Case No: AC-2024-LON-001595

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2024] EWHC 3234 (Admin)

The Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 10 December 2024

BEFORE:
MRS JUSTICE LANG DBE

BETWEEN:

THE KING
(on the application of RYDON GROUP HOLDINGS LIMITED)

Claimant

-and-

SECRETARY STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Defendant

-and-

(1) ARTA RESIDENTS' MANAGEMENT COMPANY LIMITED
(2) IKON MANAGEMENT COMPANY LIMITED
(3) STYLUS MANAGEMENT COMPANY LIMITED
(4) KDG PROPERTY LIMITED

Interested Parties

MR J LITTON KC and **MR J NEILL** (instructed by Stephenson Harwood LLP) appeared on behalf of the Claimant.

MR J HOLBORN and **MR A BURRELL** (instructed by Government Legal Department) appeared on behalf of the Defendant.

THE INTERESTED PARTIES were not present and were not represented

---

JUDGMENT
(Approved)

Digital Transcription by Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

1. MRS JUSTICE LANG: This claim concerns the arrangements for the remediation of certain buildings with unsafe cladding, following the Grenfell fire tragedy in 2017, in particular three buildings in Cable Street ("the Buildings") which were developed by a subsidiary of the claimant ("Rydon").

2. Rydon seeks permission to apply for judicial review of the defendant's decisions, communicated in a decision letter ("DL") from the defendant to Rydon, dated 28 February 2024, and made under the self-remediation terms ("the Terms") in schedule 1 of the self-remediation contract ("the Contract") which was entered into by Rydon and the defendant on 15 September 2023.

3. The three challenged decisions are:

> (1) The designation of Rydon as a designated participant developer ("the Designation Decision);
>
> (2) the direction under clause 7.7(B) of the terms that Rydon should not carry out remediation works in respect of the three Buildings and that those Buildings should be designated as Stage D Fund Buildings ("the Clause 7.7(B) Decision");
>
> (3) the direction that the Buildings should not be transferred to Rydon and should proceed to remediation through the Building Safety Fund ("the BSF"), with Rydon reimbursing the Fund in accordance with clause 13.8 of the terms ("the Fund decision").

4. Rydon filed this claim on 10 May 2024. On 3 June 2024, it applied for interim relief by way of an injunction prohibiting the defendant from authorising the release of any further funding under the Grant Funding Agreements ("GFAs") with the interested parties ("IPs"), and prohibiting the IPs from drawing down funds or undertaking works to remediate defects in the Buildings.

5. On 11 July 2024, I ordered that the application for permission and for interim relief should be listed for an oral hearing and gave directions. On 15 July 2024, Rydon decided not to pursue the application for interim relief, in the light of the evidence filed

by the defendant and the IPs, to the effect that work had already commenced on the buildings and 80 percent of the funding had already been transferred from the BSF.

6. The IPs are not taking an active part in the proceedings.

Amenability to judicial review

7. The defendant submits that the decisions are not amenable to judicial review because they were made pursuant to a contract between the parties, so the dispute is appropriately governed by private law proceedings. In the alternative, even if a judicial review can be made, the permissible grounds are limited to fraud, corruption or bad faith. In support of these submissions, the defendant referred to a number of authorities, including *R (Shashikanth) v NHS Litigation Authority* [2024] EWCA Civ 1477 at [43], [112] to [131]; *Hampshire County Council v Support Waste Community Services Limited* [2006] EWCA Civ 1035 at [42] to [56]; *State of Mauritius* [2019] UKPC 27 at [64] to [66]; *R(Annington Property Limited) v Secretary of State for Defence* [2023] EWHC 1154 (Admin).

8. *De Smith on Judicial Review* states, at paragraph 3-031, that the courts have adopted two complementary approaches to determining whether a function is amenable to judicial review. First the source of the legal authority exercised by the public body. If the source is primary or subordinate legislation, the body will not usually be susceptible to judicial review: see *R v. Panel on Take-overs and Mergers ex parte Datafin plc* [1987] QB 815 per Lloyd LJ at 847. Secondly, and additionally, where the source of power does not yield a clear or satisfactory outcome, the court may consider whether the public authority is exercising a public function.

