Westgate Chambers Seminar for Heringtons Solicitors on 23 April 2024.

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Building Safety Act 2022

The BSA amounts to a huge intervention in the construction industry.

Greater responsibility is placed on those who plan, design, construct and manage buildings.

Impossible to overstate changes introduced BSA – these are once in a generation changes.

Amongst the concepts introduced are:

- Building Safety Regulator
- Expansion of liability funder DPA 1972 for refurbishment
- Extension of limitation periods
- New liability for defective construction and cladding products
- Building Liability Orders
- Gateway System
- Golden thread of information
- New categories of 'Dutyholder'
- Implied terms in leases for cladding and non-cladding remediation costs
- Remediation Contribution Order
- Cost Contribution Order
- Building Safety Levy – funding new regime
- New Home Ombudsman
- New Home Warranties

Structure of the Act

Part 1: Introduction and overview

Overview of Act

This Act has 6 Parts, and contains provisions intended to secure the safety of people in or about buildings and to improve the standard of buildings.

Part 2 contains provision about the building safety regulator and its functions in relation to buildings in England.

Part 3 amends the Building Act 1984 to provide that the regulator is the building control authority in relation to higher-risk buildings in England, and require the regulator … to establish and maintain registers of building control approvers and building inspectors.

Part 4 is about occupied higher-risk buildings in England, and imposes duties on accountable persons

Part 5 contains further provisions, including—

(a) provisions about remediation and redress;

(b) provision requiring a new homes ombudsman scheme to be established;

(c) powers to make provision about construction products;

(d) further provision about fire safety;

(e) provision about the regulation of architects;

(f) provision about housing complaints.

Part 6 contains general provisi**7** | P a g e ons.

The Regulations that are ancillary to the Act demonstrate the complexity of the arrangements.

- The Higher – Risk Buildings (Descriptions and Supplementary Provisions) Regulations (1923)
- The Construction Products (Amendment) Regulations (2022)
- Building Safety (Leaseholders Protections) (England) Regulations (2022) (Remediation contribution orders)
- Building Safety (Leaseholder protections)(Information etc.) (England) Regulations 2022 (Remediation contribution orders)
- The Building (approved Inspectors etc) (Amendment) (England) Regulations 2022
- The Building Safety (Fees) Regulations 2022.

The Grenfell disaster

The Act is a result of the devastating and tragic fire in the Grenfell Tower tragedy on 14 June 2017 when 72 people lost their lives.
There had been warnings: the Lakanal House fire occurred in a tower block on 3 July 2009 in Camberwell, London. Six people were killed, and at least twenty injured.

The high-rise fire, was caused by a faulty television set, developed and spread through a number of flats in the twelve-storey building

Analysis of safety defects

Dangerous cladding

Range of products that raised concern, but Government focused initially on aluminium composite material.(ACM)

Testing also has shown poor performance of High-Pressure Laminate (HPL) (thin boards held together by glue), which fail easily. Also, systems that use polystyrene as insulation have failed tests in Australia.

Initial focus was on buildings over 18 metres in height – an arbitrary distinction based on the length of fire brigade ladders. As time has passed focus has also included buildings of 11-18m in height.

There are very many blocks of flats of lower height than those that prompted concerns.

Nationally there are 75,000 blocks of height between 11m and 18 m.

55,000 flats in London have been said to be a concern to the fire brigade.

Fire, smoke and evacuation

64% fire doors in Grenfell missing or failed. Fire doors frequently fail when tested 75% failed. Should provide 30 mins fire resistance and typically only provide 15 mins. In reality very many current fire doors will fail

Pre Grenfell system relied on ‘stay put.’ That relies entirely upon fire spread being prevented by the compartmentalisation of the building. What happens through inadequate design or construction methods is that fire spreads whether through inflammable cladding, or fire doors that do not hold the fire, or wooden balconies. “Stay Put” was what residents at Grenfell and Lakanal House were told. Principally, that is why they died.

Britain is an outlier. South Korea is the only other advanced country not to mandate a second staircase.

At Grenfell there was no plan B for residents to evacuate themselves or for the fire brigade can evacuate if necessary.

The key thing is to prevent smoke spread. In a single staircase this can lead to residents being unable to use staircases

Other countries reduce the problem by using sprinkler systems.

What would happen in Germany routinely in terms of evacuation, is not the case in Britain. In US and Canada residents are assisted by neighbours and friends.

Nor have there been mandatory alarms. Alarm technologies are available. There is not a mechanism for a standard alarm system.

Government suggests 'stay put' remains best approach for most blocks. Problem is when it doesn't work. Once fire breaks out statistics show you are twice as likely to die in a high rise as in a house.

The problem is that hitherto we have not designed high rise with a view to evacuation.

Judith Hackett Review

Dame Judith Hackett conducted an independent review and her report 'Building a Safer Future Independent Review of Building Regulations and Fire Safety' (May 2018) amounts to a devastating critique into fire safety and building regulations which were deemed 'not fit for purpose.' In her foreword she refers to *deep flaws in the current system* and lists some of the issues that had arisen:

- *lack of an audit trail as to whether essential safety work was carried out on e.g on the Ledbury Estate in Southwark, and other large panel systems tower blocks;*
- *a door marketed as a 30-minute fire door failed prior to 30 minutes when tested, revealing concerns around quality assurance and the ability to trace other fire doors manufactured to that specification;*
- *another tower block fire where fire spread between floors via wooden balconies; and*

- *a major fire in a car park in Liverpool which came close to encroaching on a block of flats nearby.*

She described the construction industry as having been engaged in a *race to the bottom* and referred to the need *for a radical rethink of the whole system and how it works.*

In her view the key issues include:

- *Ignorance – regulations and guidance are not always read by those who need to, and when they do the guidance is misunderstood and misinterpreted.*
- *Indifference – the primary motivation is to do things as quickly and cheaply as possible rather than to deliver quality homes which are safe for people to live in.*
- *When concerns are raised, by others involved in building work or by residents, they are often ignored.*
- *Some of those undertaking building work fail to prioritise safety, using the ambiguity of regulations and guidance to game the system*.
- *Lack of clarity on roles and responsibilities –ambiguity over where responsibility lies, exacerbated by a level of fragmentation within the industry, and precluding robust ownership of accountability.*
- *Inadequate regulatory oversight and enforcement tools – the size or complexity of a project does not seem to inform the way in which it is overseen by the regulator.*
- *Where enforcement is necessary, it* (was) *often not pursued. Where it is pursued, the penalties are so small as to be an ineffective deterrent.*
- *There* (was) *insufficient focus on delivering the best quality building possible, in order to ensure that residents are safe, and feel safe.*

At the heart of this report are the principles for a new regulatory framework which will drive real culture change and the right behaviours. (Including the) *need to adopt a very different approach to the … design, construction and maintenance of high-rise residential buildings which recognises* (these) *are complex systems where the actions of many different people can compromise the integrity of that system*

Recommendations of Dame Judith

To create a more simple and effective mechanism for driving building safety

To provide stronger oversight of duty holders with incentives for the right behaviours, and effective sanctions for poor performance

To reassert the role of residents - a no risk route for redress (to) *be created and greater reassurances about the safety of their home … offered, as well as ensuring that residents understand their role and responsibilities for keeping their building safe for themselves and their neighbours.*

The resulting legislation the Building Safety Act 2022 (BSA) and the accompanying regulations constitute a comprehensive regulatory framework for the building industry: transforming how the industry approaches the design, construction and maintenance of tall buildings - particularly those that are classed as higher-risk buildings.

The intention is to address the issue of a lack of accountability throughout a building's life cycle.

Remediation: the current challenge

The immediate issue has been to identify, commission and pay for the remedial work that needs to take place.

- It has been estimated that over 4m people in buildings over 11 metres and 1.3 m people live in buildings over 18 m.
- Only 21% of high-rise flats have been fully remediated.
- Hundreds of thousands live in flats with flammable materials.
- Family finances are under considerable pressure from remediation costs and insurance costs with premiums up by 1000% in some instances.
- *"Many residents are too frightened to live with peace of mind in their homes but find them too difficult to sell*". (Baroness Taylor of Stevenage HL 27th March)

Progress to date

Cladding safety scheme. Government has committed more than £5bn.

Over 4000 buildings are in remediation.

Throughout 2023, DLUHC started monitoring the remediation progress of buildings through the **Cladding Safety Scheme** (over 11m in height or 11-18m In London), the developer remediation contract and reported by registered providers of social housing.

In total, in its monthly release of data in December, the Department for Levelling Up, Housing and Communities (DLUHC) revealed that, as of December 2023, a total of 3,839 buildings had been identified with unsafe cladding. It is thought this could rise to 5,000 buildings.

Of those, 1,608 (42%) had started or finished remediation works. 797 (21%) have completed with 2,231 yet to start work.

(This includes data on buildings drawn from various DLUHC funding streams: The Building Safety Fund, Cladding Safety Scheme; developer remediation contract and reported by registered providers of social housing; as well as high-rise buildings with Aluminium Composite Material cladding systems)

Social Housing Remediation Schemes (Registered Providers)

In respect of social housing remediation schemes, 34% of the 18m plus buildings reported to have unsafe cladding by the registered providers of social housing have started or completed remediation, compared to 28% of the 11-18m buildings.

Developer led Remediation Schemes (DLUHC data)

There are an estimated 91,000 dwellings in buildings with defects that developers are committed to remediate. Of these, there are an estimated 32,000 dwellings in buildings that are reported as having either started or completed remediation works.

Based on the start and completion dates that have been reported by developers, 433 buildings are expected to start works and 164 buildings are expected to complete their remediation between 1 November 2023 and 31 October 2024.

Developer led remediation by height

39% of the 18 metre plus buildings have started or completed developer led remediation, compared to 29% of the 11-18m buildings.

Overall remediation by height

51% of the total 18 metre plus buildings DLUHC is monitoring have started or completed radiation on unsafe cladding, compared to 27% of 11-18m buildings.

There is still considerable remediation work to be conducted.

Many lower cost mitigations are outstanding.

2500 18m plus buildings and 1,500 11-18 m buildings.

11- 18 metres: 4092 residential buildings with unsafe cladding monitored by DLUHC

50 large developers have signed remediation contract but no time lines.

Lenders and mortgage providers cautious.

Leaseholders forced to use own money seeking remediation contribution orders.

Battles with freeholders

Housing Today article: 3839 buildings needing remediation could rise to 5000 by 2028

The Developer's Responsibilities

On 10th January 2022, the Secretary of State set out the principle that leaseholders must be protected from remediation costs that that the industry responsible should pay to fix the problems it created.

On 9 October 2022, the Department for Levelling Up, Housing and Communities (DLUHC) issued a press release regarding building safety issues at Vista House. Vista House is owned by Grey GR Limited Partnership and is a fifteen-storey tower block in Stevenage. The Government stated that 100 plus residents encountered delays of over two years waiting for work to start to remediate fire safety defects.

The freeholders of Vista House were the first building owners to have legal action brought against them by the Government's new Recovery Strategy Unit, set up to engage with other enforcement authorities and pursue parties who "repeatedly refuse to fix" unsafe or inadequate buildings.

DLUHC was taking enforcement action despite the freeholders have registered the building and applied for funding from the Building Safety Fund, though the funding agreement had not yet been signed to release funding. The Secretary of State issued a warning:

"This legal action should act as a warning to the rest of industry's outliers – big and small. Step up, follow your peers and make safe the buildings you own or legal action will be taken against you."

In this way, the Government signalled it will bring an action against freeholders if it thinks it necessary, because remediation works are progressing too slowly.

And the Government will seek a contribution from others, if it is felt necessary to enable the works to be funded and for financial contributions to be made by other actors.

Following discussions between the Government, developers and the Home Builders Federation, as at 1st November 52 developers had signed their own pledge committing to remediate life critical fire safety works in buildings over 11metres that they have played a role in developing or refurbishing over the last 30 years.

The list of developers who signed the pledge are at https://www.gov.uk/government/publications/developer-remediation-contract

Each developer who signed a pledge is expected to sign a legally binding agreement reflecting the pledge and inform leaseholders in affected buildings how they will be meeting their commitments These developers have also agreed to reimburse any funding received from government remediation programmes in relation to buildings they had a role in developing or refurbishing.

It is important to note that no time-line has been attached to that pledge.

Funding Opportunities for Freeholders/Leaseholders

The Cladding Safety Scheme

https://claddingsafetyscheme.homesengland.org.uk/LandingPage

The Building Remediation Hub and applications made for grant funding are managed by Homes England.

Remediation work for eligible buildings that are over 18m in London is funded through the Building Safety Fund and managed by the Greater London Authority and the Department for Levelling Up, Homes and Communities.

All other eligible applications, including buildings that are 11-18m in London or mixed height buildings that are not already in the Building Safety Fund, are funded through the Cladding Safety Scheme and managed by Homes England.

Applications for both the CSS and BSF are made through the same online portal - the Building Remediation Hub, which is managed by Homes England. The applicant may be a Responsible Entity – responsible for the external repair of the building and therefore potentially eligible for grant funding - or a representative of such a person (managing agent). This does not include individual leaseholders who have to go through the owner or managing agent.

The service is for buildings that are:

- over 11 metres high
- residential, with at least one flat with a lease over 21 years where leaseholder is responsible for external repair
- have unsafe cladding on an external wall

To apply the owner needs to prove eligibility for remediation works through a Fire Risk Assessment of External Walls (FRAEW) completed to PAS9980: 2022 standards through the Hub's accredited panel.

The CSS supports applications for buildings where the applicant is unable to afford to carry out the work themselves or feels that it is not their responsibility to do so. An application for the CSS can be submitted by the person or organisation legally responsible for the building's external repairs or their representative (managing agent). The CSS is part of the wider Building Remediation Portfolio whose objectives include ensuring that residents are safe from risks associated with fire safety.

The first step is to read the guidance, create an account and begin your application. Once the account is set up an additional application can be added or a building. If there are multiple buildings additional applications can be set up under one account.

Once the initial application information is provided, the applicant should instruct a Fire Risk Appraisal of External Wall construction (FRAEW) from the CSS panel of Fire Risk Assessors. The panel has been trained on the CSS process and requirements, and will ensure it's undertaken in accordance with the PAS9980:2022 methodology and that it's summarised in an approved format. Further information about a FRAEW can be found here: PAS 9980:2022 Fire Risk Appraisal, BSI.

Once the applicant has applied, they receive information about the FRAEW process and panel members.

