

# Property Litigation Column: First out the traps: Dissecting the first remediation order under the Building Safety Act

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Arash Rajai and Joshua Green of RPC consider the first remediation order made by the First-tier Tribunal under section 123 of the Building Safety Act 2022 in *Waite and others v Kedai Ltd (2023) LON/00AY/HYI/2022/0005 & 0016*.

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## Introduction

On 9 August 2023, the First-tier Tribunal (Tribunal) handed down the first remediation order under section 123 of the Building Safety Act 2022 (BSA 2022) in *Waite and others v Kedai Ltd (2023) LON/00AY/HYI/2022/0005 & 0016*. This decision followed the first remediation contribution order under section 124 of the BSA 2022 in *Arjun Batish and Others v Inspired Sutton Ltd and Others (2023) LON/00BF/HY/2022/002* in January 2023.

By way of background, section 123 of the BSA 2022 provides that an "interested person" can make an application to the Tribunal to make an order requiring a "relevant landlord" to remedy a "relevant defect" (terms defined in the BSA 2022) in a building that is at least 11 meters high or has at least five storeys and contains at least two separate dwellings.

This case provides useful guidance on the Tribunal's approach to applying section 123 of the BSA 2022, assisting leaseholders, landlords and practitioners alike.

## The building and the dispute

Originally the office of the South London Press, the building underwent conversion in 2015 to 35 residential flats. On completion of the conversion, the works were deemed to be compliant with the Building Regulations 2010 but subsequent surveys identified the use of Aluminium Composite Material (ACM), combustible insulation and a lack of internal compartmentation. The majority of the leaseholders applied for a remediation order against the landlord and the Tribunal determined that the conditions under section 123 of the BSA 2022 had been met and a remediation order was granted.

## Defect

In confirming their assessment of whether a defect is a "relevant defect" for the purpose of section 123 of the BSA 2022, the Tribunal held that it would not be a defence to the grant of the remediation order that the building complied with Building Regulations applicable at the time of practical

completion of the works. Instead, the Tribunal would assess the risk posed by the state of the building using knowledge of building materials and processes at the date of the hearing.

## **Precision of the remediation order**

### **Scope**

The Tribunal commented on whether the remediation order should include a detailed specification of remedial works (Works) that the landlord would need to carry out pursuant to the order.

The Tribunal stated that, although the order must be precise in order to allow the landlord to remedy the relevant defect, the BSA 2022 is not prescriptive as to the works necessary – the extent of the precision of the Works in the order will vary case from case.

The Tribunal noted the benefits of broadly defining the Works, namely that it leaves the choice of remediation open to the landlord thereby allowing the landlord to negotiate a specification with contractors and to apply for planning permission "unfettered by an overly specified and potentially rigid specification of works determined by the Tribunal".

### **Time**

The leaseholders requested that the landlord be obliged to complete the Works within 18 months of the remediation order, whilst the landlord countered that it would require 115 weeks (26.5 months). The leaseholders argued for a shorter timescale to complete the Works on the basis the landlord knew of the defects almost three years before the application for the order.

The Tribunal ignored the prior knowledge of the defect stating "we are where we are", and noting that it takes time to design remediation solutions and obtain planning and the landlord's estimation was not "overly excessive". This suggests, when evidenced and reasonable, landlords will be given the time needed to remediate the defects.

## **Standard of remediation**

The Tribunal considered whether it would need to dictate the applicable standard to be used in carrying out the Works, noting that no such standard is mentioned in section 123 of the BSA 2022. The Tribunal was reluctant to provide an overly prescriptive standard, but, as a minimum, held that the Works must comply with the Building Regulations applicable at the time the Works are carried out and in accordance with certain minimal fire-related standards set out in the Tribunal's decision.

## **Progress reporting during remediation**

The leaseholders wanted the remediation order to oblige the landlord to keep them updated monthly as to progress of the Works. The Tribunal "recommended and encouraged" the landlord to keep leaseholders informed of progress on a regular basis, seeking consistency with the Developer Remediation Contract (extract below) which promotes communication to third parties by the developer, landlord, freehold owner or management company:

"[The Participant Developer will]... establish effective processes to receive and promptly respond to communications from any of the leaseholders, residents, occupiers and other users... using each such Third Party's preferred contact method".

*(Paragraph 8.1(D), Schedule 1, Developer Remediation Contract.)*

The Tribunal stopped short of ordering strict reporting obligations against the landlord but stated that, insofar as the remediation of the relevant defects impinge on fire safety arrangements at the development, it would be necessary to keep interested parties informed.

### **Pre-conditions to commencement**

The leaseholders requested that their approval to the detailed scope of works should be a pre-condition to the commencement of the Works by the landlord. The Tribunal resisted obstructing the carrying out of the Works in this way, noting it had already implemented a standard for the carrying out of the Works which extended to compliance with Building Regulations.

### **Pre-conditions to completion**

The leaseholders required, as a pre-condition to completion of the Works, that the landlord obtain an independent report evidencing that the fire risk to the external wall cladding had been sufficiently reduced so that no further remedial works would be required and that the Works complied with applicable Building Regulations.

The Tribunal avoided the imposition of such additional conditions on the basis that:

- There is **no power** under section 123 of the BSA 2022 to order landlords to obtain reports into a remediated building.
- **Appropriate supervision** of the Works is likely to be carried out by the local authority and/or fire brigade and the Works would be subject to approval by the local authority's building control department.
- It is **not proportionate** to order a further report at the completion of the Works, because any remaining relevant defects can be subject of a fresh application for a remediation order to the Tribunal.

### **Changes to the remediation order**

The Tribunal clarified that a remediation order can only be amended by application to the Tribunal to: (i) vary the scope of the works, or (ii) for an extension of time to the mandated completion date of the Works.

By way of example, should the landlord consider that any part of a relevant defect might be retained safely, it can apply for a variation to the order.

## **The remediation order**

Helpfully, the Tribunal's decision appended to it the form of remediation order.

Purposefully broad, the form of remediation order contained the following:

- A high-level description of the relevant defects to be remediated under the remediation order.
- The time for completion of the Works.
- The rules governing the ability to vary the remediation order following requests to:
  - carry out reasonable alternative works to remedy the relevant defects to those Works specified in the order; and
  - extend the time for compliance with the order.
- An obligation on the landlord to notify the Tribunal of practical completion within one month of practical completion of the Works.

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