works were described as 'correcting' the packing in some way, therefore it was found that the packing had not simply deteriorated over time in the normal way: it was defective from the beginning.

156. Problems with the 'foaming' were also detailed, as it was said to be 'Excessive' in some cases, and it had to be corrected.

157. The Tribunal considered that it was highly relevant that (as conceded by Mr. Pink, above) the Pyramid report in 2020 had found (Page 590) '*Incorrect*' fire-stopping material (i.e. non-certified '*PU expanding foam*') in all risers and

management stores, which had to be ‘corrected’ by a 3rd party accredited passive fire protection company.

158. The Tribunal found that this evidence tended to show: -

- that the original construction of fire safety systems was clearly flawed in some respects, by products used or not used correctly, and by the methods employed, and that
- such flaws had not been picked up by the building inspectors or the initial FRA in 2018.

Head width reductions

159. The report referred in many cases to the ‘*structural opening*’ of the doorways being ‘*too large...excessive gaps to all edges*’ being the most common complaint.

160. Fifteen of the doors required reduction of the ‘head’ of the frame, or modification as follows: -

- *Cut bottom of door lining on closing side to reduce gaps*
- *Remove door lining fixings and wedges.*
- *Reduce width of door lining head to reduce gap.*

161. The Tribunal found that these issues were not the result of ‘shrinkage’ or ‘vertical movement’ as described by Mr. Orchard: they constituted a pre-existing condition caused by poor workmanship at the time of installation which had become more problematic over time.

Door closers

162. As to the issues with door closure mechanisms: the contractors reported that in many cases the door closers had to be changed, as follows: -

‘Existing closers not powerful enough to close doors fully...’
‘Recommend replacement with new size 6 closers’.

163. There was no evidence that any of the door closers had been replaced since the building was first occupied, with one exception (Page 67) where the mechanism appeared to have caused problems in the past and someone had attempted to correct it: -

‘Door closer incorrectly fitted and fouling on top of door P.67 – main lobby entrance.

Original door closer has been over adjusted and incorrectly fitted so proper adjustment not possible. Closer has evidence of oil leakage. Recommend replacement’.

164. It is not clear why earlier risk assessments did not identify that the closers were not sufficiently powerful: they had been mostly found to be ‘compliant’ in 2020 and in the Project Report of 2024.

165. On the balance of probabilities the Tribunal found that this problem must have been long-term. There was no information as to whether the specification as to the appropriate type of closer had changed in recent years.

Signage and hinges

166. There were also a small number of other issues such as: -

'Hinge recesses inconsistent causing door to bind on lining' which required correction as follows:-

'Re cut hinge recesses to correct depths'.

167. The Tribunal found that, on the balance of probabilities, these issues may have arisen as a result of poor workmanship in the original construction.

Door handles.

168. The Tribunal found that tightening or replacement of handles would be correctly categorised as 'routine maintenance', to be expected in a block constructed eight years ago.

Causation

169. The Tribunal did not find that Mr. Orchard's statement as to the effects of 'shrinkage' and 'settlement' in timber-framed buildings was persuasive or convincing in the particular circumstances of this case. The Tribunal also took into account the facts that:-

- i) Mr. Orchard was not an independent expert but was the designer and manufacturer of the timber frame used in the construction of Princess Court, and
- ii) his evidence had not been tested in cross-examination.

170. In conclusion the Tribunal was satisfied that the multiplicity and extent of the issues with the non-compliant fire doors was far more than could be attributed to 'settlement' or 'shrinkage' and/or to ordinary 'wear and tear'. The Tribunal found that faults in the installation of the door frames and 'packing' were an inherent (but hidden) 'relevant defect' which was caused by poor workmanship at the time of construction.

A (3) Was there a Building Safety risk?

171. The doors requiring significant remediation were key internal doors, which either divided different areas of the corridors or opened onto stairwells or risers. Fire doors situated in these areas are vital for maintaining compartmentation in the event of fire, which is especially important in a building with a 'Stay Put' policy such as this.

172. The uncertified foam used in 'all risers and management stores', as identified in the 2020 FRA, clearly represented a further risk to effective vertical compartmentation in the building.

173. The Tribunal noted that ERMCo, as managers of the building, conceded that the fire door works were essential (although the cost per door was relatively modest, as argued by both Respondents), and they needed to be completed urgently because of a risk to the safety of people in the building.

174. The Tribunal found that there was a building safety risk arising from the spread of fire. It is not a matter of degree: if there is any ‘risk to life’ then the BSA provisions apply.

DETERMINATION:

175. As the fire door remediation costs of £18,705.83 arose from a ‘relevant defect’ in accordance with Section 120 and Schedule 8 of the Act, no service charges are payable by the Applicants in respect of those works.

176. Any financial adjustment arising from this decision should be dealt with according to the terms of the Lease(s).

177. No Remediation Order is necessary in the circumstances, as the work has already been completed.

OTHER MATTERS:

Reasonableness under the Landlord and Tenant Act 1985.

178. In the light of the determination under the Building Safety Act, the Tribunal was not required to make a determination as to whether or not the service charges in respect of fire door works in 2025 were ‘Reasonably incurred.’

179. However, if a relevant defect had not been found, the Tribunal considered that the costs would have been determined as ‘reasonably incurred’ in accordance with Section 19 of the 1985 Act.

Lack of consultation under the Landlord and Tenant Act 1985/Dispensation

180. If a relevant defect had not been found, the Tribunal considered that it would have been reasonable to make a retrospective order dispensing with the consultation requirements under Section 20C of the 1985 Act.

181. It was arguable that the more extensive works discovered by the A.E.W. investigation were a separate set of works, which required either a new consultation process or some communication with the leaseholders and an urgent application for dispensation. However, the Tribunal was satisfied that the Respondents had acted promptly and in good faith in the interests of all concerned, and that the leaseholders were not prejudiced as a result. There was no evidence that the work could have been done more cheaply or in a sufficiently timely fashion if a fresh consultation had been initiated, therefore dispensation would have been appropriate.

Management fee of £1,065.

182. The Tribunal found that the freeholder was entitled to appoint managers and pay them for their services in accordance with the terms of the Lease.

It was also clear that administration of the Section 20 consultation process was outside the terms of the contract between Captiva and ERMC.

183. It was therefore reasonable for Captiva to instruct ERMC to carry out this additional work and there was no requirement for them to inform or consult the leaseholders about either the arrangement or the fee, which represented a cost of just over £27 per apartment. The Tribunal did not find that there was any 'hidden transaction' or 'breach of trust' as alleged, and the amount charged was reasonable.

184. However, as the Tribunal found that the leaseholders were not obliged to pay any of the costs associated with the defective fire doors, this extra cost was associated with the cost of remedying the defect(s), and it therefore is not payable by way of service charge.

Individual apartment doors.

185. The evidence from the Applicants was that many of the apartment doors required the same type of remedial works as the communal doors, in order to make them compliant with fire safety standards.

186. The Tribunal observed that under the demise(s) the leaseholders are responsible for their own front doors, and therefore any cost associated with them, and/or any question of liability for defects in them, is not within the Tribunal's jurisdiction.

187. It was entirely appropriate for costs of remedial works to individual flat doors to be kept separate from the costs of remediation to communal doors, in accordance with the different obligations of Landlord and Tenant under the Lease(s). If the landlord arranged for the apartment doors to be dealt with by the same contractors, with the agreement of and on behalf of the leaseholders, then that is a separate matter and should be paid for outside the service charge system.

188. However, the evidence of similar problems with all different doors tended to support the contention that there were systemic flaws in the original construction of the whole building.

Landlord's Certificate

189. No issue has been raised by the First Respondent as to whether or not they, as landlords, satisfy the 'qualifying contribution' criteria in Schedule 8, Paragraph 3 of the Act. The question of whether the landlord should have provided a 'Landlord's certificate' is therefore not relevant to the determination.

Limitation of Costs and Rule 13 Costs

190. The Tribunal found in favour of the Applicants in respect of the Building Safety Act issue, and therefore it is determined in accordance with Section 20C of the 1985 Act that it is just and equitable that the costs in these proceedings are not to be regarded as relevant costs to be taken

into account in determining the amount of service charge payable by the leaseholders.

191. The same determination is made in respect of the application under Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002, for the same reasons.

192. The Tribunal does not find that the Respondents have acted unreasonably or ‘vexatiously’ in this case: no order is made under Rule 13.

Right to Appeal

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

The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. Where possible you should send your further application for permission to appeal by email to rpsouthern@justice.gov.uk as this will enable the First-tier Tribunal to deal with it more efficiently.

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

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



Neutral Citation Number: [2026] EWHC 2003 (TCC)

Case No. HT-2026-000045

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30/07/2026

Before :

THE HONOURABLE MR JUSTICE CONSTABLE

Between:

DURKAN ESTATES LIMITED

Claimant/Respondent

-and-

WALLACE ESTATES LIMITED

Defendant/Applicant

Alice Sims (instructed by **Mayer Brown International LLP**) for the **Claimant**
Kerry Bretherton KC and **David Hopkins** (instructed by **Mills & Reeve LLP**) for the
Defendant

Hearing dates: 20, 22 July 2026

Approved Judgment

This judgment was handed down remotely at 2pm on 30 July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Constable:

A. Introduction

1. The proceedings concern a Remediation Agreement dated 1 Jul 2024 entered into by the parties (the “Agreement”). Pursuant to the Agreement, the Claimant (“Durkan”) agreed with the Defendant (“Wallace”) to remedy, at its own cost, certain relevant defects (the “Defects”), within the meaning of s 120 of the Building Safety Act 2022 (the “BSA”), at the building known as Centrillion Point in Croydon. Centrillion Point is a former office building developed by Durkan into dwellings in the late 2000s. Following the development, Durkan was originally the landlord. Wallace has been the landlord and owner of the freehold interest in the Property since 1 May 2014.
2. The Building is a relevant building within the meaning of ss 117 and 124(1) of the BSA. On 4 Jan 2024, the First-Tier Tribunal (‘FTT’) made a remediation order under s 123 of the BSA (the “RO”) against Wallace. By the RO and the Schedule thereto, the FTT required Wallace, by 31 May 2025, to remedy the Defects in the Building, as specified in the RO.
3. At around the same time the FTT made the RO, Durkan entered discussions with Wallace on the terms on which (as the entity which had converted the Building into residential accommodation, and an entity in which Wallace could seek a Remediation Contribution Order (an ‘RCO’) pursuant to s 124 of the BSA), Durkan would rectify the defects. These negotiations led, eventually, to the Agreement, dated 1 Jul 2024. Notwithstanding that the deadline under the RO was 31 May 2025, the Completion Date for the remedial works under the Agreement was 19 Sep 2025 or such other date as was agreed by the parties.
4. On 24 June 2025, the FTT rejected Wallace’s application to vary the date for compliance provided for by the RO. As at the date of the application, and indeed the FTT’s determination, no Gateway 2 application on Wallace’s behalf to the Building Safety Regulator (“BSR”) had yet been made, as required before the remedial works could commence. The FTT decided, amongst other things, that the lack of any application to the BSR meant that it was not possible to identify an anticipated completion date other than by reference to a point unfixed in time (i.e. a certain period after approval was given by the BSR) and as such had no jurisdiction to grant the application. During the application, Wallace had contended that terminating the Remediation Agreement and proceeding with a different contractor was not its intention as it was not a ‘panacea’.
5. Two days after the decision, Wallace sent Durkan a notice terminating the Agreement. That notice alleged an entitlement to terminate under Clause 3 of the Agreement, as Durkan was in ‘Substantive Breach’, as defined. It also claimed an entitlement to terminate at common law.
6. On 29 Sep 2025, Wallace commenced an application for an RCO under s 124 of the BSA against Durkan and its parent, Durkan Holdings Limited, in the FTT. It claims £13,586,797.02 inclusive of VAT. The RCO is opposed on the basis that Wallace unlawfully terminated the Agreement and it would not be “just and equitable” to impose an RCO in these circumstances, and/or that the maximum sum to which Wallace is

entitled is the sum which it would have cost Durkan to complete the Remedial Works (£6,740,268).

