FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AP/HYI/2022/0017**
Property	**:**	**Various flats at 419 High Road, Space Apartments, N22 8JS**
Applicants	**:**	**Raffaele Di Bari (lead Applicant) and various other long leaseholders**
Respondent	**:**	**Avon Ground Rents Limited**
In attendance at the hearing	**:**	**Dr Di Bari (Flat 6)** **Ms C Best (Flat 1)** **Mr P Kenkare (Flat 10)** **Mr R Bowker (Counsel for the Respondent)** **Mr A Jason (Managing Agent)** **Mr P Phillips (Senior Director, Anstey Horne)**
Type of application	**:**	**For a remediation order under section 123 of the Building Safety Act 2022**
Tribunal	**:**	**Deputy Regional Judge Martyński** **Mr S Mason BSc FRICS** **Mr A Gee RIBA**
Date of Hearing	**:**	**8 (including inspection) & 9 February 2024**
Date of decision	**:**	**28 February 2024**

DECISION

Decision summary

1. The Tribunal makes a Remediation Order in respect of 419 High Road, Space Apartments, N22 8JS ('the Building') in the terms of the Order that accompanies this decision pursuant to s.123 Building Safety Act 2022 ('BSA').

2. The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985, that none of the landlord's cost of these proceedings may be passed on to non-qualifying Applicant leaseholders through the service charge (the qualifying Applicant leaseholders being protected against payment of any costs by reason of paragraph 9 of Schedule 8 to the Building Safety Act 2022)[1].

Background

3. Section 123 of the BSA provides for applications to be made to the Tribunal for a remediation order in respect of relevant defects in a relevant building. Section 120 contains definitions and defines a "relevant defect" by reference to a "building safety risk". The relevant provisions are set out in full in an appendix this decision.

4. The Building was developed in 2005 by Paul Simon Homes. It consists of 29 flats with a maximum height of five storeys, just over 11 meters.

5. The freehold interest in the Building was acquired by the Respondent in 2015.

6. There is no dispute between the parties that, as per the provisions of the BSA, the Applicants are interested persons within the meaning of the BSA, the Respondent is the 'relevant landlord' and that the Building is a 'relevant building'.

7. The main issues of concern with the Building, so far as fire safety is concerned, can be summarised as follows:
   (a) External Walls: There are four types of wall that are a concern at the Building.
      (i) Brick facades
      (ii) Aluminium cladding cassettes
      (iii) Timber ship lap cladding
      (iv) Render systems

   All the wall types present fire safety issues

   (b) Balconies and roof terraces: The Building contains a number of external stacked balconies and roof terraces with timber decking. Attached to these areas are privacy screens and brise soleils made of timber

   (c) Window and door openings (insufficiently protected from or preventing the spread of fire)

   (d) Aluminium spandrel panels (possibly not having appropriate fire

[1] This part of the order has been made without giving the parties the opportunity to make representations at the hearing. Any party objecting to this order may apply for a re-consideration of this order. Any such application must be made within 7 days of the date that this decision is sent to the parties and must be made on the tribunal's form 'Order 1'.

barriers/containing combustible material

(e) External and internal compartmentalisation issues

(f) Service penetration issues

(g) Concerns regarding the Automatic Vent Control system

(h) Fire alarm issues

8. In May 2021, the Respondent commissioned Anstey Horne ('AH') to undertake a fire safety inspection of the Building. The report produced by AH confirmed serious issues of fire safety at the Building.

9. According to the Respondent's preliminary Statement of Case filed in these proceedings and dated 23 January 2023, after the initial report of Anstey Horne, the Respondent began the process of statutory consultation, with a view to implementing the works considered necessary. However, that process was difficult because; (a) of the lingering effects of the Covid-19 pandemic which had an effect on the availability of contractors and materials; (b) the change in fire safety standards when PSA9980 2022 came into force, and; (c) the implications of an eventual passing into law of the BSA.