9. Arguably, the scheme which the defendant operates is a statutory scheme made pursuant to statute and regulations.

10. Section 126(1) of the Building Safety Act 2022 ("BSA 2022") confers on the defendant power to be exercised by regulations to establish a scheme which is to be "maintained by the Secretary of State".

11. By subsection (2):

"A scheme may be established for any purpose connected with-–

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

(b) improving the standards of buildings".

12. By subsection (3), the regulations must prescribe the descriptions of persons eligible to become members and the conditions that an eligible person must meet in order to become and remain a member. Subsection (4) provides a non-exhaustive list of membership conditions that may be prescribed.

13. Section 128(1), BSA 2022 provides that the defendant "may by regulations prohibit a person of a prescribed description from carrying out development of land in England …". The persons prescribed may include those who are eligible to be members of the scheme established under section 126 BSA 2022 and are not members of that scheme. The purpose of such prohibition is in the same terms as section 126 BSA 2022.

14. Section 129 BSA 2022 makes provision for the defendant to impose, by way of regulations, building control prohibitions on prescribed persons which prevent the person from applying for building control approval. The purpose of such prohibition is in the same terms as section 126(2) BSA 2022.

15. The defendant made the Building Safety (Responsible Actors Schemes and Prohibitions) Regulations 2023 ("the 2023 regulations") in exercise of the powers conferred by sections 126, 127, 128, 129 and 168 BSA 2022.

16. Regulation 5 establishes a scheme known as the Responsible Actors Scheme ("the Scheme"). The purpose of the Scheme is to

"secure the safety of people in or about buildings and improve the standard of buildings by securing that persons in the building industry remedy defects in buildings relating to fire safety and contribute to costs associated with remedying such defect in relation to buildings".

17. Regulations 6 to 8 set out the eligibility criteria to be a member of the Scheme. Regulation 13 makes provision for the defendant to invite eligible persons to apply for membership of the Scheme.

18. Regulation 14(2) provides that, where a person is invited to become a member of the Scheme, he must within 60 days either enter into a Self-Remediation Contract or give notice to the defendant, supported by evidence, that neither he nor anybody corporate in the same group is eligible to join.

19. If the person invited to join the Scheme does not comply with regulation 14(2)(a) or (b), then, after the expiration of 60 days, he will be treated as a person who is eligible to join the scheme but has not joined and he will have his name published on the prohibitions list. That is a list prepared, maintained and published by the defendant to which regulation 28 applies. Where regulation 28 applies, the applicable person is prohibited under regulation 29 from carrying out major development of land in England and, under regulation 33, is subject to building control prohibitions.

20. In my view, the Self-Remediation Contract is the mechanism which the defendant has adopted in order to implement the provisions in the BSA 2022 and the 2023 regulations by which eligible persons in the building trade are to join a statutory Scheme. I consider that the statutory underpinning of the contract is plain to see (see *De Smith*, paragraph 3-057 on statutory underpinning). I consider it is arguable that the defendant is discharging public functions by entering into the contract and exercising his powers on matters, such as designation and funding, in furtherance of the statutory purposes set out in section 126 BSA 2022, namely, securing the safety of people in buildings in relation to fire risk in light of the public concern following the Grenfell fire.

21. In both these respects -- that is to say, statutory underpinning and exercise of public functions-- this Contract is very different in character to the private law contracts referenced in the case law relied upon by the defendants.

22. Although the draft terms of the Contract were subject to negotiation with industry representatives, they are now in standard form and an eligible person, such as Rydon, either has to agree to them or accept the draconian consequences of being listed on the prohibition list which restricts eligible persons from pursuing a trade as a developer/builder. In my view, this is far removed from the "consensual submission" of the parties in purely private law contracts, which is an important reason for the

exclusion of such contracts from the scope of judicial review. As *De Smith* states at paragraph 3-060:

> "Whether or not a contract exists between the aggrieved person and the body, in some situations the body may be performing regulatory or other functions which create a situation where the person is left with the stark choice of either submitting themselves to the control of the body or not participating in the activity concerned. Here, it is submitted, judicial review ought in principle to be available to an aggrieved person, though if a contract exists a contractual claim will normally be an appropriate alternative remedy which may bar judicial review".

