FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BA/HYI/2023/0017**
Property	**:**	**Spur House, 1 Milner Road, London, SW19 3BS**
Applicants	**:**	**(1) Jeremy John Wyatt (Flat 13)** **(2) Baljit Kaur Wyatt (Flat 13)** **(3) Ita Mary Shaughnessy (Flat 1)** **(4) Simon Thomas Thexton (Flat 4)** **(5) Jan Paul Jones (Flat 20)** **(6) Nicola Michelle Fleming (Flat 25)** **(7) Ian Robert Fleming (Flat 25)** **(8) Charles Henry Moore (Flat 34)** **(9) Elizabeth Rose Dell Moore (Flat 34)**
Representative	**:**	**Gardner Leader LLP**
Respondent	**:**	**WN Enterprises Limited (freeholder)**
Representative	**:**	**Nockolds Solicitors**
Type of application	**:**	**For a remediation order under section 123 of the Building Safety Act 2022**
Tribunal	**:**	**Mrs Helen Bowers MRICS MSc BSc** **Mr Andrew Thomas MRICS MBA MIFireE** **Mr Stephen Mason BSc FRICS**
Date of Decision	**:**	**17 September 2024**

DECISION

The Tribunal makes an order under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in respect of Spur House, 1, Milner Road, London, SW19 3BS, that the Respondent shall

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pay £12,052.80 to the Applicants within 28 days of this decision.

Background:

1. On 2 April 2024 the Tribunal made a Remediation Order (the RO) under section 123 of the Building Safety Act 2022 ("the BSA") in respect of the development at Spur House, 1 Milner Road, London, SW19 3BS (the "Building"/Spur House). That RO was made following the agreement of the parties that was presented to the Tribunal at a hearing held on 27 February 2024.

2. In an application dated 30 April 2024 the Applicants listed above, sought an order to be made against W N Enterprises Limited (the Respondent) under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the 2013 Rules). The Tribunal issued Directions dated 1 May 2024. Those set this matter down to be considered in the papers, unless either party requested a hearing. There was no such request, therefore the Tribunal considered the written submissions from the parties.

The 2013 Rules:

3. Rule 13 of the 2013 Rules provides:

Orders for costs, reimbursement of fees and interest on costs

(1) Subject to paragraph (1ZA), the Tribunal may make an order in respect of costs only—
(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
(b) if a person has acted unreasonably in bringing, defending or conducting proceedings;
(c) in a land registration case, or
(d) in proceedings under Schedule 3A to the Communications Act 2003 (the Electronic Communications Code) including proceedings that have been transferred from the Upper Tribunal.
(1ZA) The Tribunal may not make an order for costs under paragraph (1)(b) in proceedings under—
(za) Part 1 of the Landlord and Tenant Act 1954 (security of tenure for residential tenants);
(a) Part 4 (registration of rents under regulated tenancies) or Part 5 (rents under restricted contracts) of the Rent Act 1977
(b) Part 1 of the Housing Act 198810(assured tenancies, shorthold and non- shorthold); or
(c) paragraph 6(2) or 10(2) of Schedule 10 to the Local Government and Housing Act 198913(security of tenure on ending of long residential tenancies).

(1A) In relation to proceedings that have been transferred from the Upper Tribunal, an order under paragraph (1)(d) may be made in respect of costs of—
(a) any part of the proceedings in the Tribunal, and
(b) any part of the proceedings which took place in the Upper Tribunal before the transfer (subject to any contrary order or direction by the Upper Tribunal).
(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
(3) The Tribunal may make an order under this rule on an application or on its own initiative.
(4) A person making an application for an order for costs—
(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and
(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.
(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—
(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.
(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.
(7) The amount of costs to be paid under an order under this rule may be determined by—
(a) summary assessment by the Tribunal;
(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");
(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.
(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991 shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.
(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

Submissions:

4. The Applicants usefully reminded the Tribunal of the guidance given in Willow Court Management Company (1985) Limited v Alexander [2016] UKUT 290 (LC) (Willow Court) as to how 'unreasonable behaviour' can be assessed and the three stages the Tribunal needs to address.