Requirement for fire assessment

All multi-occupied residential buildings with two or more sets of domestic premises now need the Fire Risk Assessment under the Regulatory Reform (Fire Safety) Order 2005 to include an assessment of their external walls.

In many cases, this will not need a detailed review of their external walls. It should be obvious to a competent fire risk assessor that the risk of fire spread, particularly in buildings with brick or masonry walls, is sufficiently low that a FRAEW is not needed. In these cases, the fire risk assessor will normally address compliance of external wall construction with the Fire Safety Order as part of the routine Fire Risk Assessment process.

A FRAEW will be needed where the risk is known, or suspected, based on how the walls were built and the materials used.

It will also need to be summarised using the CSS summary sheet – this will enable the applicant to complete part two of your applications once in receipt of the FRAEW. All panel members are trained on this requirement.

Only the person or organisation legally responsible for a building's external repair and maintenance can accept funding from the CSS via a grant funding agreement. This is also known as the 'Responsible Entity'.

The Responsible Entity may be:

- the building's freeholder of a property which can include a building and other property or land or head leaseholder
- a registered provider of social housing
- a management company (whether this operates for commercial gain or is managed by residents for the benefit of residents)
- a Right to Manage (RTM) Company that has primary responsibility for the repair of the property (A Right to Manage Company is a company formed by qualifying leaseholders who manage the building or a self-contained part of a building in line with the Commonhold and Leasehold Reform Act 2002).

An applicant can be the Responsible Entity or their representative. If applying as a representative a managing agent is required to submit evidence that they are legally able to act on the Responsible Entity's behalf. The guidance provides further information for the Responsible Entity or their authorised representative to help them in making an application.

Cost recovery

Where the developer who built or refurbished the building is not able to fund the fire safety works, and where the Responsible Entity is also unable to do so, then the CSS will cover all reasonable eligible costs to address the life safety fire risks associated with cladding.

The applicant must demonstrate that they have taken all reasonable steps to recover these costs from those responsible through *insurance claims, warranties or legal action where they have the practical and legal ability to do so*. During the application process the applicant needs to provide information on the steps taken and Homes England may also seek further information to ensure that all reasonable steps have been taken.

The applicant may be able to recover costs from those responsible for historical defects on a building if construction was complete on or after 28 June 1992. This is because the Building Safety Act has extended the limitation period of the Defective Premises Act 1972 (DPA) to 30 years.

Where funding has been provided under the CSS and there is successful recovery of damages relating to eligible works, Responsible Entities must pay the government any amounts recovered. The payments to government can exclude any unrecovered legal fees that have been incurred when cost recovery efforts are successful.

Where Responsible Entities have already recovered damages, they should deduct relevant amounts in their applications and provide an explanation as to how this has been calculated.

Homes England does not rule out seeking an assignment of relevant rights of action where it considers it would be appropriate to do so, which is a right afforded to Homes England under the grant funding agreement you will be asked to sign.

Building Safety Act 2022

This sets out the context for the work that is being undertaken

Part 2: Building Safety Regulator and functions

The Act establishes the Health and Safety Executive as the Building Safety Regulator, to underpin the key regulatory reforms in the new building safety regime.

Implementing the new, more stringent regulatory regime for higher-risk buildings. This means being the building control authority in England in respect of building work on higher-risk buildings and overseeing and enforcing the new regime in occupation for higher-risk buildings.

One of the Building Safety Regulator's functions is to implement a more stringent regime for higher-risk buildings. The Building Safety Regulator will be responsible for all regulatory decisions under the new regime during the design, construction, occupation and refurbishment of higher-risk buildings in England.

The Building Safety Regulator will work closely with, and take advice from, other regulators and relevant experts in making key decisions throughout the lifecycle of a building. It will have powers necessary to bring together teams including Fire and Rescue Services, and local authority expertise (notably Local Authority Building Control teams) to assist it in making regulatory decisions.

Overseeing the safety and performance of all buildings. This has two key aspects:

- Overseeing the performance of the building control sector. This will involve developing key performance indicators (KPIs) related to building control work, data collection and powers to impose sanctions for poor performance.
- Understanding and advising on existing and emerging building standards and safety risks including advising on changes to regulations, changes to the scope of the regime and commissioning advice on risks in and standards of buildings.

to focus on 'Client' as ultimate beneficiary or end user of building.

Liability used to stop with designer or builder but now includes employer, **landlord** or commercial developer,

Regulator has investigatory powers and can issue Compliance and Stop Notices – to can stop construction by developer or work of designer.

On question - who pays for the regulator? Answer is paid for by developers through 'chargeable functions', e.g Determination of Building Control Applications

Before construction of 'higher-risk building' commences, 'client' must submit an application for building control approval containing information about:

- Use of each storey
- Design and building document
- Fire and emergency file as to how occupants can safely exit from building

S.3(1): objectives of Regulator:

(a) securing the safety of people in or about buildings in relation to risks arising from buildings, and

(b) improving the standard of buildings.

S.4(1) The regulator must provide such assistance and encouragement to relevant persons as it considers appropriate with a view to facilitating their securing the safety of people in or about higher-risk buildings in relation to building safety risks as regards those buildings.

Relevant persons include:

(a) residents of higher-risk building (within meaning of part 4)

(b) owners of residential units in such buildings

(c) persons who are 'accountable persons' (within the meaning of Part 4)

(d) 'duty holders'

Part 3 - c*onstruction phase* - amends Building Act 1984 and provides that regulator is the Building Control Authority for higher risk buildings

- deals with design and construction phase
- Part 3 construction phase regulations include hospitals and care homes
- makes BSR the building control authority for 'higher-risk buildings' (18 metres or 7 storeys with two or more residential units in England. This removes ability for developers/landlords to select building control authority.

Dutyholders

The Act allows for a new dutyholder regime to be incorporated across the lifecycle of higher-risk buildings. This is based on the principle that the person or entity that creates a building safety risk should, as far as possible, be responsible for managing that risk.

Part 3 S.34 amends Sch 1 of Building Act 1984

Creates a new category of person to which legal responsibilities apply.

- Dutyholders scheme applies to **all** buildings and runs from planning to occupation stages
- Key dutyholders during construction – client; principal designer, principle contractor, other designers and contractors
- Client's duties include ensuring work is done in compliance with regulations and competency requirements – skills, knowledge, experience and behaviours necessary.'
- General duty to ensure all work is done in compliance with requirements of BSA
- Designer – cannot start work until satisfied that developer client is aware of their duties and potential liability
- Contractor – provides each worker with appropriate instructions that liable under Act to ensure work is done in compliance with regulations
- Contravention of building regulations is a criminal offence rather than a civil matter
- If offences committed with knowledge of directors or corporate officer that could render that person liable to prosecution

Part 4: - *maintenance phase* – about occupied higher-risk buildings; and imposes duties on accountable persons (affects relationship of landlords and tenants)

It relates to the safety management: completed builds Its occupation phase regulations do not include hospitals and care homes

S. 62 Meaning of "building safety risk"

(1) In this Part "building safety risk" means a risk to the safety of people in or about a building arising from any of the following occurring as regards the building—

(a) the spread of fire;

(b) structural failure;

(c) any other prescribed matter.

By **S.65 Higher-risk buildings** are those in England that are classed as being:

- At least 18 metres in height, or
- At least 7 storeys high, and
- Which contain at least two residential units, including hospitals, care homes and student accommodation.

Reg 8 excludes from definition of higher-risk building for purpose of S.65

Type 1: buildings *comprised entirely* of a hospital or hotel

Type 2: buildings *containing* MoD accommodation

Type 3: buildings *containing* accommodation for … defence organisations

S.72 *BSA Introduces the Accountable Person*

The Dutyholder with statutory responsibility in an occupied building. They may be an individual, partnership or corporate body and there may be more than one Accountable Person for a building. Where there are multiple Accountable Persons in a building, one of them will be identified as the lead Accountable Person, known as the Principal Accountable Person. There will be a duty on Accountable and Responsible Persons in a building to cooperate with each other and with the Principal Person, backed by enforcement and sanctions, so it is an offence not to cooperate.

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An "accountable person" for a higher-risk building includes:

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

A person who holds a legal estate in possession in the common parts of a higher-risk building is not an accountable person for the building if all repairing obligations relating to the relevant common parts which would otherwise be obligations of the estate owner are functions of a Right to Manage (RTM) company.

S73.1) In this Part the "principal accountable person" for a higher-risk building is—

- Where there is one accountable person, that person
- in relation to a building with more than one accountable person, the accountable person who:

(i) holds a legal estate in possession in the relevant parts of the structure and exterior of the building, or

(ii) has a relevant repairing obligation in relation to the relevant parts of the structure and exterior of the building.

e.g Landlord (e.g a residual freeholder under a long lease) /management company occupiers.

Duties of Accountable Person – *incl Leaseholders*

- To register an existing building as a 'high risk' building.
- Apply for Building Assessment Certificate or register existing higher risk buildings. Not to do so is a criminal offence.
- Assess building's safety risks; manage these risks including repair works; produce a safety report
- If this is not done the regulator will issue a compliance notice that repairs, redesign, rectification or ongoing maintenance be conducted forthwith.
- If there is further non-compliance the accountable person will commit a criminal offence.

Part 5: Remediation and Redress

The policy of the 2022 Act is that primary responsibility for the cost of remediation should fall on the original developer, and that others who have a liability to contribute may pass on the costs they incur to the developer. That policy is most apparent from **The Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022** (LPI Regulations) which give every landlord who has contributed to the cost of relevant measures the right of recoupment from the responsible landlord (meaning the person who was, or was in a joint venture with, the developer or who undertook or commissioned work relating to the defect – regulation 3(2) and (8), LPI Regulations and paragraph 2(3) of Schedule 8, 2022 Act)

By these means, the Government has shown it is willing to pursue other parties to make a contribution.

Who pays - cladding removal?

Costs are covered by Government, developers and cladding manufacturing industry – Building Safety Fund. Leaseholders in buildings over 11 metres do not pay at all.

Who pays – non cladding remediation?

Waterfall approach: developers/landlords first, then new building owner, then leaseholders subject to a cap:

- £10k for a property o/s London (£15k in London) up to £1m value
- £50k for property up to £2m value
- £100k for property above £2m in value
- Money paid out over past 5 years contributes

  (Sch 8 S.5/S.6)

Remediation Orders

The Explanatory Notes to the BSA states the leaseholder protections in sections 116 to 125 '*are a one-off intervention designed to deal with the current serious problems with historical building safety defects in medium- and high-rise buildings*.'

S.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.

S.120 Meaning of "relevant defect"

S.120 (2) defines "relevant defect" for the purposes of sections 122 to 125 and Schedule 8 to the Act as follows: 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.

S.120 (5) "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

S.121 Associated persons

For the purposes of sections 122 to 125 and Schedule 8, a partnership or body corporate is associated with another person:

- Where a person's interest in a relevant building was held on trust at the qualifying time, any partnership or body corporate which was a beneficiary of the trust at that time
- A partnership is associated with any person who was a partner in the partnership, other than a limited partner, at any time in the period of 5 years ending at the qualifying time
- A body corporate is associated with any person who was a director of the body corporate at any time in the relevant period.

- A body corporate is associated with another body corporate if—
  (a) at any time in the relevant period a person was a director of both of them,
  (b) at the qualifying time, one of them controlled the other or a third body corporate controlled both of them.

  '*The obvious purpose behind the association provisions is to ensure that where a development has been carried out by a thinly capitalized or insolvent development company, a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedying the relevant defects by hiding behind the separate personality of the development company*.'

  (FTT in TRIATHLON HOMES LLP -and- STRATFORD VILLAGE DEVELOPMENT PARTNERSHIP (1) GET LIVING PLC (2) EAST VILLAGE MANAGEMENT LIMITED (3) Para 266)

S.123 Remediation orders

A "remediation order" is an order, made by the First-tier Tribunal on the application of an interested person (Sec of State, regulator, local authority, fire authority, **or a person with a legal or equitable interest in a building, requiring a landlord under a lease of the building (or any part of it) who is required to repair or maintain anything relating to the relevant defect** to remedy the defects in the building by a specified time.

S.124 Remediation contribution orders

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

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

A body corporate or partnership may be specified only if it is—

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

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

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

(d) a person associated with a person in (a) to (c).

An order may –

- require the making of payments of an amount, or reasonable amount in respect of the remediation of defects or things done or to be done for the purpose of remedying relevant defects
- require a payment to be made at a specified time, or to be made on demand following the occurrence of a specified event.

See also the **Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022** to similar effect.

Reg 3 Recovery of amounts from other landlords: cases under para 2 of Schedule 8

Reg 4 Recovery of amounts from other landlords: cases under para 3 of Schedule 8

Reg 5 Recovery of amounts from other landlords: other cases under Schedule 8

First Tier Tribunal

Sections 123 and 124 only allow remediation orders and remediation contribution orders to be made by the First Tier Tribunal i.e not the Upper Tribunal. A decision of the First-tier Tribunal is enforceable with the permission of the county court as if it is an order of that court.

Remediation Contribution order from other parties

Section 124 of the Act entitles interested persons to apply to the First-tier Tribunal for an order requiring particular companies or partnerships (e.g. former landlords, superior landlords, developers or parties associated with them) to make payments for the purposes of funding the costs of remediating building safety defects in a building.

The Tribunal can make a remediation contribution order where it is just and equitable to do so.

Gateways

The amendments to the Building Act 1984 in this Act, coupled with existing powers, allow for the creation of a new Gateway regime. This will ensure that building safety risks are considered at each stage of a new higher-risk building's design and construction.

The Gateways mean a project can be stopped at any key stage if there are concerns about safety. The design has to be approved before construction work can begin and occupation cannot begin until the final build has been approved.

Higher – Risk Building Regulations

3 stages: planning, pre-construction, completion for building safety

Gateway 1: planning stage -already in operation before BSA 2022 –

Planning Gateway One introduces a number of new requirements in the planning system by amendments to the Town and Country Planning (Development Management Procedure) (England) Order 2015 (as amended).

- involves the Health and Safety Executive (HSE) being a statutory consultee before permission is granted for development which involves or is likely to involve a high-rise residential building in certain circumstances
- requires relevant applications for planning permission to include a fire statement to ensure applicants have considered fire safety issues as they relate to land use planning matters (for instance fire escapes; layout and access); and
- helps inform effective decision-making by local planning authorities (or the Secretary of State as the case may be) so that those decisions and the actions that flow from them properly reflect and respond to the needs of the local community.