10. The Respondent's preliminary Statement of Case goes on to state that in late 2022 the Respondent commissioned a further report to undertake a Fire Risk Appraisal of External Walls (FRAEW).

11. The Applicants' application to the tribunal is dated 2 December 2022.

12. The tribunal issued preliminary directions dated 9 January 2023 seeking a brief response from the Respondent.

13. At a Case Management Hearing on 27 January 2023, the tribunal made orders which dealt with, service of the application on other leaseholders and the local authority and Fire Brigade and disclosure of the FRAEW report commissioned by the Respondent.

14. There is then an email sent to the tribunal by the Respondent's solicitors dated 24 February 2023 which stated;

> The Respondent has now retained the services of a Chartered Surveyors and Chartered Building Engineers Firm, Anstey Horne..... We are unable to confirm an inspection date at present.....

15. In response to this, the tribunal sent an email to the parties expressing its concern as follows;

> At the hearing held on 27 January, the Respondent told the tribunal that it had commissioned a further report on the building and that the results of that

> report were awaited.
> .....
> On 17 February, the Respondent gave further details of the report, but also stated that it had taken the decision to obtain a different report from a fire specialist. This concerns me. The Case Management Hearing which took place on 27 January was the Respondent's opportunity to consider how it was going to deal with this application. The tribunal relied upon what it was told, which was that a report was in progress and it would soon be finalised.....

16. The Respondent responded on 4 April 2023, stating;

> The decision to instruct Anstey Horne was taken in relation to the number of properties as part of a wider management review of the process in place for Remediation Works. This review takes into account not just the initial reports, but additional steps involved to include production of specifications, and also the reliance that will be placed upon these reports in further litigation to recover sums from third parties. The timing of the change was unfortunate however was taken as a prudent management measure solely in the best interest of residents with fire safety as the primary concern.

17. Dr Di Bari, the lead Applicant, chased the matter on a few occasions after inspections which took place in April and June 2023. It was not until 28 September 2013 that the Respondent's solicitors disclosed the FRAEW report from Anstey Horne. They stated that the report recommended a further report from a Chartered Fire Engineer and sought an additional three months to obtain this.

18. A further Case Management Hearing took place on 29 September 2023. The tribunal ordered that the Fire Engineer's report be disclosed no later than 27 October 2023 and that by 8 November the Respondent was to disclose its proposals for remediation works. A further Case Management hearing was set for 22 November.

19. At the Case Management Hearing on 22 November 2023, the Respondent confirmed that the Fire Engineer's report (dated 18 October 2023 and produced by Anstey Horne) concluded that major works were necessary and that other, possibly cheaper, measures (such as sprinkler systems/upgraded fire alarm) would not properly address the issues at the Building. At that hearing the dates for a final hearing on 8 & 9 February 2024 were set. The report obtained from AH at this stage set out the issues that need to be addressed and suggested works. Those works included removing the brick facades to the Building with associated works and, installing cavity barriers around windows and on compartment lines before reinstating the brick facades. These works are later costed, in December 2023, at £588,000 and £88,660 respectively.

20. The Respondents applied to the Cladding Safety Fund (CSF) for funding for the proposed works.

21. In December 2023, the Respondents then obtained a retrospective fire safety report from ORSA. That report set out various concerns and recommendations.

22. A witness statement filed by the Respondent from Avrohom Jason (Senior

Property Manager at the Respondent's managing agents, Y & Y Management Ltd.) dated 10 January 2024, heralds a shifting of the Respondent's position on the works that the Respondent considers it is liable to carry out. The shift concerns the timber decking to the balconies and terraces and the timber to the brise soleil and privacy screens. Mr Jason states that the Respondent considers that areas demised to the Applicants under their leases include this timberwork and that accordingly, the landlord has no responsibility to repair those areas and accordingly the tribunal could not include the replacement of the timberwork in any Remediation Order.

