FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CN/HER/2020/0002**
HMCTS	**:**	**V:CVPREMOTE**
Property	**:**	**St Cecilia's, Okement Drive, Wednesfield, Wolverhampton, WV11 1XD**
Applicants	**:**	**The Lessees of St Cecilia's** **St Cecilia's RTM Co Ltd**
Representative	**:**	**Pennycuick Collins Chartered Surveyors**
Respondent	**:**	**City of Wolverhampton Council**
Representative	**:**	**David Taylor – Counsel**
Type of Application	**:**	**An appeal against an Emergency Remedial Action Notice under section 45 Part 1 Chapter 3 of the Housing Act 2004.**
Tribunal Members	**:**	**V Ward BSc (Hons) FRICS** **Judge D Barlow** **A Lavender BSc (Hons) Dip Surv MCIEH**
Date of Hearing	**:**	**26 August 2020**
Date of Decision	**:**	**21 September 2020**
Date of Reviewed Decision	**:**	**28 January 2021**

REVIEWED DECISION

REVIEWED DECISION

Following an appeal by the Respondent, the Tribunal has reviewed its decision in respect of this matter. The review decision is attached as an addendum to the original decision.

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Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: CVPREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Under Rule 33A the Tribunal has directed that the hearing be recorded using UK Courts Skype. Any person may apply, within 28 days of the date of this Decision to the Regional Manager, First-tier Tribunal Property Chamber for the Midlands Region for an audio copy of the recording to be supplied to them electronically. A copy of the recording will be made available for the sole purpose of the fair and accurate reporting of the judicial proceedings of the First-tier Tribunal. The re-use, capture, re-editing or redistribution of the recording of the hearing in any form is not permitted. Any such use could attract liability for breach of copyright or defamation and, in some circumstances, could constitute a contempt of court.

DECISION

Under section 45 (6) of the Housing Act 2004, the Tribunal reverses the decision of the Respondent Local Authority to take Emergency Remedial Action. The Emergency Remedial Action Notice dated 10 March 2020 is quashed.

Background

1. On 10 March 2020, the City of Wolverhampton Council, the Local Housing Authority and Respondent served an Emergency Remedial Action (ERA) Notice ("the Notice") on the Lessees of St Cecilia's, Okement Drive, Wednesfield, Wolverhampton under section 40 of the Housing Act 2004 ("the Act").

2. On 7 April 2020, St Cecilia's RTM Co Ltd appealed to the Tribunal on behalf of its members, the Lessees of St Cecilia's. St Cecilia's RTM Co Ltd ("the RTM Company") is a right to manage company set up under the Commonhold and Leasehold Reform Act 2002 to manage the St Cecilia's development and has responsibility for repairs in respect of the same. Pennycuick Collins Chartered Surveyors ("PC") are the managing agents appointed by the RTM Company.

3. The Tribunal understood that ERA Notices were served on all the Lessees of St Cecilia's. Accordingly, the Tribunal considered that the Lessees of St Cecilia's and also St Cecilia's RTM Co Ltd should be noted as Applicants in this matter. The parties were invited to object to this proposal, but none did.

The Notice and supporting documents

4. The Notice dated 10 March 2020 confirmed the following:

    a) That a category 1 hazard exists on the premises as set out in Schedule 1 to the Notice and
    b) The Authority was further satisfied that the hazard constituted an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises and
    c) No management order is in force 'in relation to the premises under Chapters 1 or 2 of Part 4 of the Housing Act 2004.

    The remedial action to be taken by the Authority was specified in Schedule 2 to the Notice.

5. Schedule 1 states as follows:

    Schedule 1

Nature of the hazard — Fire

The residential premises on which this hazard exists - St Cecilias Okement Drive, Wolverhampton West Midlands. WV11 1XE/1XD

The deficiencies giving rise to the hazard:

1.) The main route of escape from the stairwell to the final exit door is not fire protected to a 60-minute standard. Flat entrance doors open onto the ground floor lobby area, compromising the protected route of escape from the building.
2.) Door sets to the stairwell are not certified 30-minute fire resistant and contain deficiencies which undermine their fire resistance.
3.) The door set to the rear of the ground floor lobby is ineffective in location and is not certified 30- minute fire resistant.
4.) The stairwell contains no smoke ventilation.
5.) The flat entrance doors to the ground floor flats open opposite the lift shaft'(117 and 118) and are not certified 60-minute fire resistant. They also contain deficiencies which undermine their fire resistance. They pose a risk of smoke and fire spread into the lobby and lift shafts if a fire occurs within these flats.

6. Schedule 2 states as follows:

Schedule 2

The premises in relation to which emergency remedial action has been/is to be taken by the authority:

St Cecilias, Okement Drive. Wolverhampton, West Midlands, WV11 1XE/1XD

Nature of the remedial action

Number	*Intended Remedial Action*
1	*Provide a 60-minute fire protected corridor from the base of the stairwell to the final exit of the building. This will segregate the flat and lift doors in the ground floor lobby.*
2	*Replace all stairwell door sets with 30-minute fire resistant door sets complete with intumescent strips, smoke seals. three hinges. self-closing device and all other relevant furnishings.*
3	*Construct a 30-minute fire resistant partition wall (inclusive of fire door also to 30-minute fire resistant standard) to segregate the rear exit door from flat no.118 and the lift doors.* *Fire door to be provided with intumescent strips, smoke seals, three hinges and self- closing device and all other relevant furnishings.*

4	*Undertake works to reinstate the ventilation provisions at the head of the stairwell equal to when the building was originally constructed.*
5	*Replace existing front door sets to flat no.118 with 60-minute fire resistant door sets complete with intumescent strips. smoke seals, three hinges, self-closing device and all other relevant furnishings.*
6	*Any other ancillary works to facilitate the actions identified in items 1-5.*

This remedial action is to be undertaken using powers under section 40 of the Act.

<u>The date on which the remedial action was taken/proposed to be taken</u>

3rd March 2020 until 1st June 2020

7. The Statement of Reasons attached to the Notice was as follows:
STATEMENT OF REASONS FOR DECISION TO TAKE ENFORCEMENT ACTION

Details of residential premises:

Communal areas of St Cecilia's, Okement Drive, Wednesfield WV11 1XE I 1XD

Wolverhampton City Council ("the Authority) hereby give this statement of the reasons for their decision to take enforcement action ("the relevant action") in respect of the above premises under section 5(2) of the Housing Act 2004 ("the Act") namely:-

Emergency Remedial Action

The authority is satisfied that serious hazards exist at the above premises that pose a serious imminent risk to the health or safety to occupiers and visitors to the premises and that emergency remedial action has to be taken in respect of those hazards.