7. Durkan commenced these proceedings on 6 Feb 2026, seeking, among other things, a declaration that Wallace's termination of the Agreement was unlawful, and damages. Wallace made a counterclaim, in effect seeking declarations in its favour about the lawfulness of the Termination Notice and repudiation of the Agreement. It also asserted that the works proposed by Durkan would not have been adequate to remedy further defects at the Development not caught by the RO and the existence of the further defects is an additional ground on which it was entitled to accept Durkan's repudiatory or anticipatory breach of the Agreement.
8. By its application dated 28 May 2026, Wallace seeks an order granting Wallace reverse summary judgment under CPR Pt 24 on the whole of the claim, summary judgment on Wallace's counterclaim and costs. As confirmed by Ms Bretherton KC, the application was confined to the issue of whether Durkan was in repudiatory or anticipatory breach of the Agreement at common law. It was not concerned with Wallace's alleged entitlement to contractual termination for Substantive Breach (as defined by clause 1.1 of the Agreement). The pleaded entitlement to terminate at common law is at paragraph 63 of the Defence. This states:

"The breaches identified at paragraphs 11 and 17 of the Termination [Notice] go to the heart of the Agreement. They are fundamental obligations relating to the remediation required to make the Property safe. The breaches are material and irremediable in that there is was [sic] no prospect of the Works being completed by the deadline imposed by the Order and the Agreement. Further, the breaches have deprived [Wallace] of substantially the whole benefit of the Agreement."

9. Paragraphs 11 and 17 of the Termination Notice state:

"As at the date of this letter, after nearly a year, Durkan has still not complied with its obligation to provide Wallace a complete and comprehensive copy of the plans and specifications required for remediating the defects at the building within a reasonable period of time (or at all) in breach of Schedule 1, paragraph 4.1.

...

In the circumstances, Durkan is in clear breach of its obligations:

(a) to diligently perform its duties and obligations under the Agreement and in respect of the Services;

(b) to use the Required Standard to avoid or minimise delay to the execution of the Services and the Works;

(c) to procure that the Services (and Works) should be designed, carried out and completed using the Required Standard, with due diligence and by the Completion Date."

10. Wallace argues that Durkan was plainly in repudiatory or anticipatory repudiatory breach as at the date of the Termination Notice, such that it has no real prospect of success in establishing the termination as unlawful. In summary, it contends that not only did Durkan not complete the works in the period specified by way of fixed Completion Date in the Agreement, but it did not even commence the works nor complete the necessary initial steps which would enable works to commence. Ms Bretherton argues that, at the time of termination, Durkan's breaches had deprived Wallace of substantially the whole benefit which it was the intention of the parties as expressed in the Agreement that Wallace should obtain for performing its undertakings, and that Durkan's conduct even put Wallace in a position where committal proceedings were issued against it. It is said that there is no other compelling reason for trial. The evidence relied upon by Wallace is the sole witness statement of Mr James Hordern, Special Counsel at Mills & Reeve LLP, solicitors for Wallace.
11. Ms Sims for Durkan resists, on numerous grounds, the contention that this matter is suitable for summary disposal. Durkan rely upon the evidence of:
 - (1) Mr James Morris, Partner for Mayer Brown International LLP, solicitors for Durkan;
 - (2) Mr Gary Barton, Group Technical Director at Durkan;
 - (3) Mr James Briggs, former managing director at Durkan, who was the senior representative involved in the day-to-day management of the proposed remedial works at Centrillion Point;
 - (4) Mr Paul McClelland of JPI Fire and Building Regulation Consultants Ltd, a third party consultancy advising Durkan in respect of the remedial works;
 - (5) Mr Frank Hinds, a senior director and shareholder at Comprehensive Design Architects Ltd, who provided a preliminary report in respect of various expert issues.

B. The Contract

12. The Agreement was entered into by the parties on 1 July 2024. During oral argument, Ms Bretherton essentially relied upon a number of contractual provisions which, she argued, rendered the factual matters raised by Durkan irrelevant: the terms of the Agreement provided a complete answer for the purposes of summary judgment. It is therefore necessary to set out in some detail the provisions of the contract central to Wallace's argument. These are set out in Annex 1 to the Judgment.

C. The Law

C1. Summary Judgment

13. CPR r 24.3 provides:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—

(a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

14. There was, unsurprisingly, no dispute about the applicable principles to apply. As formulated by Lewison J, as he was then, in Easyair Ltd (t/a Openair) v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15], and approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301 at para 24:

“i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: Swain v Hillman [2001] 2 All ER 91;

ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a “mini-trial”: Swain v Hillman

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. [...] However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.”

15. Ms Bretherton emphasises, additionally, the judgment of Moore-Bick LJ in Korea National Insurance Corp v Allianz Global Corporate & Specialty AG [2007] EWCA Civ 1066 at [14], in which the Court observed that if a party wished to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court.
16. For her part, Ms Sims drew the Court's attention to Okpabi v Royal Dutch Shell Plc [2021] UKSC 3 in which, at [127]-[128] Lord Hamblen indicated that, in summary, when considering that new evidence, the correct approach is not to ask whether there is a clear prospect that new material will become available before the trial which is likely to give the claimants a real prospect of success but rather to ask whether there are reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success.

C2. *Repudiatory Breach*

17. In Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd (The Spar Capella, The Spar Vega, The Spar Draco) [2016] EWCA Civ 982; [2017] 4 All ER 124, Gross LJ (with whom Etherton MR and Hamblen LJ agreed) held at [21]:

"Breaches of contract entitling the innocent party to treat the contract as at an end may be classified as follows:

- (i) *Breach of condition;*
 - (ii) *Repudiatory breach*, ie, an *actual* breach of an innominate term where the consequences are such as to entitle the innocent party to treat the contract as at an end;
 - (iii) *Renunciatory breach*, ie, an *anticipatory* breach of contract (ie, in advance of the due date for performance), where the other party makes clear to the innocent party that it is not going to perform the contract at all or is going to commit a breach of a condition *or* is going to commit a breach of an innominate term and the consequences will be such as to entitle the innocent party to treat the contract as at an end; in each case here, the innocent party has an election to accept the renunciatory breach at once and to terminate the contract, without waiting for the due date of performance: see, *Burrows*, [*A Restatement of the English Law of Contract* (2016)], at pp 116–117."
18. Anticipatory breach means simply that a party is in breach from the moment that its actual breach becomes inevitable: Universal Cargo Carriers Corp v Citati [1957] 2 QB 401 per Devlin J at p 438.
19. Where a term is innominate, the test for whether breach of that term warrants termination is, per Diplock LJ in Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir) [1962] 2 QB 26 at p 66:

“...does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?”

20. In Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri) [1979] AC 757 at p 779C, Lord Wilberforce held that *“to amount to repudiation a breach must go to the root of the contract”*. Considering the metaphor central to this description, Lewison LJ observed in Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd [2013] EWCA Civ 577; [2013] 4 All ER 377:

“[50] The trouble with expressing important propositions of English law in metaphorical terms is that it is difficult to be sure what they mean. As the High Court of Australia majority judgment pointed out in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [54] to describe a breach as ‘going to the root of the contract’ is ‘a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party’.

[51] Whatever test one adopts, it seems to me that the starting point must be to consider what benefit the injured party was intended to obtain from performance of the contract. [...]

[52] The next thing to consider is the effect of the breach on the injured party. What financial loss has it caused? How much of the intended benefit under the contract has the injured party already received? Can the injured party be adequately compensated by an award of damages? Is the breach likely to be repeated? Will the guilty party resume compliance with his obligations? Has the breach fundamentally changed the value of future performance of the guilty party’s outstanding obligations?”

21. The foregoing passage was relied upon by Ms Sims fairly to emphasise the acutely fact sensitive nature of the enquiry. Similarly, in Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd [2013] EWCA Civ 577 at [49]–[54], Lewison LJ identified the need to consider (amongst other things) the benefit the injured party was intended to obtain, the actual and prospective effect of the breach, whether the guilty party would resume compliance with his obligations (i.e. whether the breach was remediable) and whether the breach fundamentally changed the value of the future performance of the guilty party’s outstanding obligations.
22. Although Ms Bretherton’s oral submissions focussed on the benefit the injured party was intended to obtain from performance of the contract in seeking to elevate the alleged breach into repudiatory, the enquiry is no less highly fact-sensitive if the question is whether the actual and/or anticipatory conduct evinces an intention to abandon and altogether refuse to perform the contract (categorised as renunciation rather than repudiation). As such, all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker:

see Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 at [61] - [63], per Etherton LJ.

23. The extent of the enquiry in a claim requiring the Court to consider whether a contract has been lawfully terminated at common law is perhaps reflected in the following passage from *Chitty on Contracts* (36th Edn) at 28-011:

“The best that can be said is that the entitlement of a party to terminate further performance of the contract depends upon a range of factors. These factors include the nature of the contract, and of the term that has been breached, the nature of the breach and the consequences of breach”.

24. In the context of the present case, it is relevant in addition to note that a common law right to terminate does not render the termination provisions of the contract irrelevant. Here, clause 3 of the Agreement provides for a definition of ‘Substantive Breach’ which itself distinguishes between breaches which are capable of remedy and those which are not. Where the parties have expressly agreed that specified defaults are to be addressed by notice and an opportunity to cure, that machinery forms part of “*all the circumstances*” which are generally required to be weighed. The contractual regime may also inform the objective meaning of the alleged contract-breaker’s conduct, in that conduct falling within a regime the parties designated as remediable may not readily be characterised as abandonment. In this regard, Ms Sims relied upon the guidance of Ramsey J in BSkyB Limited & Ors v HP Enterprise Services UK Limited (formerly Electronic Data Systems Limited) & Ors [2010] EWHC 86 (TCC) at [1363], that “*the contractual provisions may give guidance on whether a particular breach is to be treated as repudiatory.*” He continued at [1366]:

“...Rather, in deciding whether by its conduct a party evidences an intention not to be bound by the terms of the contract, the way in which parties agree to treat breaches within the terms of their contract must be a factor to take into account. In particular, if a breach of a term had to reach a degree of seriousness before a contractual termination clause could be applied, it is unlikely that a breach which was less serious would, by itself, amount to a repudiatory breach. Equally, the fact that for a particular breach the contract provided that there should be a period of notice to remedy the breach would indicate that the breach, without the notice would not, in itself amount to a repudiatory breach.”

25. At the heart of the claim brought which underpins the alleged common law right to terminate are, as can be drawn from paragraphs 11 and 17 of the Termination Notice (through paragraph 63 of the Defence), allegations of breach of time stipulations. Paragraph 11 relates to failure to provide plans and specifications within a reasonable period of time. Paragraph 17 relies on failures to diligently perform services, to avoid or minimize delay or to procure that the Services (and Works) should be designed, carried out and completed with due diligence and by the Completion Date.
26. As pointed out at [28-011] of *Chitty on Contracts*, the law relating to the breach of time stipulations is an area which has given rise to a substantial amount of litigation across a variety of areas of law. It is necessary to consider this specifically.

