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

Tribunal case reference	**:**	**CAM/26UH/HYI/2022/0004**
Property	**:**	**Vista Tower, Stevenage SG1 1AR**
Applicant	**:**	**Secretary of State for Levelling Up, Housing and Communities**
Representative	**:**	**Adam Rosenthal KC and Ruth Keating, instructed by Walker Morris LLP**
Respondent	**:**	**Grey GR Limited Partnership**
Representative	**:**	**Alexander Hickey KC and Jennie Gillies, instructed by DAC Beachcroft LLP**
Type of application	**:**	**Remediation order**
Tribunal	**:**	**Judge Wayte** **Judge David Wyatt**
Date	**:**	**29 April 2024**

DECISION

Decision

The tribunal will make a Remediation Order after the date given to the parties for representations on the draft form of order provided to them with this decision.

Reasons

Vista Tower

1. The Property is a detached 16-storey block, more than 45 metres high, which accommodates 73 residential flats. Most of the ground level is a car park, an obvious fire risk factor. There are two staircases, one at each end of the building. The building has a sprinkler system which is

said not adequately to have been commissioned. The surroundings are largely open, but a smaller building is to the west. Southgate and Southgate Stevenage car parks are to the north. Another car park is to the south. St George's Way, a main road, is to the east. Stevenage Fire Station is on the other side of that road.

Background - before the Building Safety Act 2022

2. The building was constructed in the late 1950s/early 1960s, then known as Southgate House. In 2015/2016, it was converted from office to residential use by/for the then freeholder, Edgewater (Stevenage) Limited ("**Edgewater**"), which between 2016 and 2017 granted leases of each flat for terms of about 250 years. It appears total premiums of £15,633,725 were paid to Edgewater for the leases.

3. Under clause 5(e) of the leases, the landlord covenants to provide the Services, which include at paragraph 1 of the Fifth Schedule: "*Maintenance in good and tenantable repair and condition of (a) The main structure of the Building including the exterior walls … and the window frames …*".

4. The Grenfell Tower tragedy on 14 June 2017 prompted investigations and widespread concern about fire safety in high residential buildings, particularly those constructed or converted in recent decades. The tragedy and the general background is described in Triathlon Homes LLP v Stratford Village Development Partnership & Ors [2024] UKFTT 26 (PC).

5. In July 2018, the Respondent purchased the freehold from Edgewater for £587,650. It is the landlord, with no intermediate leases. The freehold was one of several residential buildings acquired by the Respondent as a portfolio of investments for the benefit of the Railpen Pension Fund.

6. 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 of the spread of fire) to prohibit use of combustible materials in external walls of buildings at least 18 metres high.

7. On 22 February 2019, Stevenage Borough Council wrote to the Respondent about combustible core panels at Vista Tower. On 8 March 2019, they wrote confirming the outcome of their inspection on 4 March 2019 "*with Hertfordshire Fire & Rescue Service*". They said the presence of PVC window/spandrel panels with a combustible filler had been assessed as a category 2 hazard. They said it was intended that no enforcement action would be taken based on the layout and existing fire precautions and the advice of the Fire & Rescue Service. We were told that the Fire & Rescue Service had no records of this inspection.

8. In a report dated 29 October 2019, White Hindle & Partners confirmed that the UPVC curtain glazing system incorporated materials which

were not of limited combustibility. On 6 November 2019, leaseholders were notified of the results of their survey.

9. The Building Safety Fund ("**BSF**") was announced in the March 2020 budget and opened for registrations from 1 June 2020, as explained in more detail in Triathlon at [189-190]. The Guidance published in July 2020 explained that the BSF would meet the cost of addressing relevant fire safety risks: "*…where building owners … are unwilling or unable to afford to do so*". As noted in Triathlon: "*Amongst the objects of the Fund identified in the Guidance were that fire safety risks associated with cladding should be addressed quickly and proportionately, and that "cost recovery from those responsible for the installation of cladding is maximised*".

10. In June 2020, the Respondent applied to the BSF for funding for works based on the Consolidated Advice Note ("**CAN**"). This had been published on 20 January 2020 to combine 22 guidance notes produced since June 2017 following the Grenfell Tower tragedy. The CAN required removal of all combustible material, to comply with the relevant building regulations.

11. Accordingly, the approach apparently taken by the BSF (as explained in the note provided by Homes England during these proceedings [121]) was that all combustible materials must be removed from a building to be eligible for funding.

12. In July 2020, Residents Quarter Limited (the previous "portfolio manager" for the Respondent) approached Tuffin Ferraby Taylor ("**TFT**"), independent property consultants, about Vista Tower and other buildings in the portfolio. In September 2020, TFT produced their proposed strategy to assess the relevant buildings for compliance and where deficiencies were discovered, 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, they recommended a two-stage design and build procurement approach.

13. A follow-up technical survey by Wintech in September 2020 concluded there were combustible materials in the external walls and identified no cavity barriers/fire stops in the areas inspected. On 22 September 2020, the BSF notified the Respondent of eligibility for funding in respect of "*the remediation of the uPVC spandrel panels/curtain glazing*" but not other proposed remedial works.

14. Guidance in October 2020 confirmed that the relevant applicant to the BSF was required to be: "*the person or organisation responsible under the terms of the Lease for the repair and maintenance of the common parts of the building and entitled to recover the costs from leaseholders by way of a service charge*".

15. On 1 October 2020, Inspired Property Management ("**IPM**"), property managers for the Respondent, served initial consultation notices for

external cladding works. That month, TFT put the first stage to procure those works out to tender. In November 2020, the successful tenderer, ADI Group Limited, was selected to provide pre-construction services, producing a design and pricing schedule, all based on the CAN.

16. In a report dated 5 November 2020, Jeremy Gardner Associates assessed fire risks based on the Wintech report. This advised installation of a fire alarm system and, in the interim, a waking watch.

17. A waking watch was implemented from 7/8 December 2020 and an initial consultation notice about the proposed fire alarm system was sent to leaseholders later that month. On the same date, the Respondent applied for planning permission for removal and replacement of building facing materials. Conditional permission was granted on 8 February 2021. This included a condition for approval of materials and colour of the new cladding/render (the application for approval was ultimately made on 21 September 2023 and discharged on 20 October 2023).

18. On 18 December 2020, following earlier correspondence, Hertfordshire Fire & Rescue Service wrote to IPM with an action plan for measures to be taken out. These included compartmentation surveys, repair/ maintenance of fire doors, maintenance of AOVs, emergency lighting for the rear staircase, a fire alarm system, testing of the dry riser, details of the sprinkler system and other matters, with ambitious compliance dates during January 2021.