The reasons why the Authority has decided to take the relevant action rather than any other kind (or kinds) of enforcement action under the provisions of section 40 of the Act are as follows:—

Factors considered:

- ***Consultation with owner/manager*** *- The owner has been consulted with on the issue of fire safety in the communal areas. The consultation resulted in no realistic prospect of the owner carrying out the required works. Although the manager has commenced a consultation process with the residents of the building for improvement works in relation to fire safety. This process could take considerable time which leaves the building occupants at an unacceptable health and safety risk.*
- ***Communication with residents*** *- The Authority have communicated with residents who may be affected by inspections to the building, however no consultation has been had in relation to fire safety measures in the building. It is felt that as this is an emergency circumstance, a consultation process would delay the Authority in maintaining safety in the building. Should time be available, consultation with residents will be considered.*
- ***Consultation with Fire Brigade*** *— West Midlands Fire Authority have been consulted with and are in full support of the Authorities intended course of action.*
- ***Local housing need and strategy*** *— Local housing availability is scarce considering the size of the above premises. This results in other options available under the Housing Act 2004 being unrealistic practically.*
- ***Value of property and level of rents in the area*** *— The value of property in the building has been deemed enough to justify the proposed improvement works in order to retain resident occupancy.*
- ***Consideration of Conservation Area/Planning status*** *— There are no known conservation or planning implications in relation to the works proposed.*

Emergency Remedial Action *- It was considered that the taking of Emergency Remedial Action was the most appropriate action to deal with the hazard category of 'Fire', which posed a serious imminent risk to the health and safety of occupiers and visitors to the premises. The proposed remedial works are deemed to be reasonable and proportionate as an interim measure and not overly intrusive to the occupiers. This will allow the building to be assessed in more detail. To take other action would undermine the urgency of the fire safety issue identified.*

Improvement Notice *- It was considered that the service of an Improvement Notice was not the most appropriate action to deal with the hazards identified in the premises as immediate action was required to deal with the risks encountered.*

Hazard Awareness notice *- The significant nature of the hazards and the risks they pose to occupiers and visitors to the property would not warrant the service of a Hazard Awareness Notice. This is because advising the person*

responsible of the existence of hazards and not requiring remedial action is not considered appropriate.

***Prohibition Order** - It was considered that emergency remedial action needed to be taken in this case and therefore the serving of a Prohibition Order was not considered the most appropriate response to this situation.*

***Emergency Prohibition Order** - Although the hazards encountered posed a serious imminent risk to the health and safety to occupiers and visitors to the property, the making of an Emergency Prohibition Order was not considered appropriate in this case as the remedial works are deemed to be reasonable and not overly intrusive to the occupiers. Serving an Emergency Prohibition Order also does not immediately resolve the risk to health and safety should the occupier choose to remain in their residence.*

***Suspended Action** - There are no good reasons known to the authority that would warrant considering serving a Suspended Improvement Notice or Suspended Prohibition Order for a period.*

***Demolition order**: Would involve the demolition of the premises.*
This course of action has not been deemed the most appropriate as it would not quickly resolve the immediate health and safety to residents in the building.

***Clearance area**: Would involve the demolition of the premises and others in an area of otherwise unsatisfactory dwellings. This course of action has not been deemed the most appropriate as it would not quickly resolve the immediate health and safety to residents in the building.*

The most appropriate course of action
With regard to enforcement option listed above the preferred course of action is Emergency Remedial Action and the other options can be discounted.

8. A further ERA Notice was served on 8 June 2020 (with a statement that it was served without prejudice to the original notice) in the same format as the original save that remedial action would commence on 3 June 2020 but did not specify a completion date.

Inspection

9. The Tribunal Chair carried out a limited external inspection of the Property on 19 August 2020. St Cecilia's is a tower block of 119 flats arranged over 20 floors with the upper floors served by two lifts. The building appeared to have been constructed during the 1960s. There is car parking on site.

   Participants in the inspection were as follows:

For the Applicants:

Robin Hacking	Chair of St Cecilia's RTM Co Ltd
Lyndsey Cannon-Leach	Director Pennycuick Collins Chartered Surveyors
David Baker	Director & Building Surveyor Pennycuick Collins Chartered Surveyors

For the Respondent:

Edward Langley	Environmental Health Officer WCC

Hearing

10. The Applicants had indicated that they were happy with a paper determination however due to the complexities of the case, the Tribunal convened an oral hearing which was held on the CVP video platform on 26 August 2020.

Participants in the hearing were as follows:

<u>For the Applicants:</u>

Robin Hacking	Chair of St Cecilia's RTM Co Ltd
Lyndsey Cannon-Leach	Director Pennycuick Collins Chartered Surveyors
David Baker	Director & Building Surveyor Pennycuick Collins Chartered Surveyors

<u>For the Respondent:</u>

David Taylor	Counsel for the Respondent
Chris Simmonds	Solicitor City of Wolverhampton Council (WCC)
Edward Langley	Environmental Health Officer WCC
James Turner	Private Sector Housing team leader WCC
William Humphries	Service Manager WCC
Stewart Hitchcox,	Section Leader Building Control WCC
Simon Bamfield,	Head of Commercial Services & Stock Investment Wolverhampton Homes (an organisation that manages the Respondent's housing stock)
Phil Dolphin	West Midlands Fire Service (WMFS)
Mia Temple	West Midlands Fire Service (WMFS)

Preliminary Issues

11. At the hearing, the Tribunal initially dealt with two preliminary issues.

12. The Tribunal confirmed that it was dealing with an appeal against the Notices served on 10 March 2020 and not the Notices served on 8 June 2020. The parties agreed that the Tribunal could proceed on that basis.

13. There was a suggestion within the Respondent's skeleton argument that the appeal was out of time. The Tribunal confirmed that it received an email from PC on 7 April 2020 asking for an extension of time to lodge the appeal to 17 April 2020, due to delays obtaining legal advice as a consequence of issues surrounding Covid-19. The appeal should have been filed by 31 March 2020, so they were already late, however in the opinion of the Tribunal had provided a reasonable excuse. The Tribunal responded on 7 April 2020, copying in James Turner, an officer of the Respondent, to say that the Tribunal intended to treat the letter as an appeal under section 45 of the 2004 Act against the Notice dated 10 March 2020 - and gave directions for an application in the correct form to be filed.

14. The Respondent did not raise any issue on the late appeal until the strike out application made on 22 May 2020 when it was mentioned as an afterthought, to the main grounds. The strike out application was refused. At the hearing the parties, and in particular the Respondent, confirmed that the appeal was valid.

