Neutral Citation Number: [2025] UKUT 157 (LC)

Case No: LC-2024-661

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
Ref: LON/OOBG/HY1/2023/0024

Royal Courts of Justice, Strand,
London, WC2A 2LL
28 May 2025
Corrected under rule 53, 4 June 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FTT PROCEDURE – points raised by the First-tier Tribunal of its own motion – remediation order under the Building Safety Act 2022 made in relation to "specified defects" that were not properly before the First-tier Tribunal – order made on the basis of the First-tier Tribunal's opinions, contrary to the evidence before it and in the absence of evidence supporting the FTT's view

BETWEEN:

MONIER ROAD LIMITED

Appellant

and-

NICHOLAS ALEXANDER BLOMFIELD AND OTHER LEASEHOLDERS

Respondents

Smoke House and Curing House
18 Remus Road, E3 2NF

Upper Tribunal Judge Elizabeth Cooke and Mrs Diane Martin TD MRICS FAAV
14 May 2025

Mr Jonathan Selby KC for the appellant, instructed by Donald Pugh solicitors
Mr Nicholas Blomfield for the respondents

The following cases were referred to in this decision:

Admiralty Park Management Company Limited v Olufemi Ojo [2016] UKUT 421 (LC)
Dugdale v Kraft Foods Limited [1976] 1 WLR 1288
Birmingham City Council v Keddie [2012] UKUT 323 (LC)
Regent Management Limited v Jones [2010] UKUT 369 (LC)
Sovereign Network Homes v Hakobyan and others [2025] UKUT 115 (LC)

Introduction

1. This is an appeal against a remediation order made by the First-tier Tribunal under the Building Safety Act 2022. The appellant is content that an order was made but challenges the breadth of the order, arguing that most of the defects specified in it were not properly before the FTT and that the decision was at variance with the evidence before the FTT.

2. The appellant, Monier Road Limited ("MRL") was represented by Mr Jonathan Selby KC. The respondents, whose names are listed at the end of this decision and to whom we refer as "the leaseholders", filed a Respondents' Notice within the time directed by the Tribunal when permission to appeal was granted, but did not file a Statement of Case in the appeal until a week before the hearing. Mr Blomfield, who is one of the leaseholders and represented the rest, made an application in writing for that Statement of Case to be admitted despite the very late service. The Tribunal stated that it would hear the application at the hearing of the appeal; at the beginning of the hearing Mr Blomfield communicated with MRL's solicitor by text to say that he would not be attending. Accordingly his application for permission to file a Statement of Case on behalf of the respondents was not heard and the Statement of Case has not been admitted. Nevertheless we make reference to it in the course of the decision so as to indicate why its admission would have made no difference to the outcome of this appeal. We are grateful to Mr Blomfield for his presentation of the appellant's case and for addressing points raised by the leaseholders.

3. Not for the first time this year the Tribunal has to discuss the extent to which the FTT can raise points which are not part of either party's case, and how it should proceed if it chooses to do so. The relevant law has recently been discussed in detail in the decision of the President of the Lands Chamber (Mr Justice Edwin Johnson) in *Sovereign Network Homes v Hakobyan and others* [2025] UKUT 115 (LC), and in terms of legal principle there is nothing we could add to that decision. But this is the first time the issue has arisen in the context of the Building Safety Act 2022 and the appeal provides a useful opportunity for the Tribunal to re-iterate the relevant legal principles in that context.

The statutory background: the Building Safety Act 2022

4. The Building Safety Act 2022 was enacted following the fire at Grenfell Tower in 2017, and it contains provisions intended to secure the safety of people in buildings and to improve the standard of buildings. Part 5 is about the protection of leaseholders; among its provisions are sections 119 to 124 about remediation orders in relation to "relevant buildings". A relevant building is defined as a self-contained building or part of a building containing at least 2 dwellings and being at least 11 metres high or having at least 5 storeys.

5. Section 123 of the Building Safety Act 2022 reads, so far as relevant, as follows:

> "(1) The Secretary of State may by regulation make provision for and in connection with remediation orders.
> (2) A *"remediation order"* is an order, made by the First-tier Tribunal on the application of an interested person, requiring a relevant landlord to do one or both of the following by a specified time—.
> (a) remedy specified relevant defects in a specified relevant building;

(b) take specified relevant steps in relation to a specified relevant defect in a specified relevant building.

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

…

In this section—

…*"specified"* means specified in the order."

6. A "relevant defect" is defined in section 120(2):

> "(2) *"Relevant defect"*, in relation to a building, means a defect as regards the building that—
>
> (a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and
>
> (b) causes a building safety risk."

7. The provision made pursuant to section 123(1) is made in regulation 2(2) of the Building Safety (Leaseholder Protections) (Information etc) (England) Regulations 2022, which provides:

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

8. Part 4 of the 2022 Act is entitled "Higher-Risk Buildings" and makes provision about the management of "building safety risks" in relation to such buildings – defined in section 65 as being at least 18m tall or at least seven storeys, containing two or more residential units. Part 4 creates the status of an "accountable person" who has certain duties and responsibilities for the safety of the building. The Act gives the FTT jurisdiction to decide who is an accountable person, but not to decide whether or not a building is a higher-risk building.