19. In December 2020, the BSF agreed pre-tender support of £327,195 in respect of the remediation of uPVC spandrel panels and curtain glazing. This was paid in January 2021. At that stage, it was known that initially estimated costs of £10m (which had assumed glazing frames could be cut out and replaced) would not be sufficient because it had been discovered that the entire glazing system would probably need to be replaced.

20. On 5 March 2021, TFT provided updated estimated costs of over £14.5 million. Some of the difference related to the additional glazing and other costs, but a substantial amount ("*…circa £1,764,450 (excluding prelims, overheads & profit and risk) which includes a provisional cost of £710,400 for decanting residents*…") related to works to replace combustible PIR insulation and plywood discovered in the inner sections of other external walls.

21. On 24 March 2021, the Respondent appealed to the BSF highlighting the other works considered to be necessary based on CAN, for which funding eligibility had not been confirmed. The Respondent chased and was sent various holding responses. The appeal was ultimately decided on 10 November 2021, when it was rejected.

22. Following further consultation and application to the Waking Watch Relief Fund, the fire alarm system was installed in June 2021. The Respondent applied to the tribunal in December 2021 to dispense with

the statutory consultation requirements in relation to the alarm and the proposed cladding works. Following objections from leaseholders and a hearing, conditional dispensation was given in June 2022.

23. In June and then (following opening up by ADI of identified areas) August 2021, internal compartmentation surveys were carried out by Tenos, who reported in September 2021 on the various fire safety defects they had identified.

24. On 9 August 2021, Alistair Watters (from the relevant Department) wrote to the Respondent. He hoped the Respondent was moving forward with the eligible works as best they could while awaiting the outcome of the appeal in relation to the other works. He expressed concern that leaseholders had apparently been sent service charge bills for hundreds of thousands of pounds for cladding remediation costs, saying: "*The Building Safety Fund was introduced with the aim of protecting leaseholders from unaffordable and distressing cladding remediation costs where possible…*" and: "*It is not acceptable to place such a heavy burden on leaseholders, causing them great worry over their financial liability and future circumstances, without fully exploring all other financing opportunities. This is contrary to the aims of the Building Safety Fund…*"

25. On 10 January 2022, the Government withdrew the CAN. In an explanatory speech that day, 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…*"

26. On 31 January 2022, the BSI published building safety standard PAS 9980:2022, a new code of practice for appraising the fire risk of external wall construction/cladding on blocks of flats. As noted in Triathlon at [98], this new standard offers (or was intended to offer): "*…a more nuanced appraisal of fire risks and enables the justification of alternative remedial solutions short of replacing all combustible materials, components and systems. A satisfactory remedy for the purpose of these building safety standards may, therefore, include leaving combustible components in place while adopting a pragmatic solution which overcomes the risks posed by their presence…*".

27. Unsurprisingly, it took time to procure suitable fire safety engineers to carry out investigations and assessments under the new PAS9980 standard. In June 2022, CHPK was "ultimately identified" and instructed to do so for the Respondent.

The Building Safety Act 2022

28. On 28 June 2022, sections 117 to 125 of and Schedule 8 to the Building Safety Act 2022 (the "**BSA**") came into force. Section 123 is set out below. 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) in a specified "*relevant building*" (defined in s.117, as summarised below) by a specified time.

29. 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.

30. 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.

(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."

31. 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 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."

32. 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.

33. 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.*"

34. Regulation 2(3) and (4) make basic provision for the contents of applications for remediation orders and a perhaps obvious requirement for remediation orders to be sent to the applicant and the relevant landlord as soon as reasonably practicable.

35. By regulation 2(1), the Applicant was added as an interested person for the purposes of s.123. With effect from 5 August 2023, regulation 2(1A) (inserted by regulation 4(1) of the Building Safety (Leaseholder Protections etc.) (England) (Amendment) Regulations 2023) added the Homes and Communities Agency (known as Homes England) as an interested person for these purposes.

Developments since the Act came into force

36. In July 2022, TFT prepared a specification for the internal compartmentation works and this was issued to potential contractors. In September 2022, they recommended Miller Knight.

37. On 1 August 2022, reports prepared under the PAS9980 standard were sent to the BSF for several properties, including Vista Tower. On 17 August 2022, the BSF responded asking for application forms for each of the relevant properties to transition from the CAN to PAS standard. They wrote again on 24 August 2022 to chase for these, saying the Department were keen to confirm eligibility. It appears that, for Vista Tower, the report and further versions in September 2022 were later rejected by the BSF, who required changes or had understandable difficulty giving guidance about precisely what was needed for these new documents.

38. On 3 October 2022, the Applicant sent a pre-action letter suggesting that the Respondent had been "*recalcitrant*" and threatening to make this application. The Respondent replied substantively and complained about what they said were besmirching briefings to the media.

39. On 11 October 2022, TFT advised that the compartmentation works be instructed as a separate package, rather than attempting to procure them with the cladding remediation work. The Respondent instructed TFT to proceed with Miller Knight. Following a letter of intent dated 8 November 2022 the internal compartmentation and fire stopping works started on 14 November 2022 and a formal building contract was signed in January 2023.

40. Also in October 2022, the Respondent withdrew its BSF application based on the CAN and re-submitted it by reference to the PAS9980 assessment, revised (then version 5) to add an overall assessment. The Applicant now says it was made clear that existing applications could continue to be processed under the CAN approach and it was not necessary to procure a PAS9980 assessment.

41. On 2 November 2022, the Applicant applied to the tribunal for a remediation order ("**RO**") against the Respondent in respect of Vista Tower. The Applicant's statement of case described as "Known Defects" the presence of organic foam insulation/expanded polystyrene (EPS) in opaque infill/blanking panels, absence of effective cavity barriers at the vertical compartmentations around the windows, duct vents without firestops, timber battens behind infill panels and combustible mesh in the concrete render. These appear to be based on the defects which had been identified under CAN, some of which had not been eligible for BSF funding.

42. On 3 November 2022, the tribunal gave initial directions to prepare for the first case management hearing ("CMH"), which at the request of the parties was fixed for 14 December 2022. From the outset, there was no dispute that for the relevant purposes Vista Tower is a "relevant building", the Applicant is an "interested person" and the Respondent is a "relevant landlord". Given the change to PAS and the rejected BSF appeal in relation to some of the works proposed under CAN, the Respondent did not wish to admit the alleged relevant defects until there was an agreed PAS9980 report setting out such defects.