The submissions of the Parties (both in writing and at the hearing)

The Applicants

15. Submissions on behalf of the Applicants were made by Lyndsey Cannon-Leach and David Baker, Directors of PC and also by Mr Hacking, chair of the RTM Company.

16. Initially, Ms Cannon-Leach explained the history of her firm's involvement with the Property. In 2013, PC were appointed to commence the right to manage process by the St Cecilia's Residents Association. This led to St Cecilia's RTM Company Limited obtaining the right to manage on 1 September 2014 and PC being appointed as managing agents.

17. At the time of appointment, the building was reviewed, and a reserve fund plan prepared taking into account the Lessor's covenants under the terms of the lease. A Health and Safety survey and Fire Risk Assessment (FRA) was also commissioned.

18. Works carried out to date include the following:

    - The installation of external wall insulation to the building in January 2015 work commenced to install a rockwool mineral slab to all external faces of the building.
    - The lift motor room roof has been recovered and patch repairs to the main roof undertaken.

- The lifts have been upgraded and autodiallers fitted within.
- The communal front door has been replaced.

19. In August 2016, a fire occurred in Flat 7. The fire started from a television in the bedroom located by the flat front door. The fire did not breach the compartmentation of the flat and there was no smoke damage within the flats either side or above and below. At the time of the fire, PC were advised smoke damage occurred to the common area when the fire service forced the door to enter the premises. In total, Ms Cannon-Leach explained that there have been 4 fires in St Cecilia's. Two of these have been whilst PC have managed the development.

20. Following the fire in Flat 7, in 2017, Steve Clegg the Fire Safety Officer of Fallings Park, the Black Country North Fire Safety Team of West Midland Fire Service (WMFS) requested a copy of the FRA and a meeting onsite to review this and inspect the common areas. PC provided the FRA and a meeting was held on 23 October 2017. Minutes of the meeting along with subsequent email correspondence was exhibited. As a result, some revisions were made to the 2018 FRA and all recommended improvements by WMFS undertaken.

21. Following the fire in Flat 7, Mr Clegg arranged for Safe and Well (fire safety advice) visits to a number of flats by WMFS. Under the terms of the Lease, the responsible party for the installation of fire detection within the flats is the leaseholder; the Third Schedule of lease states that the demise of a flat includes the *"floors ceilings, roofs (if any) walls doors and windows bounding the same…"*.

22. WMFS again inspected the Property on 19 November 2018 and a report was prepared dated 9 January 2019 ("the WMFS report") and required the works specified to be completed within approximately 3 months. This report is considered significant and is reproduced in full, in Appendix Two. We understand that WMFS consulted with WCC in relation to the content of this report.

23. Following receipt of the report, an onsite meeting was held on 7 March 2019 with Edward Langley, Environmental Health Officer of WCC and WMFS. The Respondent by way of a letter dated 15 March 2019 advised that they inspected a number of flats and compartmentation concerns were identified between floors. There was a lack of non-working automatic detection and residents had a lack of knowledge and understanding of the stay put policy.

24. During the initial meetings, PC explained to WMFS and the Respondent, of the restrictions under the terms of the lease and the inability to raise additional funds. The lease at St Cecilia's does not allow additional charges and the budget for 1 January to 31 December 2019 had been issued on 29 November 2018. Plus, the impact of section 20 of the Landlord and Tenant Act 1985 (as amended by the Commonhold and Leasehold Reform Act 2002) which requires leaseholder consultation when more than £250 per leaseholder is being expended on major

works, although if required due to the urgency of work an application to the First-tier Tribunal for dispensation of the section 20 procedure could have been made. The financial restrictions of a number of lessees were also conveyed as many were on limited incomes meaning undertaking all of the works in one phase may have created an arrears problem at the development.

25. Further meetings between PC, the Respondent and WMFS were held in April and June 2019.

26. At the RTM Company Directors' meeting on 2 July 2019, instructions were confirmed to issue a notice of intention under section 20 of the Landlord and Tenant Act 1985 and a specification for works.

27. An update was provided to Joy Blakeman on 20 August 2019. This requested that due to the extent of the works required at St Cecilia's an agreed priority approach between the RTM Company and WMFS be agreed where works were phased over 5 to 7 years. On 23 September 2019, the Applicant was advised that WMFS could not agree to this for the works detailed in the WMFS report.

28. On 18 October 2019, WMFS cancelled a planned meeting with the Applicant and advised that they were meeting on 11 November 2019 with the Respondent to formulate a joined-up approach. PC requested on behalf of the RTM Company to join this meeting however this was declined and a further meeting with WMFS scheduled for 14 November 2019 was cancelled.

29. PC state that they urgently tried to rearrange the meeting so that that could ensure an agreed approach between WMFS and the RTM Company so that PC could draft the 2020 service charge budget satisfactorily and develop an understanding over the phasing of works; if the Applicant could proceed with the high priority items in 2020 and complete other works in the coming service charge year(s).

30. At an RTM Directors' meeting on 23 October 2020, the Directors agreed to commence work to the stairwell doors followed by the lobby doors and that this should be factored within the 2020 budget.

31. A meeting was held on 14 November 2020 with PC, WMFS and the Respondent at the Civic Centre, Wolverhampton. PC advised of their phased approach to undertake urgent works to the Building. It was agreed that the fire strategy for the building should change from Stay Put to Stay Safe Stay Well (Evacuation) and this was communicated to the leaseholders. The fire strategy was reviewed and updated and once in place communicated to all leaseholders, residents and communal area signage updated.

32. On 28 November 2019, an RTM Directors meeting was held, and it was agreed that the Applicant would undertake the high priority items on the WMFS report within 2020 as follows:

- Fire doors to the stairwells and the internal lobby doors where there were disabled people residing
- Replace the smoke vent;
- Amend the ground floor lobby;
- Address compartmentalisation between flats by fitting collars to stack pipes.

33. At a meeting on 19 December 2019, the Respondent advised they would be serving a notice under the Housing Act 2004 due to the urgency of the work. The scope of works included reconfiguration of the ground floor, installation of smoke vent and replacement stairwell doors. The Applicants did not appreciate at this meeting that the Respondent would not be in a position to commence the works until March 2020, and have since realised that as the ERA works only covered certain items, they could, in any event, have afforded these works from their reserve fund, had the Respondent cooperated with them in identifying the most essential works earlier in 2019.

34. There were efforts between the parties to reach agreement however the Applicants consider that changes in personnel at the Respondent and WMFS have not assisted this situation. This was not accepted by the Respondent.