23. In the meantime, it appears that there were discussions with the CSF as to the extent it would fund the works. As far as we understand the situation, the CSF was not happy to fund the full extent of the works proposed by AH. This resulted in a further version of the FRAEW being produced and a revised costs budget to meet the approval of the CSF. The major changes were a scaling back of the works to the brick facades and cavity barriers resulting in a reduction of costs of over £500,000. The updated FRAEW (version 3) was produced shortly before the hearing and the updated costing (Cost Plan 2) at the hearing. As at the hearing, it was not clear if the CSF agreement had been fully signed off, but it had already committed to an initial payment of £300,000 for scoping works.

24. At the time the tribunal inspected the Building on the first day of the final hearing, a waking watch had been established and was ongoing in the light of the realisation that a 'stay put' strategy in the event of a fire was inappropriate and pending the installation of an appropriate fire alarm system for the Building, which, we understand, should be installed in the near future.

The matters in issue at the hearing

25. By the date of the final hearing, the parties had arrived at broad agreement (relying more or less exclusively on the expertise of Anstey Horne) as to the works that were required. The following issues remained in dispute;

    (a) Given the Respondent's commitment to carrying out the works, whether it was appropriate to make a Remediation Order under s.123 of the BSA
    (b) The timing of the works
    (c) Whether the timberwork to the balconies and roof terraces could be included as specified works within a Remediation Order
    (d) The extent to which the tribunal could make any ancillary orders (such as obligations to consult and provide confirmatory reports at the conclusion of the works
    (e) Works arising out of the ORSA report

Evidence

Documents

26. We had (amongst others) the documents referred to above before us, having given the Respondent permission to produce and rely upon the updated FRAEW (version 3) and costs budget and the retrospective fire strategy report from ORSA. To not have allowed these documents to be adduced and considered at the hearing would have prejudiced everyone given the direct relevance of the documents. It was vital that we were aware of all the documents relevant to the matter, even if those documents were produced at the last moment.

Mr Jason

27. Adding to his witness statement filed with the tribunal, Mr Jason stated that, as to internal fire doors in the Building, an accredited company would be inspecting and would be providing costings for the replacement/improvement of the doors. As to the fire alarm system that was shortly to be installed, this was being funded from a different fund.

28. Mr Jason's understanding from the updated FRAEW report and planned works was that it was now unlikely that any occupant in the Building would need to be decanted for the works to be completed.

29. Mr Jason agreed that there were some issues as to the completeness of the ORSA report which he was taking up with the company. He had confirmed the landlord's intention was to procure a Type 4 Fire Risk Assessment, and commented that he felt that the ORSA report did not fully satisfy this requirement.

30. As to the funding from the CSF, Mr Jason's understanding was that the funding would be supplied in stages, subject to approval of tenders for the works. As far as he was aware, all the revised works proposed by Ansty Horne were eligible for funding.

31. Mr Jason was not entirely clear as to what the Respondent's position was on the carrying out of works to the timber on the balconies and roof terraces. However, the Respondent's position on this was clarified on the following morning of the hearing when Mr Bowker offered the following as an agreed recital to any order that the tribunal might make:

> The Respondent confirms to the tribunal that it will comply fully with the terms of the grant funding agreement. The Respondent further confirms that it believes that pursuant to the grant funding agreement the costs of removing and replacing the timber decking on the balconies and roof terraces will be paid in full by the cladding safety scheme. In that event, the Respondent further confirms that it will use all reasonable endeavours to ensure that the timber decking on the balconies and roof terraces is removed and replaced, that being without prejudice to the Respondent's contentions that replacing and removing the timber decking on the balconies and roof terraces is outside the tribunal's jurisdiction under s.123 BSA 2022 and that the floor covering on the balconies and roof terraces is demised and is the tenants' responsibility under the lease.