C3. *Time Stipulations*

27. Time being of the essence means that one or more stipulations as to time are conditions. This means in turn that delay in performance is treated as going to the root of the contract without regard to the magnitude of the breach.
28. In this case, Wallace expressly admit that time is not of the essence. Whether time is of the essence is specific to particular terms, rather than the contract as a whole. In this case, Wallace rely upon both a ‘subsidiary’ time obligation at paragraph 4.2 of Schedule 1 (in which Durkan shall submit one electronic copy of an updated and finalised version of the Plans and Specifications to Wallace within a reasonable time); and a time stipulation to complete by the Completion Date as defined.
29. Durkan’s pleaded allegation, admitted by Wallace, that time was not of the essence related in context to the whole of the contract. However, no further distinction was made by Ms Bretherton to suggest that, somehow, whilst time was not of the essence in the whole of the contract, it was of the essence in respect of the subsidiary time obligation. Time is not ordinarily of the essence in construction contracts, unless it is expressly so provided (see *Keating on Construction Contracts* [12th Edn] at 8-008)
30. If, as here, time is not originally of the essence, a notice can be served which makes time of the essence. As summarized at [28-030] of *Chitty on Contracts*:

“Where time was not originally of the essence of the contract, but one party has been guilty of delay, the other party may give notice requiring the contract to be performed within a reasonable time. Notice can be served at the moment of breach; it is not necessary to wait until there has been an unreasonable delay by the party in breach before service the notice. The period of notice given must, however, be reasonable and what is reasonable will depend upon all the facts and circumstances of the case. Factors to which the courts will have regard in assessing the reasonableness of the period of notice include what remains to be done at the date of the notice; the fact that the party giving notice has continually pressed for completion, or has before given similar notices which it has waived, or that it is especially important for it to obtain early completion”

31. Giving notice does not unilaterally make ‘time of the essence’, because one party cannot unilaterally vary the terms of the contract. The principles were set out by Christopher Clarke J in *Dalkia v Celtech* [2006] 1 Lloyd’s Rep 559 at [131], as cited by Popplewell J in *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm); [2015] 1 All ER (Comm) 879 at [184]. Relevantly, the judge made clear that if the defaulting party fails to perform after service of such a notice, the failure is not automatically a repudiation of the contract, giving rise to a right to terminate. The breach must go to the root of the contract. The notice operates as evidence of the date by which the promisee considers it reasonable to require the

contract to be performed, failure to perform by which is evidence of an intention not to perform.

32. It must follow from this that a failure to have served a notice making time of the essence cannot, of itself, be fatal to claiming that a breach was repudiatory; nor, of itself, determinative of that fact. This was reflected in the judgment of May LJ in Shawton Engineering LTD v DGP International Ltd [2006] BLR 1, in which he said:

“...such an obligation was not a condition such that breach of it would automatically entitle Shawton to determine the contracts. Shawton could only in law legitimately determine the contracts for delay if either:

- (a) They gave reasonable notice making time of the essence or*
- (b) DGP’s failure to complete within a reasonable time was a fundamental breach such that the gravity of the breach had the effect of depriving Shawton of substantially the whole benefit which it was the intention of the parties that they should obtain from the contracts.*

Where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach in this sense.”

33. This passage was quoted by Lewison LJ in Ampurius at [47], relied on by both parties in argument, before going on to observe that the relevant authorities adopt as the relevant test whether the breach has deprived the injured party of ‘substantially the whole benefit’ of the contract which is the same test as that applicable to frustration. This, Lewison LJ stated, “*sets the bar high*”.

C4. Waiver and Affirmation

34. Where an innocent party elects to treat the contract as continuing, it is usually said to have affirmed the contract. There are a number of elements to this doctrine as described in *Chitty on Contracts* (36th Ed) at [28-056]:

“The innocent party will not be held to have elected to affirm the contract unless, first, it has knowledge of the facts giving rise to the breach, and, secondly, it has knowledge of its legal right to choose between the alternatives open to him. When deciding whether the innocent party has affirmed the contract, a court is not conducting a “mechanical exercise” but is exercising a judgment... Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of its right to choose, the innocent party does some unequivocal act from which it may be inferred that it intends to go on with the contract regardless of the breach or from which it may be inferred that it will not exercise its right to treat the contract as terminated... Equally a party cannot affirm the contract for a limited period of time and then abrogate it on the expiry of that period of time. Mere inactivity after breach does not of itself amount to affirmation, nor (it seems) does the commencement of an action claiming damages for breach. The mere fact that the innocent party has called

on the party in breach to change its mind, accept its obligations and perform the contract will not generally, of itself, amount to an affirmation:

“... the law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognize his obligation.”

But if the innocent party unreservedly continues to press for performance or accepts performance by the other party after becoming aware of the breach and of its right to elect, it will be held to have affirmed the contract...”

35. Once the innocent party has elected to affirm the contract, and this has been communicated to the other party, then the choice becomes irrevocable. The innocent party, having affirmed, cannot subsequently change its mind and rely on the breach to justify treating itself as discharged: see Bentsen v Taylor & Sons & Co [1893] 2 QB 274. However, there is a distinction to be drawn in the following circumstances as explained in *Chitty* at [28-057]:

“Nevertheless, in the case of a breach which is persisted in by the other party, the fact that the innocent party has continued to press for performance will not normally preclude it at a later stage from terminating the contract. In such a case the innocent party is not terminating on account of the original repudiation and going back on its election to affirm but rather is “treating the contract as being at an end on account of the continuing repudiation reflected in the other party’s behaviour after affirmation. Nor, in the case of an ongoing contract, will affirmation in respect of one breach preclude the innocent party from terminating further performance of the contract by reason of further subsequent breaches.”

C5. *Estoppel*

36. The requirements of an estoppel by convention were authoritatively restated by the Supreme Court in Tinkler v Commissioners for HM Revenue and Customs [2021] UKSC 39; [2022] AC 886 at [45], approving the summary of Briggs J (as he was then) in HMRC v Benchdollar Ltd [2009] EWHC 1310 (Ch) at [52], identifying the following principles:

- (1) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them;
- (2) the expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it;
- (3) the person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
- (4) that reliance must have occurred in connection with some subsequent mutual dealing between the parties;

- (5) some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

D. Summary of the Claimant's resistance to Summary Judgment

37. Ms Sims argues that the summary judgment application should be dismissed on account of seven interrelated reasons, which can be reduced in substance to the following points, resolution of which turns on disputed factual and expert evidence to a greater or lesser degree, and which would be shaped by disclosure, such that summary judgment is inappropriate:

- (1) Time was 'at large' with respect to the time for performance of the design element of the Remedial Works and consideration by the BSR of the Gateway 2 application;
- (2) time was not of the essence, such that delay in performance without more and without any notices of warning was not repudiatory. The delay was not so long so as to deprive the innocent party of substantially the whole benefit of the contract. The alleged conduct was not repudiatory when (a) judged against the framework of the Agreement which allowed for a Completion Date to be updated, a termination clause requiring remediable breaches to be notified, permitting the opportunity to cure, and a mutual duty of utmost good faith; and (b) significant delays to the Remedial Works were not caused by Durkan, but caused by Wallace's own approach to progress;
- (3) the purported Termination Notice was not preceded by any notices of written complaints. Indeed, the Termination Notice was immediately preceded by Wallace's legal representative (at the application to vary the RO) by a clear statement to the Tribunal and in the presence of Durkan that Wallace wished to continue working with Durkan and that terminating the Agreement would not assist matters. This amounted to affirmation.

E. Time at Large

38. Durkan's case is that the originally specified Completion Date was amended by the agreement of the parties so that time was at large for both the design of the Remedial Works and approval of the same by the BSR and/or the same effect had been achieved by a convention of the parties.
39. Ms Sims's argument is as follows:
 - (1) Completion Date is defined as being 19 September 2025 "*or such other date as is agreed as part of the Plans and Specifications in accordance with this Agreement*";
 - (2) The definition of Plans and Specifications includes '*any programme(s) for the Works... to be developed by the Developer and agreed by the Freeholder in*

accordance with paragraph 4 as may be further amended from time to time in accordance with paragraph 4”;

- (3) Paragraph 4.2 of Schedule 1 provided for the submission of an updated and finalised version of the Plans and Specifications within a reasonable time after the date of the Agreement for review and approval.
 - (4) Whilst the Plans and Specifications “*must enable the Developer to deliver the Works in accordance with the Order*” (Paragraph 4.2), this must be a reference to the quality and performance, rather than temporal, requirements of the Order, given that the Order required completion of the remediation by 31 May 2025 and the date in the Agreement was 19 September 2025. This was consistent with the fact (admitted/asserted in Wallace’s Defence) that both parties ‘*anticipated [that] an extension of time for compliance with the RO would be required...*’;
 - (5) the effect of paragraph 1.1 of Schedule 1 with regards to the definitions for Plans and Specifications and the Completion Date was that the original Completion Date of 19 September 2025 could be amended from time to time by programmes issued by Durkan and agreed by Wallace (as programmes for the Works were included within the definition of Plans and Specifications).
40. Ms Sims then relies upon pre-contract communications seeking to demonstrate that at the point the Agreement was entered into the parties knew that an amendment to the 19 September 2025 date was going to be needed. There is then reliance upon post-Agreement communications as follows:
- (1) A further version of the Master Programme (which did not have a fixed completion date) was discussed between the parties at a meeting on 3 October 2024. The e-mailed notes of the meeting record that “*Timescale does not have calendar date. We can’t confirm until the scope has been agreed.*” Of this, Mr Briggs’ evidence (unchallenged in the context of this Application) was:

“A further revision of the programme was issued in October. This programme was the same as the programme issued in March in providing for a 68 week construction period and again used week numbers rather than fixed dates. The issue of the programme at this stage reinforced the fact that the September 2025 date would not be achievable. I held regular meetings with Ms McQueen-Price and Ms Chambers, during which no objection to the programme was raised, other than that [Wallace] wanted dates to be applied, and we told them we could not, which again, they understood and accepted. [Wallace] had a number of other ongoing remediation projects and was well aware of the inherent uncertainty surrounding the timing of the design and the Gateway 2 application. We discussed this with [Wallace] repeatedly at meetings.”
 - (2) At meetings between the parties held on 16 October 2024 and also 6 November 2024, “*Durkan confirmed that the current programme would not be re-issued until the Fire Alarm and BSR submission have been concluded. Until this time, no dates can be confirmed.*” Mr Briggs evidence was:

“Ms McQueen-Price [sic] confirmed that the dates on the current programme were not going to be met given where we were, which I took to mean the referenced September date given the programme did not contain dates and we had already agreed Durkan’s programme. However, this was not said by Ms McQueen Price [sic] in a way that was critical of Durkan: it was just accepted as a fact because we were now all working to Durkan’s programme.

At this meeting [Wallace] were seeking an updated programme to include a construction start date. We reiterated that the current programme would not be re-issued until the BSR submission had been concluded and that until this time no dates could be confirmed. However relevant individuals within [Wallace] including Ms McQueen-Price [sic] and Ms Chambers accepted and agreed that neither the RO nor RWA date was going to be met.”

