FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/HYI/2023/0024**
Property	**:**	**Smoke House & Curing House, 18 Remus Road, E3 2NF**
Applicant	**:**	**Nicholas Alexander Blomfield (flat 504) and the leaseholders of 28 other flats**
Representatives present at hearing	**:**	**Mr Blomfield (leaseholder)** **Mr Selby KC (Counsel for the Respondent)**
Respondent	**:**	**Monier Road Limited**
Interested parties	**:**	**Aitch Group Limited** **Home Group**
Type of application	**:**	**For a remediation order under section 123 of the Building Safety Act 2022**
Tribunal	**:**	**Judge Martyński** **Mr A Thomas RBI, FRICS, MIFireE**
Dates of hearing	**:**	**27 March 2024 and 18 June (with inspection)**
Date of decision	**:**	**3 July 2024**

DECISION

Decision summary

1. The tribunal makes a Remediation Order in the terms attached to this decision.

Background

2. This case concerns an application for a remediation order under section 123 of the Building Safety Act 2022.

3. The application is made by a number of leaseholders in Smoke House and Curing House with the lead applicant being Mr Blomfield . The application was made in November 2023.

4. The subject building comprises 45 residential flats built over a number of storeys. The building forms an irregular oblong with an open central courtyard. The elevations facing the courtyard are timber. There are a number of substantial walkways within this courtyard area on various levels which lead to the flats. The surface of the walkways are composite boarding. There are a number of balconies on the external, street facing, elevations. There appears to be three types of balconies, all of them, to differing extents, containing timber wall coverings and composite board decking. Part of the roof to the building contains a roof garden. At the base of the internal courtyard there is a substantial amount of planting in large wooden planters. The exterior of the building is unremarkable, being in the same or a similar style to a great many modern blocks of flats. The courtyard area with its cladding and stairways is however striking and we were told by some applicants that they considered this feature of the building to be significant when purchasing their properties.

5. The purpose of the application was to obtain an order from the Tribunal requiring the remediation of elements of the building (identified in the original application as cladding to the internal courtyard) which represent a fire safety risk and to obtain disclosure and information regarding the fire safety assessment of the building carried out by the Respondent.

6. The building was constructed in 2018 by Aitch Construction Limited. The freehold interest in the building is now held by the Respondent. The building is currently managed by FirstPort who are the appointed agent of HWFI Management Company Limited (the Manager under the leases for the Property).

7. Aitch Construction Limited, The Aitch Group Limited and the Respondent are connected as they share, or shared, at least one director in common.

8. The Applicants state that the flats in the building are owned by a mixture of; The Respondent, leaseholders on long leases, Shared Ownership leaseholders and Housing Association sub-letting on short-term tenancies.

9. According to the Applicants, the flats in the building are difficult to sell and mortgage due to the fire safety issues.

10. By the time of the hearing which took place on 27 March 2024, the Respondent had commissioned two reports on the building, a Health, Safety and Fire report ('the Fire Safety Report') from Tetra Consulting Limited dated 18 November 2022 and Fire Risk Appraisal of the External Wall ('FRAEW') dated 4 January 2023.

11. From the outset of the proceedings, the Respondent did not contest the making of a Remediation Order.

12. Shortly before the hearing on 27 March 2024, the Respondent produced a draft Remediation Order which it invited the tribunal to make. In summary, that order provided for;

    (a) The replacement of the timber cladding (and material and fixings behind that cladding) to the courtyard facing elevations to be replaced with a non-combustible material
    (b) The installation of cavity fire barriers
    (c) The production of a further FRAEW report at the conclusion of the works, the terms of which would not prevent a satisfactory FORM EWS1 from being issued.
    (d) The works to be completed within 52 weeks after the contract being entered into with the contractor.

13. By the date of the first hearing on 27 March 2024, the Respondent had put together a specification of works and had put that out to tender. Four companies submitted tenders, and these were analysed in a report produced by Naismiths. One of the companies that tendered for the work was Aitch Construction Limited, the same company that had constructed the building in the first place. The report from Naismiths recommended that Aitch be awarded the contract.

14. The Respondent stated that an application had been made to the Building Safety Fund to fund the works, but its position was that the works would not be subject to that funding. Instead, the Respondent was going to fund the works by way of funding from shareholders, the Respondent being 'asset rich but cash poor'.

15. Some works had already been carried out in relation to fire safety and this included the risers and compartmentation and were not now considered to be a relevant defect.

Hearings and inspections

16. The case was originally listed for a one-day hearing (without an inspection) for 27 March 2024.

17. At the outset of the hearing on 27 March, the tribunal put to the parties its concern regarding the Fire Risk Assessment and FRAEW reports that had been obtained by the Respondent and which had been put before the tribunal shortly before the hearing on 27 March. Those concerns can be summarised as follows:

    (a) The subject building may be a 'higher risk building as it was in excess of 18 meters tall – this had not been acknowledged in the reports
    (b) The recommended remedial works did not include dealing with substantial amounts of timber on the internal courtyard walkways, on the balconies and on the roof terrace (the risks of these areas may be exacerbated by the fact that the internal courtyard would be difficult

to access in an emergency and also contained substantial combustible wooden planters and planting)

(c) What account had been taken of the risks contributed to the building as a whole by the bin store, flat entrance doors, and louvres and panels to windows/balconies

18. The authors of the reports referred to above were not at the hearing. The tribunal considered that, as a matter of fairness, those who had complied the reports should have the opportunity of considering the tribunal's concerns and giving their responses. The tribunal's initial view was that the hearing should be adjourned part-heard with one or more of the individuals involved in compiling the reports coming to the adjourned hearing. However, we were then told by Counsel for the Respondent that the Respondent was unhappy with some aspects of the service they were getting from the companies involved in producing the reports and had in fact more recently been working with a different company, Building Envelope Fire Solutions.