23. Counsel for Rydon drew my attention to the judgment of the Court of Appeal in *R (Redrow) v Secretary of State for Levelling up, Housing and Communities* [2024] EWCA Civ 651 concerning a challenge by Redrow of the Secretary of State's decision to enter into GFAs with the interested parties. In dismissing an appeal against a refusal of permission, the court rejected the argument that Redrow did not have standing to challenge the decision. Coulson LJ, at [[31], noted that the issue of standing would not arise in future, because the relationship between developers and the Secretary of State will be governed by a contract, meaning that any future challenge to funding would be a private law claim. I agree with counsel's submission that those remarks were obiter and, in any event, were concerned with issues of standing in the context of funding challenges, not the amenability of a claim to judicial review of the decisions taken in this case.

24. In my view, where the defendant is operating a scheme underpinned by statute and regulations and discharging public functions, it must be arguable that Rydon may rely on public law grounds as well as private law grounds in a claim for judicial review. It would not be appropriate to seek to restrict Rydon's grounds of challenge to fraud, corruption or bad faith and to exclude public law rights to procedural fairness and rational decision making on the part of public bodies. Whilst the defendant has produced authorities in support of such restrictions in purely contractual cases, I note that *De Smith* at paragraph 3-075 and *Fordham: Judicial Review Handbook* at paragraphs 34.5.2 and 34.5.4 refer to a number of cases in which public law challenges <u>on public laws grounds</u> (emphasis added) have been permitted in a contractual context.

25. In conclusion, I am satisfied that Rydon has an arguable case with a realistic prospect of success on the question whether the decisions are amenable to judicial review. Of course, this is not a final decision; it is merely a decision at permission stage.

The grounds of challenge

Ground 1 - the designation decision

26. The defendant's reasons for the Designation Decision were set out in the DL as follows:

> "The Contract permits the Secretary of State to 'designate' a Participant Developer where it, another company within its group, or a senior officer or director of the Participant Developer or of any member of its group has, inter alia:
>
> "been the subject of significant criticism in the findings of a public inquiry, or is currently a person whose conduct is under consideration by a public inquiry, regarding their performance or behaviour in connection with building safety matters such that the Participant Developer is reasonably considered by DLUHC to be unfit to carry out or procure the carrying out of Works in accordance with these Self-Remediation Terms and/or the Contract" (Annex 1 of the SRTs ….."
>
> Where a Participant Developer is deemed to be a Designated Participant Developer pursuant to this definition, DLUHC may:
>
> "Notwithstanding any other provisions of these Self-Remediation Terms and/or the Contract … either in relation to all relevant Buildings Requiring Work or such Buildings Requiring Work as it may determine, elect in its sole discretion (but acting reasonably) to:
>
> (1) require the Participant Developer to fund the Responsible Entity (via a funding agreement or otherwise) to undertake or procure the Works in accordance with Clause 6.1(iii), and not to undertake or procure the Works at its own cost in accordance with Clauses 6.1(i) and/or 6.1(ii)
>
> … or
>
> (2) require the Participant Developer not to undertake or procure the Works at its own cost in accordance with Clauses 6.1(i) and/or 6.1(ii), and to designate the Participant Developer's Buildings as Stage D Fund Buildings, such that the Participant Developer will reimburse the relevant Fund in accordance with Clause 13" (clause 7.7 of the SRTs….)."

27. The Defendant set out his reasons in support of the Designation Decision as follows:

> "The conduct of Rydon Maintenance Ltd ("Rydon Maintenance") in connection with its role as the lead contractor for the refurbishment of Grenfell Tower is currently under consideration by the Grenfell Tower Inquiry ("the Inquiry"). The Inquiry has heard concerning evidence that notwithstanding its responsibilities as lead contractor for the refurbishment, Rydon Maintenance failed to undertake proper due diligence before appointing subcontractors; that it lacked the expertise necessary to identify non-compliance of designs and buildings materials with statutory requirements and industry guidance; that it relied entirely on others to check these matters; that it did not have in place proper systems to establish whether subcontractors knew or had considered whether subcontractors knew or had considered whether designs and buildings materials complied with the relevant standards; and that it did not adequately supervise the quality of subcontractors' work (including where concerns had been raised).
>
> Rydon Maintenance is a subsidiary of and controlled by Rydon. In view of the troubling evidence heard by the Inquiry, Rydon is not currently considered to be fit to carry out or procure remediation works in respect of the three buildings referred in your 15 September 2023 letter…..DLHUC is prepared to consider further the designation of Rydon ….once the Inquiry's Phase 2 report is publicly available."