Gateway Two: pre-construction:– replaces 'deposit of full plans' stage

- Occurs prior to construction work beginning on a higher-risk building. It replaces the current building control "deposit of plans" stage; at this stage an application will need to be provided to the Building Safety Regulator with their full design intention.
- Provides a "hard stop" where construction cannot begin until the Building Safety Regulator is satisfied that the dutyholder's design meets the functional requirements of the building regulations and does not contain any unrealistic safety management expectations.

Dutyholders will be required to submit key information to the Building Safety Regulator as part of the building control application, to demonstrate how proposals will comply with the requirements of building regulations. Design decisions in relation to fire and structural safety must be well considered and justified, to ensure they will work effectively for the building in use. Before third stage any variations to design & construction must be reported.

Gateway Three: construction and completion

This is the certification stage. Equivalent to the current completion/final certificate phase, where building work on a higher-risk building has finished and the Building Safety Regulator assesses whether the work has been carried out in accordance with the building regulations. Regulator must satisfy itself that design meets the regulatory requirements.

All information with regard to construction must be reported before the regulator will arrange an inspection and sign off completion certificate.

S.76 provides that if someone occupies building before completion certificate is provided, the relevant accountable person commits a criminal offence.

Gateway three is “hard stop” where the Building Safety Regulator will assess the application against applicable requirements of the building regulations, undertake final inspections of the completed building work, and issue a completion certificate on approval. Only when Gateway three has been passed can the new building be registered with the Building Safety Regulator.

The registration process is distinct to the Gateway three process, and both processes must be completed before occupation of the building is allowed to commence.

This increased oversight is to ensure that no building, or part of a building, is occupied before it is safe, and building owners have the information they need to manage building safety during occupation.

At this point all golden thread documents and information must be handed over to the new building owner. Dutyholders will be required to submit to the Building Safety Regulator a building control application with prescribed documents and information on the final, as- built building.

WESTGATE CHAMBERS

Golden thread of information

Creation of digital depository

S.33 BSA amending Schedule 1 to the Building Act 1984 (building regulations) requires creation and maintenance of a golden thread of information.

There should be maintained a digital repository of all details relating to design, construction, occupation and maintenance of a building so that subsequent generations can see what works have been done and whether they were complaint with requirements under Act.

The golden thread documents must be maintained securely, be a single source of 'truth' for the building, available to people who need the information to 'do a job', be available when a person needs the information and presented in a way that a person can use.

The intention is to ensure that the right people have the right information at the right time to ensure buildings are safe, and building safety risks are managed throughout the building's lifecycle. This will ensure original design intent and any subsequent changes to the building are captured, preserved and used to support safety improvements.

For new builds, the dutyholders must start to collect this information during the design and construction process. Once construction is complete, the information must be handed over to the new building owner.

This information will be managed by the Accountable Person during occupation, including safety information about the building and information management systems**.**

The purpose is to provide a single record of building's safety information to be passed on and prevent new owners/landlords having inadequate information about e.g firedoors / building materials and represents a complete change in culture.

Changes to limitation periods

Amends S.38 Building Act 1984

Part 3 of the Act changes the limitation for civil liability under S.38 of the Building Act 1984 to permit claims for compensation to be brought for injury or property damage to as a result of work on a building which has not met Building Regulations (s135(3) BSA).

This applies to all buildings not just residential premises.

Claims can be brought within an extended period of 15 years provided that works were completed post June 28th 2022. (rather than past 6 years).

Breach of building regs will now involve both civil and criminal liability.

S135 BSA 2022 amends Limitation Act 1980 (inserting a new S.4B)

Defective Premises Act 1972

The Defective Premises Act 1972 requires those involved in constructing a dwelling to ensure that the dwelling is 'fit for habitation' when the work is completed.

The Act enables claims to be made for defective work relating to the construction of dwellings where the work renders the dwelling unfit for habitation.

Following the advent of the Building Safety Act, the limitation period (deadline) for claims under the Defective Premises Act is now extended from 6 years to 15 years for new claims. Furthermore, where the claim relates to construction rather than refurbishment, there will be a retrospective 30-year limitation period.

S.1 Defective Premises Act 1972 relates to the duty to build dwellings properly

S.135 Building Safety Act 2022 amends the limitation period for any claim under the DPA 1972 which now extends to:

30 years for retrospective claims accruing before 28th June 2022.

The idea that liability can now attach to work conducted 30 years before – many years after the parties will have assumed that no such claim could arise is extraordinary and would never have been contemplated in the past.

- 15 years for claims accruing on or after 28th June 2022

Total exposure period retrospective and prospective is, therefore, 45 years.

S.135 amends S.2A Defective Premises Act (duties relating to work to dwellings)

Insofar as the claims relate to refurbishment and rectification works: S2A DPA can be brought within the extended 15-year limitation period (s.134 BSA)

This is a huge expansion of liability.

S.130 Building Liability Orders

> (1) The High Court may make a building liability order if it considers it just and equitable to do so.
>
> (2) provides that a building liability order will extend a relevant liability of a body corporate (A) so that it will also be a liability of another specified body corporate (B) and that A and B can be made joint and severally liable for the relevant liability.

The effect will be that a person with a claim arising from a relevant liability can sue both A and B and, if the claim is successful, the assets of both A and B can be considered when damages are awarded.

The relevant liabilities are liabilities under the Defective Premises Act 1972., section 38 of the Building Act 1984, or liabilities which are incurred as a result of a building safety risk. A building safety risk is a risk *to the safety of people in or about a building arising from the spread of fire or structural failure*.

Apart from under the Defective Premises Act 1972, relating to the provision and refurbishment of dwellings, there is no constraint on the types of buildings a relevant liability can be incurred in relation to and therefore no constraint on the types of buildings for which a building liability order may be requested.

The effect is retrospective affecting liabilities arising within the new limitation periods.

WESTGATE CHAMBERS

Background to building liability orders

A practice used in property development is where a subsidiary company (which may be thinly capitalised) is set up to own and manage a development on the behalf of the corporate group it is a part of. The subsidiary company is often wound up once the development has been completed. A consequence of this practice is that the corporate group has no long-term liability for its developments.

Building liability orders have been designed to address the consequence described above, given the context of the wider building safety issues which have been discovered within medium and high-rise buildings.

Concept of 'Associates'

S.131 Building Liability Orders: Associates

For the purposes of s.130 a body corporate (A) is associated with another body corporate (B) if - (a) one of them controls the other, or (b) a third body corporate controls both of them.

Building liability orders remove corporate protections to extend the liability of a company to any of its 'associates' (e.g parent company) to make them jointly and severally liable.

S.132 Building Safety Act Order for information

About obtaining ancillary information, where companies are not forthcoming

In considering applying for a building liability order, an Information order requires a company to give specified information or documents related to associates.

The purpose of these provisions is to protect leaseholders from the limited liability that is intended to make development vehicles 'litigation proof' by assigning liability to another member of the company group that has assets that can be recovered.

Defective Construction Materials (ss 147-151)

To prevent defective materials being used in cladding.

Summary

- This is a reaction to deficient cladding products used at Grenfell.
- Purpose of scheme is to ensure quality control.
- There are new regulations
- General safety requirement (and technical assessment) UKCA conformity marking used for products placed on market in UK – now replacing CE marking
- New national regulator for construction products and criminal penalties for non- compliance
- Cost Contribution Orders can force manufacturers who have been prosecuted to contribute to remediation works.

S. 148 Liability relating to construction products – 15 years limitation.

S.149 Liability for past defaults relating to cladding products – 30 years limitation

S.150 Special time limit for actions relating to construction products.

S.152 Cost contribution orders: general definitions

S.153 Cost contribution orders made by Courts where the following conditions are met:

> A "the defaulter" is convicted of an offence consisting of a failure to comply with a construction product requirement
>
> B after the failure to comply, the construction product is installed in, or applied or attached to, a relevant building in the course of works carried out in the construction of, or otherwise in relation to, the building.
>
> C is that, when those works are completed—
>
> (a) in a case where the relevant building consists of a dwelling, the building is unfit for habitation, or
>
> (b) in a case where the relevant building contains one or more dwellings, a dwelling contained in the building is unfit for habitation.

D is that the failure to comply was the cause, or one of the causes, of the building or dwelling being unfit for habitation.

S.153(7) A "costs contribution order" under this section is an order requiring the defaulter to pay an amount to a person with a prescribed interest in the building or any dwelling contained in the building.

Regulations under this section must provide for the amount to be paid to a person under a costs contribution order under this section to be such amount as the court making the order considers just and equitable in respect of the costs that the person has reasonably incurred, or in the view of the court is likely to reasonably incur, in respect of works to make the building or dwelling fit for habitation.

Service Charges under the Building Safety Act 2022

Schedule 8 Building Safety Act

Relates to most contentious part of new Act as to who bears the cost?

Individual leaseholders are protected from cladding remedy costs.

Introduces provisions as to who ultimately bears the cost of remediation works to affected buildings. Schedule 8 provides for both the costs of unsafe cladding and remedying defects which are not cladding related.

Schedule 8 makes provision for supplementary definitions including:

'relevant measure', in relation to a relevant defect, means the measure taken –

(a) to remedy the relevant defect, or

(b) for the purpose of

(i) preventing a relevant risk from materialising, or

(ii) reducing the severity of any incident resulting from a relevant risk materialising;

'**relevant risk'** here means a building safety risk that arises as a result of the relevant defect.

S.2(2) No service charge payable for defect for which landlord or associate responsible

> No service charge is payable under the lease in respect of a relevant measure relating to a relevant defect if a relevant landlord—
>
> (a) is responsible for the relevant defect, or
>
> (b) is associated with a person responsible for a relevant defect.
>
> (3) a person is "responsible for" a relevant defect if—
>
> (a) in the case of an initial defect, the person was, or was in a joint venture with, the developer or undertook or commissioned works relating to the defect;
>
> (b) in any other case, the person undertook or commissioned works relating to the defect.

Excluding Qualifying Leaseholders from Service Charges

The remaining leaseholder protections in Schedule 8 apply only to qualifying leases.

> S.119(2) A lease is a "qualifying lease" if—
>
> (a) it is a long lease of a single dwelling in a relevant building,
>
> (b) the tenant under the lease is liable to pay a service charge,
>
> (c) the lease was granted before 14 February 2022, and
>
> (d) at the beginning of 14 February 2022 ("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.

They protect qualifying leaseholders from liability for the cost of relevant measures where the landlord meets a contribution condition related to net worth, and where the lease was below a certain value on 14 February 2022.

They also impose financial limits on service charges payable in respect of a relevant measure in any one year and over a longer period, and provide immunity from service charges in respect of cladding remediation and legal or other professional services.

Maintaining an occupied building

Building Safety Act 2022 & regulatory oversight

From 1 October 2023, the Building Safety Regulator became the building control authority for all 'high risk' buildings in England, overseeing compliance with the regulations including:

- The Regulatory Reform (Fire Safety) Order 2005 (the 'Fire Safety Order').
- The Fire Safety (England) Regulations 2022.
- The Fire Safety Act 2021.

The Fire Safety Order is the primary fire safety legislation in England and Wales and it applies to all non-domestic premises as well as the communal parts of residential buildings. Changes to this legislation have been introduced through the Building Safety Act 2022 and represent the next phase of the Government's fire safety reform programme.

The Building Safety Regulator's new building safety regime commenced on 1st April, allowing them to issue building assessment certificates.

Occupied building: duty to apply for building assessment certificate

> (1) This applies where the regulator directs the principal accountable person for an occupied higher risk building to apply to the regulator for a building assessment certificate in relation to the building.
>
> (2) The principal accountable person for the building must make the application within the period of 28 days beginning with the day on which the direction is given.
>
> (3) A person who, without reasonable excuse, fails to apply, commits an offence.

The new regulator currently based with the Health and Safety Executive will be calling in and reviewing the building safety cases for high rise residential buildings (18m / 7 floors) in tranches according to the level of risk.

Organisations have 28 days from being called up to submit this information.

If the building safety case is not ready, the Building Safety Regulator can issue a notice requiring social landlords to comply. Failure to do so could be a breach of Section 79 (3) of the Act punishable with up to two years in prison and a fine of £200 a day if the default continues after conviction.

Building Assessment Certificates and the principal accountable person

Every higher risk building must have an accountable person either drawn from the landlord or the freeholder, with duties to prevent fires and/or structural failure risks and reduce the seriousness of such a risk if it does occur.

If there is more than one accountable person, it is the principle accountable person who is responsible for preparing the safety case report for the building.

The building safety report should not read like a technical document but rather an argument that a building is safe. There should be a risk based assessment in place on a specific building. It should be a living digitally maintained document and continually updated.

The building safety report should identify any risks for the spread of fire or any structural failure and explain how those risks are being managed. It should draw together all the important information that demonstrates compliance and should be a document that can enable anyone to easily understand a building's safety.

Key elements should include:

- A building description (building name, full postal address and a photo or map)
- A risk assessment summary
- A summary of how those risks are being managed
- A summary of the management systems in place to manage risks
- The strategy in the event of an emergency in the building
- Details of any ongoing work or building improvement

Provision of information to residents – resident engagement strategy

In residential buildings with two or more domestic premises (e.g. blocks of flats) then the responsible owner must provide residents with information on the risks from fire within their building and the fire safety measures provided to keep them safe. This requirement expands upon legislation introduced earlier that required responsible persons to provide residents with information on emergency procedures and the importance of fire doors.

The principal accountable person for a higher risk building is required to prepare a resident engagement strategy and act on it.

There should be consultation about the strategy as needed and the opinions received should be taken into account.

Each version of the strategy should be provided to residents, who should be told about building safety work and who will carry out the work.

Information should be shared with residents, not least on safety and how there is a feedback loop of their comments.

When a resident raises a safety concern, it should be investigated and addressed. The resident should be given information on what has been done.

The strategy should be reviewed and revised and a record kept of the reviews. The latest version should be provided to every accountable person (if there is more than one).

Enhanced requirements for cooperation and coordination

In premises where there is more than one responsible person (e.g. in multi-occupied premises or buildings where the occupier and building owner are different entities), there are increased requirements for cooperation and coordination between responsible persons.

How will BSA affect property: practical Issues & concerns

<u>Leaseholders</u>

Those who have settled before BSA came into being or had issue determined or rejected on limitation grounds cannot bring another claim (unlucky for some)

There is very limited resources available for leaseholders to bring claims but as some recent cases have demonstrated Leaseholders can still be successful.