19. The tribunal continued to consider, and hear from the parties, on all the issues that had been raised so far in the proceedings at the hearing on 27 March and adjourned that hearing part-heard with directions that a further report be obtained from Building Envelope Fire Solutions with that report being sent to the tribunal and to the Applicants prior to the adjourned hearing and that the author of the report was to attend the adjourned hearing.

The issues (as at 27 March hearing)

20. The Applicants were in broad agreement with the proposed Remediation Order but wanted some modifications and additions to that order (which are dealt with in more detail below).

Leaseholders' issues

21. *Aesthetics and materials*: As noted above, the internal courtyard of the building is striking. The applicants were concerned therefore that any remediation work preserved the aesthetic of that area.

22. The Respondent had specified the replacement cladding materials in the draft order and stated that the Applicants could have easily investigated the aesthetic of this material from the information in the draft order. In any event, it was their position that the tribunal did not have the power to specify the materials used.

23. A compromise wording by way of a recital was reached between the parties during the hearing which was as follows;

> Upon the parties agreeing to consult with each other over a period of four weeks with a view to agreeing the type of cladding panels to be used in the remediation works, it is here by order that;..... (the type of cladding has since been put to the leaseholders and a decision made)

24. *Landlord's certificate*: In the hearing on 23 March, Counsel for the Respondent confirmed that within 14 days of the tribunal making a Remediation Order, it will provide a Landlord's Certificate to those leaseholders requesting the same, this was a repeat of a promise made on behalf of the Respondent in correspondence between the parties.

25. *Reporting to leaseholders*: As to regular reporting, Mr Patel, head of Property and Asset Management at Aitch Estates Limited, stated in his witness statement dated 21 March 2024 as follows;

> FirstPort, the appointed block manager, will provide regular communication to the residents and leaseholders in regard to start date of the works, updates on progress, disruption and all other matters as required in relation to the works onsite. We also plan for a 'Meet the Contractor' event for the residents prior to the start of the works, in order to assist in creating an harmonious relationship as best possible in a time where disruption will be inevitable.

26. *Costs of the works*: Mr Quail, one of the Respondent's directors, confirmed in his witness statement dated 21 March 2024, and to the tribunal in the hearing on 27 March, that the Respondent would not be waiting for Building Safety Act funds before starting the work. The work would be funded via the Respondent's shareholders.

27. *Timing of the works*: In the draft Remediation Order submitted to the tribunal prior to the hearing on 27 March, the Respondent had suggested a period of 52 weeks from the date of entering into a contract for the works as the appropriate time period.

28. The Applicants' view was that the time period should not be tied to the instruction of a contractor, one overall time should be given.

29. *The use of Aitch Construction Limited*: The Applicants wanted the tribunal to make an order preventing Aitch Construction from carrying out the work. There was concern that it was this company that initially constructed, what turns out to be, an unsafe building. The Applicants were also concerned that there would be a conflict of interest with Aitch doing the work. As Aitch was part of the same group of connected companies as the Respondent, there would be the suspicion of collusion on the part of the Applicants and no truly independent company involved in the works. The Applicants' suspicions were further driven by the fact that the tender from Aitch was not only the lowest, but within pence of the next nearest tender.

30. Mr Selby KC for the Respondent argued that there was, on the contrary, a 'community of interest' with Aitch carrying out the works. In any event, he argued, the tribunal did not have the power to direct who carried out the works, only the power to direct that works be carried out and completed.

31. *Provision of the original tenders*: The Applicants were concerned that they had not been sent the original tenders, dispute there being an order from the tribunal for these to be disclosed.

32. The Respondent's case on this was that the tender analysis report had been disclosed to the Applicants. That report had been carried out by an entirely different company, and contained within it all the information that the Applicants could reasonably need regarding the tenders themselves.

33. *Costs*: Mr Blomfield, the lead Applicant, asked if the tribunal could make an award of costs to compensate him for his time in making the application and pursuing it though to the final hearings. This was opposed by the Respondent.

The tribunal's issues

34. The tribunal was particularly concerned that the draft Remediation Order did not include works to replace the timber elements of the walkways and the balconies. As to the walkways, these were substantial in area, they were contained within an enclosed area that the Fire Brigade would find problematic to access and further, there are trees, timber planters and an appreciable fire safety risk within the courtyard.

35. The Respondents' case was that the balconies and the access walkways had been taken into consideration but would not be a relevant defect if the timber elevations were replaced as planned. In any event, the Respondent's view was that, if the building was inspected after the works were carried out and if the balconies and/or the walkways were still an issue, they would have to be remediated.

36. As mentioned earlier in this decision, the tribunal was further concerned with the issue as to whether the building was a higher risk building. As recorded above, at the outset of the hearing on 27 March, the tribunal informed the parties of its misgivings regarding the fire safety reports and that fact that these were predicated upon the assumption that the building was not higher risk.

37. Of lesser significance, but still of concern to the tribunal was the flat entrance and communal doors, the roof terrace, louvres and panels to various areas and the bin stores, all of which were potentially relevant defects.