5. The relevant background of the case was then set out. In summary the background was that Spur House was converted for residential use in 2016. In 2020 the leaseholders of Spur House became aware of problems of selling/re-mortgaging flats within the development due to an absence of a satisfactory EWS1. A fire risk assessment was commissioned by the Respondent in 2021 and was provided by MAF Associates in December 2021 (the MAF Report). That report identified two fire safety issues with respect to defects to the external wall insulation, as it had not been installed in compliance with the manufacturer's requirements and that combustible timber balconies required replacement.

6. Although the Applicants asked the Respondent as to their intentions, but it is said the respondent failed to engage. As a consequence, in August 2022 the Applicants engaged a solicitor. The Applicants' representative wrote in October 2022 setting out the Respondent's liability under the Building Safety Act 2022 (BSA) and that the works were a matter of urgency. The Respondent replied in November 2022 denying that the external render system was a defect, in conflict with the MAF Report and that they had been correspondence with MAF regarding the timber decking and it was agreed that to the balconies were satisfactory subject to the application of fire protection paint, but no supporting documents were provided.

7. On 6 February 2023 the Applicants sought confirmation from the Respondent that they would remedy the defects in respect of the timber balconies and the fire safety defects so that Spur House could obtain an A1 EWS1 fire safety rating. In response on 28 February 2023 the Respondent indicated that the specification/design of the non-combustible material and treatment of existing materials in respect of the balconies was being worked upon and the works would be completed during the coming month. However, the Respondent re-stated its position that the external wall system did not require remediation work.

8. On 3 March 2023 the Applicants wrote to the Respondent requesting confirmation the balcony works would be completed by 30 March 2023 and suggesting a way to proceed and resolve the dispute was to obtain a new fire safety assessment of Spur House. On 10 March 2023 the Respondent indicated that it would carry out all necessary works at their cost, if any works are agreed between the Respondent's' fire consultant and MAF. The Applicants requested copies of the Respondent's communications with MAF.

9. Bruton Safety Solutions Limited wrote on 21 March 2023 to introduce itself as the provider of fire safety consultancy services to the Respondent

and that all the leaseholders' concerns will be addressed in the following four to six weeks. The Applicants were copied into a letter sent by the Respondent to MAF on 23 March 2023 stating that the MAF findings were at variance with the findings of the Respondent's design team and their contractors.

10. There is chain of correspondence from late March to July 2023 between the Applicants, the Respondent, Warwick Estates and MAF, seeking to progress a solution to the issues. It's the Applicants' position that as no progress was being made in resolving this problem the application to the Tribunal was made on 20 July 2023.

11. The Tribunal's preliminary Directions required the Respondent to prepare a Position Statement in advance of the Case Management Hearing (CMH) by 21 August 2023. The Position Statement was not made on time and the Applicants initially made an application for the Respondent to be debarred on 24 August 2023.

12. The Respondent explained that the delay for the Position Statement was due to annual leave on the part of the Respondent and the Respondent's consultants. The Position Statement was provided on 1 September 2023. The Respondent did not seek to agree an extension of time, nor applied for such an extension.

13. The application to debar was to be considered at the CMH. However, at that time the Applicants indicated that they did not wish to pursue the application.

14. In the Position Statement the Respondent stated that that there were no relevant defects at Spur House; that the making of a RO was 'unnecessary, oppressive and disproportionate and that it disputed the form of the RO suggested by the Applicants.

15. The Tribunals' Directions made provision for a single joint expert (SJE). The Respondent gave the details of three experts. One of these, Jack Burton of Burton Safety Solutions had previously instructed by the Respondent and therefore was not regarded as an independent third party and did not have the appropriate qualifications; the two others were unacceptable as one had no experience of acting as an independent expert and the other would have been unable to provide a valid EWS1 and there was an initial lack of information about his expertise. The Applicants explained this in a letter dated 22 September 2023.

16. There was considerable correspondence between the parties regarding the appointment of a SJE. However, agreement was reached that Mr Shaun Harris would be appointed as a SJE. The Respondent indicated that it would "not seek to file its own expert report save in the event of manifest error".