Retrospective Claims

Retrospective '30 year' claims are inevitably going to cause problems

- Documents are likely to have been lost or destroyed
- Building contractors will have to rely on very old memories will be challenging – witnesses may not be reliable, be deceased or can't be traced
- Insurance policies will likely have expired
- Contributions under Contribution Act for third parties with a limit of 6 years whereas primary defendant liability will go back 30 years
- Many companies will no longer exist – or declare insolvency

There is a backstop human rights protection provided by S.135(5) BSA 2022

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

Insurance Issues

- There is an increase in claims registered under insurance policies. Everyone concerned needs to comply with notice requirements.
- Insurance policies are now exempting insurance for cladding & RAAC.
- Impact on excesses and premiums have increased.
- Directors and officers being made criminally liable will want to be insured.
- Increased premiums will inevitably result
- Insolvent defendants are also on increase. The insurance market will harden and become more expensive generally.

WESTGATE CHAMBERS

Building Safety Act Cases

Waite & Others v Kedai Limited LON/00AY/HYI/2022/0005 & 0016

This is the first case where the FTT has made a remediation order under S.123 of the Building Safety Act 2022.

Background

These were two consolidated applications for a remediation order under section 123 of the Building Safety Act 2022 ("the BSA") in respect of the development at 2-4 Leigham Court, Road, London SW16 2PG. (the "Development").

The first application in time was received September 2022 in respect of Block B and the second application was received December 2022 in respect of Block A The Development comprises 35 residential flats and one commercial unit on the ground floor. 30 of the 35 long leaseholders in the two blocks joined the proceedings as Applicants. The Respondent was the freeholder, Kedai Limited.

Decision

The Tribunal made a remediation order in respect of Block A and Block B. The Tribunal also made an order under section 20C of the Landlord and Tenant Act 1985 that 80% of the landlord's cost of these proceedings may not be passed on to non-qualifying leaseholders through the service charge (the qualifying leaseholders being protected against payment of any costs by reason of para 9 of Schedule 8 to the Building Safety Act 2022).

An expert report found that at the time of construction (completed 29th January 2016) 2-4 Leigham Court Road was non- compliant with standards set out within the Building Regulations 2010 due to the lack of cavity barriers, and no cavity closers in place around external openings. Further reports identified the cladding as Aluminium Composite Material (ACM) and concluded the overall risk rating for the building was "high", requiring remedial action to be taken, also advising that the insulation should be removed and replaced with a non-combustible alternative. Contrary to previous expectations the height was also revealed to exceed 17 metres and therefore constituted a 'tall building'. This meant an application for funding could be made to the Building Safety Fund.

Kedai Limited, as the freeholder, was the first respondent as the freeholder and associated company of the managing contractor and confirmed it was the 'relevant landlord' under the Act, but reserved its position as to whether defects at the premises were "relevant defects" and stated that technical evidence would be required to determine whether any alleged defect amounted to a "building safety risk"

A Fire Safety Engineer commissioned by Kedai Limited identified several relevant defects which, he concluded, should be removed and replaced. Kedai applied to adjourn to obtain a feasibility study to be produced by a specialist façade engineer and/or an architect, as recommended by the expert in his report.

The Tribunal decided not to postpone the hearing for several reasons, not least that on the face of the evidence as it then stood, it appeared that a tribunal could conclude that the conditions for making a remediation order would be satisfied in this case. It was considered this might also give peace of mind to the applicant leaseholders and their mortgages, and to insurers.

Further directions were given making arrangements for the Applicants to ask questions of Kedai's expert and making further provision for the drafting of remediation orders. The Tribunal directed Kedai Limited to confirm its position regarding the status of Block A and a particular joined leaseholder lease and indicated its wish to inspect the Development on the morning of 10 July 2023, the first day of the final hearing.

A letter to the Tribunal 3 days before confirmed Kadai was engaging with various professionals and set out the necessary actions to be undertaken to complete any remedial works, giving an estimate of the duration for each step. The overall time estimate was 115 weeks, starting with a feasibility report and measured survey and an investigation and agreement of suitable materials prior to submission of a planning application. It was also stated that works to rectify the internal compartmentation defects identified in the Internal Compartmentation Survey had already begun and were anticipated to take 3 weeks.

Reasoning

The Tribunal was satisfied that the conditions for the making of a remediation order against Kedai Limited had been met.

The Respondent's primary position was that it was not possible, at this time, for the Tribunal to make a remediation order, that the Applicants had not satisfied the burden of proof to establish the relevant defects upon which they relied, and they had not proposed a scheme of works to remedy such defects as might exist.

The Applicants, submitted that a remediation order was entirely justified when considering the evidence as a whole - that the three main issues to be decided were: the scope and terms of any remediation order as to the relevant defects that the Respondent must remedy; the date by which work must be finished; and the circumstances in which a party might return to the Tribunal to ask for the scope and/or the date to be varied, including any further directions.

Para 69. In response the Tribunal indicated it did not consider itself restricted in the interpretation of section 123 by reference to other statutory provisions or case law, for example, those relating to the law of specific performance of repairing covenants in a lease, applicable standards and tests applied by Building Regulations, the Regulatory Reform (Fire Safety) Order 2005, the Housing Health and Safety Rating System (HHSRS) under the Housing Act 2004, assessments of fire safety and risk under PAS 9980:2022 (a government sponsored code of practice for assessing the fire risk associated with external wall construction) or section 17 of the Landlord and Tenant Act 1985.

Para 70-71. '*The reason is simple, namely that each one of the other regimes, while dealing with the condition of buildings and housing and fire safety, arises in its own circumstances, on its own terms and applying its own tests and criteria. Here, we are dealing with a statutory remedy in simple terms, arising from certain limited criteria being satisfied. In short, the objective of the BSA is (with occasional overlap) different to all other regimes. It is simply to remove a "relevant defect". …* The BSA creates a freestanding regime designed to address a specific problem.

Once satisfied that one or more "relevant defect" is present in the building, the Tribunal's power is to make a "remediation order": see regulation 2(2) of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022

Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022.

The First-tier Tribunal may, on an application made by an interested person, make a remediation order under section 123 of the Act.

> (3) An application for a remediation order must—
>
> (a) state it is an application under section 123 of the Act;
>
> (b) identify the building to which the application relates;
>
> (c) identify the defects to the building for which a remediation order is sought;
>
> (d) identify the landlord (as defined in section 123(3) and (4) of the Act) which the applicant considers is responsible for repairing or maintaining anything relating to the relevant defects.)
>
> and section 123(2), which defines a "remediation order" as "an order, made by the First- tier Tribunal on the application of an interested person, requiring a relevant landlord to remedy the specified relevant defects in a specified relevant building by a specified time."

The Tribunal identified no guidance in the BSA about how the Tribunal should assess the risk to the safety of people in or about the building, or the scope of the works that may be required "to remedy" the relevant defects, or the standard to which any remedial works must be carried out.

It found the: *wording of this Part of the BSA was in deliberately broad terms, to enable the Tribunal to find the best and most practical, outcomes-focussed solutions to myriad circumstances that will inevitably present themselves in applications such as this.*

The Tribunal had been given a very wide power and in exercising that power, the Tribunal will have regard to all the tests and standards in related areas that are brought to its attention, give due weight to them where appropriate, without being bound by them. The Tribunal disagreed with the Respondent's contention that it was not possible to make a building remediation order – several aspects of the construction of Blocks A and B are admitted to be a "relevant defect" causing a "building safety risk". They therefore fell within the Tribunal's jurisdiction to make a remediation order.

The Applicants had to make a coherent, initial case that there were relevant defects at the Development that caused a building safety risk and that would entitle a Tribunal to make a remediation order and had done so. Although the Applicants had relied heavily on various inspection reports commissioned by the Respondent together with detailed arguments, supported by documents and photographs, that was sufficient.

> Para 81. This was an evidence based exercise, informed by the Tribunal's experience and expertise in building matters and what it saw for itself upon inspection. 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.

Scope of the Works

> Para 82. It is important for any remediation order to be sufficiently precise so that the Respondent can know what it must do to remedy the relevant defects and for enforcement purposes before the county court. However, the Act is not prescriptive as to the works that will be necessary to remedy the relevant defect or defects. The extent of precision will vary from case to case. On some occasions, a full specification will be provided. In others, a broad schedule will be sufficient with a power for either party to apply for further directions or a more detailed specification.

> Para 85. The purpose of the legislation is not to impose a costly burden on leaseholders requiring them to obtain a detailed specification of works. In this case, the landlord will have the conduct of the works and is best placed to negotiate a specification with contractors.

> Para 87. In most cases, the preparation of a specification of works will also have to be at the cost of the developer or landlord because leaseholders simply cannot afford to do so; nor will they have the necessary access to the property in question; nor the appropriate management regime. However, there may be significant advantages to landlords and developers in having a general order under section 123, namely that it leaves the choice of remediation open to them, in conjunction with the appropriate authorities, and leaves them to apply for planning permission for any remediation work, if necessary, unfettered by an overly specified and potentially rigid specification of works determined by the Tribunal.

Specificity of Remedial Order

Para 88. The Tribunal's remediation order makes clear which of those items that are relevant defects must be removed from the Development; and reasons for that are given in this decision.

Respondent can apply for variation

Where the Respondent considers that any item currently constituting a relevant defect might yet be retained at the Development, it can apply to the Tribunal for a variation of the remediation order, in a similar way to what happened in *Blue Manchester*. The ability to apply for variation also provides the Respondent with protection against unwarranted applications for enforcement by way of contempt of court, if different works are proposed to those originally envisaged by the Tribunal. If the Respondent were to apply for variation of the remediation order, the burden of proof, at least to show that there is a prima facie case that the item concerned could be retained safely, will fall on the Respondent.

Standard of work

Although no standard or benchmark for such work is specified in the Act, in this case, we are persuaded that the remediation works must:

(1) Comply with the Building Regulations applicable at the time the remedial work is carried out; and

(2) At the very least, a post-Works Fire Risk Appraisal of External Walls (FRAEW) pursuant to PAS 9980:2022 should not prevent a satisfactory Form EWS1: External Wall Fire Review from being issued

Time for Remedial Work

The Respondents ere granted 115 weeks to carry out the remedial works. The Applicants were not refused an order for prior agreement of the scope of the works.

Conclusions

These Leaseholders of a block of flats brought the application against the freeholder for a remediation order to remedy defects, including various inadequacies in the building's fireproofing, within a period of 18 months.

Although the respondent instructed a fire safety expert whose report was disclosed. The leaseholders acted in person until just before the final hearing and prepared their own statements of case. They did not commission their own expert report and relied on the respondents' expert evidence. Nor did they have significant support from the local authority.

The FTT's focus was on the purpose of the Building Safety Act and focused on the main issue of building safety. It used the BSA to protect leaseholders and took a *broad brush* to its canvass.

The Tribunal granted the remediation order and gave the landlord a period of 26.5 months to carry out the works. Issue is the non-recoverability of legal costs, which may limit many leaseholders' ability to bring claims in practice.

TRIATHLON HOMES LLP -and- STRATFORD VILLAGE DEVELOPMENT PARTNERSHIP (1) GET LIVING PLC (2)
EAST VILLAGE MANAGEMENT LIMITED (3) FTT Case No: LON/00BB/HYI/2022/0018-22

Background

These proceedings are brought under Part 5 of the 2022 Act. They concern five residential buildings at Stratford in East London, originally developed by the first respondent, Stratford Village Development Partnership ("SVDP"), to provide accommodation for 17,000 athleets and officials participating in London 2012 Olympic Games.

The former athletes' village is now known as East Village and has become a large permanent residential estate providing 2,818 new homes, including 1,379 affordable homes and houses, most of which are contained in 66 blocks of between 8 and 12 storeys.

The five buildings concerned in these proceedings are Meller House (Block A), Chroma Mansions (Block B), Seasons House (Block C), Patina Mansions (Block D) and Kaleidoscope House (Block E) (together "the Blocks"). Each Block contains three storey "town houses" or maisonettes and retail units on the lower levels and flats or apartments on the upper levels. All five are in a part of the village referred to during its development as Plot N26.

Some of the units in the Blocks are owned through subsidiaries by the second respondent, Get Living plc ("Get Living") and some are owned by the applicant, Triathlon Homes LLP ("Triathlon"). Get Living is a property company which, through subsidiaries, specialises in the private rental market and owns all the private rented housing at East Village. Triathlon is a limited liability partnership established to provide affordable housing at East Village and owns all the social and affordable housing.

Triathlon has a long lease of all of the flats and apartments in two of the Blocks (45 units in Block A and 40 in Block B). It has a long lease of only some of the units in the others (three units in Block C out of a total of 43 houses and apartments, five of a total of 41 in Block D and 36 apartments and town houses in Block E).

Get Living's holding includes all of the units in Blocks C, D and E which are not leased to Triathlon. It also owns the original developer, SVDP, although it did not at the time the development was being undertaken.

The repair and maintenance of the structure and common parts of the East Village is the responsibility of the third respondent, East Village Management Ltd ("EVML"), a company owned jointly by Get Living and Triathlon.

Findings

The fact that some of the costs, payment of which is sought by the applications, were incurred prior to 28 June 2022 does not constitute a sufficient reason or a contributory reason to conclude that it would not be just and equitable to make remediation contribution orders in respect of those costs.

It is just and equitable to make the remediation contribution orders sought by Triathlon.

Triathlon is entitled to the remediation contribution orders sought by the applications. Subject to working out the precise terms of these orders, we will make orders pursuant to Section 124 for the respondents to make payment of (i) the total sum of £16,031,244.53 to EVML, being the forecast cost of the Major Works and professional fees, apportioned between the Blocks in the proportions set out in paragraph 15.2 of Triathlon's written opening submissions, and (ii) the further total sum to EVML of £767,438.79 being costs of other remedial measures (including the forecast cost of servicing and decommissioning temporary fire alarms), and (iii) the total sum of £1,158,358.18, by way of the additional costs, to Triathlon.

The risk

Following the Grenfell Tower fire work was undertaken by EVML to identify the materials used in the construction of the East Village and to determine what risks they might present. By December 2017 it had been established that the same highly combustible aluminium composite material (ACM) employed in cladding at Grenfell had been used at plots N02 and N07, but not at Plot N26. Further investigations were commissioned in August 2019 to ascertain whether the non-ACM cladding material used in other buildings at East Village nevertheless presented a risk to the safety of residents as it was not of limited combustibility.