Works within the WMFS Report that have been completed/in progress by St Cecilia's RTM at the time of the appeal are as follows:

- Installation of the override electrical button to the front entrance door;
- Various repairs to the duct/utility cupboard doors (ongoing as occasionally they are vandalised);
- Installation of fire plate to bin chute.
- An order has been placed for the rebuilding of the bin store. This work was due to commence 29 June 2020. Works were ready to proceed during the early part of 2020 but were delayed due to the proposed works by Respondent as the Applicant did not wish to have two sets of contractors working onsite at the same time.
- Works to the lobby door break-sets commenced in February 2020 and the Applicant has replaced 24 doors and have been working through the lockdown as it is deemed that these are essential works and should continue with the contractor ensuring government guidelines are followed. The replacement doors are being signed off by a third party to ensure compliance with the guidance and the first door has already been inspected which has led the Applicant to continue with the replacement. It had initially been the intention to replace the lobby

break-sets only on those floors where vulnerable residents reside as per the plan shown at LCL347 which has been presented to WCC and WMFS. However, the Applicant decided that as funds permit all lobby break-set doors will be replaced in 2020.

- Flat Entrance Doors. These are the original flat doors. An inspection of the flat doors has identified that these have a black dot on them and a third-party fire risk assessor (Kevin Boreham Fast R Solutions) has advised that these are fire rated. Part One of the Third Schedule (The Said Flat) of the lease as highlighted in paragraph 17 of this statement demonstrates that the maintenance of the doors are the leaseholders responsibility. The cost allocated under 10.5.5 of the Respondent's bundle must therefore not form part of any potential recharge to the leaseholders.
- Smoke Ventilation provision to the Stairwell. The Applicants agree that this work should be undertaken and obtained two quotations.
- Duct/Utility Cupboards. Repairs have been undertaken to these items and the condition is continually reviewed on site visits and any repair work identified, instructed.
- Ground Floor Reconfiguration. The Applicants made representations in respect of the Respondent's proposed design configuration to the ground floor. No response from the Respondent has been received. The design proposed by the Applicant has been priced. There is contention between the parties as to whether or not building regulation approval had been granted for the existing ground floor layout.
- Stairwell Doors. The Applicants had intended to undertake these works within the first phase of fire prevention works as it is not disputed that they needed to be done.

The Respondent's Mobilisation Plan and the RTM's Position

35. A copy of the Respondent's mobilisation plan was received by the RTM on 8 June 2020. This appeared essentially to a spreadsheet setting out the phasing of works against dates from 20 May 2020 to completion on 9 July 2020. The appeal to the Tribunal was made on 17 April 2020 however according to the mobilisation plan, an order at this point had not been placed by the Respondent. The intention of the appeal was that the RTM Company could as had been originally intended take over the works at a lower cost to the Leaseholders.

36. With the benefit of time, due to works not commencing onsite until at least 5 months after they were declared urgent by the Respondent, the RTM Company had been in a position to obtain tenders and could have successfully completed the works identified in section 20 consultation process.

37. The Applicants consider that the speed of the RTM works since the appeal have increased significantly and continued through the lockdown period although those

proposed by the Respondent were delayed. The RTM Company has funding for all high priority works save for the communal electrical works.

38. The Applicants state that they were advised by the Respondent that they would not serve an improvement notice as it was deemed inappropriate due to the timeframe to deal with matters raised and the section 20 consultation that would be required. It is the Applicants' view that the alleged delay of having to consult is not a reason to not serve an improvement notice as urgent dispensation of the consultation procedure can be sought from the Tribunal. Additionally, the time in which it has taken for the Respondent to carry out the works would have allowed for consultation to be carried out in any event.

39. The Applicants state that there would have been considerable benefits for the RTM Company taking over the works; they would have been done earlier in the year and at lower cost.

40. It is therefore believed that Respondent should have afforded the RTM Company the opportunity to do the works within the emergency remedial action notice themselves and that an improvement notice would have been more appropriate in the circumstances.

Comments from individual Leaseholders

41. The Applicants provided copies of proforma letters sent by leaseholders to the Respondent essentially complaining that works were being carried out after the RTM Company had appealed and at a significantly greater cost - £840 per flat as opposed to £327 per flat. These letters were from the leaseholders of:

    Flats 1, 5, 6, 8, 9, 10, 11, 12, 20, 23, 29, 31, 32, 34, 37, 39, 40, 51, 54, 56, 57, 58, 59, 62, 63, 67, 69, 70, 75, 82, 84, 85, 92, 93, 94, 95, 98, 99, 100, 101, 102, 103, 105, 106, 108, 109, 110, 112, 113, 118 & 119.

The Respondent's reply

42. The Respondent's HHSRS assessment was undertaken on 16th December 2019. It revealed the existence of a category one hazard (fire) which was assessed by the Respondent as posing an imminent risk of serious harm to the residents of the Property.

43. The Respondent considered the various enforcement options available to them under the Act as required by section 5 and concluded that Emergency Remedial Action was the most appropriate enforcement action in relation to this hazard in order to ensure the safety of occupants of the Property. Accordingly, on 20 December 2019, the Respondent served upon the Applicants notices of intention to enter under section 40 of the Act, for the purpose of taking remedial action,

being satisfied that the fire hazard involved an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises and on 10 March 2020, served the Notices of Emergency Remedial Action on all leaseholders.

44. The Respondent's comments about the events leading to the service of the Notice and in response to the Applicants' statement are as follows.

45. It was noted that PC purport to be experts in the management of residential properties. PC took over management of the building in September 2014, and so well in advance of the issues which subsequently came to the attention of the Respondent in 2019. It is clear that PC were mindful of the fire safety issues at the outset of their management responsibilities given the commission of various surveys.

46. The Respondent notes that the Applicants were able to secure £200,000 of Leaseholder's funds in order to install External Wall Insulation to the building in late 2014. This is stated to have been carried out in order to reduce liability for external building decoration costs and secured a marked visual improvement to the building. However, although the thermal insulation would reduce heating costs, the Respondent would question why visual improvements to the Property appear to have been prioritised over fire safety concerns. This is particularly so given the commission of the surveys around the same time as these works.

47. The Respondent considers that the repairs to the lift motor room, upgrades to the lift and replacement of the communal front door are routine repair works which should have been completed in any event, and there is no reference to any works in relation to fire safety.

48. It was noted that there have been fires at the Property previously which did not breach compartmentalisation, however the Respondent would dispute that these limited instances are reliable proof of adequate compartmentation throughout the entirety of the Property. Furthermore, the Respondent does not consider that it is a reliable indication of the likely outcome of any future fires.

49. The Respondent made enquiries with WMFS and was advised by Phil Dolphin (Station Commander) that an inspection in 2017 was carried out as a result of a letter from the Cabinet office on 28 June 2017, which asked for public sector estate safety checks following the Grenfell fire incident. WMFS undertook safety checks across all high-rise buildings in the area, where possible to ensure that the maximum number of people were made safe.