The factual background

The building and the parties

9. Smoke House and Curing House are two blocks or wings of a single mixed use residential and commercial building, purpose-built between 2016 and 2018. There are 20 flats in Smoke House and 25 in Curing House; the building is a quadrangle enclosing a courtyard, laid out as a shared garden with planting in large wooden planters. The building obviously has two sets of external walls. Those facing the street are of brick; many of the flats have balconies on the street-facing walls, some protruding and some recessed. The courtyard walls on the other hand were constructed with timber cladding and combustible insulation. The courtyard is quite a striking feature with communal walkways and external staircases leading down to the garden and up to the roof terrace. There are bin stores on the street sides of the building, with louvred metal doors.

10. MRL holds the freehold of the building. The 29 leaseholders each hold a long lease of one of the flats. It is not in dispute that the building is a relevant building and that MRL is a relevant landlord as defined by the 2022 Act.

The MAF report and the application to the FTT

11. In October 2022, on the instructions of MRL, Michael A Fox Associates produced a report ("the MAF report") assessing the fire risk of the external walls of the building; such a report is known in the building safety context as a Fire Risk Assessment for External Walls, or FRAEW. It was signed by four inspectors all with experience and qualifications specific to fire safety. The MAF report assessed the façade of the building against PAS9980:2022, which is a risk assessment tool produced by the British Standard Institute. The report gave the building an EWS1 rating of B2; an EWS1 Form provides evidence to valuers and lenders of the fire risk rating of a property's external wall system. A rating of B2 indicates that the cladding contains combustible materials and that the fire risk is high enough to require remedial work. The MAF report recommended four actions, of which the principal one was that the timber cladding and combustible material on the external walls within the courtyard must be removed and replaced with a non-combustible alternative. The other three action points were the removal of commercial bins from against the external wall to a secure non-combustible bin store, the repair of the doors to the bin stores, and the installation of smoke detectors in rooms with walls within the timber cladding system. The report stated that that would "reduce the fire risk to as low as reasonably practicable"

12. Those were the only actions recommended following a comprehensive examination of the whole of the exterior of the building. The MAF report discussed the street-facing brick walls, the balconies on those walls, the roof terrace, and the planters and recommended no action. It noted that there was timber cladding inside some of the balconies (all of which are on the street side of the building and surrounded by brick walls) and said that the risk of fire spread between balconies was low. It noted that there was timber decking on the walkways, and that there was a risk of fire spread on the gallery walkways as a result of the cladding; it recommended replacement of the cladding as noted above, but did not recommend any action as regards the walkways themselves. It considered the fire escape strategy, which it regarded as satisfactory; and it noted that the nearest fire station was 1.4 miles away and that the fire service had good access to the building.

13. On 22 November 2023 the leaseholders applied to the FTT for a remediation order. The application was made against "The Aitch Group", which is a company connected to the appellant and was later replaced by MRL as respondent to the FTT application.

14. On the FTT's application form in box 5 headed "Defects to the building for which a remediation order is sought" the leaseholders said:

> "This application to the Court is for a Remediation Order to instruct Aitch Group to, without delay, undertake works to replace the high-risk cladding used on the property.
> Aitch Group has a ringfenced fire cladding rectification fund which we request should be used to, without delay, complete the replacement of the high-risk non-compliant materials they used in constructing Smoke House and Curing House.

> Aitch Group have accepted full responsibility and liability in a letter to leaseholders, however, they have declined to provide any further information on when they will instruct a building firm to undertake rectification works …"

15. On the next page in the box headed "Reasons for Application" the leaseholders explained that the freeholder had commissioned a survey but had done nothing except install fire alarms in the common areas. They pointed out that the Aitch Group had

> "a fund of over £1,500,000 specifically ring-fenced to rectify cladding issues with Smoke House and Curing House".

16. The leaseholders complained that without an EWS1 rating of B1 they could not sell or mortgage their flats. They concluded

> "We request that the Court direct the Aitch Group to without delay, instruct, at their cost, a reputable and independent builder to undertake the necessary cladding replacement works to ensure the building is safe and compliant with applicable fire safety regulations. …

17. The FTT conducted a case management hearing on 12 January 2024 and recorded in its directions that there was broad agreement regarding the works to be carried out to deal with fire safety issues and that:

> "These are works identified by Monier Road Limited and concern the removal and replacement of the timber cladding and combustible insulation within the courtyard area.
>
> … The likely dispute between the parties is the timing of the works."

18. Directions were given for disclosure and for statements of case, and for the provision of a bundle for the hearing including "all relevant reports." A hearing was listed for 27 March 2024. In their statement of case the leaseholders set out the work they wanted done, including an extra element: "the front fire doors of each of the properties and the internal fire doors of the communal areas (if required to be replaced)".