The position in relation to the N26 Blocks was not clearly identified until November 2020. Serious fire safety defects were discovered, relating both to the design and the construction of the various non-ACM cladding systems adopted for the external facades. These defects included the presence of combustible insulation and breather membranes in the cladding used on each of the Blocks, inadequate firestopping, the use of combustible timber decking in external balconies, and the absence or defective installation of cavity barriers and firestopping within the external wall systems. In response to these discoveries a waking watch was implemented in all Blocks in November 2020 which remained in place until additional alarm and heat detection systems were installed in flats as temporary measures.

A programme of work to remedy the defects at East Village permanently by the removal and replacement of the exterior cladding has been devised and is being implemented by EVML.

Remediation commenced at the first of the N26 Blocks on 20 April 2023 and is due to have started at all five by February 2024. The current timetable will see the remediation of the Blocks completed by August 2025.

For the time being the remediation work is being funded by grants made available to EVML using public money provided from the Building Safety Fund. The total cost of the work exceeds £24.5 million.

The applications

On 19 December 2022 Triathlon made five applications, one for each of the Blocks, to the First-tier Tribunal, Property Chamber ("the FTT") for remediation contribution orders under section 124 of the 2022 Act ('the applications').

The orders sought by Triathlon would require SVDP and Get Living to reimburse expenditure of £1.058 million already incurred by Triathlon through services charges paid to EVML in respect of interim fire safety measures and investigative and preparatory works. They would also require them to meet further liabilities of £153,538 in respect of service charges previously demanded by EVML which Triathlon has not yet paid, and of £613,899 in respect of costs and anticipated costs which have not yet been the subject of service charge demands. Of more significance the orders sought would also require SVDP and Get Living to reimburse expenditure of £16.03 million incurred or to be incurred by EVML in remedying the defects, representing Triathlon's share of the total remediation costs.

No order for payment is sought by Triathlon against EVML. Rather, as the proposed recipient of payments from others, EVML was joined as a respondent at the suggestion of the FTT, to enable it to participate in the proceedings if it chose to. Until a few days before the hearing of the applications EVML took no active part and it was not represented at the h earing. (Where we refer to "the respondents" we therefore mean SVDP and Get Living and do not include EVML).

The law

Schedule 8 itself is titled "Remediation costs under qualifying leases etc" and most of its provisions apply only to service charges payable under a "qualifying lease". That expression is defined in section 119(2) and refers to a long lease of a single dwelling in a relevant building which was granted before 14 February 2022 and under which the tenant is liable to pay a service charge. The dwelling must also have been the tenant's only or principal home on that date and the tenant must not have owned any other dwelling, or not more than two, apart from their interest under the lease.

By virtue of these requirements a single lease comprising more than one dwelling, or held by a company, will not be a qualifying lease. Thus, a body such as Triathlon, which holds headleases comprising a number of flats in each of the Blocks, and which cannot occupy premises as a home, will not be the tenant under a qualifying lease and will not be entitled to most of the leaseholder protections in Schedule.

One important exception to this exclusion from protection is paragraph 2 of Schedule 8, which is not restricted to qualifying leases but applies "in relation to a lease of any premises in a relevant building". The substance of the protection is provided by paragraph 2(2), as follows:

> (2) No service charge is payable under the lease in respect of a relevant measure relating to a relevant defect if a relevant landlord—
>
> (a) is responsible for the relevant defect, or
> (b) is associated with a person responsible for a relevant defect
>
> "relevant measure", in relation to a relevant defect, means a measure taken –
>
> (a) to remedy the relevant defect, or
> (b) for the purpose of—
>
> (i) preventing a relevant risk from materialising, or
>
> (ii) reducing the severity of any incident resulting from a relevant risk materialising;
>
> "relevant risk" here means a building safety risk that arises as a result of the relevant defect;

The expression "a relevant landlord" is defined in paragraph 2(4) and means the landlord under the lease at the "qualifying time" or any superior landlord at that time. The "qualifying time" is 14 February 2022 (section 119(2)(d)).

In broad terms a person will be taken to be "responsible for" a relevant defect for the purpose of paragraph 2 of Schedule 8 if they were the developer who undertook or commissioned the construction or conversion of the building with a view to granting or disposing of interests in it or were in a joint venture with the developer (paragraph 2(3)). Responsibility, in this sense, is not synonymous with fault; a developer may have done all that could reasonably be expected of it to build a safe building, but will still be "responsible for" relevant defects caused by others.

Thus, paragraph 2(2) only applies where the landlord or any superior landlord on 14 February 2022 was also the person responsible for the relevant defect or was associated with that person. If that degree of connection exists between the landlord and the defect the leaseholder under any lease of any premises in a relevant building,

including a corporate leaseholder of the whole building, is relieved from liability to pay service charges in respect of measures to remedy the relevant defect or to prevent a building safety risk arising as a result of the defect, or to reduce the severity of any incident resulting from the defect.

Section 124 allows for the making of remediation contribution orders, by which developers, landlords, and their associates may be required to contribute towards the costs of remedying relevant defects. In summary, section 124 allows an interested person (as defined in section 124(5)) to apply to the FTT for an order requiring a current or former landlord or developer of the building, or someone associated with them, to meet costs incurred or to be incurred in remedying relevant defects.

An interested person includes any person with a legal or equitable interest in the relevant building or any part of it and therefore includes the leaseholder of an individual flat, or a leaseholder of the whole building.

The landlord or their associate against whom the order is sought must in each case be a company or partnership.

If the relevant qualifying conditions are met, the FTT may then make such an order if it considers it "just and equitable" to do so (section 124(1)).

Triathlon is the proprietor of long leases of all or part of each of the Blocks and is agreed to be an interested party for the purpose of section 124(5)(e).

S.121 makes provision for the status of an associate to exist between beneficiaries of a trust and their trustees, between current and former partners and their partnerships, between directors and their companies, and between companies with common directors or controlling interests.

Any landlord (or any right to manage company or leaseholder owned management company) which has paid or is liable to pay the costs of a relevant measure which would have been recoverable from leaseholders but for paragraph 2(2) of Schedule 8, has the right to pass those costs on to another person who is a "responsible landlord".

That right is conferred by regulation 3 of The Building Safety (Leaseholder Protections) (Information etc) Regulations 2022 ("the LPI Regulations") which allows a landlord which has paid the costs of a relevant measure to give notice to a responsible landlord making them liable for those costs.

The recipient of such a notice may appeal to the FTT, but only on the limited grounds that they are not a responsible landlord or that the sum claimed is more than the cost incurred. There is no right of appeal on the ground that it is not just and equitable for the responsible landlord to have to pay.

A "responsible landlord" for the purpose of regulation 3 is any landlord or superior landlord on 14 February 2022 which is either responsible for the defect in the sense explained in paragraph 2(3) of Schedule 8) or is associated with a person responsible for the defect, or any successor in title of theirs after that date.

Similar provisions in paragraph 4 and 5 of the LPI Regulations allow a landlord, RTM company or leaseholder owned management company which is prevented by other leaseholder protections in Schedule 8 from recovering the costs of a relevant measure for which it has paid, to pass those costs on first to any landlord of sufficient means to satisfy a "contribution condition" (requiring group net worth of more than £2m. per group building) and then to any other landlord of the building in proportion to the extent of their interest and obligation to remediate. Again this entitlement is not subject to appeal on any just and equitable ground.

The provisions of section 124 and the LPI Regulations were described on behalf of Triathlon as creating a "hierarchy" or "cascade" of liability with the landlord who was responsible for the relevant defect, or which is associated with a developer which was responsible for it, standing at the top of the list of those liable to meet the costs of remediation. If no such responsible landlord can be found, then liability will pass to the next available landlord in the list.

It is apparent, however, that the same remediation costs may either be the subject of an application under section 124 or of a notice under regulations 3, 4 or 5 of the LPI Regulations.

Triathlon's case

Where a responsible landlord or developer, or a sufficiently capitalised associate of theirs, could be identified, "it will ordinarily be regarded as just and equitable to make an RCO requiring them to meet the costs of remediation works".

The BSA 2022 has retrospective application Para 66-67. Reference was made to the retrospective effect of the 2022 Act in the Upper Tribunal's recent decision in *Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point* [2023] UKUT 271 (LC) It concerned paragraph 9 of Schedule 8 to the 2022 Act.

The 2022 Act which provides that "no service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect". Costs of relevant professional services had been incurred by a landlord before 28 June 2022 and the Tribunal was required to consider whether they could be recovered as a service charge. The Upper Tribunal considered it was consistent with the overall scheme of the leaseholder protections that Schedule 8 should be capable of applying to costs incurred before it came into force.

The Tribunal was in no doubt that section 124 allows remediation contribution orders to be made in respect of costs incurred before 28 June 2022. In relation to time, the choice of language is unlimited, extending to costs which have already been incurred and those which are yet to be incurred. One of the circumstances in which it is said leaseholders might wish to seek a remediation contribution order against a developer is where they have already contributed towards the costs of remediation works before the coming into force of the leaseholder protections (under) Schedule 8.

Introducing a hierarchy of responsibility

> Para 75. *Parliament has decided that, irrespective of fault, it is fair for those with the broadest shoulders to bear unprecedented financial burdens. To that end the 2022 Act goes far beyond the limited leaseholder protections in section 18 to 30, Landlord and Tenant Act 1985 and provides for wholesale intervention in and beyond normal contractual relationships in order to transfer the potentially ruinous cost of remediation from individual leaseholders to landlords, and to distribute it between landlords and developers and their associates according to criteria which Parliament has decided are necessary and fair. We agree with Triathlon's submission that the Act and the LPI Regulations disclose a hierarchy of liability, with the original developer and its associates at the top. An interpretation of the Act which resulted in some leaseholders bearing the cost of remediation, and some developers, landlords and their associates avoiding responsibility, would not give effect to the obvious purpose of the Act to protect leaseholders to the fullest extent possible.*
>
> Para 78 It appears to us to be inconceivable that Parliament can have intended that the individual leaseholders of flats in a building which had not yet been remediated by the time the leaseholder protections in Schedule 8 came into force on 22 June 2022 were to enjoy those protections, but that the leaseholders of an identical building on the same estate which had already been remediated at their expense were to be left to bear the full costs themselves and prevented from seeking a contribution order under section 124.

Para 79. We therefore think it important to read the Act as a whole, and to give effect to its different provisions as parts of a complicated scheme with a consistent objective. Section 124 and Schedule 8 are different routes towards the same destination: the transmission of responsibility for remediation away from individual leaseholders and towards the original developer and its associates.

Relevant defects

Para104. Section 124 is about the cost of "remedying relevant defects". Not all defects are relevant defects. As defined in section 120(2) a relevant defect has two characteristics: it must arise as a result of something done or used (or not done or used) in connection with "relevant works" (including the construction or conversion of the building); and it must be a defect that "causes a building safety risk". A "building safety risk" means a risk to the safety of people in or about the building arising either from fire or from the collapse of the building.

Para 107… any measure which causes a building defect to cease to be a relevant defect, or which is part of a larger programme of measures for that purpose, is capable of being the subject of a remediation contribution order.

Relevant measures are overlapping

Para112. The definition of "relevant measure" is expressed in wide terms, in particular by the use of "measure" rather than some narrower word, such as work, or service, to describe the activity in question.

Para113. Relevant measures are all measures in relation to a relevant defect and are described in three parts: measures taken to remedy a relevant defect; measures for the purpose of preventing a relevant risk from materialising; and measures for the purpose of reducing the severity of any incident resulting from a relevant risk materialising. As a relevant risk is a building safety risk that arises as a result of a relevant defect, all three types of measures are, in principle, capable of being taken in response to the same defect.

The Tribunal determined that these three types of measures were not 'sealed compartments' into which specific measures should sit. Para 114. 'Each measure is described by reference to the purpose for which it is taken - to remedy, to prevent, to reduce - rather than by reference to a particular activity. The definition could be visualised as a Venn diagram of overlapping descriptors by which the same activity might easily fall within more than one classification'

The recently introduced building safety standard PAS 9980: 2022 was said by the Tribunal to offer a more nuanced assessment of fire risks and enables the justification of alternative remedial solutions short of replacing all combustible materials, components and systems, in contrast to so-called full or ADB - remedial works required by current Building Regulations and Approved Document B.

E.g in case of a relevant defect such the presence of combustible materials in a building PAS works could constitute an approved method of dealing with the relevant defect falling short of actual replacement of the relevant combustible materials.

> Para 115. It would be an odd, and undesirable result if such works were excluded from the scope of Section 124 because, while qualifying as an approved method of dealing with the relevant defect, they fell short of being the most extensive and, no doubt, most expensive method of dealing with the relevant defect.
>
> Para 119. A remediation order under section 123 is an order requiring a landlord to "remedy specified relevant defects". … It would be a surprising limitation of the scope of remediation orders if they could not be used, for example, to require the installation of additional fire alarms or the application of fire retardant coating to timber building components, if those were measures that the relevant fire authority considered appropriate and sufficient to remedy a relevant defect.
>
> Held: Para 122. a remediation contribution order can be made in respect of costs incurred in preventing risks from materialising or in reducing the severity of building safety incidents.

Associate companies

> Para 124. It is acknowledged that Get Living is an associate of the freeholder and of each of the landlords in the relevant chain of title. That is sufficient to enable it to be specified in a remediation contribution order (assuming the other jurisdictional requirements are met) as a body corporate required to make a contribution to remediation costs. The question whether Get Living is also an associate of SVDP, which was the developer and is a limited partnership, therefore makes no difference to the Tribunal's jurisdiction. Nor is it argued on behalf of Get Living that the capacity in which it may be specified as an associate makes any difference (in this case) to the Tribunal's determination whether it is just and equitable that an order should be made against it.
>
> *Is it just and equitable to make remediation contribution orders?*

What is just and equitable will be fact specific

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

Triathlon's case

> Paras 241-242. The principal factor emphasised by Triathlon in support of it being just and equitable to make an order against SVDP was the fact that it was the developer of each of the Blocks, and was therefore ultimately responsible for the presence of the relevant defects. To this they added a number of other factors: the role of the respondents' group of companies as bidders, purchasers and owners of SVDP. … including what were said to be Get Living's expressions of concern regarding quality assurance and its reliance, instead, on the contractual rights it has against third-parties; the terms of the Sale & Purchase Agreement and the availability of indemnities and third-party rights to SVDP and Get Living in respect of defects in the Blocks. … Triathlon's motivation in pursuing the applications, namely the safety of its tenants and occupiers and the obligations it was under as a provider of affordable housing to take action; that none of the sums claimed are recoverable by way of service charges under the Triathlon leases or any of its occupational leases by virtue of the leaseholder protections afforded by Schedule 8.
>
> Para 243. It was said by Triathlon to be just and equitable to make an order against Get Living for the same reasons and additionally: to guarantee funding for the Major Works and to ensure they are completed without interruption, delay or disruption; because of SVDP's reliance on Get Living for financial support; Get Living's ownership of SVPH-1 and SVPH-2, the owners of the freehold, and their reliance on Get Living for financial support; the substantial financial benefits to the Get Living group as a result of the acquisition of SVDP and the Blocks.