43. The correspondence shows difficulty with finding wording which would be acceptable to the BSF for the fire risk assessors to use in their PAS9980 reports about reliability of information (with concern expressed within the BSF on 21 November 2022 about the need to be clear about what would be acceptable, because lack of clarity would cause delay). It appears there were similar negotiations/discussions about provisions of the different versions of the main grant funding agreement which would be required for BSF funding.

44. The tribunal gave directions for notification of immediate potentially interested persons, mutual disclosure, provision by the Respondent of their FRAEW/PAS9980 report (revision 7, the report in "finalised form", was submitted on 20 January 2023, and then further amended as requested to revision 8), statements of case and without prejudice

meeting(s) between the parties to agree any further issues, to prepare for a further CMH.

45. Subsequently, each party argued the other had given inadequate disclosure, but the Respondent admitted the defects and matters described at paragraph 47.6 of the Respondent's statement of case, by reference to the PAS9980 report. The parties confirmed that revision 8 of the PAS9980 report, setting out the current "known defects", had been agreed. In summary, this report advised that the following defects were high risk and the following remediation works were required:

Wall types	**Remedial action required**
Wall types 1-C and 1-E (each the inner leaf of a render finish concrete exterior wall, containing different thicknesses of PIR insulation and plywood)	Removal of the PIR insulation and replacement with non-combustible material
Wall type 2 (opaque spandrel panels with uPVC framed glazing, including organic foam insulation, timber battens and EPS)	Removal of the opaque panels and combustible insulation, and replacement with non-combustible materials
All of the above	Installation of vertical cavity barriers at the vertical compartmentations, cavity barriers around window openings and effective firestops around the vent ducts and openings

46. Apart from other changes since the earlier proposed works, scenario modelling exercises carried out for this assessment identified that the plywood in wall types 1-C and 1-E could be retained (removing only the PIR insulation), avoiding the need for decanting.

47. On 24 February 2023, the BSF confirmed that all these "required" works were eligible for funding. In March 2023, it was discovered that ADI did not have (or no longer had) sufficient insurance cover for the proposed works. At a without-prejudice meeting with a mediator on 24 March 2023, the parties agreed that the Respondent be given until 23 June 2023 to procure and appoint a design and build contractor for the remedial works and the parties should then arrange a further without prejudice meeting to seek to agree a timetable for commencement and completion of the works.

48. In April 2023, TFT issued a new first stage tender to four potential contractors, including Lancer Scott. The parties suggested that the second CMH, on 25 April 2023, be vacated. Instead, it was converted

to a shorter CMH at which we gave directions requiring (amongst other things) the Applicant to confirm the scope of the relevant defects within these proceedings, a timetable to dispose of applications relating to third parties, and the Respondent to produce their specification of the remedial works (when this was expected from the new remedial works contractor) and proposed programme.

49. On 19 May 2023, practical completion of the internal compartmentation and fire stopping works was certified (subject to snagging).

50. The Respondent engaged Lancer Scott under a new pre-contract services agreement to design and produce a specification of remedial works for the defects described in the FRAEW/PAS9980 report. Lancer Scott carried out their own opening up works in June and July 2023, with their final report due in October 2023.

51. On 4 September 2023, pursuant to an order made by Judge Wayte at the request of the Respondent, Edgewater and the successor to a firm involved with the conversion of the building (Gould Baxter) disclosed documents sought from them, including as-built drawings from the conversion.

52. By letter dated 19 September 2023, the Respondent 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.

53. At the final CMH, on 21 September 2023, the tribunal indicated (following requests from the Applicant for something to this effect, or stronger) that the focus of the parties in preparing their evidence and for the final hearing pursuant to these directions should be on the current position and properly informed expert evidence. We said that, since the background had much less weight in this case, both parties needed to ensure that any evidence they wished to produce about the background was suitably limited. Directions were given to prepare for the substantive hearing.

54. Following those directions, the parties agreed the specification of relevant defects and remedial works, and the programme for carrying out those works, so there was no need for expert evidence. They could not agree whether an order should be made or what the terms of any order should be.

55. The Respondent confirmed that following the requisite enquiries it accepted that 57 of the flats are held under qualifying leases for the purposes of s.119 of the Act, 11 were not and five were presumed not to be qualifying because the relevant leaseholders had not responded to requests for certificates. Pursuant to the directions, the Respondent notified the leaseholders of the proceedings, provided explanatory information and made the relevant documents available to them. None of the leaseholders applied to be added to the proceedings.

56. On 15 December 2023, following work started under an earlier letter of intent, the Respondent entered into the full design and build contract with Lancer Scott Construction West Limited (the "**Works Contract**"). On 17 January 2024, the Respondent entered into a grant funding agreement with the Applicant's Department and Homes England (the "**GFA**").

57. Works commenced in January 2024 and initial funding of £3,733, 069.78 was released to the Respondent on 15 February 2024. The completion date for the works as provided in the Works Contract is 15 September 2025 and 9 September 2025 in the GFA. The reason for the slight difference is unclear and in any event both agreements provide a mechanism for extensions, as would be expected with works of this scale and complexity.

58. On 21 December 2023 the Respondent had sent an open letter to the Applicant proposing that the Applicant withdrew the application on the basis that the Respondent would commit to carrying out the remedial work within the time specified. In turn, the Applicant was to agree to a mutual statement confirming the agreement and both parties would refrain from making "*any besmirching or negative public statements about the other, including but not limited to any press releases…*". The offer was rejected on 18 January 2024 and the application proceeded to a hearing on 25 and 26 March 2024 at Alfred Place, the tribunal's hearing and administrative centre in London.

59. Prior to the hearing a bundle of some 11,500 pages in several lever arch files was delivered to the tribunal. In the circumstances the tribunal requested a core bundle limited to one lever arch file and made it clear that reference would only be made to the other documents if directed to do so either in the skeleton arguments or during the hearing. Both skeletons and an authorities' bundle were subsequently received. References to documents in this decision will therefore be prefaced with CB, AB or MB (main bundle) as appropriate.

60. At the hearing, the Applicant relied on evidence from Alistair Watters (Director, Building Remediation and Grenfell Directorate at the Department for Levelling Up, Housing and Communities), Anthony Smith (Group Commander, Hertfordshire Fire and Rescue Service) and two leaseholders, Richard Baldwin and Sophie Bichener. The Respondent's sole witness was Alan Pemberton of TFT. All of the witnesses confirmed their written statements and therefore most of the detail in this decision relates to the cross-examination and any re-examination. With the assistance of counsel, the hearing was completed in two days. It had been agreed previously that there was no need to inspect the building as by that time the issues had narrowed to:

    a. whether the tribunal has discretion to make a remediation order, and if it does whether to make such an order and what considerations are relevant for that purpose; and

b. if making such order, the terms of that order.