50. Ms Dolphin explained that Fire Safety in buildings was devolved to the responsible person, as detailed at length in the Regulatory Reform (Fire Safety) Order 2005. In this instance the responsible person would be PC as the managing agents of the

Property on behalf of the Applicants. Therefore, the Respondent would submit that it is the role of WMFS to enforce the order, but that the responsibility for the detection and resolution of fire safety issues remained with PC and the Applicants.

51. In October 2017, as stated above by Ms Cannon-Leach, WMFS and PC met on site. The notes of that meeting taken by Ms Cannon-Leach indicate that the matters discussed covered the following matters:

- Locks on various doors and riser cupboards
- Emergency over ride on barrier and lift
- Dry riser signage and cable ties
- The checks required on hose reels
- Removal of stored goods
- PC to advise WMFS of vulnerable residents
- Upgrades to lift cars

50. The follow up email from WMFS confirmed some of these details and also provided a flyer for the "Safe & Well" check offered by the Fire Service. In the opinion of the Respondent, it is clear that this meeting was regarding the response of the Fire Service should there be a fire, rather than undertaking a detailed inspection of the Property itself.

51. The Respondent further contends that, although the report was provided from WMFS in January 2019, the issues identified within that report were or should have been apparent on the day that PC commenced their management responsibilities in 2014 or at the latest on receipt of the surveys as professional managers with extensive experience in managing buildings such as the Premises.

52. The Respondent notes that the absence of building control approval for the ground floor reconfiguration which was undertaken in the 1990s was discussed and that this would be investigated. However, to date no building control approval has been provided by the Applicants and nor does the Respondent have any records to indicate that building control approval was requested or granted.

53. The Respondent acknowledges that there are restrictions within the lease which complicates what action can and cannot be taken by the Applicants, but the Respondent considers that this doesn't change the fact that if there was a problem within one of the flats within the Property it could breach into the common parts. Furthermore, the Respondent would also reiterate that the responsibility to detect, action and determine the urgency of the fire safety issues rests with the Applicants and that it was their responsibility to take the necessary and appropriate steps in the circumstances to address the issues.

54. In relation to the notice of intention under section 20 and the Specification for Works provided, the Respondent states that the works specified were not provided

to the Respondent until it had receipt of the Applicants' Statement of Case. Regardless, the works were inadequate to address all of the imminent risks which had been established at that time, and if it had been consulted about the Specification at this time, the Respondent would have made clear its views that the proposed works were insufficient.

55. The Respondent notes from the email from David Baker of PC dated 20 August 2019:

- Mr Baker states that they were unlikely to get any contractor to certify the doors under FIRAS or BM Trada even if approved repair methods are carried out;
- That simply repairing each door and having them tested would be unfeasible, unreasonable and unaffordable;
- That they wouldn't be able to get FD30 certification even if repairs are carried out; and
- That they were suggesting a phased replacement scheme of 5 -7 years to replace all the doors.

55. The Respondent would therefore submit that it is clear from the Applicants own commentary that the works which they had proposed would be inadequate and that they would not be able to afford to complete the works in any event as funds were not available. Indeed, in the opinion of the Respondent, the works proposed by the Applicants do not address all of the serious fire safety risks to the premises and the cheaper alternatives as proposed by the Applicants in their appeal are not viable.

56. Furthermore, given the serious risk to health and safety, the timescale of 5 - 7 years was clearly inappropriate and unacceptable. Therefore, the Respondent had no choice but to take emergency remedial action in order to secure the safety of the Premises' residents, as the Applicants did not have the ability to do so themselves.

57. PC are legally responsible to ensure that the fire safety issues are addressed, and they had failed to do within the 5 years that they had been managing the Premises. The Respondent notes that in the RTM Directors' Minutes of 23 October 2019, it was agreed that the Applicants would commence works to the stairwell doors and then the lobby doors. However, this fact was never conveyed to WMFS or the Respondent until receipt of the Applicants' bundle as part of the appeal. Had the Respondent been made aware of this at the time, it would have taken this into account in determining the ERA, however, it is noted that the minutes do not contain any timeframe for the works, and that the works had not been commenced at the time when the Notice was served. It is also noted that the Applicants' estimated costings for the replacement doors would be around £40k plus VAT, which are similar to those which will be incurred by the Respondent. Finally, it is also noted that Ms Cannon-Leach advised at the meeting that if the Applicants did

not complete the works and if a fire were to break out, the directors, Ms Cannon-Leech and David Baker could be liable for corporate manslaughter for not acting when told.

58. The Respondent states that it was not advised that a Directors' Meeting had been held or that the Applicants had agreed to undertake the urgent works within 2020. The Respondent notes that no minutes of this meeting have been provided, and it is not possible to establish by reference only to the documents that have been disclosed precisely what works the Directors agreed that they would undertake.

59. Furthermore, and to reiterate the points made previously, it still remains the case that despite having been advised of the serious fire safety issues in January 2019 by WMFS (notwithstanding that such issues should have been apparent to the Applicants prior to this date), no suitable steps had been taken by the Applicants to address the issues, or to provide the Respondent with suitable assurances that it would. Therefore, based on the information that was provided to it by the Applicants at that time, the Respondent had no choice but to deem it necessary to instigate the Notice in order to secure the safety of the Property's residents. Nor, from the limited information that the Applicants have provided to date, can the Respondent be satisfied that it would have acted any differently had the Applicants communicated their intentions more clearly.

Works within the WMFS Report than have been completed/in progress by St Cecilia's RTM Co. Ltd.

60. The Respondent would wish to make it clear that they consider that the proposed works to the bin store (which is external) would not have been impacted by the proposed works they proposed. In any event, these works were not discussed with the Respondent, and if they had been, the Respondent would have ensured that suitable arrangements were put in place with the Applicants so that these works could be carried out at the same time as the Respondent's. Furthermore, the Respondent also notes that this order was only placed on 29 June 2020.

61. A copy of any inspection or assessment of the flat entrance doors has not been provided to the Respondent for it to consider. Nor has a copy of the fee quote been provided, or details of certification from the fire risk assessor. The Respondent says that it is still unclear about the effectiveness of the flat door sets, and the Respondent is aware that several of these doors have been replaced within the building, which creates more uncertainty over their fire resistance.

62. Although the majority of the flat entrance doors have not been included in the scope of the Notice, the Respondent assessed the communal area and the doors to 118 and 117 as posing fire safety implications to the means of escape. The door to fiat 118 was replaced and the door to flat 117 was placed behind the protective fire

screen installed by the Respondent's contractors and so replacement was not necessary. Therefore, these doors were included within the scheme of the ERA.