The Respondents' case

> Para 244. … There was no presumption that an order should be made and if, as in this case, the Tribunal could see that the necessary remedial works were underway and their funding was secure, it would not be just and equitable to make an order. Instead, Triathlon should be left to its contractual and common law remedies against the contractors and consultants involved in the design and construction of the Blocks, with liability being apportioned by the Court on normal principles.

The Tribunal found

> Para 261-262. … the ability to make a claim for a remediation contribution order under section 124 is a new and independent remedy, which is essentially non-fault based. The remedy has been created by Parliament as an alternative to other fault-based claims which a party may be entitled to make in relation to relevant defects. It seems clear to us that Parliament did not intend that the availability of other claims or potential claims should either disqualify an applicant from making a claim for a remediation contribution order or delay the making of that claim. It also seems clear to us that Parliament intended that an application for a remediation contribution order should provide a route to securing funding for remediation works without the applicant having to become involved in, or to wait upon the outcome of other claims arising out of the relevant defects, which might involve complex, multi-handed, expensive and lengthy litigation. … concentrating on the question of what is just and equitable, we can see nothing unfair in making remediation contribution orders on the applications, without requiring Triathlon to hazard the pursuit of other claims which it may have. … Parties cannot contract out of this new statutory regime. In all these circumstances we see nothing unfair in Triathlon taking advantage of the ability which it has been given to act independently of the network of contractual provisions relied upon by the respondents, or in our making remediation contribution orders on the applications.
>
> Para 266. If, as we are provisionally minded, it is just and equitable to make an order against SVDP, it would also be just and equitable to make an order against Get Living, on which SVDP depends for financial support.
>
> Para 277. In the final analysis, (the Tribunal found there was no) clear and convincing reason why it would be just and equitable to allow Get Living to retain the best part of £20m, rather than this sum going to the Building Safety Fund.

Para. 271 … We have already said that we do not think the motivation of an applicant will usually be of much significance and nor do we think it matters much who the applicant is. Any eligible applicant coming within section 124(5) will have an interest in the building or an interest or responsibility for building safety and we do not see why the basis of their eligibility should be significant.

Para. 278 … S.124 contains a list of persons against whom a remediation contribution order may be made. Section 124, combined with the LPI Regulations, creates a hierarchy or cascade of liability in relation to a relevant defect. The taxpayer does not appear in section 124 or in this hierarchy, save in so far as a taxpayer funded entity may constitute a body corporate or partnership within the terms of section 124(3) or a landlord within the terms of the LPI Regulations. Given this position, it is difficult to see how it could ever be just and equitable for a party falling within the terms of section 124(3) and well able to fund the relevant remediation works to be able to claim that the works should instead be funded by the public purse. We do not see that this point loses any of its essential force in circumstances where it is said that the public purse will eventually be reimbursed from the fruits of successful litigation against third parties. … 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.

Para 283. Even if it is assumed, and we are not in a position to make any such assumption, that the other claims said by the respondents to be available to Triathlon would be viable claims, worth pursuing, we do not regard this as a factor carrying any material weight in our decision on whether it is just and equitable to make the remediation contribution orders.

Arjun Batish and others v. Inspired Sutton Limited and others 2023) LON/00BF/HY/2022/002

An application was made by eighteen leaseholders of fifteen long leases at 9 Sutton Court Road in Sutton for remediation contribution orders under S.124(1) of the BSA 2022.

The building is a high-rise block of flats converted from office accommodation in 2017. The developer was Inspired Sutton Ltd and also the freeholder of the building.

All parties were aware that the materials used in the development, including ACM and HPL cladding, constituted a significant fire risk. Inspired Sutton Ltd therefore engaged contractors to carry our remediation work. On 27 September 2020, the lessees were served with a consultation under section 20 of the Landlord and Tenant Act 1985 in respect of the works.

An application was made for a grant in respect of the works, but while the cladding remediation itself was funded, the works to replace balconies that also constituted a fire risk were not. The works commenced in February 2021. On 3 March 2021, Inspired Sutton Ltd issued invoices to the leaseholders in respect of remediation works to the balconies.

Inspired Sutton Ltd did not produce a statement of case, and as a consequence, it was barred from taking part in the proceedings.

In its judgment the First Tier Tribunal (FTT) confirmed that some entities were required to make contribution to the leaseholder. The applications against the two directors were dismissed. The FTT noted that a remediation contribution order is an order requiring a *specified body corporate or partnership* to make payments. Because these respondents were individuals those applications were dismissed.

The FTT decided to make a remediation contribution order against Inspired Sutton Ltd. The FTT held that the costs did relate to 'relevant defects', and in particular, that the defects constituted a 'building safety risk' within the meaning of section 120(5) of the Building Safety Act 2022.

The Tribunal determined that the *just and equitable* required it to be satisfied that the lessees paid for the cost of works which ought to have been met by Inspired Sutton Limited.

The FTT was satisfied that there were *no mitigations or other matters to be taken into account in the exercise of its discretion*; accordingly, the applicants were entitled to a remediation contribution orders which were made totalling £194,680.

Newham Council v. Chaplair Limited (18th October 2023 City of London Magistrates)

In a verdict delivered (Wednesday 18th October 2023), Tan Ikram, Deputy Chief Magistrate at City of London Magistrates Court, ruled against Chaplair Ltd after it failed to meet a deadline to remove dangerous cladding from its Lumiere building at 544 Romford Road, London E7.

Newham Council pursued a prosecution using its powers under the Housing Act 2004 after Chaplair Ltd failed to remove dangerous cladding on the Lumiere building by the 31 March 2021 deadline imposed in an improvement notice issued by the Council in September 2020. Work began in May 2021, with dangerous cladding removed by February 2022, and the Council argued that there was no reasonable excuse for the delay. This is the first court action where a local authority pursued a building owner for delays in carrying out works to replace cladding.

Although the works did begin two months after the deadline in the improvement notice and were completed nine months later, the City of London Magistrates Court ruled that there was no reasonable excuse for the defendant's delay, finding Chaplair guilty of failing to comply with the improvement notice.

Conclusion:

Be careful to meet local authority improvement notice deadlines.

WESTGATE CHAMBERS

Recent Landlord and Tenant Cases

Pretoria Energy v Blankney Estates [2023] EWCA Civ 482

The question before the Court was, in the absence of a fully populated signed lease agreement, could heads of terms be sufficient to create a binding agreement between the parties? Was there a lease?

The Claimant was a company in the business of operating anaerobic digestion ("AD") plants, producing biogas and electricity from organic matter. The Defendant had a farming business.

The Claimant *Pretoria* contended that the parties entered into an agreement in November 2013 under which the Defendant agreed to grant the Claimant a 25-year lease of a site in Lincolnshire for the purpose of an AD plant and that this imposed a contractual obligation to grant the lease.

Because no lease was granted, Pretoria brought a claim alleging that Blankney repudiated the contract in September 2014 and was liable for damages for loss of profit of £56m and £416,000 in reliance losses.

The alleged agreement was in a document called "*Heads of Terms of Proposed Agreement between Blankney Estates, Lincolnshire and Pretoria Energy Company Limited Subject to Full Planning Approval and appropriate consents and easements*".

The “Heads of Terms” set out basic terms under the heading “Lease” which identified the site, provided for a lease term of 25 years outside the Landlord and Tenant Act 1954 and a lease value of £150,000 payable on quarter days subject to RPI review.

The Defendant *Blankney Estates* contended there never was a binding contract by which it agreed to grant the Claimant a lease, that the only enforceable contract in the ‘Heads of Terms’ was an exclusivity or "lockout" arrangement by which the parties agreed, until 31 July 2014, not to enter into negotiations with third parties.

The parties disagreed about whether the terms concerning the grant of a lease were contractually binding or not. The document included other provisions relating to matters such as the supply of energy which Pretoria conceded were not binding.

The trial Judge, Joanne Wicks QC decided that the parties did not intend the Heads of Terms to have contractual effect other than with regard to the 'lockout' provision.

The Court of Appeal upheld the decision and agreed that on an objective assessment, here was no contractual obligation on the parties to enter into a lease, but took a different approach on what evidence was relevant to that assessment.

At first instance, the parties agreed and the trial judge determined that in order to decide whether a contract has been made, **it is necessary to look at the whole course of dealing between the parties**: *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37, [2017] 4 WLR 163 at [28]-[39].

Also, that events which occur after the making of the alleged contract may be relevant to understanding whether, objectively, the parties intended their dealings to be contractually binding even though they would be irrelevant to the question of how any contract so made should be interpreted.

However, the Court of Appeal, although it upheld the first instance decision, considered that the legal effect of the Heads of Terms depends upon the interpretation of the document as it stands and that any negotiating positions and preliminary drafts had no significant bearing on that question.

If the Heads of Terms had been labelled "*subject to contract*" there would have been no doubt that they had no contractual effect. However, in the absence of such wording it was held to be of considerable significance that the parties had stipulated in that document that a formal contract would be drawn up.

The Court of Appeal said that the stipulation was even more important in the context of an alleged agreement to grant a lease. **Importantly, such a formal contract would require a detailed lease with numerous provisions going beyond anything expressly or impliedly agreed in the Heads of Terms**.

In addition, the Court of Appeal considered the fact that the Heads of Terms referred to a lease being granted outside of the Landlord and Tenant Act 1954 was indicative that there was no intention to enter into a binding agreement to grant a lease in circumstances where the necessary formalities to exclude the provisions of the 1954 Act had not yet been fulfilled.

Also, the lockout provision in the Heads of Terms which provided for an exclusive negotiating period was incompatible with Pretoria's assertion that there was a binding agreement.

The lesson is that all documents communicated to the other side during the negotiation of a lease should be headed 'subject to contract.'

WESTGATE CHAMBERS

AHGR v Kane-Laverack [2023] L&TR 23

AHGR Ltd v Kane-Laverack and another [2023] **concerned a mixed-use development in Bermondsey, London comprising residential flats, office units and one 'live/work' unit at Unit 8, of which the appellant was the freeholder and the respondents the leaseholders.**

The leaseholders, Peter and Luke Kane-Loverack, worked as a barrister and a doctor.

The premises were let on a 999-year lease, which contained a covenant on the part of the leaseholder *"not to use or permit the use of the demised premises…otherwise than as a live/work unit in accordance with the… planning permission…"*.

The local planning authority produced Supplementary Planning Guidance in 1999 containing planning guidance around 'live/work development in Bermondsey Street'.

The freeholder argued that the terms of the lease required the leaseholders to both live and work at the property, but that the activities carried out by the leaseholders at the property, which included writing books and papers, and consulting with patients over the phone, did not properly constitute 'work'.

The freeholders claimed damages of £60,000 for breach of covenant, contending that 'live/work' required the leaseholders to 'live **and** work' at the premises, rather than offering a choice of whether to 'live **and/or** work' there.

The High Court found in favour of the leaseholders, stating that the leaseholders were entitled to 'live and/or work' at their unit, and that the activities they were undertaking were sufficient to constitute 'work' in any event.

The freeholders appealed further to the Court of Appeal, arguing that the phrase 'live/work' was ambiguous and should be interpreted in line with the Supplementary Planning Guidance, which would suggest that the term means 'to live and work'.

The Decision

The Court of Appeal dismissed the freeholder's appeal, finding in favour of the leaseholders.

The parties agreed that the phrase was ambiguous, with several possible interpretations. The planning permission referred only to ‘live/work’, with no division of areas in which to ‘live’ or ‘work’. Accordingly, the leaseholders themselves could choose where to live and work; they may do both at the premises, or only ‘live’ or only ‘work’.

Although the planning permission for the development did not make reference to the Supplementary Planning Guidance or to a deferral report by the planning officer, the Court of Appeal nevertheless found that both documents supported interpretation of the phrase as meaning ‘to live and/or work’.

Advice and action for landlords

Although a case that turned on its facts, this is a useful guide as to interpretation of provisions where terms are ambiguous.

The Court of Appeal made reference to a ‘reasonable reader’ in its decision, finding that a planning permission which permitted ‘living and/or working’ was right.

A leaseholder may become subject to proceedings for breach of planning permission, and so any positive requirement that the premises are used for both living and working should be made clear, without ambiguity.

In this context, the phrase ‘live/work’ could be interpreted as ‘to live and/or work’, and it is open to the leaseholders to choose how they wish to occupy the flat.

WESTGATE CHAMBERS

Sara & Hossein v Blacks [2023] 1 WLR 575 [2023] UKSC 2

The majority of the Supreme Court found that the correct contractual interpretation of a provision in a lease was different to both parties' proposed interpretations, and to the interpretations in three prior decisions of the lower courts.

However, Lord Briggs dissented, stating that "*the court does not … have carte blanche simply to make up a solution of its own. It must choose between genuinely available constructions, rather than mending the parties' bargain*."

The facts

Blacks rented retail premises from Sara & Hossein (**S&H)** The leases included a provision that each year S&H should provide "*a certificate as to the amount of the total cost and the sum payable by the tenant and in the absence of manifest or mathematical error or fraud such certificate shall be conclusive*".

Blacks refused to pay the service charge for 2017/2018 and 2018/2019, arguing that it was excessive and included items that were not properly due.

S&H therefore issued proceedings and applied for summary judgment on the basis that, under the leases, the certificate was *conclusive, subject only to manifest error, mathematical error or fraud* (which were not alleged here).

A Deputy Master of the High Court dismissed S&H's application for summary judgment and held that the certificate was conclusive as to the sum spent by S&H, but not as to Blacks' liability to pay. The Deputy Master considered it unlikely that the parties would have intended that the landlord should be able "*to decide conclusively the significant issues of law and principle which might arise in the course of determining the service charge payable*", becoming "*judge in his own cause*". This was particularly so where the lease provided for independent expert determination of the, arguably less important, proportion of S&H's total costs payable by Blacks.

S&H appealed to the High Court which dismissed S&H's appeal and agreed with the decision and reasoning of the Deputy Master.