The Applicant's case

61. The Applicant's Statement of Case was succinct, setting out their argument that as the pre-qualification criteria were met in respect of Vista Tower, it was entitled to a remediation order pursuant to section 123 of the BSA requiring the Respondent to undertake works to remedy the defects within such period as may be specified by the tribunal. It further stated that there was no basis for the Respondent to insist on receipt of further public funding before it undertakes the remediation work required. At the date of the Statement of Case, the Respondent had received £327,000 of Pre-Tender Support funding (and other monies in respect of the Waking Watch).

62. In the Reply to the Response to the Application, the Applicant stated that since the Respondent had admitted each of the elements required to be proved by s.123, a remediation order must be made, subject only to the tribunal's discretion as to its terms. The Respondent's application to the BSF for funding was of no relevance to whether a remediation order should be made or its terms. By the time of the hearing, practical completion had been agreed for 9 September 2025 for any Remediation Order. The other terms of any order made remained in dispute.

63. The Applicant's arguments were maintained at the hearing, save for a concession that the Applicant accepted the Respondent had always intended to carry out the works. The complaint was that there had been a lack of pace, caused by the Respondent's "insistence" on obtaining funding before carrying out the works and their move from the CAN to PAS, which had led to further delay.

64. In terms of the tribunal's obligation to make an order, that stemmed from an analysis of the BSA, which laid out the protection for leaseholders in three stages: remediation of relevant defects by the relevant landlord under section 123; Schedule 8 protecting qualifying leaseholders from the cost of those works and section 124 which provides for the recovery of those costs after remediation with the focus on the "polluter" i.e. whoever caused the defects.

65. Mr Rosenthal pointed out that, unlike contribution orders under section 124 or building liability orders under section 130 of the BSA, section 123 says nothing about the tribunal needing to be satisfied that an order is just and equitable. This, he submitted, was a strong indicator that Parliament intended that if the tribunal was satisfied there were relevant defects, then it must make an order. Given the age of the BSA, authorities were limited to the FTT but Mr Rosenthal suggested that support for his argument could be found in Waite & Others v Kedai Limited LON/00AY/HYI/005 and 0016 [81]: "*Once the Tribunal has determined that relevant defects exist, it is for the Tribunal to make an order to remedy those defects within a specified time. That is all that the Act requires*."

66. While Regulation 2(2) of the 2022 Regulations appeared to provide the tribunal with a discretion (*the tribunal may…make an order*), Mr Rosenthal submitted that this was not in fact a true discretion and simply provided the tribunal with the power to make the order. In closing, he relied on the Court of Appeal's decision in Willingale v Globalgrange Ltd [2000] 18 EG 152 in support of that interpretation – an authority which he produced on the second day of the hearing. This case concerned leasehold enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993. That Act sets out a process for buying the freehold, with a notice from the qualifying tenants and a landlord's counternotice. If a landlord fails to serve a counternotice, section 25 of the 1993 Act enables a tenant to apply to the County Court for an order determining the terms of acquisition. In particular, the relevant part of section 25(1) provides that: "*Where the initial notice has been given in accordance with section 13 but (a) The reversioner has failed to give the nominee purchaser a counter-notice in accordance with section 21(1)…the court may, on the application of the nominee purchaser, make an order determining the terms on which he is to acquire, in accordance with the proposals contained in the initial notice, such interests and rights as are specified in it under section 13(3).*"

67. In Willingale, the landlord had failed to serve a counternotice but still wished to challenge the terms proposed by the tenant. The county court judge had decided that was not permissible and the landlord appealed. The Court of Appeal, having heard arguments from both parties' counsel decided that the first instance judge was correct. In this case, "may" meant "shall have the power to"; it did not confer a discretion to make an order on different terms to the proposals in the initial notice. The word "may" was sufficiently explained by the fact that the court is not obliged to make an order in every case, for example if other requirements in section 25 are not satisfied.

68. Mr Rosenthal argued that the BSA worked in a similar way: the heart of the Act was leaseholder protection. It followed that once the qualifying criteria were established, the tribunal had to make an order.

69. If the Applicant was wrong and the tribunal did have residual discretion, Mr Rosenthal reiterated the Applicant's view that the Respondent should have "forward funded" the works, rather than wait for BSF funding as public funding should be a claim of last resort - see Triathlon Homes LLP v Stratford Village Development Partnership [2024] UKFTT 26 (PC) at [278/854]: "*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*".

70. As the Freeholder of the Property, the Respondents were responsible under the terms of the leases for the maintenance of the structure. Railpen were clearly well-resourced, with cash of £134m and over £32bn in assets disclosed in their 2022 Annual Report. The Applicant

reiterated paragraph 1017 of the Explanatory Notes to the BSA at [AB/1213]: "*It is expected that landlords will comply with their new obligations to forward-fund, or fund in full from their own resources, the remediation of their own buildings.*" Mr Rosenthal conceded that statement (and that in the Triathlon case) was made in the context of Remediation Contribution Orders but submitted that there is no less force in applying that same argument to section 123. He also dismissed the Respondent's argument that fiduciary duties required the pursuit of the BSF as "hopeless". Railpen's investment vehicle had assumed responsibilities under the leases and no explanation had been provided as to why the fiduciary responsibilities of its pension trustees would take precedence.

71. Mr Rosenthal said that the leaseholders should be front and centre in everyone's thinking. As to the suggestion that pursuing the BSF application was in the interest of leaseholders, who would otherwise be faced with ruinous service charges (pre BSA), Mr Rosenthal argued in closing that section 19 of the Landlord and Tenant Act 1985 meant no service charge would be payable. He cited Avon Ground Rents Ltd v Cowley and others [2019] EWCA Civ 1827, involving works covered by an NHBC guarantee, in support of his submission that the costs could not have been "reasonably incurred" when third party funding was available. That principle is now included as section 20D of the 1985 Act which obliges (or on commencement will oblige) the landlord to take reasonable steps to ascertain whether a grant or monies from third parties is available and enables a tenant to apply for an order that in the event of failure to do so all or any of the remediation costs are not payable.

72. At very least, the Respondent should have proceeded with the works approved under the CAN, which would have meant that the work would have been completed by now. There was no requirement to change to PAS and that had led to a considerable delay.