28. The Defendant then went on to consider the other 11 buildings for which Rydon was responsible, acknowledging Rydon's information that it had completed works in respect of 5 developments, was currently carrying out works in a further four which were due to be completed by 28 March. The Defendant concluded that he would not issue any directions under clause 7.7. of the Terms in respect of these four buildings and instead audit the qualifying assessments to be provided by Rydon on completion. The Defendant had not yet made a decision in respect of the other three buildings in Rydon's data return.

29. Rydon submitted that the Designation Decision was unlawful on the following grounds.

Ground 1A

30. In breach of natural justice, the defendant failed before reaching his decision to identify and/or provide the evidence given by Rydon Maintenance employees in evidence

provided by the IPs and the Greater London Authority to give Rydon an opportunity to respond to it.

31. In response, the defendant submitted there was no contractual obligation on the defendant to identify this evidence or to give Rydon an opportunity to respond. In any event, Rydon would have been well aware of the evidence provided to the Grenfell Inquiry,

Ground 1B

32. When deciding whether to designate Rydon, the defendant failed to take into account the following material considerations, namely, that, since the Grenfell fire, Rydon has successfully remediated 18 buildings without any concern being expressed as to the quality or the timeliness of those works. Rydon applied to amend this ground to add previously pleaded paragraphs 85(1) and (2), which contended that the defendant failed to take into account the fact that the remediation works to the buildings are to be undertaken by Rydon and not Rydon Maintenance. It appears that this ground was originally deleted in error when the pleading was amended.

33. In response to Ground 1B, as currently pleaded, the defendant submitted that there was no statutory or contractual obligation to take into account these considerations. They were not so obviously material that they had to be taken into account applying a *Wednesbury* irrationality test. In any event, these matters were adequately considered in the DL.

Ground 1C

34. The defendant failed to explain adequately or at all why the troubling evidence given by Rydon Maintenance employees to the Inquiry made Rydon unfit to carry out remediation works. It leaves Rydon unable to respond to the case made against it or to understand what it has to do to prevent further buildings being remediated through the Fund. Annex C to the first submission made by departmental officials to the defendant suggests there was no basis for designation.

35. In response, the defendant submitted that there was no requirement under the contract to explain his reasoning. In any event, he did provide sufficient reasons in the DL in

circumstances where Rydon must have been aware of the evidence given at the Inquiry, the barring of Rydon Homes in the light of that evidence, and the defendant's views.

Ground 1D

36. The defendant failed in his *Tameside* duty to investigate adequately or at all whether Rydon was a fit person to carry out or procure the remediation works.

37. In response, the defendant submitted that he was not required to conduct any particular form of investigation. In the exercise of his discretion, it was a matter for him to determine how to go about determining Rydon's fitness and what investigation was required. He is entitled to rely on the information already before him.

Ground 1E

38. The Designation Decision was vitiated by apparent predetermination. A fair-minded and informed observer, having regard to the first witness statement of Ms Ivanec and the documents disclosed by the defendant, would conclude that the evidence gave rise to a real possibility/risk that the defendant predetermined the decisions. This was evident from the fact that the analysis in Annex C pointed towards Rydon not being designated and the absence of any reasons from the defendant, when taking the decision on 4 January 2024 to designate Rydon. Further, or alternatively, the decision to designate Rydon was taken in bad faith and for an improper motive: namely, to make an example of Rydon because of its subsidiary's role as the main contractor for Grenfell Tower.

39. In response, the defendant submitted that there was no predetermination and Ms Ivanec's evidence did not support that allegation. The allegation of bad faith was hopeless. There was no evidence that the defendant was focused on making an example of Rydon. Even if there was political motivation which was denied, that would not provide a basis for a public law challenge. The subsidiary's role at Grenfell Tower was plainly relevant to the question whether Rydon was unfit.

Ground 1F

40. In deciding that Rydon was unfit to procure or carry out remediation works and/or that Rydon was a designated participant developer, the defendant manifestly reached a decision, which was *Wednesbury* unreasonable and/or in breach of the express requirement in clauses 7.7 and/or 13.2 of the Terms to act reasonably.