63. The Respondent notes that the smoke ventilation quotes were provided in June 2020, and so after both the Respondent's decision to instigate ERA, and the date of the Applicants' appeal. Therefore, the Respondent was unable to refer to this as the time it instigated ERA, and it avers that such quote should have been provided well in advance of this decision, or in any event prior to the notice of appeal. It is also noted that the Applicants' quote only includes the replacement of one vent at the top of escape stairwell, whereas the Respondent's ERA also includes the changing of an additional vent above the roof access door, as this was in a defective condition and had been boarded over. Therefore, this quote is insufficient to cover the works that were required, and if it did, the cost of this quote would necessarily be much higher.

64. In relation to the Applicants' representations regarding the proposed ground floor reconfiguration received on 21 May 2020. The Respondent set out its response and reasoning as to their proposals in its Statement of Case. It therefore denies that no response has been provided as asserted by the Applicants. The Respondent's designer's responded to Mr Hacking by way of a letter dated 20 May 20. The Respondent therefore denies that it had failed to respond to the Applicants' proposals regarding the proposed ground floor configuration.

65. The Respondent disputes that the replacement of the lobby door fire break sets started in early 2020. Whilst carrying out the stairwell door set replacements under the Notice, the Respondent stated that once architrave/quadrant headings were removed, significant voids around the frames have been found. These gaps between frame and fire resisting structure are in excess of those permitted by the Applicants proposed replace door only solution. This confirms that complete replacement of door sets was appropriate. The Respondent cannot find any reference to removing architraves/beading to check how well fitted the frame is to the structure within the Applicants replace door only solution. This is considered a significant flaw in the Applicants proposals. This also demonstrates that assumptions cannot be made on the stairwell door sets when improving fire resistance to the stairwell, which is a last resort protective measure for escape from the building. Such issues have not been considered as part of the Applicants' quotations and suggested method statement, which if considered, would necessarily increase the cost of the works, which would make them more akin to those stated by the Respondent.

66. On all floors on the stairwell side, the door frame quadrant beading abuts textured coating which contains asbestos. This requires specialist removal. There are also asbestos insulating board tiles within the Property. The Applicants' solution makes no reference to this issue and raises significant concerns in relation as to whether the Applicants have an understanding of the risks.

The Respondent's Mobilisation Plan and the RTM's Position

67. The Respondent has also responded to the specific points raised in the Mobilisation Plan and the RTM Company's Position. The Respondent confirms that it had entered into a legal binding contract with its approved contractor on 18 March 2020, which committed it to the Notice, as well to paying the costs of it. This therefore predates any appeal and is well in advance of the quotations provided by PC, which were only obtained by in June 2020, despite the Applicants in their notice of appeal stating that cheaper alternatives had been obtained in advance of their appeal.

68. The Respondent explained the reasons for the delays in undertaking the works under the Notice, not least due to the global pandemic and country wide lockdown. The Respondent would not proceed on the basis of appointing a sole trader who could work compliant to COVID restrictions and rejects the notion that it sped up the completion of the works after the appeal was lodged.

69. Although the Applicants now state that funding is available for the work and it should have been undertaken by the RTM Company, the events leading up to the decision to serve the Notice gave the Respondent no confidence that the works would be carried out or that funding would be available. The Respondent contends that prioritisation should have been given to these works when PC first took over management responsibilities for the Property in 2014, but that they were not, and steps were only taken once WMFS/the Respondent had intervened.

70. In summary, the Respondent had no reassurance or confidence that from the Applicants in relation to: their specification of works, their timescales, their lead times for materials or their ability to fund the works. Furthermore, the Respondent would state that no full specifications, lead times for obtaining materials, asbestos considerations / other ancillary measures such as wiring or lighting installation, have been made in the Applicants' statement of case. It also appears that quotations obtained from the Applicants are dated as recently as 05 June 2020. This is after the date the Respondent began the ERA process, after the Respondent lodged its works order in March 2020 and a matter of days before the Respondents contractors arrived on site, with materials to safeguard residents. Therefore, the Respondent does not believe that the Applicants could have completed the works comprised within the ERA sooner, cheaper, or to an acceptable standard.

71. The Respondent notes that in the Applicants' evidence there are multiple references in reports from WMFS and PC to damage to existing door frames. There is detailed guidance as to how to repair door cases (door frames) for fire doors to ensure the door set (frame, door, fixings) will achieve the required standards. The contractors, William Goughs make specific comments and raise concerns over the cost implications of ensuring all repairs to retained frames are undertaken to

achieve the required performance standards. The contractors are essentially stating that it is cost prohibitive to retain the existing frames due to the cost of the repair work over removing and replacing existing frames.

73. The Respondent was contacted by the leaseholder of 22 St Cecilia's, Mr Brian Nelson in support of the defence of the appeal. Mr Nelson had written to Mr Hacking, and the Respondents, confirming that he does not agree to the appeal or the actions taken by the Applicants, and that he supports the actions of the Respondent in undertaking Emergency Remedial Action. He also supplied the Respondent with three FRAs which were undertaken by PC on behalf of the RTM Company in 2014, 2016 and 2017.

74. The Respondent submitted that these FRAs did not, identify the works required. David Baker of PC admitted at the hearing that these FRAs were deficient.

75. The hearing moved onto to a discussion of the works proposed under the Notice which were as follows:

- *Provide a 60-minute fire protected corridor from the base of the stairwell to the final exit of the building. This will segregate the flat and lift doors in the ground floor lobby.*

- *Replace all stairwell door sets with 30-minute fire resistant door sets complete with intumescent strips, smoke seals. three hinges. self-closing device and all other relevant furnishings.*

- *Construct a 30-minute fire resistant partition wall (inclusive of fire door also to 30-minute fire resistant standard) to segregate the rear exit door from flat no.118 and the lift doors.*
  Fire door to be provided with intumescent strips, smoke seals, three hinges and self- closing device and all other relevant furnishings.

- *Undertake works to reinstate the ventilation provisions at the head of the stairwell equal to when the building was originally constructed.*

- *Replace existing front door sets to flat no.118 with 60-minute fire resistant door sets complete with intumescent strips. smoke seals, three hinges, self-closing device and all other relevant furnishings.*

- *Any other ancillary works to facilitate the actions identified in items 1-5.*

76. There was broad agreement that the works identified were required although there was spirited discord about how the required results should be achieved particularly in the reconfiguration of the ground floor lobby and the flat door sets. There was

also significant disagreement as to the costs of achieving these results. The works are now virtually complete, and the Respondent's costs are approximately £86,500 although in the final reckoning may exceed £90,000. This amount is, in the opinion of Mr Hacking, ludicrous and is a result of the works not being properly tendered. By using a mixture of local contractors and expertise amongst the RTM members, it is the Applicants' position that the same results could have been achieved for approximately £21,600.