17. Mr Harris' report was provided on 19 January 2024 and concluded that there were defects and a new external wall system was required and that the combustible elements of the balconies required removal and

replacement.

18. There were a number of emails in respect of the report and the Applicants sought to engage with the Respondent regarding the contents to Mr Harris' report. This included a letter to the Tribunal on 6 February 2024 indicating that there was no agreement about the need or contents of a RO and the hearing dates of 27 and 28 February 2024 would be required to determine the terms of the RO.

19. It is submitted that despite the agreement in respect of the SJE, the Respondent refused to accept the findings and opinions of Mr Harris. In a letter to Mr Harris dated 8 February 2024, the Respondent indicated that it had instructed Mr Jack Bruton of Bruton Safety Solutions Limited to prepare a report and the report was sent to Mr Harris. The letter asked Mr Harris to confirm whether he agrees to the proposals set out in Mr Bruton's report. There was no application for permission for the Respondent to file the Bruton report, nor had the Respondent indicated that there was a manifest error in Mr Harris' report. In preparing for the substantive hearing the Applicants were unaware of the Respondent's position in respect of the expert evidence and the application as a whole.

20. To the Applicants it appeared that the Respondent was attempting to resile from the agreement to be bound by Mr Harris' report, but not alleging any manifest error. As a consequence, the Applicants were obliged to prepare witness evidence in support of the RO application; and to instruct counsel for the two-day hearing. Counsel's fee was incurred in two parts on 13 and 20 February 2024.

21. On 20 February 2024, the Applicants wrote to the Respondent indicating that it had failed to meaningfully agree with their request to agree the hearing bundle; that they had produced a competing document and Mr Bruton disagreed with the recommendations of Mr Harris and that they had not engaged with the draft RO and that as a consequence the Applicants had been forced to incur unnecessary costs. On the same day Mr Harris responded to various questions raised by the Respondent in disagreement with his report and reiterated that he did not agree with Mr Bruton's suggestions but maintained that a full replacement of the external walls was necessary. As a consequence, the Applicants sought to confirm the Respondent's position in respect of Mr Harris' report and asked about the exchange of skeleton arguments due on 22 February 2024. There was no response from the Respondent until 3.33 on 22 February 2024, just before the Applicants' skeleton argument was to be served and two working days before the hearing that Respondent confirmed its agreement with the draft RO and that they intended to write to the Tribunal to vacate the hearing. The Applicants explained that as the RO could not be made by consent, the hearing could not be vacated. The Applicants also invited the Respondent to agree that Mr Harris was not required at the hearing. They gave indication of the Rule 13 application and invited the Respondent to make a n offer on costs.

22. There was no skeleton argument from the Respondent until 26 February,

the day before the hearing and no explanation was given. It is further explained that as at the date of the Rule 13 application, there had been no further contact from the Respondent about the intended works under the terms of the RO.

23. The Applicants state that there are several examples of the Respondent's unreasonable behaviour/conduct. First is that the Respondent's position to defend the substantive application was unreasonable from the outset. There had been long standing communications between the parties regarding the need for the remedial works. The Respondent had been aware of the defects since the MAF Report in December 2021, so two and half years before the application was made. But the Respondent had failed to provide any evidence as to why the MAF Report recommendations were wrong and to agree to instruct a third-party surveyor to resolve the dispute. This had been suggested by the Applicants at an early stage and was the approach finally taken as a consequence of the Tribunal's Directions.

24. The second example is that the Respondent's position was that the making of a RO was oppressive. However, the Respondent was the developer of Spur House in 2016 and was the party responsible in fact under the BSA and it is difficult to see how it could reasonably challenge the making of the RO also they adduced no evidence in challenge. Hence it could be inferred that the Respondent had no legitimate basis for making any challenge. The Respondent was aware of the issues for the leaseholders but had not resolved the fire safety issues. If the Respondent had accepted the situation at an earlier stage the costs for both parties would have been dramatically reduced.