38. There was much discussion regarding the measurement of the building from the detailed plans that were available.

Further expert evidence

39. Prior to the adjourned hearing, the Respondent filed two further reports. The first report (Earl Kendrick dated 14 May 2024) dealt with the height of the building. The other report (ESTP dated 25 May 2024) dealt with the issues of remediation.

The inspection and hearing on 18th June 2024

40. The tribunal inspected the building on the morning of 18 June. We walked around the exterior of the building and then proceeded to walk through the building starting from the roof terrace. We were able to inspect four private flat balconies.

41. At the hearing following the inspection, we heard from Mr McGrill IEng. C.Build E MCABE, MIFireE and Mr Veti MA LLB MIRire E. Mr McGrill was the author of the ESTP report, Mr Veti endorsed the report as having been approved by him.

42. Both Mr McGrill and Mr Veti were at the hearing, both gave evidence and answered questions from the tribunal and Mr Blomfield on behalf of the Applicants.

43. The report from ESTP considered the issues raised by the tribunal (balconies, communal walkways, flat entrance doors, roof terrace, louvres and panels and bin stores). Overall, the report concluded that the scope of works as proposed by the Respondent was sufficient and that no further remediation works were required. The thrust of the report was that, if the timber cladding to the internal courtyard façades was replaced, this would sufficiently reduce the risks presented by other combustible materials in the balconies, communal walkways and roof terrace and any risks presented by louvres, panels and bin stores.

44. As at the date of the adjourned hearing, it was the Respondent's case that;

    (a) Any Remediation Order should be limited to that proposed by the Respondent
    (b) The Respondent had secured funding and finalised contracts and that the works were ready to proceed
    (c) The Respondent should be given until March 2025 complete the works.

The tribunal's analysis of the evidence and decisions

Remediation Order (principle of making)

45. Apart from the fact that the parties had agreed that, in principle, a Remediation Order should be made, the tribunal is also of the view that an order is appropriate. We say this for the following reasons;

    (a) There is a clear and substantial safety risk as the building stands which needs to be remediated as a matter of urgency.
    (b) As matters stand, the leaseholders' flats will probably be difficult to sell and possibly unmortgageable. The making of a Remediation Order is likely to alleviate at least some of the problems with saleability and mortgageability, otherwise these issues will persist, in full, until the works are completed in full, and the building certified as having been remediated.
    (c) Whilst the Respondents have clearly been engaging with leaseholders regarding the fire safety issues, we have concerns regarding the way

that they have proceeded which has left the leaseholders with, at least the impression, that they are not being given the full information and are not being fully consulted with.

(d) There have been issues with the experts used by the Respondents in the past and it was not until after the tribunal voiced its concerns at the hearing on 27 March that the Respondent revealed that new building safety consultants had been instructed.

46. For the reasons set out later in this decision, the tribunal considers that it is necessary and appropriate to make a Remediation Order in terms that go beyond that proposed by the Respondent.

Aesthetics and materials

47. We have considerable sympathy for the leaseholders' position on this issue. It is an issue that will be important to the future value of their flats and for those who live in their flats, many of whom would have purchased their flats on the basis of aesthetics.

48. However, we do not consider that we have the power under the Building Safety Act 2022 to make an order that would specify the particular materials and style to be adopted in the carrying out of the works. Section 123 of the Act states that the tribunal can make an order; 'requiring a relevant landlord to remedy specified relevant defects in a specified relevant building by a specified time'. It is difficult to see how this power extends to the specification of materials.

49. Furthermore, it seems to us that the specification of materials would be a problematic course to follow for a number of reasons. For example, not all the leaseholders in a building may be parties to the proceedings, those not a party to the proceedings may have contrary views as to materials and colours. How would we proceed in the case of a divergence of opinion amongst those who were parties? What if the materials that we specified are not actually available when the works come to be carried out?

50. In any event, as recorded above, some agreement was reached between the parties in the hearing on 27 March on a way to reach broad agreement on the type and colour of replacement wall cladding.

Landlord's certificate

51. This is probably not an issue for the tribunal, but happily it appears that the parties have agreed a way forward on this issue.

Reporting to leaseholders:

52. Again, this is probably not an issue for the tribunal, but again it appears that the parties have agreed a way forward on this issue as well.

Costs of the works

53. This will only be relevant to the tribunal's decision to the extent that it impacts upon timing. The tribunal clearly has the power to specify the time in which a building is to be remediated and to that extent it could have, and in this case would have, specified that the works could not be delayed pending funding from the Building Safety Fund (because of the other resources that are clearly available to the Respondent, such as shareholders and associated companies). However, this is not an issue in this case as the Respondent is not asking for time to raise the necessary funds from public sources.

Timing of the works

54. A period of time was recommended by the Respondent of 28th March 2025. This was dependent on the works being limited to the agreed remediation of the walls within the courtyard. Contracts had been prepared on this basis. The tribunal has made an order that requires the Respondent to undertake considerably more work than it envisaged. This may oblige the Respondent to; (a) raise further funding, and; (b) put out the further works for tender. Accordingly, we consider that the proposed date of 31 March 2025 for completion of the works should be extended to 30 September 2025.

The use of Aitch Construction Limited

55. The answer to this issue is similar to that on the question of the type and aesthetic of materials to be used. Whilst we understand the leaseholders' views on Aitch Construction Limited, we do not consider that the tribunal has the power to direct which contractors the Respondent must use to complete the works.

Provision of the original tenders

56. Whilst we have the power to order disclosure, we do not consider that at this stage in the proceedings that any purpose would be served by such an order. We agree with the Respondent that all the information that could reasonably be required by the Applicant is contained within the tender report which has been disclosed.