- (3) During a meeting held between the parties on 8 January 2025, it was further agreed that there were no further comments on the Master Programme at this time and that the timescale would be confirmed “*once gateway 2 has gone though this can be actioned.*”
- (4) the contemporaneous documents show that Wallace’s team continued to operate on this footing well into 2025. Mr Barton’s evidence was:

“I did not consider that the programme committed Durkan to having the design completed or the BSR application finalised by 19 September 2025. The 68-week period related to the construction works themselves, not the period needed to complete the design and Gateway 2 process. I am confident from my recollection that the deadline of 19 September was never raised in any meeting I attended. I have reviewed contemporaneous documents that support this. For instance, in an email of 12 March 2025 from Sam Gumble, Simarc, to Nigel Shields (Durkan), Sam refers to Excel attending site for final inspections and to thereafter share a full specification. Sam says “On receipt of the specification, Durkan to produce a high-level project programme. Dates TBC based on BSR approval time but should provide an indication of programme length.” This seems to me to clearly show that Simarc/[Wallace] understood the basis on which the Master Programme in March 2024/October 2024 was issued i.e. that time only began to run from BSR approval and dates could not be applied at this stage. My review of the matter is that this was what was relayed to [Wallace] all along.”

41. Ms Sims therefore argues that there is a real prospect in establishing Wallace’s agreement to the Master Programme and its revisions, inferred from its lack of challenge or objection to the same and/or the agreements at the meetings on 2 and 16 October 2024, 6 November 2024, and 8 January 2025 (as recorded in the meeting minutes). The alternative pleaded claim is that there was a convention that existed between the parties that the Completion Date would be interpreted as at large until such time as the design was complete, relying on the evidence from Mr Barton and Mr Briggs, unchallenged on this application, that both parties were in fact proceeding on an assumption that there was no defined date by which the completion of the design and approval by the BSR would be finished. Durkan, it is said, relied on that assumption by continuing to progress the design in accordance with the revised Master

Programme and by not applying for an extension of time consequent upon the delays to the design which were not of its own making.

42. This argument is, it is said by Ms Bretherton, hopeless; it can be dismissed summarily. As a matter of contractual interpretation, agreement of some other date than that fixed (i.e. 19 September 2025) could only be agreed in accordance with the definition of Completion Date as part of the Plans and Specifications. Whilst this may include a programme, the agreement needed to be achieved through the paragraph 4 procedure. Paragraph 4.2 provided that this procedure would be initiated by the submission of ‘an updated and finalised version of the Plans and Specifications...’, but which the Agreement envisaged as a single, finalised submission. The ‘agreement’ of the Master Programme relied upon by Durkan did not, on Durkan’s own evidence, form part of any such submission made pursuant to paragraph 4.2 and therefore the contractual machinery for reaching an agreement by which the Completion Date became something other than 19 September 2025 had not been operated. It is also argued that the minutes of meetings relied upon were all contained in e-mails and therefore excluded from constituting an agreement ‘in writing’ for the purposes of the Agreement. Although Ms Bretherton also made reference to the Entire Agreement clause, including a no-oral modification machinery and a requirement for variations to be in writing, this does not add materially to the argument where Durkan’s case is that the Completion Date changed through the paragraph 4 process rather than by way of standalone change or variation.
43. There is no doubt that Ms Bretherton’s contractual analysis (about which I need not express a definitive view) is a potentially powerful one. However, it does not meet Durkan’s case on estoppel by convention which would be, if correct, an alternative way of achieving the same outcome. Cases of estoppel overriding clear contractual machinery are generally not straightforward, but it is not possible to determine such a case against Durkan summarily. On the documentation and factual evidence before the Court, it is plainly arguable that the parties were in fact proceeding on the basis that (a) notwithstanding its inclusion in the Agreement, no one actually anticipated completion by 19 September 2025; (b) the Completion Date would be 68 weeks after such date as became clear after approval by the BSR; (c) given that time was not of the essence, and there were no liquidated damages provisions, the date of 19 September 2025 was not being treated by either party as one of contractual significance. If those facts were, at trial, established, the trial judge would have to consider whether, in all the circumstances, they were sufficient to give rise to an estoppel. If Wallace were estopped from relying upon 19 September 2025 as the Completion Date, the anticipatory breach case would fall away.
44. That cannot be determined summarily, not least in circumstances where it is likely that disclosure may well produce documentation which is relevant to Durkan’s estoppel case.

F. Delay Not Repudiatory

45. There is no dispute that time was not of the essence. Moreover, no notices were served to ‘make’ time of the essence (insofar as that is possible – see the analysis above).

46. In the circumstances, Wallace would have to establish that the delay was so prolonged that it deprived Wallace substantially of the whole benefit of the contract, which is the same test as that applicable to frustration. This is a high bar.
47. As Lewison LJ said in Telford Homes, relevant questions would include what financial loss has the breach caused?; How much of the intended benefit under the contract has the injured party already received?; Can the injured party be adequately compensated by an award of damages?; Is the breach likely to be repeated?; Will the guilty party resume compliance with his obligations?; Has the breach fundamentally changed the value of future performance of the guilty party's outstanding obligations?
48. The answer to these questions is acutely fact sensitive and must take into account all the circumstances of the case, and is likely to be inherently unsuitable for summary determination.
49. It is insufficient, as Ms Bretherton sought to do, to point simply to the fact that delay could result in the directors of Wallace facing committal proceedings for non-compliance with the RO, particularly in circumstances where taking Wallace's contractual case at face value, it had itself signed up to an Agreement which (without achieving an extension to the RO) already gave rise to such a risk. Ms Bretherton's argument was in substance a submission that although she accepted that the contract itself did not make time of the essence, the risk of committal in the face of delay was such that a failure to comply with the temporal obligation, without further enquiry, was repudiatory. Whilst the Building Safety Act context and the RO materially increase the importance of timely performance, they do not of and in themselves alter the test for repudiation nor convert a non-essential time stipulation into a condition.
50. Where time is not of the essence, the analysis which is required in order to answer the question of whether the delay was repudiatory in nature would need to take account of all the circumstances, which include the reasons for the delay. Those are in dispute: Durkan's evidence squarely places blame for some of the delay at Wallace's feet, and has the support of independent expert evidence in doing so. In answer to this, Ms Bretherton in her oral submissions pointed to various contractual provisions which, she argued, was a complete answer to Durkan's factual case. For example, in relation to Durkan's evidence that Wallace delayed in the provision of necessary documentation, Ms Bretherton pointed to those parts of the Agreement that stipulated that all documentation relevant to the BC Application was to be developed by Durkan. Similarly, in relation to Durkan's evidence that Wallace's conduct had contributed to delays to access, Ms Bretherton identified the provision of the licence to access, and the requirement upon Durkan to seek access through Wallace's Management Company. A further example is Ms Bretherton's reliance upon the notice/extension of time machinery to argue both that the complaints made did not fall within the definition of 'Relevant Event' and/or no notices were issued by Durkan so that, on any view, the facts relied upon would not justify any adjustment to the Completion Date.
51. The first difficulty faced by Ms Bretherton is that her case on the effect of the various contractual clauses is entirely unpleaded. In responding to the various allegations of Wallace's contribution to the fact of delay, Wallace's pleading merely denies that they did, in fact, act in such a way so as to cause delay. Wallace does not plead that the answer to the allegations of interference and prevention lies in particular clauses of the

contract which render the factual cause of delay irrelevant. Whilst it is right that the Defence makes the not uncommon plea that Wallace will rely on the entire Agreement at trial, this is not sufficient to raise what are specific contractual defences to specific allegations of prevention. A pleading is not required to argue the law: it must plead the facts relied upon. Ms Bretherton relies upon the fact of particular clauses (and their legal effect); and those facts should have been identified so that any potential answers to the contractual points are themselves made clear in reply. For example, a typical response might be to raise an estoppel in so far as the facts support such a case. That is something which evidence is likely to be relevant to the determination of, and must be raised by the pleading process for the matter fairly to be dealt with in the litigation. It cannot fairly be raised for the first time in oral argument during a summary judgment application.

52. In any event, even if the specific clauses relied upon had been pleaded, their existence would have been insufficient to allow disposal of the matter summarily. That is because of the fact specific nature of claim of repudiatory breach at common law. Taking the first of Wallace's allegations relied upon for the purposes of repudiation, it is that Durkan, nearly a year after the date of the Agreement, had still not complied with its obligation to provide Wallace a complete and comprehensive copy of the plans and specifications required for remediating the defects at the building within a reasonable period of time (or at all). The obligation was to do that in a 'reasonable' period of time. It was a subsidiary obligation in respect of which time was not of the essence. Without more, its breach was not therefore repudiatory. It was also not an obligation to which any particular extension of time machinery attached. The question on breach (before one turns to whether that breach was repudiatory), therefore, would be what a 'reasonable' time in all the circumstances would be. There is a real prospect that Durkan could argue that what *in fact* caused delay could be relevant to determining what that reasonable time would be, irrespective of the minimal obligations imposed upon Wallace under the Agreement. For example, taking another of the points made by Ms Bretherton, Wallace was not under an obligation to hire their own consultants or to involve itself in review of Plans prior to the ultimate submission to them under paragraph 4.2. However, Durkan's evidence is that *in fact* Wallace did involve itself, and the delay in the appointment of their own consultants impacted the ability of Durkan to progress matters. That fact may be relevant to what a reasonable time was, irrespective of the absence of obligation upon Wallace.
53. What was actually causing delay is also likely to be relevant to an assessment of whether the delay is repudiatory in nature. As May LJ said in Shawton, where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach. Thus an assessment of whether Durkan was 'making an effort' is likely relevant to the analysis. The factual evidence served is clear that Durkan was making such an effort, irrespective of the allocation of contractual risk. However, whether this is in fact the case, and the role that evidence plays in the overall assessment of whether Wallace have been deprived of the substantially the whole benefit of the contract, or whether Durkan were evincing an intention not to be bound by the contract, are questions for determination at trial.
54. The progress made, and the reasons for any absence of progress, would also form part of an assessment of whether Wallace had, at the time of repudiation, been deprived of

substantially the whole benefit of the contract. Mr Hordern accepted the existence of disputed facts, but nevertheless submitted in his evidence that the Court could proceed safely on the basis that Durkan had made no material progress toward conferring on Wallace the benefit of the contract. However, that itself is a disputed fact and cannot be determined summarily against Durkan. Mr Hordern relied in part on an analysis of the pleadings by which it was said that Durkan, by reference to CPR r 16.5, must be taken at the time of the Termination Notice to accept that it had not submitted to WALLACE an updated and finalised version of the Plans and Specifications within a reasonable period after the date of the Agreement as required by the Agreement; and Durkan's failure to provide that prevented any Gateway 2 application to the BSR being made. I accept Ms Sims' argument that, by reference to paragraphs 54 and 55 of the Reply, the relevant allegations in the Defence were satisfactorily traversed such that there is no room for a deemed admission. But on any view, the pleadings put clearly in issue the *reasons* for the delay which will require factual investigation, both in the context of breach and whether any breach is repudiatory in nature.

55. Similarly, the question of whether the delay was remediable may be highly relevant not only to whether any breach could be said to be remediable, but to whether (if so), there was a common law right to terminate at all. Clause 3 of the Agreement provided a regime by which remediable breaches were required to be subject to a notice requiring cure prior to termination. There is a real prospect of success in an argument that delayed progress could be remediated by the allowance of a further reasonable period of time. In this context, Durkan rely upon the expert evidence of Mr Hinds, which is not contradicted for the purposes of the application, that the Gateway 2 submission could have been completed in 8-10 weeks from the date of termination. In fact, having terminated, it took Wallace's replacement contractor many months to make the submission, and it was during this longer delay (rather than in the period identified by Mr Hinds) that committal proceedings were in fact started against Wallace. Wallace deny that an appropriate comparator is looking to how long it has taken the replacement contractor to make a Gateway 2 submission, but that is a question of fact that would need to be determined at trial. However, to the extent that Wallace saw the solution as instructing a replacement contractor who would, or might, take longer to submit a compliant scheme to the BSR than the remaining time in which Durkan would have done so, there is a real prospect that this fact would at least be relevant to the assessment of whether any breach by Durkan had deprived Wallace of substantially the whole benefit of the contract.
56. Similarly, the manner in which Wallace itself approached the importance of timely progress plainly has the potential, at the very least, to be relevant to an assessment of whether delay can be said to have deprived Wallace substantially of the whole benefit of the contract. The authorities make clear that the analysis is an acutely fact sensitive one. The absence of complaints from Wallace about delay is a factual question which may be relevant to the overall assessment of whether delay should be taken to be repudiatory. Put simply: if Wallace's own conduct was, as Durkan's evidence served for the purposes of this application makes a case for, inconsistent with delayed progress being of central importance to it at any point up to the date of termination, can it be said failure to comply with such temporal obligations as Wallace may establish deprived them of substantially the whole benefit of the contract? These are matters which Durkan are undoubtedly entitled to explore at trial.