25. A further example was that the parties had reached an agreement about the use of a SJE, save in the event of a manifest error. The Respondent should have conceded the application on receipt of the report from Mr Harris in mid-January 2024. Instead, there was a further challenge to the report and Mr Bruton had been instructed and this had derailed the Applicants' preparation for the hearing as they did not know what position the Respondent was taking. Costs were incurred by the instruction to counsel to prepare for the hearing and that instruction proved to be far wider than if the hearing was limited to the issue of the terms of the RO, including preparation for a contested hearing on the basis of expert evidence preparation for a contested hearing on the principle of whether there should be a RO and a dispute as to the extent the Respondent was entitled to rely on Mr Burton's report, given the agreement on the use of a SJE. It was only two working days before the hearing that the Respondent conceded the case and by that time much of the work had been completed.

26. It is also submitted that the Respondent had failed to meet the deadlines in respect of the provision of a position statement that was provided on 1 September 2023, but had been due on 21 August 2023. It is acknowledged that these breaches of the Tribunal's Directions would not ordinarily amount to unreasonable conduct but in this case should be

considered in the context of the rest of the background preparation for this case. The second breach was in relation to the agreement over the bundle, which was to be done by 13 February 2024. In an email of 15 February 2024 the Respondent indicated that, but did not engage with the agreement as to the content of the bundle. The contents were not agreed. This uncooperative approach was said to be unreasonable. Finally, the Respondent missed the deadline for the submission of the skeleton argument and provided it only the day before the hearing without any explanation.

27. As to whether the Tribunal ought to make an order for costs, it is submitted that the Respondent has been aware of the issues since December 2021 and that the issues at Spur House will take at least a further 18 months to resolve. This is in the context that the Respondent was the party who re-developed Spur House and therefore had knowledge of the property and the issues. The leaseholders have suffered in respect of feeling safe in their homes, issue regarding sales and re-mortgaging and the costs involved in pursing the application. If the Respondent had been proactive, then the Applicants would not have incurred significant costs.

28. As to the form of the order, the Applicants contend that the Respondent should pay the entirety of the Applicants' costs, amounting to £55,647.20 [at page 60 of the Rule 13 bundle]. This sum is claimed on the basis that had the Respondent acted reasonably at the outset, then it would have been unnecessary to make the application. As an alternative the Applicants seek the costs of the making of the debarring application as a response to the Respondent's initial failure to engage with the proceedings and the costs that postdate Mr Harris' report after 19 January 2024. Those costs amount to£24,105.60 [page 63 of the Rule 13 bundle]. It is stated that most of the Applicants' costs after 19 January 2024 would not have been incurred if the Respondent had accepted the evidence of Mr Harris.

29. The Respondent's position is that it had engaged with the issues relating to the defects at Spur House. It has included evidence of its engagement with the managing agent, Warwick Estates, the London Borough of Merton, the Respondent's building control inspector, Butler & Young, the manufacturer of the wall installation system, Sto Limited and the Applicants' solicitor.

30. In March 2023 the Respondent had arranged for its own design team and contractors to examine the wall and insulation and suggested that MAF Associates participate in the inspection, as the Respondent's team had identified areas where the insulation had been installed correctly. In addition, the Respondent's building control inspector had concluded that "*horizontal and vertical fire barriers required to 50 mm cavity behind cladding, details received are satisfactory, installation also inspected on site*". MAF Associates were not able to attend the inspection but was inundated with work. During this time the Respondent was committed to carrying out any remedial work if there was agreement on

the scope of the works. The instruction of another third-party expert, as suggested by the Applicants would have resulted in more costs. The Respondent was still hopeful in September 2023 that it would inspect the property with MAF Associates with the aim of resolving the matter and it was frustrated that an application had been made for a RO.