Costs

57. Mr Blomfield is to be commended for taking this case on for the benefit of the leaseholders. We have no doubt that this case has consumed a vast amount of Mr Blomfield's time and energy. However, the tribunal is in general terms a no-cost forum. The only relevant exception to this is Rule 13(1)(b) of the tribunal's rules where the tribunal can make a costs order in favour of a party if it considers that the other party has behaved unreasonably in bringing, defending or conducting proceedings. The unreasonable behaviour therefore has to occur, in the case of an order sought against a Respondent, during the course of proceedings. Conduct, no matter how bad, prior to the proceedings being commenced can be taken into account by the tribunal. We are not prepared to make any order as to costs generally.

58. However, we do consider it appropriate to order that the Respondent pays to the Applicants the tribunal fees that they have paid (£400). The Applicants have had to issue these proceedings in order to obtain an order and have obtained an order in more favourable terms that that conceded by the Respondent. The sum of £400 is to be paid by the Respondent to the Applicants within 21 days of the date of this decision.

Is the building in the higher risk category?

59. Unfortunately, this is not a straightforward question even after a consideration of the relevant law and guidance.

60. The Building Safety Act, section 65, sets out the meaning of 'higher-risk building' as follows;

> **65 Meaning of "higher-risk building" etc**
> (1) In this Part "higher-risk building" means a building in England that—
> (a) is at least 18 metres in height or has at least 7 storeys, and
> (b) contains at least 2 residential units.
>
> (2) The Secretary of State may by regulations make provision supplementing this section.
>
> (3) The regulations may in particular—
> (a) define "building" or "storey" for the purposes of this section;
> (b) make provision about how the height of a building is to be determined for those purposes;
> (c) provide that "higher-risk building" does not include a building of a prescribed description.

61. The regulations made pursuant to section 65 are, The Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023. The relevant parts of those regulations provide as follows;

> **5.**—(1) Subject to paragraph (2), the height of a building is to be measured from ground level to the top of the floor surface of the top storey of the building (ignoring any storey which is a roof-top machinery or roof-top plant area or consists exclusively of roof-top machinery or roof-top plant rooms).
>
> (2) Where the top storey is not directly above the lowest part of the surface of the ground adjacent to the building, the height of the building is to be measured vertically from the lowest part of the surface of the ground adjacent to the building to the point which is a horizontal projection from the top of the floor surface of the top storey of the building (ignoring any storey which is a roof-top machinery or roof-top plant area or consists exclusively of roof-top machinery or roof-top plant rooms).
>
> Storeys
>
> **6.**—(1) Subject to paragraph (2), when determining the number of storeys a building has the following is to be ignored—
> (a)any storey which is below ground level;
> (b)any storey which is a roof-top machinery or roof-top plant area or consists exclusively of roof-top machinery or roof-top plant rooms; and

(c)any storey consisting of a gallery with an internal floor area that is less than 50% of the internal floor area of the largest storey vertically above or below it which is not below ground level.

(2) Where a section is a building pursuant to regulation 4(2) or (4), any storey directly beneath the building which is not below ground level is to be counted in determining the number of storeys the building has.

(3) A storey is treated as below ground level if any part of the finished surface of the ceiling of the storey is below the ground level immediately adjacent to that part of the building.

62. Despite section 65 of the Building Safety Act providing that the regulations could define 'storey', there is no such definition in the regulations. However, in the secondary legislation, regulations 5 & 6 provide that any storey containing exclusively machinery/plant is not to be counted when calculating the number of storeys or measuring. This, by implication, would therefore mean that a useable roof top containing a roof garden together with plant/machinery would count as a storey.

63. This in turn would lead one to conclude that for the subject building, there are seven storeys. There are commercial premises on the ground floor, then five storeys of residential flats and then a roof terrace containing a roof garden and plant and machinery. If there are seven storeys, then regardless of measurement, the building is higher-risk as defined in Part 4 of the Building Safety Act.

64. Further to this conclusion the Building Regulations approval for the original construction was for a 7-storey building (Head Projects Building Control Ltd Approved Inspectors Final certificate dated 11 Jan 2019). This was submitted as evidence in the bundle for the first hearing.

65. However, the government has issued guidance, published on 21 June 2023, on the question of whether a building is higher-risk. The relevant parts of that guidance provide as follows:

This guidance relates to the legal criteria for determining whether a building is considered a higher-risk building under the Building Safety Act 2022 and the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023. It relates to the definition of higher-risk building during the occupation phase of the higher-risk regime only.

Roof-tops

When counting storeys, any storeys which contain exclusively rooftop machinery or rooftop plant rooms should not be counted. Rooftop machinery is machinery which provides services to the building (for example, an air-conditioning system). Plant rooms are areas which contain machinery or equipment that provides services to the building. Only rooftop plant rooms and areas made up exclusively of rooftop machinery are excluded – for example, if floor three of a 7 storey building contained exclusively plant rooms and machinery, it should still be counted as a storey.

A storey must be fully enclosed to be considered a storey. The roof of a building should not be counted as a storey. Open rooftops such as rooftop

> gardens are not considered storeys and should not be counted as such when determining the number of storeys or measuring the height.
>
> When measuring the height of a building, the building should be measured up to the top of the floor surface of the top storey that is not exclusively rooftop machinery or plant rooms. This is demonstrated in diagram 11.
>
> Diagram 11 shows a 6-storey residential tower with a rooftop garden.
>
> In this example, height should be measured to the proposed floor surface of the top storey, as indicated by the arrow. The rooftop garden is not considered a storey, so the floor level of the roof should not be measured. Storeys should be counted from the first storey above ground. The proposed building in Diagram 11 has 6 storeys.
>
> If the top storey is exclusively rooftop machinery or plant rooms, then the height of the building should be measured to the top floor surface of the storey below. This is demonstrated in Diagram 12.