73. Given that the works were some 18 months from completion Mr Rosenthal argued that the need for a RO was unaffected by the start of the works. He also argued that the Respondent's concerns about the interface with the Works Contract and GFA were overblown. A RO would provide oversight in relation to the works which would be a comfort to the Applicant and the leaseholders. It would not act as an invitation to the tribunal to police the project, coming back to the tribunal would always be a last resort once other avenues had been explored. In terms of the Respondent's fears of contempt, Mr Rosenthal pointed to section 123(7) of the BSA which required permission of the county court before proceeding with enforcement. He argued that contempt proceedings would require very cogent facts of egregious behaviour on the part of the Respondent before such permission would be given.

74. Mr Rosenthal denied that there was any political motivation for bringing the application and pointed out that no evidence had been submitted by

the Respondent to back up their allegations in that regard. In any event, he suggested that motive, in the absence of malice or some other motivation which might be said to taint the case, was irrelevant (Triathlon at [246][AB/847]). The Secretary of State was entitled to bring the application and it was wholly appropriate in all the circumstances.

75. The Applicant submitted that the open offer made by the Respondent before the hearing would have been unworkable as having withdrawn the application, the only way to enforce the terms of the agreement would be to start again.

76. As stated above, the Applicant relied on the evidence of the leaseholders Sophie Bichener and Richard Baldwin, Alistair Watters of DLUHC and Anthony Smith of the Hertfordshire Fire Service.

77. Sophie Bichener went first, confirming the contents of her witness statement dated 10 November 2023 [CB/172]. That statement confirmed that 57 of the leaseholders and occupiers of Vista Tower sought a remediation order to provide reassurance that the works will now be completed in a timely fashion and the Respondent be held accountable for their completion. They had all signed a letter which had been sent to the tribunal in these proceedings [CB/203]. Ms Bichener also gave an account of the distress she had suffered since finding out the building was unsafe back in 2019, the delay in the works being undertaken since then and of her fears that she would be responsible for the cost of the works, which she could not afford.

78. Her cross-examination by Mr Hickey started with an apology from the Respondent about the effect on her of the issues at Vista Tower. Ms Bichener confirmed that she had had contact with ministers and had given evidence to a House of Commons Select Committee about the plight of leaseholders in a similar position. She had bought her flat as the first step on the property ladder but currently lived with her husband in his flat, with her flatmate in Vista Tower. As soon as her flat was marketable again, she and her husband wanted to sell both flats and buy a home together.

79. Mr Hickey wanted to know whether the witness statement was drafted by her or the Applicant's representatives. The answer was that it was a combination and that some of the more emotive paragraphs were her own work. Ms Bichener conceded that she had understood that before the BSA came into force, the Respondent had sought BSF funding to avoid charging the leaseholders for the works. As a qualifying tenant under the BSA, Ms Bichener was now protected from costs in relation to relevant defects but spoke of the stress caused by confusing communications from the property agents and references in the service charge statements to over £200k in additional costs caused by the works. She conceded that no formal demand had been made but since the letters all stated that monies were not being sought "*at this time*", she felt there was a threat for the future.

80. At the time she purchased her lease she had not appreciated that the cost of structural works could fall on the leaseholders. The threat of potentially huge liabilities led her to contacting her MP who lobbied for changes to the BSA to protect qualifying tenants.

81. In terms of the relevant defects, she felt that the Respondent could have "forward funded" the works to ensure they were completed earlier. It was clear from at least 2019 that the works were required and the defects only really started to be rectified from late 2023.

82. The next witness was Richard Baldwin, who approved his statement dated 9 November 2023 [CB/155]. That statement focussed on his attempts to get clarification from the Freeholder and their agents as to the plan to remediate the building, once it was confirmed that the external wall system contained combustible elements. He was also a leaseholder but owned his flat at Vista Tower as an investment along with four other buy to let properties. His lease therefore fell outside the definition of a qualifying lease in the BSA and he was potentially liable for the full cost of the works, subject to third party funding.

83. Mr Baldwin was a retired quantity surveyor with experience of JCT contracts. Since the works commenced at Vista Tower, he had signed a second statement on 19 March 2024 expressing concerns about delays at the start of the contract, although he conceded that at this stage the delays were unlikely to affect the completion date. Mr Hickey questioned him about his knowledge of JCT contracts and he accepted that the Respondent would face a claim for damages if they terminated their contract without good reason. Nevertheless, he felt that a RO would apply judicial pressure to get the works done.

84. The tribunal asked Mr Baldwin whether he was concerned about his potential liability for the cost of the works. His response was that he would have walked away from the investment if he had personally faced the costs, as they would have been more than the flat was worth.

85. The next witness was Mr Watters. He also approved his witness statement, dated 10 November 2023 [CB/138]. He is the Director of the Building Remediation and Grenfell Directorate at DHLUC. His statement again emphasised the delay by the Respondent in carrying out the works to Vista Tower but also mentioned a number of other properties within their portfolio where similar delays were said to have occurred.

86. His role was strategic and therefore his view of the Respondent was informed by colleagues at Homes England in particular. He had also met with leaseholders at Vista Tower. In cross-examination he clarified the role of Mott Macdonald who he stated were appointed to assist applicants with the grant process and had no control over the actual works or their completion date.

87. Mr Watters accepted that the Respondent had registered for the BSF at the first opportunity but denied that the delays with the GFA were the

fault of Homes England or the department. He felt that the change by the Respondent from CAN to PAS was further evidence of stalling by them and the Respondent should have continued with CAN to avoid further delay. He conceded that the department had some responsibility for delays to the process overall but the changes introduced by them were intended to be positive and to protect everyone involved. His belief was that the Respondent put the brakes on the works after the BSA became law. Other freeholders had got on with the works and claimed BSF funding later.

88. When questioned by Mr Hickey about allegations that in 2022 the Respondent had refused to sign a GFA when none had been sent out he was unclear of the eventual date but accepted that his statement confirmed it was first sent out on 19 September 2023. He denied that the application had been politically motivated. He gave examples of works being stuck at other projects despite JCT and GFA agreements being in place or where costs which were ineligible for funding were holding works up. A RO would provide much needed and deserved reassurance for the leaseholders that the works will be completed by September 2025.

89. The final witness for the Applicant was Anthony Smith. He confirmed his statement dated 14 November 2023 [CB/146] and the role of the Hertfordshire Fire and Rescue Service in enforcing fire safety, either alone or in conjunction with the local authority. There were a range of enforcement options available to the service, which considered a number of factors including the compliance record and attitude of the responsible person. The aim is to see progress with necessary works, although practicalities including funding would be taken into account.