Mr Phillips

32. Mr Phillips is a Chartered Building Surveyor and Chartered Engineer at Anstey Horne and appeared as an expert witness. He confirmed to the tribunal that he was aware of his responsibilities as an expert witness giving evidence.

33. As to why the latest version of the FRAEW report (version 3) was provided only just before the hearing, Mr Phillips told the tribunal that his firm had been contacted by the CSF regarding a number of aspects of the proposed works, his firm had pushed back on those matters but had agreed changes as detailed above, principally concerning the wholesale removal of the brickwork. He was satisfied that the modified extent of the works, as reflected in the up-to-date costs budget (Cost Plan 2) were sufficient and reasonable.

34. On the question of the timing for the works, Mr Phillips said that he considered that he thought the estimate for the pre-contract works, eight months, may be a little too short and that 8-12 months would be more realistic. His understanding as to decanting of occupants was that, if the brickwork forming some of the walls was not now to be removed completely, there would be no need for decanting. Accordingly the six months provision for decanting would not be needed. As to the works themselves, he estimated a period of 10 months. Although he was not involved in the funding process, Mr Phillips estimated 4 months should be allowed to deal with any funding delays.

35. Mr Phillips stated that the balconies were a steel structure and considered that it was likely that the timber decking was screwed down into a batten resting on the steel structure.

36. Mr Phillips was not sure that he understood the AOV system at the Building and that the design and use of the system should be reviewed and any necessary work carried out (the tribunal, on its inspection was similarly puzzled by the AOV system).

37. In answer to questions from the tribunal, as to wall type 4 (render), Mr Phillips stated that the insulation and timber framework were not necessarily an issue, it was the installation of fire breaks that was key. As to wall type 1 (brickwork), Mr Phillips agreed that it would be fair to describe the currently proposed works as a fire engineered solution, but added that a similar approach had, in his experience, been accepted by building control on other developments. As to completely filling the cavity behind the brickwork with blown insulation, Mr Phillips said that this may cause issues with water penetration in later years.

38. Mr Phillips was asked if he would be comfortable if all the works were done, but the balconies and terraces were left with the timber attached. He stated that he would not be comfortable with that, given the stacking of the balconies. Realistically, scaffolding (or possibly a cherry picker) would be required in order to replace the timber on the privacy screens

and brise soleil, contractors would be unwilling to have to access these parts via the interior of the residential flats given the problems that this could create.

39. Mr Phillips was able to confirm that building control would monitor the works, and that once the works had been completed, his firm would produce a new EWS 1 and FRAEW.

Dr Di Bari

40. Dr Di Bari has been the lead Applicant throughout. In the original application made to the tribunal, Dr Di Bari referred to the practical problem faced by leaseholders as a result of the fire safety issues, being that leaseholders were unable to sell or re-mortgage and that they had become trapped. He further complained of a lack of urgency on the part of the Respondent and the Respondent's failure to properly share information with the leaseholders.

41. It was confirmed by Dr Di Bari that not all the Applicants were 'qualifying leaseholders' as some of them appeared to own more than one property.

42. Dr Di Bari's evidence in his witness statement centred on the issues that the Applicants wanted any Remediation Order to include. Dr Di Bari had to modify his position given the late introduction of crucial evidence by the Respondent. In summary, his position was that he accepted the nature and extent of the works proposed by the Respondent, including the major change to the remediation method for Wall Type 1. Dr Di Bari stated that any order made should extend to;
    (a) The full extent of the balconies and roof terraces
    (b) Compliance with building regulations
    (c) The production of a new FRAEW and EWS 1 at the conclusion of the works
    (d) Full consultation with leaseholders

The parties' submissions

The making of an order

43. Mr Bowker, Counsel for the Respondent, argued that there was no need for the tribunal to make an order at this stage. Given the progress made by the Respondent so far, justice could be done by simply adjourning the proceedings with liberty to restore. Mr Bowker referred the tribunal to the notes to the BSA which, when discussing s.123 provide the following example;