66. The guidance appears to do what the regulations do not, that is to define 'storey' where it provides; '*A storey must be full enclosed to be considered a storey. The roof of a building should not be counted as a storey. Open rooftops such as rooftop gardens are not considered storeys and should not be counted as such when determining the number of storeys or measuring the height*'.

67. This guidance appears to not only add to the statutory provisions, but also to contradict them. The Act provided that the regulations could define 'storey', the regulations do not contain that definition but the guidance purports to provide such a definition. The regulations appear to provide that a roof top can be a storey save for the one exception where that storey has plant/machinery, however the guidance appears to say that there are other exceptions.

68. Evidence provided regarding fire safety and the calculation of height referenced 'Approved Document B'. This document is produced pursuant to The Building Regulations 2010 and has been regularly updated, including an update in March 2024. Page 143 of that document contains similar provisions to those in the 2023 regulations, stating that; 'Height of top storey excludes roof-top plant areas and any top storeys consisting exclusively of plant rooms.

69. It is difficult to see therefore where the additional commentary in the 2023 guidance comes from. The guidance has no references or indication of relevant sources.

70. There is therefore a question over the status of Government guidance. These advisory web-pages have developed and evolved extensively over the previous 7 years since Grenfell. They range from simple advisory guidance on where the legislation is, to complex definitions on how to comply. They are written by civil servants and published by the relevant government department such as the DLUHC. There are now more than

50 web-pages relevant to the Building Safety Act and the other legislation such as Leaseholder protections.

71. Most have caveats on use and interpretation. The one referred to in this case is the "criteria for determining whether a building is a higher-risk building during the occupation phase of the new higher-risk regime". At the end of Paragraph 5 "*Diagrams in this guidance document show examples of potential buildings and are for illustrative purposes only. You will need to consider the legislation carefully to understand whether you are responsible for a higher-risk building in scope of the higher-risk regime. You may wish to seek legal advice on this*". This was published 21 June 2023 and the content amended on the 19th October 2023.

72. The evolution, amendment, addition to and in some cases withdrawal result in a continuously changing resource. There is no index, no library or consistent route to these notes and a number overlap. It is challenging to know which is the latest version or to find notes that covers certain areas.

73. There are a series of guides to relevant defects. The first Consolidated advice note suggesting how to remedy defects, was issued on the 1st January 2021 but then withdrawn on 1st November 2021. This was replaced by an updated Consolidated advice note which also was withdrawn on the 1st January 2022. This was due to the DLUHC Minister stating on the 20th January 2020 "*The Consolidated Advice Note has in some circumstances been wrongly interpreted and has been used to justify instances of an excessively risk-averse approach to building safety. The Consolidated Advice Note has therefore been withdrawn to ensure that it is not used to justify disproportionate assessments*". "*Where a detailed assessment of external walls of existing multi-storey, multi-occupied residential building is deemed necessary it should now be carried out in accordance with the more comprehensive and holistic guidance included in Publicly Available Specification (PAS) 9980".* It was therefore replaced by a new fire risk assessment tool PAS9980. This 193 page document is now the commonly used reference document for external wall risk assessment.

74. These web-pages therefore do not constitute a reliable method of interpretation of law.

75. One of the concerns behind the definition of 'storey' for fire safety considerations must be where people might be located the event of a fire. Clearly person might be located within flats or enclosed storeys, but where there is a roof garden, persons may well be located there. Therefore the level of the roof garden will be significant in determining height. The Respondent's expert witnesses claimed that a storey must be enclosed to be counted. The Tribunal requested evidence of this definition.

76. Storey is mentioned twice in the Building Act 1984. The Building Regulations 2010 has 27 mentions and the Building Safety Act 2022 has

14 mentions. In Part 4 of the Building Safety Act it is not defined but states that supporting legislation may be made to define storeys. Within this Statute "The Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023" storey is mentioned 16 times. None of these have definitions that specify enclosure.

77. Referring to the Approved Document B 2022 edition storey is mentioned 292 times and defined in Appendix A in the following way –

    a. **Basement storey** A storey with a floor that, at some point, is more than 1200mm below the highest level of ground beside the outside walls. (note this is yet another way of measuring)
    b. **Storey** Includes any of the following.
       • Any gallery in an assembly building (purpose group 5).
       • Any gallery in any other type of building if its area is more than half that of the space into which it projects.
       • A roof, unless it is accessible only for maintenance and repair.

    There is no mention of enclosure.

78. Therefore, the mention of "enclosure" is limited to the statements within the Government web-page which would seem to attempt to amend a critical and legal definition.

79. Statutory interpretation. We have both Primary and Secondary legislation. Some definitions are applicable to the whole Act or Statute, some are specific to a Part of the Act or Statute, and some are only relevant to a single regulation or section. It is a fundamental rule that these definitions cannot be interchanged, supplemented or interpreted using other sources without just reason.

80. Height and storeys have clear and concise definitions in the Building Safety Act Part 5 under Section 118/117. This defines relevant buildings which are defined by both height and storey number.