19. We pause there to say that the defects specified in the application to the FTT were the cladding and combustible insulation in the courtyard, and nothing else. The leaseholders relied upon the MAF report and the purpose of the application was to make the freeholder get on with the work recommended in that report. The replacement of doors was added in the leaseholders' Statement of Case in the FTT. Mr Blomfield in his statement of case in the appeal (see paragraph 2 above) argued that the application was for an order requiring the removal of all combustible material in the building; it will be clear from the extracts quoted above that that was not so. Only the cladding and insulation were specified, as the FTT recognised in its directions and later in its decision.

The hearing on 27 March 2024

20. The authors of the MAF report did not attend the hearing; there was no need for the leaseholders, who relied upon their report, to call them because there was no dispute about

the contents of the report. Indeed, by the date of the hearing MRL had put together a specification of works and put it out to tender.

21. In its later decision the FTT summarised what happened at the hearing on 27 March. It said that at the outset of the hearing it "put to the parties its concerns" that the building might be a higher risk-building, that the recommended works did not include dealing with substantial amounts of timber on the walkways, balconies and roof terrace, that the courtyard contained wooden planters and planting, and that it wanted to know what account had been taken of the risks generated by the bin store, flat entrance doors, louvres and panels to windows and balconies. The FTT decided to adjourn the hearing; it wanted the authors of the MAF report to have the opportunity to consider and respond to the FTT's concerns.

22. Mr Selby KC explained to the FTT at the March hearing that MRL no longer wanted to work with MAF and, if required to produce a further report, it wanted to instruct Building Envelope Fire Solutions ("BEFS"). He asked for a direction listing precisely what the FTT wanted BEFS to report on. The FTT gave directions for the hearing to be re-listed and for it to conduct a site visit on the day of the adjourned hearing. It set out the following requirements (the "Respondent" of course being MRL):

> "5. The tribunal (being satisfied that the cladding to the external courtyard walls is a Relevant Defect and that it will be included in a Remediation Order) is concerned regarding the following issues:
>
> Whether the following are a relevant defect and their remediation be required in a Remediation Order
> (a) Balconies
> (b) Communal walkways
> (c) Flat entrance doors
> (d) Louvres and panels
> (e) Roof terrace
> (f) Bin store
> Whether the flat entrance doors are identified as relevant defects.
> Confirmation of and proof of remediation of communal doors.
>
> 6. The Respondent to provide a report from Building Envelope Fire Solutions which addresses Relevant Defects (as defined by the Building Safety Act 2022) and the extent to which remediation works are required to the above, and if so in what respect."

The FTT's decision and the remediation order

23. On 18 June 2024 the FTT visited the building and then conducted the adjourned hearing. MRL by then had filed a report about the height of the building and whether it was a higher-risk building, and a report by BEFS dated 17 May 2024; the authors of the BEFS report attended the hearing. The FTT issued its decision and a remediation order on 3 July 2024.

24. The decision first recorded what had happened at the hearing on 27 March 2024, and set out the issues that had been discussed at that hearing under two headings. Under

"Leaseholders' issues" it noted that the leaseholders were concerned about the aesthetics of the remediation work, about the cost (as to which MRL confirmed that it would fund the works itself) and about the choice of contractor. Under "The tribunal's issues" the FTT recorded that at the March hearing it had been concerned about the timber elements of the walkways and balconies and about the timber planters; it recorded MRL's position that those items would not present a risk once the cladding was replaced. It also recorded its concern about doors and about the bin stores. The FTT acknowledged that the BEFS report concluded that if the timber cladding was replaced, that would sufficiently reduce the risk presented by other combustible materials, and that no further remediation works were required.

25. The FTT then went through the concerns raised by the leaseholders. It concluded that it had no power to impose requirements about aesthetics and materials, nor about the choice of contractor.

26. Paragraphs 59 to 91 of the decision, extending over 6 pages, comprised a discussion of whether the building was a higher-risk building as defined in section 65 of the 2022 Act, the meaning of the word "storey" and the status, authorship and accuracy of government guidance. It said:

> "88. The [leaseholders] 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."

27. The FTT went on to criticise the evidence adduced by MRL about the height of the building and concluded that the building is a higher-risk building, that it should be registered with the Building Safety Regulator and that it should have an accountable person appointed. It added:

> "This is not for the Tribunal to specify under the terms of a Remediation Order…"

28. The FTT then moved on to the remediation work and the contents of the BEFS report, which did not agree that the items it was instructed to investigate (paragraph 22 above) were relevant defects. The FTT said that there had been no risk assessment under PAS9980 (which, as we have seen, was incorrect; that is precisely what the MAF report was), and criticised BEFS's use of Building Regulations and of Approved Document B (being one of the documents issued by the Secretary of State explaining how Building Regulations can be complied with; Approved Document B deals specifically with fire safety requirements).