31. In response to the Tribunal's Directions, the Respondent had proposed three fire safety experts, who could act as a SJE. The Respondent did agree with the Applicants' suggestion of Mr Shaun Harris and agreed to pay his fee. On 2 February 2024 the Respondent confirmed that it was considering the contents of Mr Harris' report and was seeking further technical information from Sto Limited. On 8 February 2024 the Respondent wrote to Mr Harris asking if he agreed with the proposals from Mr Burton and this correspondence was sent to the Applicants on 16 February 2024. It's the Respondent's position that given the considerable remedial work in the report, that it was reasonable for it to take time to consider and question those findings. The ability to ask questions of a SJE is important. The questioning of Mr Harris would not have any financial consequences on the Applicants as the Respondent had undertaken to pay his fees.

32. The witness statement from Mr Thexton, for the Applicants is dated 14 February 2024 and is after the witness statement deadline set out in the Directions. It is the Respondent's position that the witness statement was not prepared as a response to the Respondent's letter of 8 February 2024, but simply submitted to strengthen the Applicants' case in the run up to the hearing.

33. Having had a response from Mr Harris on 20 February 2024, the Respondent confirmed the contents of the draft RO on 22 February 2024. At 16.07 on 22 February 2024, was the first time the Applicants suggested a date for the commencement of the works should be included, but no date was suggested. Mr Harris was asked on 26 February 2024 whether a reasonable starting date for works could be 1 June 2024 and if not, what would be a reasonable date for the works to be completed by 31 December 2025. Also, Mr Harris was asked whether the occupants of Spur House would need to vacate during the works. There was no response before the hearing, but on the same date the Respondent proposed that the works should start no later 1 August 2024 with the plan to complete the works within four months. Although no response from the Applicants this was subsequently accepted by them with a completion date of 31 December 2025.

34. The Respondent did not consider the issue of Rule 13 costs in any detail as the amount of costs were unknown at that stage and by 22 February 2024, there had been no application for costs. On 3 May 2024, the Respondent requested a breakdown of the Applicant's costs but that was refused on 17 May 2024 on the basis that breakdowns had not been provided in other Rule 13 applications.

35. It is the Respondent's case that Applicants have not identified any

conduct which could conceivably meet the threshold for a cost order to made against the Respondent. The disagreement between the parties for the need for the works, is not a reason why an adverse cost order should be made, especially when the Respondent's building control had advised that Spur House had been built in accordance with Building Regulations. As MAF Associates had been unable to attend a site inspection it was unclear what works were required. There was no delay to the proceedings caused by the Respondent. The Respondent had agreed with the SJE and had agreed to pay his costs. The Respondent had raised some questions, but after Mr Harris confirmed that he did not agree with Mr Burton's proposals, the Respondent then signed and returned the draft RO. And has agreed to commence the works on 1 August 2024.

36. The Applicants have argued that the costs order is justified amongst other matters because of the late filing of the position statement ahead of the Case Management Hearing and the skeleton argument ahead of the hearing on 27 and 28 February 024. However, it was explained that the director dealing with this matter was on holiday before the position statement was due and that because the draft RO had been agreed on 22 February 2024, the only issue for the hearing was the commencement date for the works. The late filing of the skeleton argument had no impact on the progress of this case. The reason the Respondent had not agreed the bundle was that it included a late witness statement from Mr Thexton.

37. The Respondent has offered on an open basis and as a matter of goodwill the Applicants a sum of £8,000, without any admission that they are entitled to any costs. This offer was rejected on 17 May 2024. The Respondent therefore submits that the Tribunal should refuse to exercise its discretion to make an order for costs.

38. If the Tribunal is minded to make an order, the Respondent raises the following points in relation to the whole sum of £55,647.20: that when the applicantion was made, the Applicants would have been informed that the Tribunal is a 'no cost jurisdiction'; that the vast majority of the work was undertaken by a Grade A fee earner, with little delegation to more junior staff; as counsel was present at the CMH, there was no need for the Applicants' solicitor to attend; the preparation of the bundle at a costs of £1,191.50 could have been undertaken by administrative staff at a minimal/no cost basis; the time of 38.7 hours for attendance on the Applicants suggests that there was contact with all the Applicants rather that one or two individuals appointed to give instructions; 15 hours for attendance on others has been claimed, but there has been modest correspondence with the Tribunal and the SJE and that the rates of between £285 and £370 is too high for solicitors based in Maidenhead. In respect of the sum of £24,105.60 some of the same points are raised. It is also stated that the cost for the debarring application was £420 plus VAT and the application was withdrawn after the Respondent had provided its position statement; the RO was always likely to have been agreed, but despite agreement there would still have been costs incurred in relation to the deadline for the works and attendance at the Tribunal

on 27 February was required to answer questions from the Tribunal, so costs would have been incurred in any event.