> A high-rise residential building has a number of historical cladding and non-cladding defects. Despite the remediation of these defects being life-safety critical, work to remediate them has not yet started, three years after they have been identified. The fire and rescue authority inspects the building and considers that the work needs to begin to make the building safe. The landlord does not undertake the work despite leaseholders and the fire and rescue authority attempting to contact them to insist on the work getting underway. The fire and rescue authority applies to the First-tier Tribunal for a

> remediation order. The Tribunal issues a remediation order, ordering the landlord to remedy the defects within a specified period.

The position in this case, argued Mr Bowker, could not be more different. Here we have a landlord who has been proactive throughout and who is committed to procuring the carrying out of the necessary works.

44. Further, it could not be said in this case that the Respondent had been guilty of undue delay. Whilst the Respondent may not have acted as quickly as someone else may have done, there is no evidence to show that it has acted unduly slowly since the time that the issues with fire safety became apparent.

45. It was the Applicants' case that, given the delays in the matter so far, they considered that, unless the tribunal made an order, they would have no guarantee that the works would be done at all or in any reasonable time frame.

The timing of the works

46. The Respondent's position was that the deadline for the works should be 12 June 2026.

47. The Applicants' pressed for a shorter timescale of 2 years including the time to decant leaseholders.

Balconies, brise soleil and privacy screens

48. Mr Bowker's argument, in summary was as follows: The BSA defines a Remediation Order as being an order requiring a 'relevant landlord' to remedy specified defects. A 'relevant landlord' is a landlord under a lease who is required under the lease or by virtue of an enactment, to repair or maintain anything relating to the relevant defect. The relevant defect here is the timber decking of the balconies and roof terraces.

49. Under the terms of the Applicants' leases [clause 4(a)], the landlord is required to; '*repair maintain renew uphold and keep in good and substantial repair and condition*'. These obligations relate to the structure of the Building and to the structure of the balconies and roof terraces and to; '*all other parts of the Building not included in the foregoing sub-paragraphs and not included in this demise or in the demise of any other flat in the Building*'. The demise to the leaseholder includes [at para (B) (vii) of Part 1 to the First Schedule of the leases]; '*The floor surface only of any patio or balcony or roof terrace within the Demised Premises*'.

50. Mr Bowker argued that the 'floor surface' of any balcony or terrace would include the timber decking. The lease excludes that timber decking from the landlord's obligations and there are no enactments (i.e. primary or secondary legislation) that impose an obligation on the landlord in respect of that decking.

51. The result is therefore that the tribunal is unable to include within a

Remediation Order a requirement to take up the decking and replace it with alternative materials.

52. Mr Bowker's original position appears to be that this argument would extend to the brise soleil and privacy screens, however, during the course of the hearing he accepted that the argument in respect of those areas was less straightforward.

53. The Applicants' arguments can be summarised as follows; The timber on the balconies and terraces relate to the Building as built, are a relevant defect and require remediation before the Building can be made safe. Further, reference was made to the tribunal's decision in *Batish v Inspired Sutton Ltd* where the tribunal made a Contribution Order in respect of balconies that were included within the leaseholders' demise. The Applicants concluded that it was irrelevant whether the balconies fell within the leaseholders' demise or the landlord's.

54. Further, argued the Applicants, their leases contained powers for the landlord to enter upon their demises and to carry out works in question.

Additional orders - Consultation, Compliance with building regulations & Reports upon completion of the works

55. The Applicants were concerned that costs for the work were based on building regulations at the point of construction and did not make allowance for changes since that time.

56. The Applicants' concern was that the only way in which they could move forward at the completion of the works was for the Respondent to provide documentation to confirm that the Building had been made safe, this could only be done by providing an updated FRAEW and EWS1. Without these, there could be no certainty, and any leaseholder's attempt to sell or re-mortgage would be impeded.