41. In response, the defendant submitted that the *Wednesbury* test does not apply to decisions made under contracts unless expressly incorporated. Furthermore, clauses 7.7 and 13.2 of the Terms do not apply here. It is the definition in Annex 1 that applies. I observe that the definition in Annex 1 also includes a reasonableness requirement.

Ground 2 - the 7.7(B) decision

42. The DL provided the following reasons for the 7.7(B) decision and the Fund decision.

> "….Each of these buildings suffers from life-critical fire safety defects. By default, they are classified by the SRTs as Stage C Fund Buildings, because at the time Rydon entered into the Contract as the Participant Developer for its group (15 September 2023), awards of full funding had been communicated to the Responsible Entities but the Grant Funding Agreements ("GFAs") had not yet been signed by all parties, DLUHC not yet having provided its countersignature.
>
> Had the GFAs been countersigned by DLUHC by 15 September 2023, the buildings would have been automatically classified as Stage D Fund Buildings and the planned works programmes would have commenced on or around 30 October 2023.
>
> Stage C and D Fund Buildings are to be contrasted with Stage A and B Fund Buildings (where no award of full funding has been communicated as at the date of the Contract). Whereas the default position is that Stage A and B Fund Buildings will be transferred to the relevant Participant Developer (see generally clause 12 of the SRTs), a Stage C Fund Building may only be transferred to a Participant Developer where it requests this in writing and "DLUHC, acting reasonably, accepts such request" (clause 13.2). Stage D Fund Buildings may not be transferred to Participant Developers to carry out remediation works themselves (see clause 13.8).
>
> …..
>
> Second, having determined that Rydon is a Designated Participant Developer DLUHC has decided to exercise its powers under clause 7.7 of the SRTs to direct Rydon not to carry out or procure remediation works itself in respect of the three buildings referred to in your 15 September 2023 letter. The three buildings will instead be retained within the BSF as Stage D Fund Buildings in accordance with clause

7.7(B), such that Rydon will reimburse the BSF in accordance with clause 13.8

In reaching this decision, DLUHC has carefully considered whether to require Rydon to fund directly the Responsible Entities to enable them to arrange the necessary remediation works (i.e. in accordance with clause 7.7(A) of the SRTs), instead of the Responsible Entities receiving the funding approved by the BSF. In this regard, DLUHC acknowledges evidence you have provided to the effect that the scope and cost of works may be reduced if the buildings are not retained within the BSF. However, DLUHC considers that there is a material risk that this course of action could lead to delays in the commencement of the works and has therefore decided to exercise its right under clause 7.7(B) to designate the three buildings as Stage D Fund Buildings instead. As noted above, the GFAs between the BSF and the Responsible Entities for the three buildings have already been prepared and the planned works programmes can therefore commence with minimum further delay.

Finally, DLUHC has separately considered whether, in the absence of Rydon's designation as a Designated Participant Developer, it would accede to Rydon's request for the three buildings to be transferred out of the BSF under clause 13.2 of the SRTs. In doing so, DLUHC has carefully considered the evidence provided by Rydon in support of the transfer request but has determined that the request should not be granted in any event. In particular, DLUHC notes that as at the date Rydon entered the Contract (15 September 2023), awards of full funding had been communicated to the Responsible Entities for the three buildings, and the GFAs had been drawn up and signed by all relevant parties save for DLUHC. Had DLUHC applied its countersignature by 15 September 2023, the buildings would have been automatically classified as Stage D Fund Buildings and the works programmes contemplated by the GFAs would have commenced as planned on or around 30 October 2023. In those circumstances, DLUHC considers that it is appropriate to regard the three buildings as being unsuitable for transfer, as would automatically be the case had they reached Stage D by the time Rydon entered the Contract."

43. Rydon alleges that the Clause 7.7(B) Decision was vitiated by three errors of law.

Ground 2A

44. The defendant took into account an irrelevant/immaterial consideration, namely, that, if the GFAs had been signed by 15 September 2023, the Buildings would have been Stage D Fund Buildings, and further failed to take into account that, as at 15 September 2023,

he had not signed the GFAs for the buildings and the Buildings were, therefore, Stage C Fund Buildings not Stage D.