81. For Higher-risk Buildings in Part 4 (which includes Sections 61-115 of the Building Safety Act) there is no definition of height and storeys but with Section 65 the Building Safety Act allows the Secretary of State to make further regulations as to what defines a Higher-risk Building. This was carried out using the "The Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023". This defines height and storey number in Regulations 5 and 6 clearly and concisely.

82. Each of these pieces of legislation is therefore the source of the definition. Unfortunately, they are different in context of what constitutes a storey.

83. To give an example Section 118 of Part 5 identifies that any floors that are exclusively plant rooms or machinery are not counted. In respect of Part 4 (HRB's) Regulation 6 of the Second-tier legislation, the definition is different stating that only roof-top plant floors are to be discounted. Therefore, an intermediate plant floor (sometimes used on tall buildings) or a basement plant room would be counted within Part 4 but not Part 5.

It is therefore possible if there was a plant room in the basement (that does not have it's ceiling entirely below ground level) to have a 7-storey building under Part 4 (Higher-risk buildings) but the same building being an 6 storey building under Part 5(Remediation Orders).

84. Height also has numerous legislative interpretations in different guides, Acts and Statutes, examples are – from the lowest floor level, ground level, average ground level, basement level, fire brigade access level, then up to the top of the roof, top of the walls or to the upper surface of the floor of the top storey.

85. To give another example of the risks of using an incorrect definition, there are numerous ways to define Relevant Buildings. Within the Building Regulations 2010 under Regulation 7 it is 18m/7 storey. Within the Building Safety Act 2022 a Relevant Building is 11m and 5 storeys. The Building Act 1984 defines Relevant Buildings in Section 105C as a building containing one or more dwellings with no height or storey requirements.

86. Critically, they are not interchangeable, each source (and its definitions within) is designed to achieve a specific and perhaps different aim. The various guidance documents, laws and statutes have a function and aim to deliver a solution relative to that specific intent.

87. It is therefore essential to use the correct interpretation, guidance, law or statute relevant to the issue being determined.

88. The Applicant requested that the building is declared a Higher-risk building under Part 4 of the Building Safety Act 2022. The Respondent refutes this, and the tribunal has no jurisdiction to make this declaration.

89. Expert evidence provided by the Respondent contained two reports, one on the building height and one on the Relevant defects as requested in the Directions from the first hearing.

90. *Report 1 (Earl Kendrick report dated 14th May 2024)*: This report used the Building Regulations method of measurement. Unfortunately, the Author was not present. The Tribunal queried the brief from the Respondent to the Apprentice Surveyor, who carried out the report, however this was confirmed to simply be "measure the building". It did not contain any context of why or under what requirement this should be determined. The RICS headed report did not query this or have any peer review or countersign / audit of its content despite being carried out by a Trainee. This evidence had incorrectly measured the building by using internal and not external measurements and had not considered the measurement requirements of the Building Safety Act Part 4 (HRB's) or Part 5 (Remediation orders). This report is therefore flawed and not provided by an Expert witness.

91. This Tribunal on considering the evidence and legislation considers the building to have 7 storeys, and its height as being over 18m. This is

measured and assessed according to the Building Safety act and Secondary legislative requirements. Therefore, the tribunal agrees that this building is a Higher-risk Building for the purposes of Part 4 of the Building Safety Act. In our view, it should be registered with the Building Safety Regulator and have a Principal Accountable person appointed. This is not for the Tribunal to specify under the terms of a Remediation Order, but it is considered essential that this building (both Smoke house and Curing House) are managed under the Higher-risk Building regime. The remedial works should be carried out with an application to the Building Safety Regulator as Local Authorities and Building Control Approvers (previously known as Approved Inspectors) are not permitted to work on Higher-risk buildings.

Remediation works

92. *Report 2 (ESTP report dated 25/05/2024)*: Assessed the evidence of relevant defects and their extent based on a list of items identified in directions from the first hearing namely - balconies, communal walkways, flat entrance doors, louvers and panels, roof terrace and bin stores. The authors did not have the original fire design strategy (Point 3.18) and confirmed it did not know which design code was used. This is an important point as any assumptions could be based on the incorrect guidance or design code.

93. Whilst agreeing that the timber wall cladding should be replaced, the Respondent's expert witness report generally disputes that the elements on the list are Relevant defects. The reasons given generally cite Building Regulation compliance with Approved Documents. The tribunal queried the lack of risk assessment under PAS9980 and reasons for the reliance on compliance with the Building Regulations as proof of the items not being a fire safety risk.

94. In respect to the individual items on the list, the Flat entrance doors were discussed and the Expert witness confirmed that the doors appeared to have been fire doors but no certification was available. The tribunal's site inspection on the day of the hearing was able to confirm that this was the case. The tribunal accepted the professional judgement of the Expert as confirmation that the doors were not a relevant defect.

95. For the other items on the list, with the exception of the louvers and panels, the Building Regulations supporting guidance in Approved Document B was referred to as indication of compliance. The expert's evidence on Item (e) louvers and panels had no reference to guidance, standards or specific evidence of assessment. In the report;

    a. Balconies quotes Approved Document B
    b. Communal walkways quotes Approved Document B
    c. Flat entrance doors quotes Approved Document B and BS5588
    d. Louvers and panels did not use AD B or other guidance
    e. Roof terrace quotes Approved Document B and LABC warranty guidance

f. Bin stores quotes Approved Document B

96. *Approved Document status*. Approved Documents are enabled as guidance under the Building Act 1984 regulations 6 and 7. Regulation 7 (1) states "*A failure on the part of a person to comply with an approved document does not of itself render him liable to any civil or criminal proceedings; but if, in any proceedings whether civil or criminal, it is alleged that a person has at any time contravened a provision of building regulations— (a)a failure to comply with a relevant approved document may be relied upon as tending to establish liability, and (b)proof of compliance with such a document may be relied on as tending to negative liability*. This is in context of Building Regulation compliance only. It is not compliance with any risk assessment process.