29. The FTT said that it accepted the professional judgment of the authors of the report that the flat entrance doors were not a fire risk.

30. The FTT devoted a lengthy discussion to the fire escape strategy in the building, which it said was raised as a concern by the leaseholders at the June hearing. It expressed concern about space for fire-fighting, and again asserted that although this was one of the criteria in PAS9980 it had not been addressed in the BEFS report.

31. Finally in six paragraphs the FTT went through the issues it had raised at the first hearing and listed in the order of 27 March 2024. It stated that the walkways should be constructed of non-combustible materials. It stated that the wall cladding in the balconies should be replaced with non-combustible materials, referring to comments in PAS9980 about balconies that are used as escape routes (despite the fact that these balconies, on the external walls, are not). It stated that there is a risk of fire spread from one balcony to another or from the bin stores. It stated that it had been given no evidence about the implications of a fire in the bin stores and therefore considered that there was a considerable risk of fire spread. It stated that the decking on the roof (which it said it had measured at the site visit) and the planters were an unacceptable risk of fire spread.

32. The remediation order made on 3 July 2024 included standard text in the body of the order and scheduled the following requirement:

> "The Respondent shall remedy the
> A. balconies, including the walls and floor decking and construction,
> B. external walls, including the courtyard and street elevations,
> C. bin stores
> D. courtyard walkways
> E. courtyard floor area – including planters, flooring and other combustible materials
> F. roof terrace, including flooring and planters

33. We refer to the requirements of the order other than the courtyard cladding and combustible insulation (which we take to be comprised in item B under "external walls including the courtyard") as the "Additional Items". The appellant appeals their inclusion in the order.

The appeal

34. The FTT refused permission to appeal its decision (and we return later to some of its comments in the text of its refusal). The appeal is brought with permission from this Tribunal, on the ground that (a) the Additional Items were not properly before the FTT and (b) even if they were, they were not on the evidence before the FTT relevant defects. For both those reasons Mr Selby KC argued that the inclusion of the Additional Items in the remediation order was a serious procedural irregularity and a breach of natural justice.

35. There is no appeal in relation to the FTT's statement that the building is a higher risk building because the FTT in refusing permission to appeal stated that that statement was an expression of opinion, not a decision:

> "… the tribunal had no jurisdiction to make a declaration that the subject building is a higher-risk building. … Accordingly, the tribunal's comments; (a) form no part of its operative decision, and; (b) are accordingly no more than a statement of the tribunal's opinion on the matter which is not binding on any party."

36. Mr Selby KC developed his argument under five headings. He argued that the FTT should not have raised the Additional Items at the hearing in March and did not follow a fair procedure having done so; that there was no evidence before the FTT that the Additional

Items were relevant defects, let alone that they required remediation; that the FTT inappropriately used its own expert knowledge to make findings contrary to the evidence before it; that the FTT never put it to MRL or to its experts that the Additional Items were, contrary to their unchallenged evidence, relevant defects, nor that they required remediation; and that two of the Additional Items (the street-facing walls and the courtyard floor) were not identified at the March hearing as matters to be addressed by the BEFS report. We look at those points in turn

(1) The FTT's raising of the Additional Items on its own initiative

37. It will be clear from the account we have set out above that none of the Additional Items (see paragraphs 32 and 33 above) was specified as a defect in the respondents' application to the FTT. Their pleaded case went a little wider by introducing the possibility of a requirement to replace fire doors (paragraph 18 above), but the FTT accepted that the doors were not relevant defects and they were not among the Additional Items. Most (but as we shall see later not all) of the Additional Items were raised by the FTT at the hearing in March 2024, and in its decision of 3 July 2024 the FTT discussed them under the heading "The Tribunal's issues", as distinct from "The Leaseholders' issues". As the FTT itself acknowledged (paragraph 54 of its decision) the remediation order required MRL to "undertake considerably more work than it envisaged".

38. Consideration of the circumstances in which the FTT may raise issues on its own initiative, when they do not form part of a party's case, takes us again to the ground trodden by the President in *Sovereign Network* (paragraph 3 above). His discussion of the authorities was comprehensive, and there is no point in our reproducing it and no need for us to present the authorities in the same detail. We commend *Sovereign Network* to readers who seek a full account of the law. What we aim to do here is to present a summary, based on Mr Selby KC's excellent skeleton argument, which FTT judges and members may find useful when deciding, before or during a hearing, whether they should raise a new point.

39. The law can be summarised in five propositions. First, the FTT can raise points that the parties have not raised. In *Regent Management Limited v Jones* [2010] UKUT 369 (LC) the Tribunal (HHJ Mole QC) said this in the context of service charge disputes, and with reference to the Leasehold Valuation Tribunal which is now the FTT:

> "29. The LVT is perfectly entitled, as an expert tribunal, to raise matters of its own volition. Indeed it is an honourable part of its function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much."