90. Mr Smith had no knowledge of the inspection by the local authority back in March 2019, which identified a category 2 hazard but took no further enforcement action at that stage. It was not until November 2020 that his file records involvement with Vista Tower, leading to the installation of the waking watch in December 2020. He confirmed that an action plan had been agreed in January 2021 for remediation of the risks identified by the service and that the last email on file was dated 26 October 2021. At that time, they were aware that the fire alarm system had been installed and the internal compartmentation survey had been carried out, but had requested an update about plans to deal with the deficiencies identified in the façade report.

91. His impression was that the proceedings had speeded up the work. The service had held a case conference in the summer of 2022 to consider taking enforcement action but they had then found out about the application to the tribunal for a RO, which the service supported.

The Respondent's case

92. The Respondent's Statement of Case was a lengthy document, going into some detail about Vista Tower, the Government's response to the

Grenfell Fire and the factual background to the application. Their position was that the application had been issued prematurely as the Respondent was fully committed to carrying out the works. The delays to securing funding and ascertaining the scope of the works required had been caused mainly by the obfuscation and inaction of DHLUC and Homes England.

93. Mr Hickey opened the Respondent's case with an acknowledgement to the leaseholders of their invidious position following Grenfell. He acknowledged that there had been a long delay in starting the works. Their scale and complexity was one factor. This necessitated detailed planning and complex procurement with skilled contractors. Covid was another, causing real practical difficulties in arranging inspections and reports. The third source of delay was the engagement with Government as part of seeking funding since 2020. The Respondent's parent company is a holder of pension funds. The cost of remediation works to the Respondent's portfolio of residential properties is in the region of £150m and Mr Hickey maintained that it is not realistic to expect those funds to pay for that work. That approach would ignore the fiduciary obligations to protect pension funds.

94. The Respondent welcomed the Applicant's change in tone when it was stated in opening that it accepted the Respondent had always intended to do the works. This contrasted with much of the press coverage beforehand, when the Respondent was described as "*recalcitrant*" and proceedings being necessary to "*bring* [the Respondent] *to book*".

95. The BSA brought in a radical change to the relationship between long leaseholders and their landlords, overwriting the leases in the case of qualifying leaseholders to prevent them having to pay for relevant defects. Before the BSA came into effect, the Government had established the BSF and invited freeholders to apply. The Respondent had applied at the earliest opportunity (in June 2020) but it was not until shortly before the hearing that the GFA was entered into. The motivation for applying for funding was to ensure that the leaseholders would not have to pay for the remediation works, the same motivation expressed by the Government when setting up the BSF in the first place.

96. After eligibility was confirmed in September 2020, the Respondent's file was passed to Homes England, the Government's Delivery Partner. The Respondent has worked with them since then in accordance with their project plan. Details of the works and costings were required before a GFA could be signed and the works could only start after that. Mr Hickey referred the tribunal to the official Building Safety Fund guidance, updated in August 2023 and in particular the flow diagram summarising the "journey" after technical eligibility had been confirmed [MB/5705]. He submitted that nowhere in that guidance was there any suggestion that the works should be done first and funding claimed later. To the contrary, the diagram clearly shows the GFA before project delivery and access funding, followed by monitoring and then practical

completion. "Forward funding" was a new argument by the Applicant which was simply not reflected in Government guidance or process.

97. It was also plainly untrue or at least highly unlikely that the Respondent would have been able to carry out the works and claim funding later. For example, the original contractor had to be replaced at a late stage due to a new requirement introduced in the GFA. If the Respondent had proceeded with ADI as originally planned, the BSF would have refused to pay and the Respondent would then be left with a claim against the leaseholders, or at least some of them.

98. The first serious delay caused by Homes England was the length of time taken to deal with the Respondent's appeal in respect of the increased costs identified by their original contractor. In January 2021 Homes England advised that they required a completed pricing schedule for all works, including those ineligible for funding. At that stage the total cost was estimated at some £10m.

99. In March 2021 the costs increased following a Stage 2 tender process with the contractor to £14.5m. Additional funding was refused and the Respondent appealed, a process which took until November 2021. During that period, the standard response from Homes England was to say they required a further short period of time to determine the appeal. In these circumstances it was reasonable to wait for that final response. That delay had been explained to the leaseholders.

100. Nevertheless, the Respondent took every step to progress with the works under the CAN approach until it was withdrawn by the Government in January 2022 and proposals for the BSA were announced that same month. Mr Hickey argued that the criticism levied against the Respondent for moving to the PAS was misplaced for three reasons: firstly, it was essential to protect the leaseholders who before the BSA came into force were all liable for the costs of the works under their leases. Secondly, there was an obligation in the GFA (and under the BSA) for the Respondent to take reasonable endeavours to recover costs from third parties. Failure to mitigate losses is a frequent argument made in cases for damages and if the new standard had reduced the costs of the remediation work that would be an obvious ground for challenge. That led to the third reason, the possibility that the new approach might reduce the cost of the works for the benefit of all parties, including the taxpayer.

101. The decision by the Respondent to move to PAS was therefore entirely reasonable in the circumstances and the contemporaneous emails from the BSF show no hint of disapproval or disquiet at that stage. The Respondent were not the only building owners to follow this track, about 100 others did so. The blueprint programme for the works had in fact been agreed between Mott Macdonald and TFT in November 2022 with a start date of early 2024 and therefore it was not correct that the move to PAS had led to a further long delay in terms of the works, which had of course started in January 2024.

102. Mr Hickey submitted that the allegation that the Respondent was "dragging its heels" is simply not made out. References to the changes to the programme timetable did not explain the reason for the extension, which was due to the new Building Safety Regulator and the initial understanding that they would need to approve the works for building control purposes. In the event, the Respondent was able to use existing building control routes and the delay avoided. Once it had been clarified that the works could proceed without decanting the residents that provided further certainly that the works could at last commence.

103. However, the development of the GFA was a further source of delay. This included a "no litigation clause" which meant it was impossible for the Respondent to enter into the agreement in that form once the Secretary of State had issued a letter before action in October 2022. New requirements introduced in the GFA in January 2023 had also meant that the Respondent was forced to part company with their original contractor and appoint a new one, which added a further 6 months including the time waiting to see whether ADI could meet the requirement and then the tender process to find a new contractor that could. It was not until September 2023 that the first GFA was sent out for signing.