77. It is not necessary for this Tribunal to consider the works in detail or the costs of the same. As confirmed by Mr Taylor, the Respondent has not yet decided about how to recover the monies expended. A party upon whom a demand for the recovery of expenses has been served may appeal against the demand (Section 42, HA 2004 & Paragraph 11 of Schedule 3 to the Act.). In this matter, the operative time for such an appeal is after this decision on the primary appeal.

Discussion

78. Under section 45 (5) of the Act, the appeal is to be way of re-hearing; it is therefore necessary for the Tribunal to reach its own conclusion that Emergency Remedial Action under section 40 was necessary.

79. Guidance as to how the Tribunal should approach this was provided by His Honour Judge Huskinson in *Eli Zohar v Lancaster City Council* [2016] UKUT 510 LC ("*Zohar*") where paragraph 19 states as follows:

> 19 Permission to appeal to the Upper Tribunal was granted on the 12 August 2016 by the Deputy President who made the following observations:
>
> *1. The threshold for taking emergency action is a **high one** as the local authority (or the tribunal on re-hearing) must be satisfied that such action was immediately necessary in order to remove the immediate risk of serious harm which it has identified.....*
>
> and where paragraph 24 states as follows.
>
> *24. Upon such an appeal the parties to the appeal (and in particular the local housing authority) can be expected to place before the F-tT full evidence and argument directed to enabling the F-tT to reach its own conclusions upon all relevant points including in particular the following points. The F-tT should then analyse the evidence and reach its own conclusions, with reasons, upon all the following points, namely:*
>
> *(1) Whether a hazard existed at the relevant premises;*

(2) Whether this hazard was a "category 1 hazard". This will involve examining whether the hazard was of a prescribed description and whether it fell within a prescribed band as a result of achieving, under the prescribed method for calculating the seriousness of hazards of that description, a numerical score of or above a prescribed amount -- see paragraph 6. It will be necessary to examine whether the numerical score fell within bands A or B or C of table 3 in paragraph 7 – because only such hazards constitute a category 1 hazard.

(3) If the F-tT is satisfied that a category 1 hazard existed on the premises, it will next be necessary for the F-tT to consider whether it is satisfied that the hazard involved "an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises."

(4) The F-tT will next have to check that no management order was in force within section 40(1)(c).

(5) The F-tT will need to consider whether the emergency remedial action which has in fact been taken by the local housing authority was action which fell within section 40(2) namely whether it was such remedial action in respect of the hazard concerned as the F-tT considers was immediately necessary in order to remove the imminent risk of serious harm.

(6) If the F-tT concludes that the taking of this emergency remedial action was a course of action available to the local housing authority, the F-tT must then conclude whether the taking of this emergency remedial action involved the taking of "the appropriate enforcement action" within section 5.

80. The Tribunal will consider each of these points in turn.

81. Whether a hazard existed at the relevant premises?

It is clear to the Tribunal that a fire hazard existed at the Property and also to the parties. Whilst David Baker of PC admitted during the hearing that the earlier FRAs prepared by his company were probably deficient, it was clear that the fire hazard had been identified by PC in their FRA of 19 December 2019:

"*The fire risk assessment has found that the general fire precautions in part at St Cecilias are inadequate at this time and steps are required to implement interim measures to safeguard life whilst mitigation measures are carried out to reduce and remove risks to life to a tolerable level*"

The hazard was in any event crystalized by the WMFS letter of 9 January 2019 and the Respondent's HHSRS assessment, which reflected the findings of their

inspection on the 16 December 2019 and additional supporting information including the sample flat inspections carried out in November 2018.

82. *Whether this hazard was a category 1 hazard?*

Having regard to HHSRS Operating Guidance (Section 9, Housing Act 2004) and worked examples. The Tribunal accepts the Respondent's HHSRS Assessment that there was an increased likelihood of exposure to an uncontrolled fire and associated smoke when compared to the national average (national average for flats (1946-79) 1: 2,729 to 1:100. In addition, there was a small increase in the Class I spread of harm 6% to 10%, keeping to the national average for Class II & III. Producing a HHSRS Score of 1,101 Band C). Consequently, the Tribunal is satisfied that a category 1 hazard (fire) existed.

83. *Whether the Tribunal is satisfied that the hazard involved "an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises."*

The Applicants did not directly address whether the hazard constituted an imminent risk of serious harm save that they were of the opinion that an improvement notice would have been a more appropriate.

The Respondent has also not directly addressed the imminent risk issue in its statement of case and only briefly in paragraph 27 of the skeleton argument, to say that the spread of harm outcomes described in the HHSRS Assessment "posed an imminent risk of serious harm to occupiers" that was consistent with PC's 2019 FRA, which stated that "the risk to life from fire at these premises is Substantial", where 'Substantial' is defined as meaning "Considerable resources might have to be allocated to reduce the risk…….if the premises are occupied then urgent action should be taken"

At the hearing, the Tribunal put it to the Respondent that to take Emergency Remedial Action, they needed to justify that there was an imminent risk. As the chronology above shows, both the Respondent and WMFS were aware of the issues since at least November 2018 and these were clearly identified within the WMFS report of 9 January 2019 which included the following statement:

Timescale for Completion
You should complete the work outlined in the schedule as soon as possible, balancing the need for safety against the demands on your business or undertaking. I will visit again and will contact you in approximately 3 months (from the date of this letter) to arrange my next visit. You should complete the actions and outcomes before that visit.

The Respondent wrote to PC on 15 March 2019 about the risks identified by WMFS in that letter and proposed an "Action Review Meeting" in April 2019. The letter concluded with the following paragraph in bold:

"The council wants to work with managing agents and freehold landlords of high-rise buildings to ensure the safety and wellbeing of residents and the public. However, where there is insufficient progress with achieving this aim, the Council will not hesitate to use its Enforcement Powers as permitted under the Housing Act 2004. Use of these Enforcement Powers will result in the issue of an Enforcement Notice (Including Civil Penalty Fine) that will place a legal duty on the responsible person(s) to undertake the works.

In addition, during the period between 12 October 2019 and 7 November 2019 all ground floor flats were inspected by WCC and a range of fire safety deficiencies were identified.

There is a Joint Protocol between WCC and WMFS (2015-2017), which states that the communal areas of purpose-built blocks of flats (including city centre apartment blocks) shall fall to the fire and rescue authority as the lead enforcement role. It was raised by the respondent that there were limited enforcement options available to WMFS under the Fire Safety Order 2005 (prosecution or closure) to deal with the issues.