57. The Applicants also sought the inclusion of orders that the Respondents consult on the works and that the leaseholders be given the chance to approve contractors.

58. For the Respondent, Mr Bowker argued that the tribunal did not have the jurisdiction to make orders that fell outside of the plain wording of s.123 BSA, that is orders to remedy a specified defect by a specified time.

The tribunal's conclusions

The making of an order

59. We conclude that an order should be made.

60. There is prejudice to one party or the other in making and in not making an order. The prejudice to the Respondent in making an order is that it is having an enforceable order imposed on it to carry out extensive works that it is willing to undertake in any event. However, that prejudice is

mitigated by a provision in the Remediation Order allowing the Respondent to make an application to the tribunal to vary the order in the future if circumstances warrant such an application.

61. The prejudice to the Applicants in not making an order is that they remain at the mercy of the Respondent. Realistically, it is only the Respondent that has the means to carry out the works. There is the further prejudice of uncertainty. Until the works are complete, the Applicants must continue to live in a Building that is unsafe and in flats that may well be unsellable and unmortgageable. A binding order will alleviate these problems to a certain extent.

62. It appears to us that the greater prejudice will be caused to the Applicants in not making an order.

63. Further, whilst it is clear that the Respondent is engaging in the process and is willing to carry out works, we have concerns regarding the delays that have already occurred. This can be illustrated by events earlier in the proceedings. As described above, at the Case Management Hearing that took place on 27 January 2023, the tribunal was clearly told by the Respondent that it had commissioned a FRAEW report and that the results of that report were awaited. The directions given at the hearing compelled the Respondent to disclose the report to the Applicants when it was ready and stated that the matter would be reviewed in any event by 3 March 2023. There was a clear expectation of swift action being taken at that point. However, on 24 February 2023 the Respondent informed the tribunal of a change and that it was now instructing Anstey Horne and that a report would be available in 8 weeks (i.e. by early May 2023). The explanation for this change of plan appeared to be concerned with the Respondent's wider business concerns including recovering costs from third parties ('*The decision to instruct Anstey Horne was taken in relation to the number of properties as part of a wider management review of the process in place for Remediation Works. This review takes into account not just the initial reports, but additional steps involved to include production of specifications, and also the reliance that will be placed upon these reports in further litigation to recover sums from third parties*' – as quoted earlier in this decision).

64. In all the circumstances, whilst we do not doubt the Respondent's intentions to carry out works, we consider that it is appropriate to now bind the Respondent to a firm timetable.

Timing

65. The parties' original views regarding timing of the works have to be considered in the light of the evidence that we heard from Mr Phillips and in the light of recent developments. Clearly the most important factor was the view that it was now unlikely that any leaseholders would have to be decanted given the change in the scope of the proposed works. In considering this question, we have therefore discounted the six-months' time estimate for decanting issues.

66. Mr Phillips considered that the original pre-contract period of 8 months was on the short side. We agree. We have allowed a total period of 10

months, with a further 10 months to complete the works.

67. In arriving at our conclusion on timing, we considered the question of funding. Mr Phillips stated that funding issues could result in some delays. It seems to us that, whilst it is fortunate for the Respondent that funding is available, the availability and timing of funding is not, generally speaking, a matter to be given any weight in assessing the timing for works. No evidence was adduced by the Respondent to the effect that it would not be able to carry out the works without the funding being paid/in place. In those circumstances, we do not consider that funding should be a factor.