45. In response, the defendant submitted that Rydon had misstated the defendant's reasons for the Clause 7.7(B) Decision. It was reasonable for him to take into account there was a set of GFAs which could be executed promptly if a clause 7.7(B) direction was issued, whereas, if he made a clause 7.7(A) direction, this would require a funding arrangement to be agreed between Rydon and the RMCs. There was a pressing public interest in remediating the buildings as soon as possible.

Ground 2B

46. The defendant relied on what the position would have been if the GFAs for the buildings had been signed by 15 September 2023 and, as a matter of fact, the GFAs had not been signed, thereby rendering clause 13.2 of the terms completely nugatory and depriving Rydon or any participant developer from succeeding in having a Stage 3 building transferred out of the Fund. In doing so, the defendant acted unreasonably in the *Wednesbury* sense and/or in breach of clause 7.7 of the Terms to act reasonably.

47. In response, the defendant submitted that the *Wednesbury* test does not apply to decisions under contracts unless expressly incorporated. In any event, the defendant's alleged position was not unreasonable. As already indicated under Ground 2A, the defendant's position had been misstated by the claimant.

Ground 2C

48. In breach of natural justice, before reaching the Clause 7.7(B) Decision, the defendant failed to disclose the evidence on which he subsequently based his assertion that:

    i. there was a material risk that transferring the buildings could lead to delays in their remediation and/or give Rydon an opportunity to respond to that evidence;
    ii. the responsible entities were in a position to commence work on the Buildings and/or to give Rydon an opportunity to respond to that evidence. In doing so, the defendant manifestly adopted an unfair procedure.

49. In response, the defendant submitted that his responses made to Ground 1A applied here too. There was no contractual obligation on the defendant to identify this evidence or to give Rydon an opportunity to respond.

Ground 2D

50. The defendant acted unreasonably in the *Wednesbury* sense and/or in breach of the requirement in clause 13.2 of the Terms to act reasonably, in that he relied on:

    i. purported material risk of delay to the remediation works, when Rydon had indicated that it would have been in a position to start the works within 28 days of the Buildings being transferred out of the Fund and that any delay was attributable to DLUHC taking in excess of five months to determine Rydon's application. Had the defendant determined the application within a reasonable period of time, Rydon could have commenced the remediation works before 28 February 2024. Furthermore, by failing to engage constructively in good faith negotiations, as required by clause 17 of the Terms, the defendant substantially contributed to the delay to the remediation works that Rydon would have carried out by now.

    ii. the Fourth IP being able to start the remediation work to the buildings when there was no evidence to that effect.

51. In response, the defendant reiterated that the *Wednesbury* test is not applicable to contracts unless expressly incorporated. Further, the matters relied on by Rydon could not be considered unreasonable for the purpose of clause 13.2 of the Contract. Clause 13.2 affords the defendant a wide discretionary power to accept or to refuse transfer requests. It was neither irrational nor inconsistent with the terms for him to have regard to the point at which a BSF application was reached, nor was it irrational to suggest that there was a risk of delay.

Ground 2E

52. The Clause 7.7(B) Decision was, like the Designation Decision, vitiated by apparent predetermination. Further or alternatively, it was taken in bad faith and for an improper

motive, namely, to make an example of Rydon because of its subsidiary's role as the main contractor for Grenfell Tower.

53. In response, the defendant repeated his earlier response made under ground 1E.

Ground 2F

54. As is clear from annex D, the defendant's decision not to transfer the buildings was entirely predicated on his Designation Decision which itself was flawed and unlawful.

55. In response, the defendant submitted that the Designation Decision was not unlawful for the reasons already given.

Ground 3 - the Fund decision

56. Rydon submitted that the defendant's decision not to transfer the buildings to Rydon and to require Rydon to reimburse the Fund was premised on two reasons: first, by transferring the buildings to Rydon, there was a material risk that doing so would lead to delays in the commencement of works and that the GFAs between the Fund and the responsible entities allowed the works programme to commence with minimum further delay; secondly, that, if the defendant had at 15 September 2023 entered into the GFAs, the buildings would have automatically been classified as Stage D Fund Buildings and the works would have started on or about 30 October 2023: Rydon submitting that the Fund decision was unlawful on the following grounds.