G. Affirmation

57. Durkan's case is that by the time of the Purported Termination Notice, Wallace had waived and/or affirmed the Agreement and thereby lost any right to assert that Durkan was in repudiatory breach of the Agreement.
58. Durkan's evidence is that in around March 2025 Wallace asked Mr Briggs and Ms Elias of Durkan to meet Mills & Reeve, Wallace's solicitors, to provide factual information in support of Wallace's intended application to extend the RO deadline. Mr Briggs said:

"There was no suggestion during those discussions that [Wallace] was dissatisfied with Durkan's performance or intended to remove Durkan from the project. On the contrary, the impression given was that [Wallace] would present this information to the FTT in a neutral way to demonstrate that both parties had been working together as a team to facilitate the remediation of the building, but that they had been delayed by various factors outside of their joint control."

59. Mr Barton gave evidence that by the beginning of June 2025, Durkan had substantially reached agreement with Wallace's professional team on the design approach, if not on every remaining detail, and that this had largely been signed off by Part B (Durkan's fire engineer):

"43. This was confirmed by Tenos ([Wallace]'s fire engineer) and Thomasons ([Wallace's] consultant) at a technical meeting on 3 June 2025, which Nigel Shields attended on behalf of Durkan, but which was relayed at a client meeting the following day. At this client meeting Simarc (for [Wallace]) said: "SG advised the technical meeting took place on 03/06/25 between Simarc, Durkan, Excel, Part B, Thomasons and Tenos to discuss the outstanding points on the fire-stopping solutions. Excel provided solutions for standard and non-standard details with supporting evidence using FSI product datasheets. Thomasons/Tenos confirmed this was suitable – on the strict basis each application is completed in accordance with the manufacturer's installation instruction."

60. The hearing at which Wallace sought to vary the RO ('the RO Variation Hearing') took place on 24 June 2025. The RO Variation Hearing was attended by a representative of Durkan. The skeleton argument for Wallace stated:

"Termination of the Remedial Agreement is not the panacea that the Applicants portray.

- i. If the Remedial Agreement is terminated, then [Wallace] will have to consider how to engage Durkan's subcontractors and design team, who may well not want to be novated to [Wallace].*
- ii. [Wallace] will also have to consider the intellectual property rights in the surveys and design work carried out to date.*
- iii. A new party, such as Thomasons would have to be engaged.*

- iv. *Given how close Durkan is to the submission of a Gateway 2 application, [Wallace] is reasonable in allowing Durkan to continue at this point in time.”*

61. In paragraph 26 of her witness statement for the RO Variation Hearing, Ms Chambers of Wallace confirmed that:

“We also felt by this stage that we had little option other than to continue to engage with Durkan to complete the remediation programme, though our view on that is beginning to change. However, having discussed the option of Thomasons’ taking over the project, I feel that is not viable and that it would simply lead to a longer delay in starting work on site.”

62. Wallace’s barrister at the FTT (as can be seen from the CMS Attendance Note) submitted:

“[Wallace] took the view that it should continue working with Durkan to progress the remediations. Let’s say today [Wallace] were to try to terminate the contract, this wouldn’t take us very much further and would possibly delay matters.”

63. The Notice of Termination was served two days later.

64. Ms Sims contends that the constituent elements of election, (i) knowledge of the facts giving rise to the right; and (ii) unequivocal conduct consistent only with the continuation of the contract, are made out. It was not suggested by Ms Bretherton that Ms Sims was incorrect that Wallace has offered no explanation - in its Defence, in Mr Hordern’s statement, or otherwise - for its volte-face between 24 and 26 June 2025. Ms Sims submits that the obvious inference is that the Termination Notice was a sudden reaction to the outcome of the RO Variation Hearing rather than a considered response to anything Durkan had done or failed to do. Ms Sims contends that disclosure of Wallace’s internal and advisory communications in that 48-hour window is crucial and likely to bear directly on the waiver and affirmation issues (and on the objective seriousness of the alleged breaches). It is said to be a paradigm example of evidence which can reasonably be expected to be available at trial but is not available now.

65. Ms Bretherton relies, again, on the Agreement. Clause 11.2 states that “any failure or delay by the Freeholder to exercise or enforce any right under this Agreement shall not operate as a waiver of that right or preclude the exercise or enforcement of it at any time or times thereafter, or constitute an election to affirm this Agreement. No election to affirm this Agreement by the Freeholder shall be effective unless it is in writing.” It is said that this is a complete answer to the affirmation case.

66. First, it is to be noted that, but for the clause, Ms Bretherton’s first point is that the communication to the FTT by way of written evidence or submissions could not constitute an affirmation to Durkan. Whilst it may be relevant to whether affirmation is made out that the submissions were directed at the FTT rather than directly to Durkan, a finding in respect of affirmation will take account of the totality of the evidence, including the earlier meetings in June relating to approval of the designs and Durkan’s

involvement in helping Wallace prepare for the FTT. Not least because Durkan were present at the FTT hearing, there is at least a real prospect that the factual elements of election may be made out.

67. There is also a real prospect of establishing, as Ms Sims argued, that clause 11.2 is no bar to Durkan's claim to affirmation. First, it is reasonably arguable that the initial sentence within the clause, directed at failure or delay in the exercise of rights, is simply not directed to election. Whilst a matter for full argument, it is also reasonably arguable that submissions to a Court by the innocent party unequivocally representing an intention to continue with the contract in writing to the knowledge of the contract breaker may be effective as affirmation in writing for the purposes of clause 11.2.
68. There may also be, at trial, a legitimate debate about whether even if affirmation took place on 24 June 2025, there nevertheless existed a renewed right to terminate two days later because of the persisting nature of a breach constituted by ongoing delay. That debate is likely to be informed by the precise factual circumstances established at trial. Were it otherwise, the existence of a persisting breach would always mean that unequivocal conduct amounting to affirmation is effectively writ in water, and neither counsel suggested such an answer in law.

H. Conclusion

69. Durkan's claim that the Notice of Termination was unlawful has a real prospect of success. It will require factual investigation and determination at trial. Wallace's application for reverse summary judgment on the claim and summary judgment on its counterclaim is not appropriate and must be dismissed.

ANNEX 1

1. The Recitals state as follows:

“Recitals

(A) The Developer originally procured and constructed the Property around 2008.

(B) The Freeholder subsequently acquired the legal title to the Property on 1 May 2014.

(C) It has been established that there are relevant defects at the Property and, pursuant to an order made by the first tier tribunal property chamber (residential property), the Freeholder is required to carry out internal compartmentation and other building safety works required to remediate those defects at the Property.

(D) The Developer has agreed to design, procure, carry out and complete the Works at the Property. The Freeholder grants the Developer a licence to access the Property in order to do so.”

2. In the body of the Agreement:

(1) “Works” is defined as *“all the works specified by the Order which the Freeholder is required to carry out pursuant to the Order, together with all associated works, necessary for the Project.”*

(2) “Substantive Breach” means:

“(a) a material breach of any term of this Agreement which is incapable of remedy;

or

(b) a material breach of any term of this Agreement which is capable of remedy but which has not been remedied within a reasonable period after the Party claiming the breach has given written notice of the breach (requiring its remedy) to the Party committing the breach”.

3. Pursuant to clause 1.2.2, "Writing" or "Written" means ‘excludes email and faxes’.

4. Clauses 2.1 and 2.2, under ‘The Services and the Works’ provide:

“2.1 With effect from the Commencement Date the Parties shall comply with each of their respective obligations, and shall benefit from their respective rights, as set out in Schedule 1.

2.2 The Parties agree that there is no fee for the Services or the Works.”

5. Clause 3 deals with 'Termination'. Clause 3.1 states:

"3.1 Either Party may (without prejudice to any other right, remedy or power available to any of them) after giving fourteen (14) days' written notice to the other Party terminate this Agreement if the other Party:

...

3.1.2 is in Substantive Breach, in which case this Agreement shall determine but without prejudice to any right of action or other remedy of either against the other in respect of any antecedent breach."

6. Clause 6, 'Entire Agreement', provides:

"6.1 This Agreement contains the complete and entire agreement between the

Freeholder and the Developer relating to the Project and supersedes all other oral and written communications relating to the Project. The Parties shall not be bound by, or be liable for, any inducement, promise, representation, statement or understanding not contained in this Agreement.

6.2 No changes or variations to this Agreement shall be valid unless they are recorded in writing and executed as a deed by both Parties."

7. Clause 11, 'Non-waiver' states:

"11.1 No acknowledgement, admission, advice, approval, comment, confirmation, consent, direction, enquiry, guideline, indication of satisfaction, inspection, review, instruction, or anything similar, given or made by or on behalf of the Freeholder, any of the Freeholder's Consultants, Professional Consultants or any of their agents, or failure to give or make any of these, shall exclude, limit, modify, qualify or reduce the Developer's obligations or liability under this Agreement.

11.2 Any failure or delay by the Freeholder to exercise or enforce any right under this Agreement shall not operate as a waiver of that right or preclude the exercise or enforcement of it at any time or times thereafter, or constitute an election to affirm this Agreement. No election to affirm this Agreement by the Freeholder shall be effective unless it is in writing".

8. Clause 16, 'Good Faith', provides:

"Each Party owes the other Party a duty to act with the utmost good faith in subsequently all terms of this Agreement."

9. Schedule 1 then sets out the Services and the Works.

10. Paragraph 1.1 deals with further definitions.
- (1) “BC Approval” means “the building control approval granted by the Building Safety Regulator under the Building Safety Legislation and Statutory Requirements following the submission of a BC Approval Application”;
 - (2) “BC Approval Application” means “any application(s) made in relation to the Works under any Building Safety Legislation and Statutory Requirements for building control approval for work to an existing HRB”;
 - (3) “Completion Date” means “the date on or before which Practical Completion must be certified, being 19 September 2025 or such other date as is agreed as part of the Plans and Specifications in accordance with this Agreement which may be updated from time to time by the Parties in accordance with this Agreement and confirmed in writing;
 - (4) “Plans and Specifications” means “the plans and specifications (including any programme(s)) for the Works in relation to the Project (including any fire alarm system changes or upgrades or other like fire and building safety measures) to be developed by the Developer and agreed by the Freeholder in accordance with paragraph 4 as may be further amended from time to time in accordance with paragraph 4”.
11. Paragraph 2 deals with ‘General obligations’. It provides:
- “2.1 The Developer warrants and undertakes that it shall:
- 2.1.1 comply with the terms of this Agreement;
 - ...
 - 2.1.3 diligently perform its duties and obligations under this Agreement and in respect of the Services and the Works; and
 - 2.1.4 use the Required Standard to avoid or minimise delay to the execution of the Services and the Works ...
- 2.4 The Parties acknowledge and agree that, unless subsequently agreed otherwise in writing, the Freeholder hereby delegates to the Developer and the Developer shall be responsible for the preparation and submission of the BC Approval Application and Completion Certificate Application and the Developer shall provide draft applications and assistance for the Freeholder to review and approve in reasonable time prior to submission of each application in accordance with this paragraph 2.”
12. Paragraph 3.1 provides a licence to occupy such parts of the Property as may be necessary for the Permitted Use for the Licence Period in common with the Freeholder and all others authorised by the Freeholder.
13. Paragraph 3.6 then provides that:

“The Developer intends to carry out and complete the Works without, in so far as practicable, accessing the residences and/or allocated parking areas at the Property.”