39. In reply the Applicants state the Respondent relies on evidence of correspondence to show that it had engaged with various parties and stakeholders between September 2021 and July 2023 and that demonstrates that the Respondent was 'committed to carrying out any remedial works'. It is the Applicants position that the correspondence demonstrates that the Respondent was not trying to remediate the building and did not take responsibility for the work, until it was forced to do so. As an example the Applicants highlight various emails form late 2021 between the Respondent and its managing agents, Warwick Estates. In which when referring to the MAF Report, the Respondent wrote to say that it had 'no further responsibility'. On 3 October it is stated that there is a gap in the email chain between 15 December 2021 to 3 October 2022, it is suggested that there was no progress from the Respondent during this period. Although the Respondent contacted MAF Associates in October 2022 and there was a holding response, there was no further correspondence until March 2023. Again, it is suggested that there was a period of five months with nothing of substance happening. There was a further two-month delay between 23 March and 25 May 2023, in which MAF Associates indicated that they had not been provided with various supporting documents. On 18 July 2023 MAF Associates still maintain that there are defects to Spur House and despite this the Respondent defended the substantive application on the basis that it states that there were no defects. Finally, the contact with the London Borough of Merton was in relation to the issue of a Dangerous Structure Notice and not because the Respondent was proactively sharing its intentions to remediate.

40. The Respondent's claim that the Applicants' suggestion that a third-party expert would have increased costs, is denied. If a third-party expert had been engaged in March 2023, the parties may have reached an agreement and the application would have been unnecessary and costs would have been saved.

41. The Respondent's position in respect of the use of its own expert, Mr Burton in February 2024 was unreasonable as the parties had agreed to be bound by the findings of the SJE. It is accepted that it is reasonable for a party to ask questions of the SJE, it is stated to be unreasonable to commission a report contradicting that of the SJE. In this case the Respondent has a history of disagreeing with its own experts (MAF Associates) without any evidence to justify its position.

42. In response to the Respondent's position that the substantive application was made before the MAF Associates inspection and the timing was a source of frustration, it is stated that this demonstrates the Respondent's failure to appreciate the effect of its decision and the impact on the occupants of an unsafe building. In respect of Mr Thexton's witness statement, it is accepted that it was prepared after the date set out in the Directions. However, it was hoped that if the parties had agreed a SJE,

there would be no need of evidence of fact. The need subsequently arose when the Respondent, up to a couple of days before the hearing, refused to confirm that it would concede the making of a RO.

43. The Applicants acknowledge the offer of £8,000 made by the Respondent. It is submitted that the Applicants reasonably rejected that offer as the costs incurred were significantly higher than that sum. It is stated that there was a threat that the Respondent would seek to recover its costs of dealing with the Rule 13 application from the Applicants if the offer was not accepted or that any award does not exceed £8,000.

44. In respect of quantum, the Applicants seek a summary assessment by the Tribunal. However, it responds to the quantum comments made by the Respondent as follows: the use of a Grade A fee earner is appropriate as this is new legislation and justifies the use of an experienced solicitor, but the Applicants have delegated appropriate work to a Grade D fee earner; all the Applicants were entitled to speak to their legal advisers, and it was not incumbent upon them to appoint representatives. If all had been separately represented the totality of the costs would have been much higher; the hourly rates are reasonable when considered in the round. The Grade A rates of £285 to £370 is lower that the guidelines for a fee earner in London at Band 2, at £398 per hour. It is finally stated that the costs are reasonable and proportionate when the issues of fire safety defects in a building are considered.

Determination and Reasons:

45. As indicated in Willow Court a Tribunal should not be 'overzealous' in detecting unreasonable behaviour, providing a high barrier for such an application to be successful.