S&H appealed to the Court of Appeal which allowed S&H's appeal and awarded summary judgment in S&H's favour, holding held that the natural meaning of the words meant that the certificate was conclusive, both as to the total costs and the sum payable by Blacks: "*Treating the categorisation of the relevant services and expenses as not being conclusively determined by the landlord's certificate (subject to mathematical or manifest error or fraud) would require express words to that effect or a necessary implication. There are no such express words, and … there are no grounds for a necessary implication to that effect*".

Blacks appealed to the Supreme Court which considered the competing interpretations put forward by each party.

Interpretation of the contact.

The general principles of contractual interpretation are set out in *Wood v Capita Insurance Service Ltd* **[2017] AC 1181; [2017] UKSC 24** which the Supreme Court cited with approval. The court identifies the objective meaning of the contractual language by:

1. ***identifying what the reasonable person****, with the knowledge reasonably available to the parties when they entered into the contract, would have understood the language to mean.*
2. ***considering the contract as a whole****, giving appropriate weight to its constituent elements depending on the nature, formality and quality of its drafting.*
3. ***checking each suggested interpretation against the provisions of the contract and investigating its implications and consequences****.*

S&H argued that the certificate was conclusive as to Blacks' liability, subject only to manifest or mathematical error or fraud. The majority of the Supreme Court considered that S&H's interpretation was inconsistent with other provisions in the leases, in particular:

(i) a detailed dispute mechanism to assess the proportion of the total service charge that Blacks was obliged to pay, and
(ii) Blacks' right to inspect S&H's receipts, invoices and other evidence relating to the service charge after receiving the certificate.

Blacks argued that the certificate was conclusive only as to S&H's costs.

However, the Supreme Court found that Blacks' interpretation contradicted the natural and ordinary meaning of the language used: the certificate was said to be conclusive both as to the "*amount of the total cost*" and "*the sum payable by the tenant*".

The majority also saw force in S&H's submission that allowing Blacks to challenge payment of the service charge would undermine the commercial purpose of the provision: to enable the landlord to recover costs and expenses with minimal delay and dispute.

The majority held that neither party's interpretation was satisfactory. **Instead, they preferred a third, alternative interpretation**: **S&H's certificate is conclusive as to what is required to be paid by Blacks, subject only to *manifest or mathematical error or fraud.*** That means S&H can be certain of payment of the service charge without protracted delay or dispute.

But it does not stop Blacks from later disputing liability for that payment. The Supreme Court said their interpretation is consistent with the contractual wording, enabled all the provisions of the leases to work together satisfactorily and avoided surprising implications and uncommercial consequences. They concluded that the Court of Appeal was correct to award summary judgment to S&H but noted that it does not prevent Blacks from pursuing its counterclaim.

Lord Briggs dissented saying he would have found in favour of S&H's interpretation. Whilst the majority's "*pay now, argue later*" solution is the "*plainly commercial solution*", and both interpretations offered by the parties are uncommercial for different reasons, a more commercial solution can only come about "*if there is some basis in the language of the contract as a peg upon which that alternative can properly be hung*". He noted that the "*pay now, argue later*" interpretation was not identified by any of the lower Courts or proposed by either party. Instead, it was *"an imaginative creation which the parties could sensibly have agreed ...But in [his] view it is not to be derived by any process of construction of the terms … actually agreed."*

WESTGATE CHAMBERS

Comment The impact of the judgement on leases generally will depend on the words used in the particular lease.

In this instance the commercial reality was that the landlord wanted the certainty of claiming the money spent and for it to be paid swiftly without an intervening dispute. Yet the defendant was still able to argue the counterclaim later. The impact on leaseholders would be to consider carefully the merits of a counterclaim.

The decision rejects the more usual ‘literalist’ approach to contractual interpretation in favour of an interpretation of the context that no party had argued, that had not been identified by the lower courts and which did not reflect the express wording of the clause in issue. Arguably, this more flexible approach to construction leads to greater uncertainty and more disputes.

The lesson is surely to take care with drafting so that contracts are internally consistent and set out any onerous clauses in clear terms with regard to their application and effect.

Avondale Park v Miss Delaney's Nursery [2023] L&TR 29 Forfeiture of the lease of the nursery

The case involved premises in Holland Park, West London, occupied by Miss Delaney's Nursery Schools Ltd and from which it ran a children's nursery school.

Avondale Park Ltd was a tenant of the premises under a head-lease that was not contracted out of the Landlord and Tenant Act 1954 and the original permitted use was as residential accommodation.

Miss Delaney's had been granted an underlease of the premises, expiring on 29 August 2022 and contracted out of the Act.

The underlease provided that, if Avondale had not produced a deed of variation permitting change of use to a nursery school by 14 December 2014, the underlease would be terminated. No such deed of variation was produced. However, Miss Delaney's ran a children's nursery from the premises from late 2014 until August 2022.

In August 2022, disputes arose between the parties concerning rent, and Avondale forfeited by peaceful re-entry.

Miss Delaney's obtained interim injunctive relief to prevent interference with its possession and **Avondale appealed** against the continuation of the injunction.

The appeal was rejected for the following reasons:

- Failure to provide the deed of variation ensured that the underlease automatically terminated on that date
- The termination of the tenancy in 2014 and the continued occupation and payment of rent was consistent with the existence of an implied periodic tenancy, protected by the Act
- As regards any argument of estoppel (whereby Avondale tried to argue the parties had conducted themselves on the basis that the underlease remained in place and Miss Delaney's should be estopped from denying that mistaken assumption), the evidence was insufficient to support such a conclusion.

Comment: Implied Periodic Tenancies

One of the most common ways an implied periodic tenancy is created is when a tenant remains in occupation following expiry of a contracted-out lease.

If Miss Delaney's underlease had not automatically terminated - given the underlease was contracted out of the Act - it would have come to an end upon expiry of the contractual term and Miss Delaney would have had no right for Miss Delaney's to remain in the premises.

In contrast, an implied periodic tenancy falls within the protection of the security of tenure provisions within the Act. This means a landlord cannot simply terminate the tenant's interest at the end of the relevant period. Instead, a landlord must serve notice and prove one or more of a number of statutory grounds for termination, such as redevelopment or landlord's own occupation (in respect of which statutory compensation may be payable).

Pointers to the existence of an implied periodic tenancy:

- The longer the tenant remains in occupation after the contracted-out lease has expired, the more likely it is that they have an implied periodic tenancy.
- If negotiations for a new lease are not resolved and the tenant remains in occupation.
- If rent continues to be paid and accepted periodically after the original lease has ended
- Where the landlord has not expressly indicated a wish to recover possession.

Lesson: It is important in managing an estate to maintain a file of the expiry dates of all leases, arising automatically or further to a notice being served.

Before any expiry date, the landlord should communicate in good time with the tenant and send a reminder of the expiry date and seek to understand the tenant's position.

Of particular importance is that the tenant should not be allowed to remain in occupation, following the termination date, without action being taken.

Gill v Lees News [2023] EWCA Civ 1178 Obtaining a new lease per the 1954 Landlord and Tenant Act ?

This case in the Court Of Appeal concerned a landlord's opposition to the grant of a new tenancy to a newsagent pursuant to Part II of the Landlord and Tenant Act 1954 ("the Act").

The facts - on 31 August 2018 the tenant made a request for new tenancies under section 26 of the Act. The landlord served counter-notices opposing the grant, relying on S.30(1) grounds (a), (b) and (c).

The questions that arose were:

i) By reference to what date or dates must the grounds be established?
ii) What is the scope of the value judgment that is implicit in the phrase "the tenant ought not to be granted a new tenancy"?

This procedure is initiated either by the landlord serving notice under section 25 of the Act terminating the current tenancy; or by the tenant making a request for a new tenancy under section 26.

If the landlord serves notice under section 25 wishing to oppose the grant of a new tenancy, the notice must state the grounds of opposition.

If the tenant initiates the process by requesting a new tenancy, the landlord may serve a counter-notice opposing the grant of a new tenancy, stating the grounds on which it will be opposed.

In either case, there is no power to amend the grounds of opposition.

In relation to the S.30(1) grounds the Court is required to make a decision as to whether the tenant "ought not" to be granted a new tenancy in view of the default or misbehaviour:

> Section 30(1) grounds:
>
> "(a) '… that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding …'

(b) '… that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent'

(c) ' … that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding.'.

Following a two-day trial, the Judge found that at the date when the counter-notices were served:

i) The premises were in substantial disrepair as a result of the tenant's breach of its repairing covenant.

ii) The tenant had persistently delayed in paying rent.

But went on to decide that the substantial disrepair had been remedied by the date of the hearing; and that the delay in payment of rent was minor and would not recur. There were other breaches of covenant, but they, too, were minor.

Accordingly, the landlord had not established that the tenant "ought not" to be granted a new tenancy and ordered new tenancies to be granted.

The landlord appealed to the High Court.

The landlord then brought the second appeal, where the original judgement was upheld.

The Court of Appeal then upheld the decision that ground (a) does not confine the court to consideration of the state of repair of the date of the notice nor is the Court confined to the date of the hearing but should look at the whole.

The Court may be engaged even by minor disrepair at the date of the landlord's s.25/s.26(6) notice and earlier in the term, so that a landlord may oppose the grant of a new tenancy on ground (a) although the disrepair has been remedied.

However, the whether the disrepair was substantial or not and whether or not the tenant has remedied it were both clearly relevant to the court's judgment as to whether the tenant "ought not" to be granted a new tenancy.

The Court of Appeal gave guidance about the nature of the value judgment as to whether or not a tenant "ought not" to be granted a new tenancy.

The Court should look at matters from the perspective of the landlord as well as the consequences for the tenant of refusing a new tenant.

The Court is entitled to look at the totality of the relationship between the landlord and tenant including past behaviour, the state of repair and rent arrears at the time of the hearing, egregious conduct during the litigation and the credibility of future promises by the tenant.

Lesson

Gill v Lees News suggests the Court should not take a compartmentalised approach to its value judgment, but should look at the grounds both individually and cumulatively.

WESTGATE CHAMBERS

Global 100 v Jimenez [2023] EWCA Civ 1243 – the property guardians case

This case concerned combined appeals from the Upper Tribunal lands Chamber of Global 100 v Jimenez [2023] EWCA Civ 1243 and (1) Global Guardians Management Limited, (2) Global 100 Limited (3) Theo Kyprianou v (1) London Borough of Hounslow (2) Maria Laleva and others.

The FTT and UT previously held that two sister companies and their director had each committed the offence under s.72(1) of the Housing Act 2004 of failing to licence a premises in Stamford Brook as an HMO. They dismissed appeals by the companies against civil penalty notices issued by Hounslow, and made Rent Repayment Orders ("RROs") in favour of several "guardians" who had lived in the premises.

Camden Council recorded that Mr Jimenez and the others occupied the property as their main residence. Camden Council determined that the property was being occupied as a HMO.

The Upper Tribunal had dismissed appeals from decisions of the First-tier Tribunal (Property Chamber) (the FTT) which had found that the relevant properties constituted HMOs.

In *Jimenez* the FTT and UT ruled that one of the same companies had committed the s.72(1) offence at another premises in the West End, and made RROs in favour of three residents of that building.

The Court of Appeal dismissed the appeals by property guardianship companies which arose from their management of two sets of premises and confirmed that property guardianship companies must licence premises as HMOs (houses in multiple occupation).

Both appeals raise an issue about whether the use made by "property guardians" of their "living accommodation" constituted "the only use of that accommodation" for the purposes of section 254(2)(d) of the Housing Act 2004, and consequently were "houses in multiple occupation" (HMO) for the purposes of section 254 of the Housing Act 2004.

There is no statutory or official definition of a "property guardian" who are also referred to as "guardians". The Government published non statutory guidance which recorded that a property guardian is someone who has entered into an agreement to live in a building or part of a building that would otherwise be empty for the primary purpose of securing and safeguarding the property.

Property guardian companies use empty buildings such as old factories, offices, schools or pubs. The property guardian companies then license property guardians to live in the empty property who pay the property guardian companies a licence fee for living at the empty property. This assists in securing and safeguarding the empty property. The Government guidance warned about the risks to safety arising from living in buildings which were designed for other purposes. It was estimated that there were 5,000 to 7,000 people living as property guardians in empty buildings.

> In *Ludgate House Limited v Ricketts* [2020] EWCA Civ 1637; [2021] 1 WLR 1750 (*Ludgate House*) a property guardian company contacted the owners of an empty office building scheduled for redevelopment, offering to install property guardians to occupy the empty property before it was redeveloped.
>
> Lewison LJ said "a property guardian is a private individual who, usually with others, occupies vacant premises under a temporary contractual licence until the building owner requires it for redevelopment. The arrangement provides the guardian with accommodation at a lower cost than in the conventional residential letting market, it provides the supplier with a fee for making the arrangements, and it provides the building owner with some protection against squatters …".

The Housing Act 2004 includes a provision permitting the local authority to declare that certain properties would be HMOs. If a property is an HMO, then that property will need to be licensed if it is of a prescribed description, for the purposes of the Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018.

In *Brent London Borough Council v Reynolds* [2001] EWCA Civ 1843; [2002] HLR 15 Buxton LJ identified that Parliament had made special provision for HMOs because of the fact that it was often persons and families most in need of social protection who were obliged to occupy housing that had been designed for occupation by one family

but which had been converted for occupation by a number of separate families or individuals.

What constitutes a HMO?

The principal definition of an HMO for the purposes of the Housing Act 2004 is in section 254.

The first issue was whether the property guardians' occupation "of the living accommodation constitutes the only use of that accommodation"

The companies argued that no premises occupied by property guardians were capable of meeting the standard test for HMOs because the guardians' occupation was not "*the only use of that accommodation"* within the meaning of s.254(2)(d). They argued that the guardians' security function offered a second 'use'.

On the findings of fact made by the FTT in both cases, it was apparent that the property guardians were using the living accommodation as their main residence. They had no responsibilities as property guardians save to live in the accommodation and were not trained as security guards.

The presence of the property guardians in their living accommodation and the property may have deterred persons from entering the property, but it did not convert the use made of the living accommodation. **In these circumstances the Court of Appeal found the Upper Tribunal was right in both appeals to find that the occupation of the property guardians of the living accommodation constituted the sole use of that living accommodation.**

'Persons managing' the HMO – tenancy vs licence

The issue of whether Global Guardians had been granted a tenancy, and not a licence, to Global Guardians in respect of the Stamford Brook property was relevant to the finding that Global Guardians was a person managing the property. This is because the person managing the property is defined by section 263(3) of the Housing Act 2014 to be the person who is an owner or lessee of the property. The definition of lessee in section 262 of the Housing Act 2004 was a person with a grant of a lease or tenancy.