14. Paragraph 3.7 states:

“To the extent that the Developer cannot practicably carry out and complete the Works without accessing the residences and/or allocated parking areas at the Property the Developer shall notify the Freeholder and Management Company of this and shall, subject to paragraph 3.8, liaise with the same to arrange and agree such access to residences as is strictly necessary for the carrying out and completion of the Works.”

15. Paragraph 3.8 provides:

“Any such access made available to the Developer under paragraph 3.7 shall:

3.8.1 only be permitted to the extent and for the duration that is strictly necessarily for the Permitted Use;

3.8.2 be subject to the Developer's compliance with paragraph 3.3 and to the Management Company being given sufficient notice to allow the Management Company to give the resident(s) reasonable notice that such access is required and to allow the Management Company to comply with any residence access protocol in place at the Property...”

16. Paragraph 4, ‘Design and Plans and Specifications’ central to Wallace’s case, states as follows:

“4.1 The Developer and the Freeholder acknowledge and agree that the Plans and Specifications current at the date of this Agreement are indicative only and shall be replaced by detailed subsequent Plans and Specifications agreed by the Parties in accordance with paragraphs 4.2 and 4.3 and which may then be further amended from time to time.

4.2 The Developer shall submit one electronic copy of an updated and finalised version of the Plans and Specifications (the "Submitted Plans and Specifications") to the Freeholder within a reasonable period after the date of this Agreement for the Freeholder's review and approval (such approval not to be unreasonably withheld or delayed, provided always that the Plans and Specifications must enable the Developer to deliver the Works in accordance with the Order). The Developer shall take account of any reasonable comments the Freeholder may raise, and shall resubmit the Plans and Specifications in accordance with this paragraph 4.2 until the Freeholder confirms its approval of them in accordance with this clause. The Freeholder will complete its review and provide either the Freeholder's comments or approval as soon as reasonably practicable having regard to the nature of the Submitted Plans and Specifications

and such period of time shall, where appropriate to the submission, also include (without limitation) sufficient time as is reasonable for the Freeholder's Consultants to review the Submitted Plans and Specifications and provide comments and advice to the Freeholder in respect of the same."

17. Paragraph 5, 'Carrying out of the Services and the Works', provides:

"5.1 The Developer acknowledges and agrees that the Works under this Agreement will not commence prior to the date on which:

5.1.1 BC Approval has been given by the Building Safety Regulator and received by the Freeholder for the Works...."

5.2 The Developer shall procure that the Services and Works are designed, carried out and completed:

...

5.2.3 with due diligence and in a good and proper workmanlike manner;...

5.2.6 by the Completion Date;"

18. Paragraph 12, Delay and the Order, states:

"12.1 The Developer shall indemnify the Freeholder in respect of all reasonably incurred and properly mitigated costs which the Freeholder incurs in connection with any application the Freeholder is required to make to the First Tier Tribunal Property Chamber (Residential Property) in relation to any extension for the time for compliance specified by the Order. ..."

19. Paragraph 13, Delays and extensions of time, provides:

"13.1 If, at any time, it becomes reasonably apparent that the progress of the Works is being or is likely to be delayed then the Developer shall as soon as reasonably practicable, and in any event within fifteen (15) Working Days of becoming aware (or when it should have reasonably become aware) of the delay or likely delay, give the Freeholder and the Freeholder's Surveyor written notice of the material circumstances...

13.2 The following are the Relevant Events referred to in paragraphs 13.1 and 13.3:

...

13.2.2 delay in receipt by the Developer of necessary instructions or other information which the Freeholder is expressly required to provide under this Agreement;

13.2.3 subject to the express provisions of this Agreement, failure by the Freeholder to give possession of or access to the Site in accordance with this Agreement;

13.2.4 any impediment, prevention or breach by the Freeholder of its express obligations set out in this Agreement (or, in the case of any impediment or prevention, except to the extent that the same is in consequence of the reasonable exercise of the Freeholder's rights under this Agreement); and

13.2.5 any prevention or delay to the Developer's carrying out of the Works caused by the residents of the Property preventing the Developer's access to the Site provided that the Developer has complied with its obligations set out in paragraph 3. 7 and paragraph 3.8.

(each a “Relevant Event”).

13.3 Provided that the Developer has:

13.3.1 given notice in accordance with paragraph 13.1;
[...]

the Freeholder shall upon a written request by the Developer as soon as reasonably practicable by notice in writing grant an extension of the Period for Completion of the whole or part of the Works as may in its opinion be fair and reasonable [...]

...

13.5 The Freeholder and Freeholder's Surveyor shall within twenty-eight (28) days of the issue of the Practical Completion Certificate review all the circumstances of the kind referred to in paragraph 13.1 and shall finally determine and certify to the Developer with a copy to the Freeholder the overall extension of time (if any) to which the Freeholder considers, having due regard to the professional opinion of the Freeholder's Surveyor on the same, the Developer is entitled in respect of the Works.”

20. Paragraph 15.2 provides:

“15.2 The Developer shall prepare and maintain the following documents in accordance with this Agreement, the Statutory Requirements and the Development Control Requirements:

[...]

15.2.5 Fire and Emergency File

...”



Neutral Citation Number: [2026] EWHC 2133 (TCC)

**IN THE MATTER OF AN APPLICATION FOR A REMEDIATION CONTRIBUTION
ORDER UNDER S.124 OF THE BUILDING SAFETY ACT 2022
CASE REF: LON/00AH/BSB/2025/0611**

Case No. HT-2026-000045

**IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 August 2026

Before:

THE HONOURABLE MR JUSTICE CONSTABLE

JUDGE SIOBHAN McGRATH
President of the First tier Tribunal (Lands Chamber)

Between:

WALLACE ESTATES LIMITED

Applicant (FTT) /Defendant and Part 20 Claimant (TCC)

-and-

DURKAN ESTATES LIMITED

First Respondent (FTT) /
Claimant (TCC)/Part 20 Defendant (TCC)

-and-

DURKAN HOLDINGS LIMITED

Second Respondent (FTT)

Alice Sims (instructed by Mayer Brown International LLP) for the Claimant
Kerry Bretherton KC and David Hopkins (instructed by Mills & Reeve LLP) for the Defendant

Hearing date: 31 July 2026

Approved Judgment

This judgment was handed down remotely at 10:30am on Monday 10th August 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Constable and Judge McGrath:

A. Introduction

1. This short judgment marks the first joint hearing of the President of the First tier Tribunal (Lands Chamber) ('FTT') and a Judge of the Technology and Construction Court ('TCC'), the latter sitting both in his capacity as a High Court Judge and, jointly with Judge McGrath, as Tribunal member. The disputes concern a Remediation Agreement dated 1 Jul 2024 entered into by the parties (the "Agreement") pursuant to which Durkan Estates Limited ("Durkan") agreed with Wallace Estates Limited ("Wallace") to remedy, at its own cost, certain relevant defects ("the Defects") within the meaning of section 120 of the Building Safety Act 2022 (the "BSA"), at the building known as Centrillion Point in Croydon. A party to the FTT proceedings, but not the TCC proceedings, is Durkan's parent company, Durkan Holdings Limited ('Durkan HL', together 'the Durkan Entities').
2. The Defects are presently the subject of a remediation order dated 4 January 2024 ("the RO") which was imposed against Wallace by the FTT following an application by the leaseholders under section 123 of the BSA. At a hearing on 24 June 2025, the FTT considered and rejected Wallace's application for an extension of time for compliance with the completion date in the RO. On 26 June 2025, two days later, Wallace served a notice purporting to terminate the Agreement both through the contractual machinery and at common law. Thereafter, Wallace took over the Remedial Works
3. On 29 September 2025, Wallace commenced proceedings in the FTT for a remediation contribution order ("RCO") under section 124(1) of the BSA and claims, as their current estimate, £13,586,797.02 inclusive of VAT against the Durkan Entities.
4. Durkan issued the TCC proceedings on 6 February 2026 seeking a declaration that the termination was unlawful, and claiming damages. Wallace counterclaimed for declarations regarding the lawfulness of the termination, additionally claiming that there are further defects at the Development not caught by the RO ("the Further Defects"). The existence of the Further Defects is disputed.
5. Durkan accepts that the Defects are its responsibility to remedy, and by letter dated 19 May 2026 made an open offer to pay Wallace's remedial costs to date and thereafter to pay instalments up to the full sum (£6,740,268, including VAT) which Durkan says it would have cost it to complete the Remedial Works. Durkan has now paid £498,455 (inclusive of applicable VAT) on account of WEL's incurred costs.

6. By its application dated 28 May 2026, Wallace sought reverse summary judgment under CPR Pt 24 on the whole of the claim, summary judgment on Wallace’s counterclaim and costs. That application was dismissed on 30 July 2026 (see [2026] EWHC 2003 (TCC)).
7. The matters before the FTT and the Court were:
 - (1) The Durkan Entities’ application to the FTT dated 20 May 2026 (“the FTT Application”) for joint case management of the FTT proceedings and the TCC proceedings.
 - (2) Durkan’s application to the TCC, made simultaneously with issue of the Claim, dated 6 February 2026 (“the TCC Application”) for joint case management of the FTT and TCC Proceedings.
 - (3) The first CMC in the TCC Proceedings.
8. By the date of the hearing, much had been agreed between the parties, including the central issue of principle namely whether the FTT proceedings and the TCC proceedings should be managed and heard together as provided for in the 2026 TCC Guide. Given, however, that this hearing was the first of its kind, both the Court and the FTT considered it appropriate to hand down a short judgment appending the Order made by the Court and the FTT by way of some initial guidance as to how FTT and TCC proceedings are to be managed.
9. We are enormously grateful to the Counsel, and the parties’ representatives, for their work in reaching agreement. In particular we share the thanks voiced by Ms Bretherton KC to Ms Sims who played the lead role in drafting what has become the Order, appended at Annex 1, and in canvassing the various issues that have required consideration prior to its finalisation.

B. Joint Case Management

10. At paragraph 23 of the Particulars of Claim, Durkan aver:

“The FTT has no jurisdiction to decide issues concerning the lawfulness of the Purported Termination Notice and/or whether Durkan committed a repudiatory breach of the Agreement. Alternatively, the RCO Proceedings are not the appropriate forum in which to have these matters determined.”
11. Wallace admitted this paragraph in its Defence.
12. At the time it commenced the TCC proceedings, on 6 February 2026, DEL issued the TCC Application in which it applied to the TCC for “an early joint case management hearing in the TCC proceedings and the FTT Proceedings on the first available date after 10 July 2026”. Paragraph 3 of the draft order attached to the TCC Application states: “An issue to be decided at the case management conference is whether and how the FTT Proceedings and the TCC Proceedings will be case managed together [...]”.