97. Building Regulations defined in the 2010 Building Regulation are what is termed as a functional requirement in that they contain only general statements of reasonable and safe standards that should be provided in the design. Regulation B4 for instance dealing with external walls simply states – "*The external walls of the building shall adequately resist the spread of fire over the walls and from one building to another having regard to the height, use and position of the building"*. This then would bring up the question of what is considered "adequate".

98. The Building Regulations allows some flexibility in assessment by use of functional statements which permits alternative sources of guidance to determine adequacy. There are no mandated guidance documents.

99. The Building Act 1984 provides in Section 6 and 7 for the Secretary of State to produce a general set of guidance documents to establish methods of compliance. These are Approved Documents but are not statutory instruments. Each of the Approved Documents, in its introduction, explain that this guidance is only one method of compliance for "common building situations" and that they are not mandatory. The decision to use this document or an alternative such as British Standard 5588 or BS7974 fire engineering assessment lies with the designer.

100. They are not risk assessment tools, however in certain cases the recommended guidance can be used to ascertain certain standards of requirement such as if a Fire door should be 30 or 60 minutes fire resistance period. The risk assessment would then additionally interpret if this door had been fitted correctly.

101. The expert witness helpfully demonstrated how to assess a fire door in the Hearing room. The first part would be to see if it was the correct door and of the correct specification (Building Regulations) and then to check the fitting, gaps around the edge of the door, hinges etc. (the fire risk assessment).

102. This was an appropriate and informative clarification of the dual and different roles of Building Regulations and Fire risk assessment.

103. The Tribunal has a concern over the validity of assessing ~~a~~ the building against Approved Document B when it may not have been used by the designer. The Tribunal queried if the expert knew if this document was the guidance used for the design. The Expert witness confirmed that they did not know what guidance had been used in the original design and the Tribunal had no evidence to determine this.

104. When assessing the content of a remediation order under Part 5, Section 120 (2) defines Relevant Defect and subsection (5) defines Building Safety Risk. Building safety risk is – "*a risk to the safety of people in and around the building arising from the spread of fire*". The key principle being assessment of risk.

105. The Tribunal further queried why the method of assessment of the items on the list used the Building Regulations and did not use the recognised PAS9980 Standard which specifically was designed to assess risk. This document also includes recommendations on the assessment of balconies and terraces, the ability of the Fire service to firefight and many other factors. The Expert witnesses said this was outside their remit.

106. The Expert witnesses did not carry out a holistic risk assessment but made assurances that the overall risk when the main cladding was remediated would result in the remaining risk being acceptable. This was challenged by the Tribunal as not assessing the building safety risk in accordance with the requirements of the Building Safety Act.

107. The expert witnesses confirmed that further fire risk assessments and possibly an FRAEW (specialist assessment of the external wall) would be required. This confirmed therefore that the risk had not been fully assessed. The unavailability and the Respondent's discharge of the Authors of the original MAF reports result in further uncertainty of the Respondent's role to fully address the requirements of the Building Safety Act and the Directions from the first hearing.

Stay Put and Escape strategy

108. The Applicant in the second hearing raised a concern with escape strategy. Currently there is a full evacuation strategy based on the presence of fire safety risk from the timber cladding. The expert witnesses confirmed a stay-put strategy would be re-instated when the remediation works are complete.

109. Stay-put is a two-stage strategy where, in the event of a fire, the occupiers would remain in the flats relying on compartmentation to protect them but may escape if they choose to do so. This is the first stage. The expectation is that the Fire service would deal with the fire and prevent it spreading to other flats or other floors. Stage 2 may occur if the fire spread is not controlled, and further evacuation would be necessary. The reason Stay-put was changed to full evacuation is the presence of combustible materials on the walls which are adjacent to the escape routes.

110. The Tribunal has a concern over the design of the two properties as in all cases the occupiers are required to exit via the communal courtyard. The courtyard is a garden area with timber planters and trees/bushes etc. These combustible elements are a fire safety risk which would compromise any escape or firefighting and therefore may allow the fire to spread. This is due to the nature of this courtyard, its size and design would mean any fire within this central area would produce smoke and fire that would affect all of the escape routes and fire brigade access.

111. The Expert witness suggested that there was an alternative route for any resident by exiting up over the roof terrace to the other stairs. This however would result in the need to use the other stairs back into the courtyard. If the courtyard was compromised, escape onto the roof would result in people being trapped with no protected route to an exit.

112. The principle of a fire escape route is that it is a protected route to a place of safety, and to a final exit. The design of these two buildings is such that all must use the walkways and external stairs within the courtyard. While Curing House has an additional enclosed stair, Smoke house does not, and even this stair is not to a final exit but returns at first floor level, back into the courtyard. This therefore places a heavy reliance on the courtyard being a place of safety.

113. The provision of external escape routes is covered in the Approved Document guidance (2022 edition) to the Building Regulations in Sections 3.65 to 3.69.

    a. In point 3.66 it recommends the maximum height should be 6m. These stairs are in the region of 14m from the first-floor deck.
    b. Section 3.67 recommends that you can have externals stairs but at least one alternative is an internal protected stair. Neither Smoke House or Curing house have protected stairs.
    c. In 3.68 (e) it recommends external stairs more than 6m high are protected from the elements, the stairs are unprotected. Further,
    d. Point 3.81 recommends that every protected stair leads directly to a final exit which in both cases the stairs run to the base of the courtyard and then the route must enter an additional stairs down into a corridor to an exit.
    e. In 3.82 the flights and landings of escape stairs should be constructed of materials achieving A2-S3-D2 rating – the composite decking does not meet this standard.