Global Guardians Management (GGM) challenged the conclusion it was a 'person managing' the premises at Stamford Brook within the meaning of s.263(3)(b). It did so by challenging findings that the freeholder of the premises had granted it a tenancy of the building rather than a mere licence, meaning that it was an 'owner or lessee' for the purposes of ss.262 and 263(3).

The Court of Appeal agreed with the FTT that the 'property protection' proposal had the hallmarks of a of the grant of an interest in land: namely the grant of exclusive possession for a term at a rent. There was sufficient evidence before the FTT to support its finding that GGM had been given exclusive possession, even though the written agreement had been drafted using language more consistent with a service agreement or licence.

Lesson

Insecure occupants such as property guardians and other licensees are just as entitled to the protection of the 2004 Act as those holding statutory tenancies.

Most premises occupied by multiple guardians should be licensed as HMOs. Although each case will have its own facts, the Court did not consider the 'guardianship' in itself made any difference to the application or interpretation of the Standard Test.

Guardianship companies and freeholders should review their contractual documents and should consider whether the substance of their contractual arrangements in reality confers exclusive possession on guardianship operators.

Persons 'in control' of the HMOs – meaning of 'rack-rent'

Global 100 challenged the conclusion it was a person 'in control' of the Stamford Brook premises within the meaning of s.263(1). It argued there had been insufficient evidence for the FTT to be satisfied it was in receipt of the 'rack-rent' of the premises, defined by s.263(2) as *"a rent which is not less than two-thirds of the full net annual value of the premises"*. At the CA hearing it became common ground that 'licence fees' qualified to be part of the rack-rent of the property.

The FTT and UT had both been satisfied that Global 100 had received rack-rent of the property including all the monthly licence fees totalling £15,000 which guardians were willing to pay for rooms advertised on the open market.

That was held to be sufficient evidence of the annual value of the premises. The Court of Appeal dismissed Global 100's argument that expert valuation evidence was required. There was no reason to believe that Global 100 would have advertised and licensed the rooms for significantly less than the market rate for such accommodation, as they were experienced operators in the guardian business, running their business for a profit and not charity.

This relevant for FTT panels asked to determine disputes about the value of 'rack-rent' as part of HMO disputes. Respondents to appeals against Civil Penalty Notices and Rent Repayment Orders should resist arguments that expert evidence is required to make out the s.72(1) offence. '*A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.'*

WESTGATE CHAMBERS

B&M Retail v HSBC [2023] EWHC 2495(Ch) A "rolling" break clause ?

This appeal concerned the terms of a new lease to be granted to the appellant (**B&M**) as tenant by the respondent (**HSBC**) pursuant to the Landlord and Tenant Act 1954 (**the Act**).

B&M is a tenant of HSBC of 1980s standalone retail premises with a garden centre in Willesden, London NW10

HSBC, managed a pension fund as Trustee on behalf of current and former employees of HSBC UK Bank Plc in the UK, acquired the Premises in 2007. In 2015, B&M took an assignment of a lease of the Premises for a term of 20 years dated and commencing 20 December 2000.

Following the expiry of the contractual term on 19 December 2020 the tenancy continued under s. 24 of the Act. On 22 January 2021 B&M served HSBC with a notice under s. 26 of the Act requesting a new tenancy commencing on 27 July 2021. Owing to an error in the post room used by HSBC during the pandemic, the s. 26 notice was never received by the right person at HSBC and no counter-notice was served within the statutory time limit (22 March 2021).

Instead on 3 February 2021 HSBC entered into a conditional agreement for lease of the Premises with Aldi. Under this conditional agreement, Aldi would be obliged to carry out defined redevelopment works on behalf of HSBC, involving substantial works of demolition and construction to the site including the Premises.

On 5 May 2021 HSBC sought to serve a notice terminating the Lease pursuant to s. 25 of the Act which was not effective due to the previous service of B&M's s. 26 notice. It was at this point that HSBC realised the error in the post room.

HSBC was therefore out of time to oppose the grant of the new lease and the Tenant was, in accordance with the provisions of the 1954 Act, entitled to a renewal lease.

On 21 July 2021 B&M issued a Part 8 Claim under s. 24 of the Act and CPR 56 for the grant of a new tenancy, and under s24A for determination of an interim rent. B&M sought a 10-year term. HSBC proposed an 18-month term with a landlord's redevelopment break clause operable immediately on 6 months' notice.

Under section 33 of the 1954 Act, in the absence of any agreement, the duration of the new tenancy is to be "such tenancy as may be determined by the court to be

reasonable in all the circumstances," subject to a maximum term of 15 years.

Under section 35 of the 1954 Act, again in the absence of agreement, any other terms of the new tenancy "may be determined by the court; and in determining those terms the court shall **have regard to the terms of the current tenancy and to all relevant circumstances**."

B&M's position at trial was that there should be no redevelopment break clause but that, if the Judge was against it on that point, then the break clause should not be operable before the 5th year of the 10-year term.

By trial the issues for determination had been narrowed to (i) the length of the term; (ii) whether there should be a redevelopment break clause; and (iii) if there was to be a redevelopment break clause, when this should be exercisable.

By his order of 17 March 2023, HHJ Saunders ordered that there should be a new lease of the relevant property for five years with a rolling redevelopment break clause, exercisable immediately, on six months' notice.

The decision was based on the finding there was a real possibility (as opposed to a probability) that the premises will be required for reconstruction during the continuance of the proposed new tenancy and that therefore it was right to include a break clause which will enable such reconstruction to take place.

The tenant pursued an appeal in the High Court's Chancery Division arguing that the purpose of security of tenure provisions under the LTA 1954 was to give tenants greater certainty as to their occupation of premises, and that inclusion of the redevelopment break clause contradicted this.

The Court found the Judge had considered:

- termination of the new tenancy would impact the tenant's business;
- finding – and giving due weight to the fact – that including the break clause in the lease would result in disruption and potential damage to the tenant;
- that the tenant had not committed itself to finding alternative premises or preparing to vacate the premises;
- the trial judge had considered the landlord's redevelopment plans, concluding that these were advanced and not simply a suggestion in order to obtain greater value to its reversion. The judge clearly considered this to be a factor carrying weight, which he was entitled to decide;
- The landlord had entered into an Agreement for Lease with a development partner;
- If vacant possession could not be secured, the agreement may not have been enforceable which would frustrate the landlord's plans for redevelopment.

The High Court found the trial judge had balanced the interests of both parties; the tenant's interest in security of tenure of the premises, and the landlord's interest in redevelopment of a vacant property. The discretion afforded to the trial judge was wide.

The High Court referenced cases where immediate break clauses were found to be appropriate and concluding that the principle could not therefore contradict the role of security of tenure and the LTA 1954. Therefore, the trial judge had not erred in his approach.

WESTGATE CHAMBERS

Aviva Investors Ground Rent GP Ltd v Williams [2023] UKSC 6 Determining service charges

Section 27A(1) of the Landlord and Tenant Act 1985 (LTA 1985) gives the FTT jurisdiction to make decisions about service charges in residential leases, including whether it is payable and, if so, in what amount.

Section 27A(6) provides that an agreement between a landlord and a tenant in a lease is void if it purports to provide for a determination in a particular manner or on particular evidence, any question which may be the subject of an application to the FTT under s.27A(1).

In this case, a residential 'long lease' gave the landlord the power to vary the share of service charge payable by each leaseholder, subject to a 'reasonableness' requirement. The leaseholders argued that this clause was void under section 27A(6) Landlord and Tenant Act 1985. The Supreme Court upheld the lease provision and found the reapportionment by the landlord was reasonable.

The Court found that section 27A(6) protected the FTT's power to review a landlord's exercise of its reapportionment power but did not empower the FTT to substitute itself for the landlord. In so far as a lease provision does not purport to exclude the FTT's reviewing power, it will be valid.

WESTGATE CHAMBERS

A case of 'overlooking' potentially relevant to leaseholders

Fearn and others v Board of Trustees of the Tate Gallery [2023] UKSC 4

This case involves two sets of extraordinary buildings.

On the top floor of the Blavatnik Building, which is part of the Tate Modern art museum on Bankside in London, there is a public viewing gallery. It is a popular visitor attraction. From the viewing gallery visitors can enjoy 360-degree panoramic views of London. When the claim was brought, about 5½ million people were visiting the Tate Modern each year and, of them, several hundred thousand (between 500,000 and 600,000 on one estimate) visited the viewing gallery, with a limit of 300 people at any one time. Entry to the museum and the viewing gallery is free but the top floor of the Blavatnik Building is also available to hire for external events. Such events are very important financially to the Tate Modern because they bring in significant income.

The claimants all bought their flats nearby in 2013 or 2014. The Blavatnik Building including the viewing gallery was first opened to the public in June 2016.

Unfortunately for the claimants in this case, visitors to the viewing gallery can see straight into the living areas of their flats. The distance between the two buildings is about 34 metres and the flats on the 18th and 19th floors - which are the most affected - are at about the same height above ground level as the viewing gallery. The walls of the Neo Bankside flats are constructed mainly of glass. The trial judge found that, on the southern walkway of the viewing gallery, "[a] major part of what catches the eye is the apparently clear and uninterrupted view of how the claimants seek to conduct their lives in the flats. One can see them from practically every angle on the southern walkway": [2019] Ch 369, para 203. Many photographs showing the interiors of the flats have been posted on social media.

The claimants sought an injunction requiring the Board of Trustees of the Tate Gallery to prevent members of the public from viewing their flats from the relevant part of the viewing gallery walkway; or alternatively, an award of damages. Their claim was based on the common law of private nuisance.

The trial judge found that the extent of the viewing and interest shown in the claimants' flats is a material intrusion into the privacy of their living accommodation, using the word "privacy" in its everyday sense. He held that intrusive viewing from a neighbouring property can in principle give rise to a claim for nuisance.

But he nevertheless concluded that the intrusion experienced by the claimants in this case does not amount to a nuisance. The judge's reasoning, was that the Tate's use of the top floor of the Blavatnik Building as a public viewing gallery is reasonable and that the claimants are responsible for their own misfortune: first, because they have bought properties with glass walls and, second, because they could take remedial measures to protect their own privacy such as lowering their blinds during the day or installing net curtains.

On appeal, the Court of Appeal (Sir Terence Etherton MR, Lewison and Rose LJJ) found that the judge's reasoning involved material errors of law and that, if the principles of common law nuisance are correctly applied to the facts of this case, the claim should succeed. Nevertheless, they dismissed the appeal. They did so on the ground that "overlooking", no matter how oppressive, cannot in law count as a nuisance.

By way of cold comfort to the claimants, they explained that "even in modern times the law does not always provide a remedy for every annoyance to a neighbour, however considerable that annoyance may be": [2020] Ch 621, para 79.

The Supreme Court held, with a majority of three to two, that the harm complained of did amount to an actionable nuisance, reversing the judge and the Court of Appeal below.

Lord Leggatt gave the majority judgment.

First, Lord Leggatt confirmed the principles of the tort of private nuisance:

The relevant harm is the diminution in the utility and amenity value of the claimant's land, and not personal discomfort to the persons who are occupying it ([9] – [11]).

There is no conceptual or a priori limit to what can constitute a nuisance ([12] – [17]). As per *Donoghue v Stevenson* [1932] AC 562, 619, the categories of nuisance are not closed. Anything short of direct trespass on the claimant's land which materially interferes with the claimant's enjoyment of rights in land is capable of being a nuisance.

In applying these principles, the first question which the court must ask is whether the defendant's use of land has caused a *substantial* interference with the *ordinary* use of the claimant's land. The test is objective. What amounts to a material or substantial interference is not judged by what the claimant finds annoying or inconvenient but by the standards of an ordinary or average person in the claimant's position. As famously expressed in *Walter v Selfe* (1851), the question is whether the interference ought to be considered a material inconvenience "not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people!

The Supreme Court identified the following features of the case:

> "*The viewing and photography which take place from the Tate's building cause a substantial interference with the ordinary use and enjoyment of the claimants' properties."* ([48]). Lord Leggatt commented: 'it is not difficult to imagine how oppressive living in such circumstances would feel for any ordinary person - much like being on display in a zoo. It is hardly surprising that the judge concluded that this level of visual intrusion would reasonably be regarded by a homeowner as a material intrusion into the privacy of their living accommodation'
>
> 'Inviting members of the public to look out from a viewing gallery is manifestly a very particular and exceptional use of land.'

It cannot even be said to be a necessary or ordinary incident of operating an art museum. Hence, the Tate cannot rely on the principle of give and take and argue that it seeks no more toleration from its neighbours for its activities than they would expect the Tate to show for them. ([50])

It would not have mattered if the viewing gallery had already been operating when the Neo Bankside flats were built or when the claimants acquired their flats. Nor did it matter who was there first, or what each party knew of the others intended uses at various stages of the planning process. ([51]).

The present claim … is different because the nature and extent of the viewing of the claimants' flats goes far beyond anything that could reasonably be regarded as a necessary or natural consequence of the common and ordinary use and occupation of the Tate's land.([74])

It was held that the Court of Appeal was right to find that liability in nuisance does not extend to *"overlooking"*. However, the Court of Appeal went wrong in *"supposing that this claim is about "overlooking".* ([89])

The complaint was not that the block was overlooked by the Blavatnik Building. The complaint was that "the Tate actively invites members of the public to visit and look out from that location in every direction including at the claimants' flats situated only 30 odd metres away; that the Tate permits and invites this activity to continue without interruption for the best part of the day every day of the week; and that this has the predictable consequence that a very significant number of the roughly half a million people who visit the Tate's viewing gallery each year peer into the claimants' flats and take photographs of them.'

This was an important distinction that distinguishes this case from the ordinary instance where eg. a new building overlooks flats or houses nearby

Lord Leggatt drew this analogy: *'To argue that this use of the defendant's land cannot be a nuisance because "overlooking" (in the Court of Appeal's sense) cannot be a nuisance is like arguing that, because ordinary household noise caused by neighbours does not constitute a nuisance, inviting a brass band to practise all day every day in my back garden cannot be an actionable nuisance; or that because the smell of your neighbour's cooking at mealtimes is something you have to put up with, noxious odours from industrial production cannot be an actionable nuisance. The conclusion simply does not follow from the premise.'*

WESTGATE
CHAMBERS

The Supreme Court rejected the reasoning of the Court of Appeal and the Judge at first instance and remitted the case to the High Court to determine the appropriate remedy.