13. The Fourth Edition of the TCC Guide had not, at the date of commencement of proceedings, been issued. The newly drafted section 9 reflects the work of the TCC/BSA Working Group, established in May 2024 and including Mr Justice Constable and Judge McGrath, to promote consistency of approach to BSA issues across the TCC and the FTT. Ms Sims is correct in her observation that its rationale – consistency of factual findings, the avoidance of duplicated evidence and cost, and a single, or joint, judicial mind across both sets of proceedings – is the same rationale that informs the exercise of the powers under CPR 3.1(2) and rule 6(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169) (“the Rules”) in any case of overlapping proceedings.

14. Section 9.2 states:

“9.2.1 Whilst the FTT and the High Court have different powers under the BSA, it is to be recognized that those powers might, on occasion, give rise to proceedings in both jurisdictions in respect of the same building. The procedure set out below is intended to assist in the case management of TCC BSA Proceedings, particularly where multiple proceedings are possible in relation to the same building.

9.2.2 The BSA does not prescribe how TCC BSA Proceedings should be commenced.

9.2.3 All claim forms and/or application notices in TCC BSA Proceedings are required to be accompanied by:

a) a completed questionnaire in the form provided at Appendix L of this Guide. This is designed to inform the TCC Judge about the building to which the proceedings relate, and any other proceedings or applications which have been or are likely to be commenced in the FTT or the TCC; and

b) the claimant/applicant’s proposals for case management of proceedings (where more than one set of proceedings is likely).

9.2.4 All TCC BSA Proceedings will be referred by TCC Listing for the urgent attention of the Judge in Charge of the TCC (or such TCC judge as the Judge in Charge may designate), who will consider the claim form and/or application notice and the Appendix L questionnaire, and consider whether it is necessary for an initial CMC to be held to consider case management of proceedings in relation to the same building (the “Allocation CMC”), or to give such directions as the judge may deem fit, including the provision of further submissions such that any matter may be determined on the papers. The issues for consideration at this stage will generally be limited to how multiple proceedings in the FTT and TCC in relation to the building should be case managed.”

15. The TCC Application effectively, therefore, foreshadowed this procedure, prompting the same intervention by the TCC as would be achieved by the Appendix L questionnaire. The defined term in Section 9 of the TCC Guide (“*TCC BSA Proceedings*”) attaches to proceedings under ss.130 and 132 of the BSA, whereas the TCC Proceedings between Durkan and WEL concern the alleged termination and repudiation of the Agreement, and the declarations and damages sought in the event that the FTT makes an RCO against the Durkan Entities in the FTT Proceedings. The TCC Proceedings in this case do not fall in terms within the definition of “*TCC BSA Proceedings*” in the TCC Guide. Nevertheless, the general principle is plainly capable of application to the present situation, and it seems likely that the TCC Guide will in due course be updated to reflect a broader definition of the type of TCC case which is suitable for joint management with the FTT.
16. On 12 February 2026, the FTT rejected the Durkan Entities’ informal application for a joint case management hearing. The FTT stated: “*if the Respondents wish to pursue this approach, the proper course is that the Respondents make an application on Form Order-1, which the Applicant can then have a full opportunity to consider. Any such application would need to carefully explain how such an approach would be advantageous to the advancement of the claim(s). While we make no finding on the issue, we would note that at this stage, it is not immediately apparent that this is the case. For example, having regard to the TCC Particulars of Claim, it can be argued that the claim is, at least in part, a protective claim in the event that a RCO is made against the Respondents...*”.
17. On 20 May 2026, the Durkan Entities issued the FTT Application “for a joint Case Management Conference to take place between the FTT in the current proceedings and the TCC in the related unlawful termination proceedings”.
18. Apprised of the two applications (and having consulted the President of the FTT in advance), on 10 June 2026, the TCC held a directions hearing, at which Constable J directed Wallace’s summary judgment application to be heard on 20 July 2026 and this joint CMC on 31 July 2026. Wallace submitted that it was in light of the dismissal of its summary judgment application that it then agreed to joint case management, and accepted that it was inevitable in those circumstances that the current listing of the FTT hearing in November 2026 is vacated. In any event the FTT listing for November was already in jeopardy because of a significant delay in the experts’ site inspections which would inevitably have required the FTT Directions to be re-timetabled.
19. In the TCC Proceedings, the Court’s powers derive from CPR 3.1(2), exercised in furtherance of the overriding objective in CPR 1.1. The Court may consolidate proceedings (CPR 3.1(2)(h)); try two or more claims on the same occasion (CPR 3.1(2)(i)); and decide the order in which issues are to be tried (CPR 3.1(2)(k)). The White Book commentary on CPR 3.1(2)(h) and (i) is set out at note 3.1.9. In summary, the factors are:
 - (1) The extent of the overlap of parties, facts or issues between the sets of proceedings;
 - (2) The extent to which an order would avoid the risk of inconsistent findings;
 - (3) The cost and delay of a multiplicity of proceedings, pleadings, pre-trial steps and interlocutory applications which would thereby be avoided;

- (4) The stage which the proceedings have reached, an order being more likely to save cost and delay if made early rather than late;
 - (5) The extent to which the same advantages could be achieved by other means, including an order under CPR 3.1(2)(i) that the claims be tried on the same occasion.
20. The overriding objective is for the “court to deal with cases justly and at proportionate cost”: see CPR 1.1(1). The non-exhaustive list in CPR 1.1(2) includes factors relevant to this matter including saving expense, dealing with cases in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, ensuring that it is dealt with expeditiously and fairly, and allotting to it an appropriate share of the Court’s resources.
21. The FTT has a closely analogous power to jointly manage proceedings: by rule 6(3)(b) of the Rules, the Tribunal may “consolidate or hear together two or more sets of proceedings (or parts of proceedings) raising common issues or treat a case as a lead case (whether under rule 23 or otherwise)”. That power is exercised in accordance with the overriding objective in rule 3 of the Rules, which is similar, but not identical, to the overriding objective in the CPR: Rule 3(2) includes two matters with no CPR analogue: avoiding unnecessary formality and seeking flexibility in the proceedings (rule 3(2)(b)), and using any special expertise of the Tribunal effectively (rule 3(2)(d)). Where the criteria for joint case management are met, an order that proceedings be heard together (rather than formally consolidated) is generally to be preferred in both the FTT and the Court: each set of proceedings retains its separate identity, parties, procedural rules and judgment, avoiding the consequences of formal consolidation.
22. Both parties now seek joint case management and a single hearing to determine the RCO and the declarations/damages claims brought in the TCC, notwithstanding the inevitable delay caused to the overall resolution of the matters in dispute. It may be that the approach now agreed is little more than a reflection of the position averred by Durkan at paragraph 23 of its Particulars of Claim, and quoted above, as admitted by Wallace. The Court and the FTT are content to endorse the parties’ agreed approach, particularly in light of the significant overlap of issues and facts between the TCC and the FTT Proceedings. It plainly has the effect of avoiding inconsistent findings, and duplicative costs for both parties in relation to disclosure, witness statements, expert reports and the trial itself.
23. However, this should not be taken as a necessary endorsement (had it been argued) of Durkan’s averment at paragraph 23 as to the ability or appropriateness of the FTT deciding the question of unlawful termination, if considered relevant to a determination of whether to issue an RCO. It would be inappropriate to express a view, either way, on whether such limits exist when the matter is not in dispute between the parties and when the question has not been the subject of full argument.

C. Directions

24. The procedural rules in the TCC and FTT are different in a number of respects. The TCC proceedings are governed by the Civil Procedure Rules (“CPR”). The FTT proceedings are governed by the Rules. With thanks to Ms Sims’ submissions, largely

agreed by Ms Bretherton, this section of the Judgment highlights some of the main differences and explains how such issues have been dealt with in Order.

25. **Composition:** The mechanism by which one judge may try both sets of proceedings is straightforward. By virtue of sections 4(1)(c), 5(1)(g) and 6(1)(d) of the Tribunals, Courts and Enforcement Act 2007, a puisne judge of the High Court is already a judge of the First-tier Tribunal (and of the Upper Tribunal); no separate appointment is required. What is required is the concurrence of the President of the FTT (Property Chamber) contemplated by paragraph 9.2.5 of the TCC Guide.
26. That concurrence is provided by way of the Order, which provides at paragraph 9 that the composition of the Court and FTT for the PTR, trial and general conduct of the TCC and FTT Proceedings shall include a TCC Judge and an FTT Judge. Whilst, as envisaged by paragraph 9.2.5 of the TCC Guide, the proceedings could be dealt with by a single TCC judge sitting also as a judge of the FTT, which requires no fresh appointment but does require the concurrence of the President of the FTT (Property Chamber), the Court and the FTT consider that, at least in the circumstances of this case, there are sufficient advantages to a Court and FTT composed of at two members that the use of such judicial resources is justified.
27. In order, however, to promote efficiency, the composition of the Court/FTT for the general conduct and case management of the FTT and TCC Proceedings prior to the PTR may be a single Judge capable of sitting in the TCC and FTT.
28. The parties took a neutral stance about whether a professional member of the FTT sits alongside the judges. However, the Court/FTT took the joint decision that to include a professional member would, at least in the context of this case, add a layer of complication without significant benefit. That is because the professional member would be limited to decision making about the FTT Proceedings alone and their views would have to be ignored/isolated from decision making in the TCC. This is not insurmountable. However, where both parties are proposing to lead evidence from technical experts in the fields of architecture, fire engineering and quantity surveying, the practical complication caused by the inclusion of a professional member is not outweighed by the benefit.
29. **Disclosure:** The Order provides that all further disclosure not already provided shall be given by Durkan and Wallace in accordance with Practice Direction 57AD and Rule 18 of the Rules (insofar as the latter is not inconsistent with Practice Direction 57AD and the directions). This avoids the parties having to go through the disclosure process twice and it makes practical sense for the (more onerous) extended disclosure rules to primarily apply to all documents as otherwise the parties would have to work to two separate and different requirements when undertaking disclosure.
30. Rule 18(3) of the Rules restricts a party's use of a disclosed document to the proceedings in which it was disclosed subject to, inter alia, the permission of the FTT, and CPR 31.22 is to the same effect (as is CPR 32.12 in relation to witness statements). Because the two sets of proceedings will remain separate, documents disclosed and statements served in one set could not, strictly, be deployed in the other without permission. The Order therefore records that the parties have permission to use

documents, witness statements and expert reports disclosed in either set of proceedings for the purposes of both.