46. From Willow Court, when we consider the first stage of the test as to whether the Respondent has acted unreasonably, namely does the conduct complained of, have any reasonable explanation, in this case there have been minor infringements which could be construed as being in the realm of reasonable behaviour. The minor matters relate to the late compliance by the Respondent in the delivery of its Position Statement before the CMH; the seemingly uncooperative behaviour in the agreement of the bundle and the late skeleton argument. The Respondent was professionally represented and that it never sought permission for an extension if time in relation to the late Position Statement. These factors are disappointing, especially as the Respondent was represented. However, in themselves they would not be sufficient to indicate unreasonable behaviour.

47. Likewise, whilst we appreciate the Applicants' position in relation to the delays in making Spur House safe and the seeming inactivity of the Respondent before the application was made. Again, we are disappointed that the Respondent did not proactively pursue solutions in a building for which it was involved in the redevelopment. However, the Building Safety Act 2022 is new legislation and introduced concepts

with no precedent guidance. As such the Tribunal accepts that a party should be able to take time to explore the scope of its liabilities.

48. However, what is of concern to the Tribunal is the Respondent's actions in relation to the SJE. We make these comments in the context that prior to the application the Respondent had the benefit of the MAF Associates report, which it seemed to dispute and that the suggestion by the Applicants for use of an independent third party to review the situation, was ignored by the Respondent. After some discussions between the parties they reached an agreement as to a SJE. The Respondent agreed to be bound by the findings of the SJE, except in the case of a 'manifest error'. However, when the report by Mr Harris was produced, the Respondent did not appear to accept the findings but likewise did not indicate what was the 'manifest error'. Instead at a very late stage the Respondent took steps to obtain its own report. The Respondent submits that it was reasonable to take such steps and to ask questions of Mr Harris. We accept that it is reasonable to ask questions from an expert, but we do not accept that it was reasonable to dispute the report and then not show any manifest error. In the opinion of the Tribunal, given the background to this case and the knowledge of the Respondent we consider that these steps did amount to unreasonable behaviour, without any reasonable explanation.

49. The next stage is for the Tribunal to decide whether we should make an order for costs. We should have some consideration of the overriding objective. The Respondent was warned by the Applicants of the likelihood of an application for costs. The actions of the Respondent at the later stages of this case, just before the hearing could have derailed the hearing and we find that the Applicants were exposed to further costs in their additional preparation for the hearing, as they were unsure of the Respondent's position until only two days before the hearing. Overall, we consider that we should make an order for costs.

50. The final stage is to consider what that order for costs should be. We have not done a detailed assessment of the costs. We find that the whole litigation costs of £55,647.20 should not be considered. As explained above this is new legislation and it is reasonable for all parties to explore the law and consider their own position. A large proportion of the £55,647.20 relate to the reasonable investigation of the issues before and at the early stages of the application. However, the lower sum of £24,105.60 are costs which should be considered when making the order. Those costs relate to the debarring order at the CMH stage due to the Respondent's late compliance with the Tribunal's Directions and costs that post-date the report of Mr Harris. Whilst the first non-compliance does not by itself amount to unreasonable behaviour, we consider we can take this into account in considering the amount of the costs order. In our opinion the non-compliance of the Directions for the Position Statement and the very late, disruptive behaviour of the Respondent in respect of the SJE, seems to indicate a general denial and/or avoidance of responsibility by the Respondent in a case where there were serious implications on the Applicants. Overall, we consider

that the Respondent should pay 50% of £24,105.60, namely £12,052.80. In essence those costs relate to the reimbursement of counsel's fees for the hearing on 27 February 2024. Although the hearing was required in relation to the terms of the Remediation Order, there was some preparation on the Applicants' part and attendance by counsel in anticipation of the Respondent's position, which was unclear and the costs in relation to the Rule 13 application. The sum of £12,052.80 shall be paid by the Respondent to the Applicants within 28 days that this decision is issued.

Tribunal: Mrs Helen Bowers, Mr Thomas and Mr Mason **Date:** 17 September 2024

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).