    These standards for escape routes and external stairs were not assessed in the expert report in their assessment using the Approved Document.

114. *Firefighting*. This is an important factor for two reasons. Firstly, effective firefighting is essential for the Stay-put strategy to work. Secondly the primary way to stop fire spread (the criteria for the Building Safety Act) would be to fight the fire. The Tribunal has concerns of the tenability of the courtyard in respect of its vital significance to the escape strategy. The

Expert report did not comment on this issue. This element is required to be assessed in PAS9980. The reliance on the firefighting is an important element of the design. Building Regulation B5 requires (that the design) "provides reasonable facilities to assist firefighters". This means both access for firefighters and provision of firefighting water. The only routes into the building are via two corridors that exit into the courtyard. After exiting this corridor there is no protection for the firefighters to then set up what is known as a "bridgehead". This is a base for firefighting where the fire service would assemble the necessary equipment and firefighters, charge fire mains, arrange breathing apparatus and manage the firefighting. Usually this is set up one or two floors below the location of the fire. The bridgehead and source of water supply is usually within a protected stairwell to allow the fire service to set this bridgehead, connect a water supply and prepare to fight the fire in a place of safety. On this design the fire main water outlets are on the landings in the courtyard requiring the fire service to set up in the Courtyard. Firefighting capacity is one of the criteria in PAS9980 however this has not been assessed in the expert witness report.

115. *Walkways*: It is of vital importance in fire safety risk terms to ensure that the walkways are a safe route for both residents to escape and firefighters to gain access to the floors at all levels. The walkways should be constructed of non-combustible materials.

116. *Balconies*. Firstly, the walls of a balcony are part of the external wall and should be non-combustible. Therefore all the wall cladding around, inside and forming part of the numerous types of balconies should be replaced with non-combustible materials. This also applies to the street elevations. In respect of flooring the Consolidated advice note initially stated that all combustible materials on balconies should be removed however this was withdrawn in 2022. Replacing this was PAS9980 and this recommends a risk assessment.

117. PAS9980 Clause 13 includes "*reference to certain features of a building that can give rise to the potential for fire to ignite combustible material within the external walls. For example, if a fire were to occur on a balcony, especially one which has combustible decking, due to the use of a barbecue, such a fire could give rise to direct flame impingement on the external walls or spread to other balconies. Such hazards need to be considered, albeit the extent to which controls can be applied is outside the scope of this PAS*". This is suggesting that the balconies are fully and holistically assessed in the main Fire risk assessment. Table F1 comments that a "negative" element is an open balcony with combustible decking. Table N11 Comments – "*A balcony approach to flats could potentially be considered an attachment if combustible, but other constraints regarding its construction and combustibility apply in the case of new buildings because of its use as an escape route. A combustible balcony used as a communal means of escape has the potential not only to impact on the fire behaviour of the external walls but also to lead to the means of escape being compromised in the event of fire*". Table N11 outlines extensive analysis of the potential for fire spread based on the

design. This has not been produced in the expert witness evidence and is a concern to the Tribunal.

118. *Design* - There are 3 different types of balconies. There are also different sizes of balconies ranging from a small area to ones that have room for 4 chairs and a table. Based on the requirements above, the stacking of balconies (one balcony above another) the risk from bin-stores and the size, it is considered that there is a risk of fire spread.

119. *Bin Stores* – the bin stores are below balconies. There are 4 bin stores – some serve the retail units. It is considered that the open louvered doors will represent a hazard of fire spread to the balconies. It is therefore a consideration of the risk assessment to determine if the location and design with open louvers are an acceptable fire safety risk. The expert witness report stated that these were an acceptable risk however the Tribunal was presented with no evidence of the implications of a fire in the bin stores. This Tribunal therefore considers that there is a considerable risk of fire spread.

120. *Roof terrace*. The Respondent outlined that the access over the roof could be used as an escape route for anyone who is unable to use the stairs in their half of the building. It contains timber planters and the flooring is the same composite decking as the terraces / stairs. This is both unconventional and concerning to the Tribunal. The roof terrace has a capacity for more than 50 people. The Tribunal measured one area of the two main areas available to be 54m2 which is assessed using the Building Regulation guidance (AD B) factor of 1m2 per person. This is a concern and in fact may be the highest population of any floor of the building. The potential for barbecues and use risks as mentioned in PAS9980 is a concern and would result in fire spread over a large section of the roof. The expert witness also proposed that the roof would be an escape route for residents to access the other stair. Reliance on this would further require the roof area to be a place of safety. The Tribunal does not consider the decking and planters to be an acceptable risk of fire spread.

Conclusion

121. For the reasons given above, we consider that the removal and replacement of only the internal timber façades alone would leave in place relevant defects that present an unacceptable level of building safety risk.

122. We consider that the combustible materials in the balconies, communal walkways and roof terrace, which constitute relevant defects, would, if left unremediated, still present a building safety risk even with the internal courtyard façades having been replaced with non-combustible materials.

123. Furthermore, we consider that the bin stores will still present a building safety risk regardless of the works proposed by the Respondent and works will have to be undertaken to reduce that risk.

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).