31. **Witness statements:** The Order provides that there is one set of witness statements covering the FTT and the TCC Proceedings. This avoids obvious duplication and cost. It also provides that the witness statements comply with the requirements of CPR Part 32 and Practice Direction 57AC. These requirements are more formal than the requirements under the Rules but not incompatible.
32. **Expert evidence:** The Order provides that there is one set of expert evidence for both proceedings covering architecture, fire engineering and quantity surveying and that this be covered by CPR Part 35. CPR Part 35 and its Practice Direction are more prescriptive than rule 19 of the Rules but, again, the two sets of procedural rules are not incompatible.
33. **Costs:** The parties agreed that because the value on the claim form is £10 million or more, costs management does not apply for the TCC Proceedings: see CPR 3.12(1)(a).
34. The FTT is, in essence, a no-costs regime save for any costs that may be recoverable under Rule 13 due to a party's unreasonable conduct. By contrast, the ordinary rule in the TCC is that "costs follow the event" and there are detailed rules about costs in, inter alia, CPR Parts 36 and 44.
35. The Order provides that the parties are to maintain and utilise separate cost codes for work done in relation to the FTT and TCC proceedings in the following way: *"(a) work done solely in relation to the FTT Proceedings; (b) work done solely in relation to the TCC proceedings; (c) work done jointly in relation to the FTT and TCC Proceedings. The parties recognise that apportionment arguments may be relevant when it comes to any costs decisions."*
36. Issues about costs will plainly be left for determination at the end of both proceedings in the usual way, but the three-way cost coding approach at least provides in advance for potential apportionment between the TCC and the FTT proceedings if that is ultimately determined to be appropriate in principle.
37. **Appeals:** Similarly, the appeal routes differ. A single joint trial could therefore give rise to two appeals, in two appellate courts, on the same findings of fact. However, this is not the appropriate time (or, potentially, forum) to consider the complications that this may, in the future, give rise to.
38. **Parties:** Durkan HL is a respondent to the FTT Proceedings but is not a party to the TCC Proceedings. The directions record, by consent, that the findings of fact made at the joint trial are to be treated as binding in both sets of proceedings and as against all three parties.
39. **Compelling witnesses:** Rule 20 of the Rules and CPR Part 34 provide different mechanisms for requiring a witness to attend. This will be addressed only if and to the extent it is necessary to in the future.
40. **The Trial.** The earliest the trial would be ready for hearing on the basis of the directions as ordered would have been October 2027. The Court is presently only able to list trials

of three weeks or more from January 2028. In order to mitigate the effects of the delay, the Court determined it appropriate to fix a ‘first’ listing in January 2028, but also to fix a second listing in October 2027. Cases in the TCC have a high settlement rate: it has been about 85% over the past few years. There is a good chance, therefore, that over the next twelve months, some of the cases presently listed for October will settle, and the Court will be available to hear the case sooner. If that has not transpired by July 2027, then the second fixing will drop away, and the January 2028 listing confirmed. The Court made clear that the onus was on the parties (and, most likely Wallace) to keep in touch with listing, rather than for listing to notify the parties should October become available.

ANNEX 1

JOINT CASE MANAGEMENT DIRECTIONS

UPON hearing Counsel for all parties at the joint Case Management Conference on 31 July 2026

AND **UPON** an open financial offer being made by Durkan Estates Limited ("**DEL**") in a letter dated 19 May 2026

AND **UPON** all parties agreeing that a direction should be made that the findings of fact made at the joint trial are to be treated as binding in both sets of Proceedings and as against all three parties

IT IS HEREBY ORDERED THAT

Generally

1. The proceedings bearing case reference LON/00AH/BSB/2025/0611 ("**FTT Proceedings**") shall be jointly managed and tried together with claim number HT-2026-000045 ("**TCC Proceedings**"). The FTT Proceedings and TCC Proceedings are collectively referred to hereafter as the "**Proceedings**".
2. Durkan Estates Limited ("**DEL**") is the Claimant in the TCC Proceedings and the First Respondent in the FTT Proceedings. Durkan Holdings Limited ("**DHL**") is the Second Respondent in the FTT Proceedings (and not a party to the TCC Proceedings). Wallace Estates Limited ("**WEL**") is the Defendant in the TCC Proceedings and the Applicant in the FTT Proceedings.
3. The Directions of the FTT dated 13 February 2026 are superseded save as set out below. For the avoidance of doubt, the pre-trial review listed on 30 September 2026 and the hearing listed on 30 November-11 December 2026 in the FTT Proceedings are vacated.
4. At all stages the parties must consider settling the Proceedings by any means of alternative dispute resolution (including mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge(s) until questions of costs arise. The parties have agreed to mediate in principle either in August or September 2026.
5. The findings of fact made at the joint trial are to be treated as binding in both sets of Proceedings and as against all three parties.

6. The Court and the FTT give permission for cross use of documents, witness statements and expert reports between the Proceedings in accordance with Rule 18(3) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules ("**Rules**"), CPR 31.22 and 32.12.

Trial

7. The trial of all issues in both the TCC and FTT Proceedings shall take place as follows (the primary listing) subject to any further directions to be given at the pre-trial review:

- (a) First day of trial: 31 January 2028.

- (b) Estimated length of trial: 12 sitting days, excluding Fridays, including two judicial reading days on 31 January and 1 February 2028.

8. The second listing for trial (if the Court becomes available for such dates by the PTR listed for July 2027) is as follows:

- (a) First day of trial 11 October 2027

- (b) Estimated length of trial: 12 sitting days, excluding Fridays, including two judicial reading days on 11 and 12 October 2027.

9. The composition of the Court/Tribunal for the trial and PTR shall be a TCC Judge and a separate FTT Judge. However for procedural efficiency, the composition of the Court/Tribunal for the general conduct and case management of the FTT and TCC Proceedings prior to the PTR may be a single Judge capable of sitting in the TCC and FTT. The composition is not to include a professional member of the FTT.

10. For the purposes of the trial fee in the TCC Proceedings, but for no other purpose, the trial date is provisional. This date shall cease to be provisional and the trial fee shall become payable 28 days before trial.

List of Issues

11. The parties shall seek to agree the List of Issues by 5pm on the date 2 weeks after the close of any amended pleadings initiated by WEL's proposal to amend its Defence and Counterclaim.
12. Any remaining disagreement on the List of Issues is to be resolved on the basis of short written submissions to the Court and FTT, which are to be filed and exchanged by 5pm on the date 1 week after the date by which the parties shall seek to agree the LOI in paragraph above.
13. The parties shall review the List of Issues in advance of the PTR. In the event that any proposed amendments to the List of Issues cannot be agreed between the parties, an application should be made at the PTR.

Disclosure

14. In addition to any disclosure already provided in the FTT Proceedings by the date of the joint CMC, DEL and WEL shall provide extended disclosure on all issues in accordance with the DRD filed on 31 July 2026 in the form approved by the Court at the joint CMC. It is not envisaged that DHL has any disclosure to give.
15. All further disclosure not already provided shall be given by DEL and WEL in accordance with Practice Direction 57AD and Rule 18 of the of the Rules insofar as the same is not inconsistent with Practice Direction 57AD and these directions..
16. DEL and WEL shall by no later than 5pm on 27 November 2026:
 - (a) File and serve their lists of documents so as to comply with the DRD;
 - (b) Serve a Disclosure Certificate substantially in the form set out in Appendix 4 of PD 57AD;
 - (c) Produce the documents which are to be disclosed and over which no claim is made to withhold production, or (if the party cannot produce a particular document) comply with the steps set out in paragraph 12.3 of CPR Practice Direction 57AD.
17. The parties shall liaise as to the most practicable and cost-effective means of providing disclosure.
18. DEL and WEL agree that further disclosure may have to be given after the dates set out in paragraph 13 above in respect of any Gateway 2 Application made by WEL and/or the consequences of any response thereto by the Building Safety Regulator.
19. Any further disclosure requests must be made promptly. DEL and WEL shall respond to any such requests and provide any documents they agree to disclose within 28 days of such a request being made.

Witness Statements

20. The witness statements shall comply with the requirements of CPR Part 32 and Practice Direction 57AC.
21. The parties shall exchange witness statements of fact on or before 4pm on 29 January 2027.
22. The parties shall serve on each other supplementary witness statements of fact, but only to the extent proper and necessary, by no later than 26 February 2027.

23. The supplementary witness statements of fact shall be limited to matters raised in the witness statements served by the other party and not already covered in the principal witness statements.
24. Unless otherwise ordered, the witness statements shall stand as the evidence in chief of the witness at trial.

Experts

25. CPR Part 35 applies to all expert evidence and Rule 19 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules insofar as the same is not inconsistent with CPR Part 35 and these directions.
26. The parties shall each have permission to rely upon expert evidence in the following respective disciplines, (i) fire engineering (ii) architectural and (iii) quantity surveying, some of whom have already appointed in the FTT Proceedings and are identified below:
- (a) Architecture:
 - (i) DEL and DHL: Frank Hinds of CDA;
 - (ii) WEL: Niralee Casson ;
 - (b) Fire engineering:
 - (iii) DEL and DHL: Mario Ledermann of Diales Consult Ltd;
 - (iv) WEL: Dr Nadia Mofidi;
 - (c) Quantity surveying:
 - (v) DEL and DHL: Angela Austin of Corderoy Contract Services limited;
 - (vi) WEL: TBC.
27. The parties shall seek to agree a list of issues/agenda for the expert discussions by 6 November 2026. If the parties cannot agree, any dispute/issue/item shall be referred to the Court/FTT for determination on paper.
28. In respect of architectural and fire expert evidence:
- (a) WEL confirms that it will grant DEL and DHL's experts such access to the building as they will reasonably require and that WEL can reasonably provide in order to enable them to carry out inspections and/or investigations for the purposes of the matters on which they are to opine, and the parties will cooperate with one another to arrange access with the relevant leaseholders of any flats within the building in relation to which the experts may reasonably need to carry out inspections and/or

investigations. The site inspections and/or investigations shall be carried out by no later than 20 November 2026.

- (b) Experts of like discipline shall each hold discussions in accordance with CPR r.35.12 by 12 March 2027.
- (c) Experts' joint statements for each expert discipline, of matters agreed and not agreed in accordance with CPR r.35.12(3), shall be prepared and filed by 4pm on 7 April 2027.
- (d) Experts' reports, limited to matters not agreed between experts of like discipline, shall be filed and served by 7 May 2027.

29. In respect of quantity surveying expert evidence:

- (a) The experts shall hold discussions in accordance with CPR r.35.12 by 21 May 2027.
- (b) Experts' joint statements of matters agreed and not agreed in accordance with CPR r.35.12(3) shall be prepared and filed by 4pm on 11 June 2027.
- (c) Experts' reports, limited to matters not agreed, shall be filed and served by 4pm on 2 July 2027.

30. All experts shall attend trial if they are not in substantial agreement on all material matters and/or if they are required for cross-examination by the other party.

Pre-Trial Review

31. Pre-Trial Review is listed on 16 July 2027 with a time estimate of ½ day.

32. By 5pm, 4 working days before the PTR:

- (a) Each party shall file and serve upon the other party a completed copy of the PTR questionnaire in the form set out in Appendix C to Practice Direction 60.
- (b) DEL and DHL shall file and serve on WEL a draft timetable for the trial providing for oral submissions, examination in chief (if any) and cross-examination of witnesses of fact and expert witnesses. The parties shall use reasonable endeavours to agree the timetable prior to the PTR.

Trial Bundle

33. DEL and DHL shall provide WEL with a draft index of the proposed trial bundle by no later than 5pm on the date which is 10 weeks before the trial date.

34. The parties shall seek to agree the contents of the trial bundle by no later than 5pm on the date which is 9 weeks before the trial date.

35. DEL and DHL shall prepare an indexed and paginated bundle comprising all relevant documents, including pleadings, statements, reports and other material, by no later than 5pm on the date which is 8 weeks before the trial date.

Extensions of Time

36. The above dates and time limits may be extended by agreement between the parties for periods no greater than 28 days, but the dates specified for the trial and PTR cannot be varied without permission of the Court/FTT.

Costs

37. Pursuant to CPR 3.12(1)(a), the need for costs budgeting in the TCC Proceedings is dispensed with.
38. Given the different costs rules applicable to the FTT and TCC Proceedings, the parties shall maintain and utilise separate costs codes for work done in relation to the FTT and TCC Proceedings in the following way: (a) work done solely in relation to the FTT Proceedings; (b) work done solely in relation to the TCC proceedings; (c) work done jointly in relation to the FTT and TCC Proceedings. The parties recognise that apportionment arguments may be relevant when it comes to any costs decisions
39. The costs of the Case Management Conference and TCC Application are costs in the case.
40. Further directions as to costs management and/or the assessment of costs are to be given at the PTR and/or at the trial.