104. The Respondent was clear that the tribunal has discretion under the BSA and in these circumstances should refuse to exercise it in favour of the Applicant and their somewhat arbitrary requirement for "pace" in the context of complicated and expensive works and the face of their own delay. Developing his argument about the BSA, Mr Hickey was clear that section 123 defines the scope of remediation orders but says nothing about how the tribunal should go about its role. The 2022 Regulations were of course introduced by the Applicant himself and therefore if he meant the tribunal to have no discretion he would have used a word such as "*shall*" as opposed to "*may*". Mr Hickey pointed out that his interpretation of the 2002 Regulations was supported by their reference to the use of the word "*Where* [the FTT makes a RO]" in reg 2(4), indicating that an order may not be made, for example where it would be disproportionate to carry out the work.

105. Willingale v Global Grange turned on the specific wording of the 1993 Act. There would be no point in giving a claim notice setting out terms and requiring a counter notice to do the same (and providing that the matter could then be referred to the tribunal to determine terms) if the court could just do whatever they wanted, where the landlord had failed to serve a counter notice. The decision on the extent of the court's power had to be seen in that context [57D]: "*Needless to say, the meaning of the word "may" in an individual statute will depend on the terms of the individual statute*". The BSA was a very different statute and the case was not relevant.

106. The Respondent's Statement of Case suggested that a RO was akin to an order for specific performance and therefore no order should be made unless it was necessary or desirable to do so. This is the first case where

contracts have been entered into both with regard to the works and the funding from BSF and in that context the tribunal cannot be satisfied that a RO is necessary or desirable.

107. The interest of the Applicant is due to its funding of the works. Government funding brought with it the additional complication of dealing with Homes England, their experts Mott Macdonald - who were allegedly appointed to assist the Respondent even though they had their own project managers in TFT - and the layers of approval inherent in any scheme involving taxpayers' money. The Respondent was therefore concerned that delays from any of those parties could lead to it being in contempt of court, should a RO be made and the deadline for completion of the works fail to be met.

108. The works are also subject to a JCT contract with its own mechanisms for extensions and disputes. A RO would place the tribunal in the unenviable position of being the third supervisor of the works. The Respondent submitted that courts have always resisted making orders for specific performance where they would be faced with ongoing supervision or where an order would be unnecessary or undesirable.

109. If the tribunal decided to make an order in this case, the Respondent asked that it be made subject to the JCT contract and the GFA to minimise overlap or confusion. Given that the parties to the application were both bound by at least one of the agreements, it would be a nonsense for the RO to allow 73 leaseholders to have their say about the works. Mr Hickey submitted that once the tribunal had heard the evidence, it would realise that caution was the better option and the works should be allowed to run their course under the agreements entered into. If necessary, the application could be stayed until practical completion. This would allow an element of "supervision" without the potential complications that might even push the works back even further.

110. As stated above, the sole witness for the Respondent was Alan Pemberton, Senior Director and Chairman of TFT. He approved his witness statement dated 10 November 2023 [CB/187] and a second statement in response to that of Mr Baldwin dated 22 March 2024. His first statement confirmed that he was responsible for overseeing 12 major high-rise cladding remediation projects which are at various stages of procurement and delivery for the Respondent. He was unable to answer why no-one from the Respondent was giving evidence as he was not involved in that decision.

111. Mr Pemberton conceded that he would have expected work to start before 4 years from knowledge that it was required but when questioned on the idea of the Respondent "forward funding" the works, as discussed in correspondence within TFT, he pointed out that the reference was not necessarily to the whole of the cost but could be for investigations and the like. A decision on funding was for the client not TFT.

112. When questioned about the gap in his witness statement between 2020 and 2022, the witness confirmed that generally TFT were not involved with the PAS reports. That said, the PAS process had been helpful as it had refined the process of the works and removed the need to decant the residents.

113. Mr Pemberton also explained that ADI had been the chosen contractor for the Vista Tower project until 2023, when they failed to meet a new requirement for indemnity insurance imposed by the BSF. This led to a 6 month delay as ADI sought and failed to obtain cover and a further tender for a new contractor (Lancer Scott) was carried out.

114. Mr Pemberton was also questioned about delays to the compartmentation work which was identified as necessary in 2020. He confirmed that the works were not put out to tender until July 2022. That delay was not due to funding as it had always been clear that the works would not be covered by the BSF. The plan had initially been to carry out the works at the same time as the works to the external wall systems but that changed in 2022. No real explanation was given for this, but it appears the change to proceed independently with the internal work was shortly after the letter before action from the Applicant.

115. When questioned about the role of Mott Macdonald, Mr Pemberton maintained that in reality they acted more as support to Homes England than the Respondent. He was shown a number of iterations of the "blueprint programme" which appeared to show the start date for the works moving back as far as November 2024 and then back to January 2024. He explained that the blueprint programme had originally been produced by Mott MacDonald for funding purposes, it did not necessarily take into account the actual works which would push the dates back unless processes could be combined or shortened. The appointment of Lancer Scott enabled the start on site date to be brought back to January 2024 in line with the original intentions.

116. Mr Pemberton denied that the application for a RO had achieved any acceleration of the works. TFT's remit was always to ensure the works progressed as quickly as possible. On re-examination he confirmed that the works had progressed with gusto and due diligence. His approach was to "*measure twice and cut once*" to ensure that the solution is the most appropriate and best chance to put right the situation that was not of the Respondent's making. The defects were hidden in the structure.

The Tribunal's decision

117. We consider that the 2022 Regulations give the tribunal both the power to and a discretion as to whether to make a remediation order. To quote Lord Justice Waller in Willingale [58B]: "*It is common ground that the word "may", when used in a statute, can grant a power that, if exercised, can only be exercised one way or can confer on the court a*

discretion when the power is being exercised. It is a question of construction of the particular statute what the word "may" means."

118. The 1993 Act is familiar territory to this tribunal. As set out in paragraph 67 above, section 25 specifically provides that the court's determination is to be made in accordance with the proposals contained in the initial notice. It is therefore hardly surprising that the Court of Appeal confirmed that where the landlord had failed to serve a counter notice, there was no discretion open to the court to allow further consideration of the price of the freehold.

119. The BSA and the Regulations contain no similar wording. On the contrary, as noted in Kedai and Triathlon, the BSA is drafted in what appear to be "*deliberately broad*" terms to enable the tribunal to respond appropriately to the "*myriad circumstances that will inevitably present themselves*" in applications of this type. As noted above, the definition in s.120 of the BSA of "*relevant defect*" is wide. It is not difficult to imagine circumstances in which experts and leaseholders agree that some relevant defects remaining in a building represent a tolerable risk relative to the difficulty of remedying them (or the impossibility of doing so without demolishing and reconstructing a building), so a RO should not be made even if a local authority or other interested person applies for one. That seemed rather to be the aim of the new approach, and new PAS9980 standard, since early 2022.