40. Second, and as an important qualification of that first principle, legal proceedings in England and Wales (with a few exceptions not relevant to this appeal) are adversarial, not inquisitorial; that means that it is for the parties to present their cases and for the tribunal (by which we mean the court or tribunal, whether a single judge or a panel) to decide between them. It is not for the tribunal to suggest, let alone to argue, a case for either party. To do so is to step out of its proper role and into the arena of dispute; it is unfair, because it involves taking sides. As the Tribunal *(HHJ Nigel Gerald)* said in *Birmingham City Council v Keddie* [2012] UKUT 323 (LC):

> "17. …It is the jurisdiction and function of the LVT to resolve issues which it is asked to resolve, provided they are within its statutory jurisdiction. It is not the function of the LVT to resolve issues which it has not been asked to resolve, in respect of which it will have no jurisdiction. Neither is it its function to embark upon its own inquisitorial process and identify issues for resolution which neither party has asked it to resolve, and neither does it have the jurisdiction to do so.
>
> 18. […]
>
> 19. That said, there may of course be rare cases in which it is appropriate or necessary for the LVT to raise issues not expressly raised by the parties but which fall within the broad scope of the application in order to properly determine the issues expressly in dispute."

41. Third, the authorities have identified three types of occasion when it will be appropriate for a tribunal to raise a new point:

    a. Where the tribunal needs to raise a new point on the basis that it may not have jurisdiction to decide the issue before it, or on the basis that there is a fundamental problem with a party's case. This will often be a point of law but it may be one of fact. As the Deputy President (Martin Rodger KC) put it in *Admiralty Park Management Company Limited v Olufemi Ojo* [2016] UKUT 421 (LC) at paragraph 30, the FTT is not required "to shut its eyes to an obvious and potentially fatal irregularity."

    b. Where a statute requires the tribunal to address a matter that the parties have not raised. The example that springs to our minds is the requirement in section 84 of the Law of Property Act 1984 which requires the Tribunal, when considering an application for discharge of a restrictive covenant, in some circumstances to consider town and country planning considerations such as the local plan.

    c. In order to clarify a party's case (see the passage quoted above from *Keddie*, and see paragraph 127 and following of the President's decision in *Sovereign Network*).

42. Fourth, whether or not to raise a new point is a matter of discretion, and the decision to do so will not be interfered with on appeal unless the appeal court takes the view that the decision to raise the new point was one which no reasonable tribunal could have taken (see paragraph 147 of the President's decision in *Sovereign Network*).

43. Fifth, if the tribunal does raise a new point it must follow a fair procedure. That has been stressed repeatedly in the authorities. As the President put it in *Sovereign Network* at paragraph 195(4):

> "In raising a new point the FTT should not descend into the arena or give the appearance of descending into the arena. The role of the FTT is limited to raising the new point, assuming that it is appropriate to raise the point at

all. Thereafter, it is for the relevant party, to whose advantage the new point may be, to decide whether to pursue the new point."

44. As the President explained, for the point to be pursued it must be pleaded, and the first question will be whether the relevant party can amend its statement of case in order to add the new point; the tribunal must hear from both parties as to whether that should be allowed. If it is allowed then it is for the party now taking the point to argue it and for the other party to respond to it; if evidence is required to prove it then both parties must be able to adduce evidence on the new point. An adjournment may be needed and case management directions will then be given.

45. In light of the law, Mr Selby KC framed his argument in a number of ways.

46. First, he argued that the FTT had no jurisdiction to make a remediation order in respect of the Additional Items because they were not specified in the leaseholders' application. The FTT has jurisdiction to make a remediation order only on the making of an application (section 123(2) of the Buildings Safety Act) and, said Mr Selby KC, only in respect of defects specified in the application as required by the regulations and as invited by the layout of the application form.

47. We agree that the FTT has jurisdiction to make a remediation order only if an application has been made. We do not agree that the FTT can order the remediation of a relevant defect only if it was specified in the application. "Specified" in section 123 means "specified in the order"; we are not persuaded that any problem of jurisdiction arises where the FTT is asked by an applicant to make an order that goes rather wider than envisaged in the application. The extent of the application may well change once the parties have formally pleaded their cases (as the leaseholders' case did here, in adding the fire doors when their filed their statement of case), or they may seek to amend their pleading later and may be permitted to do so. Either way, a defect not actually listed in the application form may become part of a party's case, and the FTT may be persuaded by evidence to specify that defect in the remediation order after hearing both parties on the point. That is not what happened here; but our point is that the fact that a defect is not specified in an application does not mean that the FTT cannot make a remediation order in respect of it. It can, provided the correct procedure is followed.