68. We do have some concerns regarding the major change to the scope of the works regarding brickface wall type 1. Originally, Anstey Horne, who had inspected the Building in depth and who had a considerable amount of time to consider the issues, concluded that the appropriate way to proceed was with the dismantling of the brick façade wall type 1 with the installation of a sheathing board to the SFS structure, cavity barriers on compartment lines and installation of replacement non-combustible insulation in the wall cavity. This approach changed because the CSF stated that funding would not be available for the work. We do not know the extent of the CSF investigation into the matter, it seems to us that Anstey Horne would be in the better position to decide on what works were appropriate. However, we were assured by Mr Phillips that proceeding with the less extensive and intrusive option was, probably an acceptable alternative. However, given that the change in the scope of the works appears to have been driven by funding considerations and given our views generally on the relevance of funding in this case, if it transpires that the currently proposed type 1 wall works are not appropriate, the Respondent may have difficulty in persuading the tribunal to extend the overall time for the completion of the works.

69. In addition, the tribunal noted that the construction of Wall Type 4 (external insulated render system) did not appear to be understood in detail by Mr Phillips, and wishes to highlight that the proposed remediation work does not involve removal of the 150mm combustible PIR foam insulation layer, which could conceivably present difficulties in complying with current building regulations applicable to buildings over 11m in height.

Balconies and terraces

70. We agree with the Respondent's analysis of the position regarding the tribunal's power to make an order in respect of the timber decking to the balconies and decking to the roof terraces.

71. The Applicants' leases make it clear that the floor coverings to the balconies are within their demise. The balconies are steel constructions attached to the face of the Building. The timber on the balconies and terraces are attached as a decking. That timber therefore appears to be included in the Applicants' demise. Under the terms of their leases, the landlord has no obligation to repair or maintain that decking. Whilst there

may be powers reserved to the landlord in the leases to carry out work on this decking, there is no obligation on the landlord to do so. It is the obligation to carry out works that triggers the power of the tribunal to make a Remediation Order. We accept also that there is no enactment that imposes an obligation to repair or maintain the decking.

72. This reasoning does not extend to the brise soleil and privacy screens, those items, it would appear, fall outside of the demise to the leaseholders and so fall to be maintained and repaired by the landlord.

73. Accordingly, we have included in the Remediation Order an obligation to remediate the brise soleil and privacy screens on the balconies but not the decking.

Additional orders

74. In our view, we must have the power to make ancillary orders if such orders are necessary to make the Remediation Order effective and workable.

75. *Reports at the conclusion of works*: The Remediation Order is of no use to leaseholders if there is no mechanism for verifying that the defects have been remedied. Realistically, the leaseholders do not have the resources to monitor the work at a technical level, nor to assess that work on completion. One can imagine a scenario where a landlord carries out works as per the terms of an order, but the fire risks have not been eradicated due to inadequacies in the specification. Indeed, we have such a potential scenario in this case. As described above, the proposed works in respect of wall type 1 have changed significantly. What if the current specification for those works does not remedy the fire risk? The landlord will have carried out the works in accordance with the specification and so could not be criticised in that respect. The on-going fire risk would only be picked up by Building Control, or, on the completion of a report on the works and the level of fire risk following the works. We conclude therefore that it is necessary, and therefore within our jurisdiction, to include in our order a requirement for reports to be undertaken at the conclusion of the works.

76. There is another issue regarding the timber decking and the importance of the carrying out and disclosure of end of works report. It is possible that, at the end of the works, the timber decking remains on the Building. The Respondent has no obligation to remediate the decking, what if it does not carry out those works for whatever reason? The leaseholders will need to know the consequences in terms of fire risk for them and the tribunal will be concerned that the Building may remain at risk and will want to consider (at the instigation of the leaseholders) if any further order needs to be made.

77. *Consultation regarding works*: We are not convinced that an order requiring consultation is necessary.

78. The statutory requirement to consult leaseholders regarding works is contained in the Service Charges (Consultation Requirements) (England) Regulations 2003 (Schedule 4, Part 2). The penalty for failing to comply with those regulations (or failing to obtain dispensation from the requirement to consult) is set out in section 20 Landlord and Tenant Act 1985, that penalty being that a landlord can demand no more than £250 per leaseholder in respect of the costs of the work. Of course, in this case, the qualifying leaseholders in the Building will not have to pay anything to the works because of the provisions of the BSA. Non-qualifying leaseholders could be asked for contributions towards the costs of the works. Therefore, if the Respondent does not consult those leaseholders, the costs recoverable from them may be limited to £250 per leaseholder. It may be, if the works are fully funded by the CSF, that the Respondent could chose not to consult any leaseholders.