Ground 3A

57. The defendant acted unreasonably in the *Wednesbury* sense and/or in breach of the requirements in clause 13.2 of the Terms to act reasonably, in that:

    i. he gave as a reason that, had DLUHC countersigned the GFAs by 15 September, works programmes contemplated by the GFAs would have commenced on or about 30 October 2023. That reason was wholly inconsistent with the Annex D analysis.
    ii. he relied on what the position would have been if the GFAs for the Buildings had been signed by 15 September 2023 when, as a matter of fact, the GFAs had not been signed, thereby rendering clause 13.2 of

the Terms completely nugatory and depriving Rydon from succeeding in having a Stage 3 Fund Building transferred out of the Fund.

iii. the consequence of the Fund decision was that Rydon will be expected to reimburse the Fund for the costs of remediating the Buildings to a substantially more extensive standard of remediation (i.e. the CAN standard) which exceeds the standard required by the contract (PAS 9980) to make the building safe. It was estimated that the difference was approximately £8 million.

Ground 3B

58. Like the other two decisions, the Fund Decision was vitiated by apparent predetermination, improper motive and bad faith.

59. In response to Ground 3, the defendant submitted that Rydon misstated the basis for the defendant's decision not to transfer the buildings to Rydon and to require Rydon to reimburse the Fund. The defendant repeated the same response to ground 3A as previously submitted under ground 1A, and reiterated the previous response to the allegation of bad faith.

Conclusions on grounds 1 to 3

60. I do not consider that the allegations of bad faith in Grounds 1E, 2E and 3B are arguable with a realistic prospect of success. *Fordham: Judicial Review Handbook* states at 52.1:

> "Bad faith is a strong accusation not lightly to be made, it is difficult to prove and is rarely encountered. There are always readily available alternative characterisations, such as bias, improper motive, failing to promote the legislative purpose".

61. In my view, in this case, none of the evidence comes close to supporting the very serious allegation of bad faith.

62. Aside from the bad faith allegations, I consider that the Grounds have passed the relatively low threshold for permission set out by Lord Sales in *Attorney General of*

Trinidad and Tobago v Ayers-Caesar [2019] UKPC 44 at [2]. Rydon has demonstrated arguable grounds with a realistic prospect of success.

63. I consider that the proposed amendment to Ground 1B is also arguable and so I allow the amendment. Even though the defendant distinguished between the two companies, it is nonetheless arguable that the significance of the distinction was not appreciated in circumstances where Rydon Maintenance would play no part in remediation works. The defendant has been aware of this contention which Rydon has made on a number of occasions, and it will have the opportunity to address the allegation more fully in the detailed grounds of defence.

Alternative remedy

64. The defendant submits that Rydon should pursue its alternative remedy, namely, a private law claim for breach of contract. He points out that Rydon has alleged breaches of the contractual requirement to act reasonably. In my view, the grounds for judicial review are more extensive than those which would be available to Rydon in a private law claim. The defendant has submitted that the contractual remedies are essentially restricted to disputing on the limited grounds in paragraph 13.17 to 13.25 of the terms (see paragraph 35 of the amended summary grounds of defence). Those limited grounds relate to the amount of the reimbursement. I also consider that the potential remedies in judicial review are more extensive than a private law claim: i.e. declarations, quashing orders, as well as damages.
65. For these reasons, I do not consider that permission should be refused on the basis that Rydon has a suitable alternative remedy.

Is the claim academic?

66. The defendant accepts that the challenge to the Designation Decision is not academic, but submits that the challenges to the Clause 7.7(B) Decision and the Fund Decision are academic, because the works on the Buildings will be largely or wholly complete by the time this claim is concluded.

67. In my view, these challenges are not academic as whether or not the defendant complied with his public law duties in reaching these decisions is going to be relevant to any dispute with the defendant in relation to reimbursement of the costs of the remediation. Also there are at least three further buildings for which Rydon is responsible and for which the defendant has not yet made a decision under the contract.

68. Therefore, permission to apply for judicial review is granted on all grounds other than the allegation of bad faith under grounds 1E, 2E and 3B and I also grant permission to amend ground 1B.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 46 Chancery Lane, London WC2A 1JE
Email: civil@epiqglobal.co.uk