48. Second, Mr Selby KC argued that the FTT had no jurisdiction to raise the Additional Items.

49. We agree that the FTT should not have raised them, although we would not put it the same way; jurisdiction is about the ability to decide things, and the question here is whether the FTT exceeded not its jurisdiction to decide but its discretion to raise a new point. The exercise of a discretion will rarely be appealable, unless the decision concerned was one that no reasonable tribunal could have made. That was the case here. We can explain that by reference to the third point in our summary of the law, at paragraph 41 above. The FTT's concerns about the Additional Items were not points about jurisdiction, nor was the FTT under any statutory direction to raise them; the Building Safety Act 2022 does not require or enable the FTT to conduct a building safety audit, which is what it did here. Nor did the FTT raise the Additional Items in order to clarify the leaseholders' case. Their case was perfectly clear. They relied upon the MAF report, with which MRL had no quarrel, and which not only set out what was wanted by way of remediation but also

considered the Additional Items and concluded that they were not relevant defects and did not require remediation. The leaseholders' case needed no clarification; and these were not items that no-one had thought of. The FTT's decision discloses no good reason for its having raised the Additional Items and we conclude that it exceeded its discretion in doing so.

50. Moreover, having raised the Additional Items the procedure adopted by the FTT was unfair. We refer here to the fifth point in our summary, at paragraphs 43 and 44 above. The FTT did not invite the leaseholders to amend their pleadings or in any way to make a case about the Additional Items themselves. Instead the FTT became a party to the dispute. The issue about the Additional Items was between the FTT and MRL. We are told by the FTT in its refusal of permission to appeal that Mr Blomfield in his closing submissions expressed the wish for the FTT to resolve all the building safety matters at the building; but the new case was raised by, and argued by, the FTT without the leaseholders' involvement. It required nothing from them; it gave directions for MRL to produce evidence but sought neither argument nor evidence from the leaseholders; at the adjourned hearing it questioned the authors of the BEFS report but the leaseholders did not until after the FTT had done so. It set out its decision about the Additional Items under the heading "The Tribunal's issues", thus making it explicit that these were not the leaseholders' issues.

51. In light of the circumstances in which the FTT raised the Additional Items, and the procedure it adopted having done so, we take the view that its decision to require the remediation of the Additional Items was vitiated by a serious procedural irregularity and was a breach of natural justice, and we set it aside.

(2) Decision contrary to the evidence

52. Equally fatal to the FTT's decision is that it was taken contrary to the evidence before it and gave no reason for its disagreement. Mr Selby KC referred to *Re B (Care: Expert Witnesses)* [1006] 1 FLR 667 where Butler-Sloss LJ said 674F:

> "… it is important to remember that the decision is that of the Judge and not of the professional expert. Judges are well accustomed to assessing the conflicting evidence of experts. As Ward, LJ said, Judges are not expected to suspend judicial belief simply because the evidence is given by an expert. An expert is not in any special position and there is no presumption of belief in a doctor however distinguished he or she may be. It is, however, necessary for a Judge to give reasons for disagreeing with experts' conclusions or recommendations. … A Judge cannot substitute his views for the views of the experts without some evidence to support what it is he concludes."

53. We have already observed that the MAF report, prepared by qualified experts whose competence was not challenged before the FTT, was a comprehensive survey of the building. It considered the street-facing walls and balconies, the walkways, the bin stores, escape arrangements and firefighting capacity and concluded that no remediation was needed. The BEFS report too examined those items that were referred to it and concluded that no action was needed. No other evidence was presented to the FTT.

54. Why the FTT disagreed with that evidence we do not know. Its views about the Additional Items, or rather most of them – some are not even mentioned in its decision, as to which see paragraph 64 below – are set out in six paragraphs, on a single page, and consist only of assertions. For example, the FTT said this about the walkways:

> "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."

55. That is all. No reason is given for the FTT's disagreement with the assessment, in both the expert reports before it, that the walkways would present a low risk once the cladding was removed. The following paragraphs, relating to balconies, bin stores and so on, present the same difficulty. Either the FTT had no reason for disagreeing with the experts' opinions or it did not give its reasons; either way, the decision has to be set aside.

(3) Inappropriate use of the FTT's expertise

56. This point arises only from the FTT's refusal of permission to appeal; there was no mention of the FTT's expertise in the decision of 3 July 2024. In its refusal of permission to appeal the FTT said:

> "The tribunal's decision contains its reasons, in respect of each of the matters listed above, as to why it, as an expert tribunal, disagreed with the expert, and why it found that these matters were Relevant Defects and why they should be included in a Remediation Order."

57. As we said above, the decision of 3 July 2024 does not give the FTT's reasons why the FTT disagreed with all the evidence before it. The reference to its expertise does not help matters. Certainly the FTT is a tribunal whose judges and members have considerable expertise in property law and in a number of other disciplines. The non-legal member of this panel is a Registered Building Inspector, a Fellow of the Royal Institution of Chartered Surveyors, and a Member of the Institute of Fire Engineers. But expertise is not evidence, and the possession of expert knowledge does not enable the FTT to ignore evidence without giving reasons for doing so.