79. What is the purpose of consultation? In *Daejan Investments Ltd v Benson* [2013] UKSC 14, the Supreme Court stated that the purpose of statutory consultation was to reinforce and give practical effect to the purpose of section 19(1)(a) & (b) Landlord and Tenant Act 1985, ensuring that leaseholders are not required to pay more than they should for works and that they should not have to pay for works carried out to a defective standard. So, in the case of qualifying leaseholders, given that they have no obligation to pay, there is no purpose to the consultation requirements. For those non-qualifying leaseholders, there is purpose, but if they are not consulted, their contributions to the costs may be severely limited.

80. Given the above, we do not believe that there is any need to make an order regarding consultation. Such an order would not enhance the leaseholders' position as it stands regarding statutory protections. The leaseholders' vital interest in eradicating the fire risk would still be protected by the tribunal's order which contains a provision that they be supplied with reports at the end of the works which confirm whether the fire risks have been reduced to an acceptable level.

81. *Compliance with building regulations*: We consider that we have the jurisdiction to make such an order because such compliance would be a necessary step to remedying the defects and to the confirmation that such defects have been remedied.

Other matters relevant to the Remediation order made by the tribunal

82. We have included a requirement for compliance with the fire safety report compiled by ORSA in the order as works to be carried out insofar as that report identifies relevant defects under the BSA.

Tribunal: Judge Martyński **Date:** 28 February 2024

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.
If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.
The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.
If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.
The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.
If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of leaseholder applicants

Lead Leaseholder Applicant:
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Appendix – legislation

117 Meaning of "relevant building"

(1)This section applies for the purposes of sections 119 to 125 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.

119 Meaning of "qualifying lease" and "the qualifying time"

(1)This section applies for the purposes of sections 122 to 125 and Schedule 8.

(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 ("the qualifying time")—

(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.

(3)Where a dwelling was at the qualifying time 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".

(4)For the purposes of this section—

(a)"long lease" means a lease granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice given by or to the tenant or by re-entry, forfeiture or otherwise;

(b)a person "owns" a dwelling in England, Wales or Northern Ireland if the person has a freehold interest in it or is a tenant under a long lease of it;

(c)"relevant tenant" means a person who, at the qualifying time, was the tenant, or any of the tenants, under the lease mentioned in subsection (2);

(d)"service charge" has the meaning given by section 18 of the Landlord and Tenant Act 1985.

120 Meaning of "relevant defect"

(1)This section applies for the purposes of sections 122 to 125 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.

(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 remedy specified relevant defects in a specified relevant building by a specified time.

(3)In this section "relevant landlord", in relation to a relevant defect in a relevant building, means a landlord under a lease of the building or any part of it who is required, under the lease or by virtue of an enactment, to repair or maintain anything relating to the relevant defect.

(4)In subsection (3) the reference to a landlord under a lease includes any person who is party to the lease otherwise than as landlord or tenant.

(5)In this section "interested person", in relation to a relevant building, means—

(a)the regulator (as defined by section 2),

(b)a local authority (as defined by section 30) for the area in which the relevant building is situated,

(c)a fire and rescue authority (as defined by section 30) for the area in which the relevant building is situated,

(d)a person with a legal or equitable interest in the relevant building or any part of it, or

(e)any other person prescribed by the regulations.

(6)In this section "specified" means specified in the order.

(7)A decision of the First-tier Tribunal or Upper Tribunal made under or in connection with this section (other than one ordering the payment of a sum) is enforceable with the permission of the county court in the same way as an order of that court.