120. It is true that in order to exercise the power to make a RO, the tribunal must be satisfied of its jurisdiction under section 123 but that is no different to a number of other statutes conferring jurisdiction on the tribunal, for example the power to make a Rent Repayment or Banning Order under the Housing Act 2016. In each case the tribunal must be satisfied that a relevant offence has been committed. A Banning Order also requires service of an initial notice. For each jurisdiction there are a number of other requirements which the tribunal must consider satisfied before it "may" make an order. It is well established that the tribunal has a discretion under its powers in the 2016 Act and in our judgement the BSA and the 2022 Regulations are no different. As the Respondent has stated, if the Applicant wished to limit the power of the tribunal it could have worded its own Regulations differently to make that clear.

121. 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. Kedai is an example of a case where the tribunal had no hesitation: the

respondent in that case was associated with the original developer and had taken no apparent steps to remedy the defects at all.

122. As to relevant considerations, we think the facts of the case and in particular the works required and the situation of the relevant parties are much more relevant to the exercise of the discretion than any suggestion of unreasonable delay or even political motivation. We consider that our jurisdiction should be more practically focussed on ensuring the defects are remedied in a responsible fashion.

123. Here, we consider that there has been delay on both sides but that has to be seen in the context of the Grenfell Fire and the sea change brought to the regulation of the construction industry and enforcement of fire safety in high-rise buildings. The fact that the Applicant is a Government Department administering a fund for the works will inevitably lead to delays with approvals bearing in mind that the fund is taxpayers' money. Similarly, the Respondent is part of a large institution which is responsible for the pensions of railway workers. That will also involve delays with approvals and constraints on spending. The fact that the Respondent has a portfolio of at least 12 buildings with similar issues to Vista Tower is a further complicating factor, together with the building itself which is more than 45m high.

124. We consider that the criticism of the Respondent in pursuing their application to the BSF is misplaced. The Government introduced the fund without a means test and encouraged applications from freeholders in the same position as the Respondent, which bears no responsibility for the creation of the relevant defects. It became responsible for the structure of the building, with rights to collect estimated/actual costs of works from the leaseholders under the terms of their leases. That was the basis on which the Respondent bought the freehold. The cost of the works is of course many times the value of the freehold, even without the impact of the BSA.

125. The introduction of the BSA has provided welcome protection for the qualifying leaseholders but there are still several non-qualifying leaseholders who would also face crippling service charges without recourse to the BSF. Mr Rosenthal's submission about the new section 20D of the Landlord and Tenant Act 1985 rather reinforces the point that the Respondent was right to seek payment from the BSF – that is what the section requires before reverting to the (non-qualifying) leaseholders.

126. As to the suggestion of forward-funding, we consider that given the scale of the Respondent's portfolio and the cost of the works, that would have been impracticable and even unreasonable, bearing in mind that the Respondent is not a "polluter" i.e. was not responsible for causing the defects. The suggestion in the Explanatory Notes that landlords should forward-fund works was part of an explanation about Remediation Contribution Orders that where external sources of funding cannot be found landlords will need to meet remediation costs from their own

resources and must not wait until the outcome of legal claims against developers or the like before commencing work. Similarly, the comments in Triathlon about recourse to public funds were made in the context of Remediation Contribution Orders sought from polluters/associates and therefore is of no direct application here. The tribunal also agrees with the Respondent that it would have been a huge risk to carry out the works and claim later. Again, given the cost of the works in the portfolio, this approach would not have been responsible. Even in his letter of August 2021, Mr Watters was not suggesting that the Respondent should forward-fund works. On the contrary, he hoped that they were progressing as far as they could pending their funding appeal and emphasised that the BSF was intended to protect leaseholders from remediation costs. That approach seems to have been fair and consistent with the communications from the leaseholders at the time. It did not change until the latter part of 2022.

127. Similarly, we consider that the criticism of the Respondent for changing to the PAS approach when the Government withdrew the CAN is also misplaced. It must have been sensible to check whether the works could be reduced. The Respondent could not have been sure of the result without commissioning the further assessment and there does not appear to have been much of a delay caused by the move given the problem that arose with the original contractor. As Mr Hickey pointed out, the Respondent is expected to seek to recover the BSF funding from the developer/associates, so may need to be able to show that it has mitigated the remedial costs. In any event, the tribunal is unclear why the Applicant would object to a freeholder following its most recent advice. Its position at the hearing is not supported by the contemporaneous correspondence which clearly supported the move.

128. That said, we do not consider that an allegation of political motivation for making the application is relevant to the exercise of our discretion. Ms Bichener had ensured that Vista Tower remained in the headlines and it is perhaps unsurprising that the Applicant "made an example" of the large portfolio held by the Respondent. It is also true that progress has subsequently been achieved on both sides in working towards remediation (and the GFA) since the application commenced.

129. That leads us to the most obvious reason for not making an order, the fact that the Respondent has entered into a JCT Works Contract with its contractors and a GFA with the Applicant and work has at last started to remediate the defects at Vista Tower. Both agreements provide for practical completion by September 2025 and in those circumstances it is difficult to see whether a RO will make any practical difference. We agree that the tribunal would not wish to interfere with the agreements and any disputes about the works or funding should be considered within those parameters first.

130. Having said all of that, the tribunal also agrees with the Applicant that the whole focus of the BSA is on leaseholder protection. 57 of the leaseholders at Vista Tower have asked the tribunal to make a RO and

they are not party to either the Works Contract or GFA. The works have only just started and are scheduled to last at least a further 17 months. In the circumstances we consider it is appropriate to make a RO but as a backstop to give reassurance; this is not a fault-based order or a case where an order should set short deadlines and expect active interventions to put pressure on a defaulting landlord. In this case, if a RO might get in the way of the arrangements put in place to carry out the remedial works, we would not make it. Accordingly, this RO must be in terms which are clear that it is subject to the Works Contract and GFA and with a clear period of grace for any extensions of time agreed via those contracts. Applications to the tribunal may only be made after the date for practical completion. That underlines the novel nature of this remedy and the practical approach of the tribunal. In view of the failure of the parties to reach an agreement on the terms of the order before the hearing, the tribunal has provided a draft for comment which will be published once the order has been finalised.

Judges Wayte and Wyatt

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).