58. In *Dugdale v Kraft Foods Limited* [1976] 1 WLR 1288 Phillips J sat as a judge in the Employment Appeal Tribunal, and his comments are equally relevant to other tribunals:

> "The members of industrial tribunals are appointed because of their special knowledge and experience, and we have no doubt that they are entitled to draw upon it in playing their part in assisting the tribunal as a whole to reach a decision. The main use which they will make of this knowledge and experience is for the purpose of explaining and understanding the evidence which they hear. Certainly, they are entitled to use their knowledge and experience to fill gaps in the evidence about matters which will be obvious to them but which might be obscure to a layman. More difficult is the case where evidence is given which is contrary to their knowledge and experience. If such an occasion arises, we think that they ought to **draw to the attention of the witnesses the experience which seems to them to suggest that the evidence given is wrong**, and ought not to

> prefer their own knowledge or experience without giving the witnesses an opportunity to deal with it. Provided that this opportunity is given there seems to us to be no reason why they should not draw on their own knowledge and experience in this way also. But it is highly desirable that in any case where particular use is made by an industrial tribunal of the knowledge or experience of one or more of their members in reaching their decision this fact should be stated, and that particulars of the matter taken into account should be fully disclosed."

59. The emphasis there is ours, and that is what the FTT did not do. The FTT in its decision did not explain why its expertise led it to draw conclusions contrary to the evidence; it did not, for example, set out professional guidance which pointed to contrary conclusions, nor to practical examples of buildings of which the judge or member had knowledge, nor to previous cases in the FTT nor to authoritative decisions that led them to doubt the contents of the MAF report or the BEFS report. There is no indication that they did so at the hearing and therefore whatever it was that influenced them the witnesses had no opportunity to deal with it. We really have no idea why the panel's expertise led it to contrary conclusions; nor have the parties. Insofar as the FTT's decision was reached in reliance, in some undisclosed way, on its own expertise it was unfair and for this additional reason must be set aside.

(4) The matters were not put to MRL or its expert witnesses

60. The FTT in its decision of 3 July 2024 devoted just six paragraphs to the Additional Items, or rather to some but not all of them. It did not set out what was MRL's position on any of those items, nor did it say what was the view of the authors of the BEFS report (apart from the generic comment earlier in the decision that their report concluded that none of the items referred to it by the order of 27 March 2024 were relevant defects). Mr Selby KC said that the FTT's views about the Additional Items were not put to the authors of the BEFS report.

61. In its refusal of permission to appeal the FTT said:

> "The tribunal's notes of the final hearing record that there was discussion between the tribunal and the Respondent's expert regarding all the above matters."

62. That is not an assertion that matters were put to the authors of the report. We accept what Mr Selby KC told us about this aspect of the hearing and regard it as confirmed by the FTT's comment in response to the point.

63. It is crucial that a party and its witnesses have the opportunity to answer the case against it before a court or tribunal reaches its conclusion. In these proceedings of course the FTT's concerns about the Additional Items were its own concerns; they were not part of the leaseholders' application nor of its pleaded case. For that reason we have already concluded that the decision was unfair and must be set aside, but this further point is an additional reason why the decision was unfair and cannot stand.

(5) Additional Items not identified in the March order

64. Finally, Mr Selby KC pointed out that two of the Additional Items, namely the external street-facing walls and the courtyard floor, were not listed in the order of 27 March 2024 as matters that BEFS was to report on. All that has been said about the rest of the Additional Items applies to these two items, with the further problem that MRL had no warning before the hearing in July 2024 that these two parts of the building were a concern to the FTT. Their inclusion in the remediation order was therefore particularly unfair. We agree, and would add that the street-facing walls are not even discussed in the FTT's substantive decision. We fail to see what MRL was supposed to do about the street-facing walls, which were made of brick.

65. Mr Selby KC also observed that the FTT's expressed concern about fire escape routes, external stairs and firefighting capacity were inappropriate since BEFS was not asked to report on those matters. Further, its complaint that it did not have a PAS9980 risk assessment was doubly inappropriate because it did not direct such an assessment on 27 March 2024 and because of course it already had one since that was what the MAF report was. We agree.

Conclusion on the grounds of appeal

66. For all the reasons set out above the FTT's decision to include the Additional Items in the remediation order was procedurally irregular and unfair, and is set aside.

Consequences

67. The appeal was, as we said at the outset, opposed by the leaseholders. We accept that they were content with what the FTT did and believed what the FTT said; and in that response is seen the damage that the FTT has done. The leaseholders are now convinced that they live in a dangerous building. The cladding and combustible insulation in the courtyard have now been removed and replaced, and the building has an EWS1 B1 rating so that the flats can be sold and mortgaged, yet the leaseholders do not feel safe because the FTT has convinced them that they are not. Their relationship with MRL is seriously damaged. We do not know to what extent our decision might begin to put things right; we hope that they will read it and come to understand that the course taken by the FTT was not only unfair but substantively wrong because there is no evidence that the building is unsafe and ample evidence that it is now safe.

68. It is appropriate that we add a comment about the FTT's "expression of opinion" that the building is a higher-risk building. By contrast with its position about the Additional Items, the FTT knew and acknowledged in its decision that it had no jurisdiction to decide or declare that the building was a higher-risk building and that what it said had no legal effect. It confirmed as much in its refusal of permission to appeal. Why it did not therefore review its decision in response to that application so as to remove the lengthy discussion about higher-risk buildings is impossible to understand.

69. The FTT's comments in its refusal of permission to appeal did not mend the damage that has been done. Before the March hearing neither party took the view that this was a higher-risk building. The FTT in raising the point caused MRL to incur the expense of

producing evidence about the height of the building, pointlessly since the FTT had no jurisdiction to say anything about the point. We see from the leaseholders' statement of case in the appeal that Mr Blomfield is now convinced, and perhaps other leaseholders are too, that the building is a higher-risk building; yet there was no evidence before the FTT to support that opinion. And its public expression of its opinion in its decision, including its comments on government guidance, has doubtless caused concern and confusion for building safety professionals. All of this illustrates how dangerous it is for a tribunal to express a view about a matter that is not within its jurisdiction.

70. So what should the FTT do in a case where an application has been made for a remediation order and the FTT spots a serious fire safety risk that neither party has noticed and which it thinks is a relevant defect that requires remediation? Imagine a case where the application before the FTT is clear, and the defect the FTT has spotted has nothing to do with the defects specified in the application. It is not addressed in any of the evidence before the FTT. The FTT has visited the building and thinks that there is a problem that no-one has spotted. Is it required to close its mind to a problem that is not figuratively (as in *Admiralty*, see paragraph 41(a) above) but literally potentially fatal?

71. We discussed this question with Mr Selby KC at the hearing and we agree with his answer. The FTT has a discretion to raise new points. In the case we have imagined there is a sound reason for doing so. But having done so the FTT must then follow the correct procedure, and if the applicant for the remediation order declines to pursue the point there is nothing the FTT can do about that and it has discharged its responsibility.

72. We would add that the likelihood of that happening is vanishingly small. Usually an application for a remediation order will be made after a comprehensive risk assessment, as was the one in the present proceedings. It is unlikely that a real risk will have gone unnoticed by professionals charged with a risk assessment and yet be obvious to the FTT from a hearing bundle and a site visit. Furthermore if that does happen and the FTT is able to explain why there is a real risk to life it is very unlikely that neither party will be willing to address it.

73. What we saw in the present case was a very long way from that situation. The FTT raised its concerns without having seen the building and in the face of unchallenged evidence that its concerns were unfounded. Nothing that we have said in this decision, and nothing in the law we have discussed, gives rise to concerns that real fire risks will go unremedied because of a legal technicality. On the contrary, the law is designed to ensure that risks are properly assessed and the FTT's discretion can safely be exercised within that framework.

Re-making the order

74. There is no question of any need to remit the matter to the FTT. We are asked to re-make the remediation order so as to exclude the Additional Items, and we will make an order in the form of the draft submitted by Mr Selby KC. He has asked us also to delete from the order the FTT's requirement that MRL submit the order to the Building Safety Regulator; that order arose from the FTT's view that the building is a higher risk building. Since the FTT had no jurisdiction to determine that the building fell into that category the requirement had no rational basis and we delete it.

Upper Tribunal Judge Elizabeth Cooke Mrs Diane Martin TD MRICS FAAV

28 May 2025

Corrected in paragraphs 9, 50, 64 and 67 under rule 53 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010

4 June 2025

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

List of Respondents

MARIA ESCRIBANO (2)
HELENA LENDRUM AND MATTHEW RANKIN (3)
JAMES MICHAEL FORSTER (4)
SARA AND ALEXANDER GRADY (5)
KERRI ANNE PRITCHARD (6)
CLAIRE WAXLER AND TANJA LAUTENSCH LAEGER (7)
AMY AND JOHN ACKERLEY (8)
JUSTIS JUSTIN (9)
PAVIR AND CHERYL PATEL (10)
JONATHAN SMITH (11)
MICHAEL ELSDORFER AND SEYEDEHAMAGHAN FATEMI (12)
M A MOTTALIB (13)
HEIDI OLSEEN (14)
DHEARAEN QUICK (15)
EDOARDO PASCALE AND KATE PENWARDEN (16)
ROBYN YON (17)
ANNE MARIE MCLOUGHLIN (18)
ISABEL HARRIS (19)
WAYNE HOLLAND (20)
RICHARD PAYNE (21)
ROBERT PILKINTON (22)
ANDREW SIEPRATH AND KATE PEARSON (23)
AMAKA UKPABI (24)
ANDREI ZAMFIRACHE AND AMY SHIELDS (25)

MAGDALEN A KOZAK (26)
JO COLE (27)
CLARISSA CAPPELLETTI (28)
NICK WALTERS AND LOMA ROBERTSON (29)