Meetings were held between WCC, WH and WMFS on the 11 and 14 November 2019. WMFS expressed their grave concerns over the fire safety of the building, both for residents and their own ability to deal with any serious fire. It was agreed at that meeting that WCC would utilise their enforcement powers under the Act instead of WMFS.

It is suggested that WCC did not pursue enforcement action at an earlier stage as WMFS were responsible for enforcement under the Joint Protocol.

There was significant evidence available to the Respondent during the November 2019 meeting, to confirm that there were major fire safety concerns regarding the property.

The Respondent delayed using formal powers of entry notices (section 239) until 13 December 2019 and carried out an inspection on the 16 December 2019. Even if the Tribunal took the formal inspection date as the date on which the Respondent became aware that there was a category 1 fire hazard, (the most advantageous position for the Respondent), it still took 85 days until the ERA Notice was served on the 10 March 2010.

Guidance on the imminent risk principle is given in *Bolton Metropolitan Borough Council v Amratlal Patel* [2010] UKUT 334 (LC). In *Bolton,* George Bartlett QC,

President of the Upper Tribunal considered that an imminent risk was a *"risk must be one of serious harm being suffered soon"* and further "*a good chance that the harm will be suffered in the near future".*

For the Respondent, Mr Taylor said that the Tribunal need to take into account the delay in the context of the scale of the risk which was endorsed by officers of the Respondent who cited that to organise contractors and materials for such a project took a significant period of time.

For the Applicant, Mr Hacking said that at the meeting on 19 December 2019, the Respondent stated its intention to carry out the works and promised to start the same in the following January. Mr William Humphries, employed by the Respondent as a Service Manager confirmed, when challenged by Mr Hacking, that at that time, it was the Respondent's intention to carry out the works as soon as possible but conceded that the start date of January "might have been aspirational". The possibility of the works starting in January was attractive to the Applicants as the RTM Company would not have the funds to start works on its own account until March 2020 (It is a matter of contention whether or not the Respondent was aware of this fact).

The Notice stated that date on which the remedial action was taken/proposed to be taken was 3 March 2020 until 1 June 2020. The works on site did not start as planned principally due to the Covid-19 Public Health Emergency although this did not impact the contractors employed by the RTM Company to the same degree.

In the opinion of the Tribunal, there is contradiction in the delay between the Respondent being aware of the risks at the Property and serving the Notice, at best nearly 3 months, as being action to deal with *"an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential* premises".

84. *Check that no management order was in force within section 40(1)(c).*

There is no evidence to suggest that a management order was in place in respect of the Property.

85. *The Tribunal will need to consider whether the emergency remedial action which has in fact been taken by the local housing authority was action which fell within section 40(2) namely whether it was such remedial action in respect of the hazard concerned as the Tribunal considers was immediately necessary in order to remove the imminent risk of serious harm.*

The remedial works undertaken by the Respondent as specified in the Notice were considered immediately necessary to remove the imminent risk of serious harm hazard.

86. *Was an emergency remedial action notice the appropriate enforcement action".*

The Respondent had presented a chronology of the interaction between the parties and also the RTM Company and its agent, PC. In the opinion of the Respondent, the lack of action showed serious shortcomings, it was not until the WMFS letter that the RTM Company gave consideration to obtaining quotes for some elements of the work and even by the end of 2019, all quotations had still not been obtained. The Respondent did not consider it practical to serve an improvement notice as it would need to be reasonable in the timescale provided for compliance due to the impact of the consultation procedures imposed by section 20 of the Landlord and Tenant Act 1985. In the opinion of the Respondent this would present too long a time frame when considering the urgent threat to health and safety in the building.

The Respondent also considered that the service of a prohibition order relating to the communal areas would be inappropriate. The fire safety repairs and improvements required to mitigate the severe risks to health were not deemed to be so greatly onerous, expensive or intrusive that all residents should leave their homes. The Respondent believed the works can be carried out with relative ease and negate the need for a mass evacuation of the Property. Further, the Respondent was aware that the enforcement of the order would potentially result in criminal charges against offenders, not the improvement to fire safety at the Property.

The Applicants consider that that an improvement notice would have been more appropriate in the circumstances.

Summaries

87. For the Respondent, Mr Taylor stated that the action had been undertaken after careful consideration of the best method of managing the risks involved, after consultation with WMFS and its own officers. The issues that have been raised by the Applicants all reflect the understandable desire to minimise the recovery of expenses from residents. But the solutions proposed by the RTM Company were not solutions at all: they may result in costs saving, but they do not adequately address the risks identified at the Property. Whilst there were no specifics given, Mr Humphries confirmed that any recovery of expenses would be done as sympathetically as possible. The Tribunal was also reminded by Mr Taylor that if the appeal was upheld and the Notice quashed, the Respondent would be unable to recover a substantial sum of taxpayers' monies.

88. Mr Taylor also submitted that if the Tribunal determined that serving an Improvement Notice was the appropriate enforcement action, the Tribunal nevertheless has discretion under section 46 (6) of the Act to determine what

should be done about that. It was not, he contends, appropriate to quash the section 41 notice for three reasons:

a. All parties agree that the overwhelming majority of the ERA works needed to be undertaken.
b. The issues, mainly concerned the manner in which the works were carried out and their expense.
c. Had PC or the RTM Company undertaken the works the leaseholders would have paid through the service charge for the improvements, whereas the burden of all the costs of improving the building would be thrown on the tax payer.

For these reasons Mr Taylor contends that the section 41 Notice should be confirmed even if the Tribunal determine that it was not the most appropriate enforcement action.

89. For the Applicants, Mr Hacking summarised by saying that the process adopted by the Respondent was flawed because there was never any prospect of urgent delivery of the works: in December 2019, they were promised that the works would start in the following January, but nothing happened until March and even then, the works were delayed. Actual works commenced in June 2020. The Covid related delays were unacceptable considering that the RTM Company had works carried out during that period without any significant problems. The Respondent could not have really believed in the urgency having some 12 weeks later, failed to carry out or certify any of the works. In addition, the costs incurred by the Respondent were exorbitant.

DECISION

90. The appeal of the Respondent's decision to serve the Notice is, as already stated, by way of re-hearing but may be determined having regard to matters of which the Respondent authority were unaware section 45 (5) of the Act.

91. It is clear to the Tribunal, and to the parties, that significant hazards related to fire were present in what is a vulnerable building. The Grenfell tragedy was a wake-up call to all those involved with high rise residential buildings whether they be residents, landlords, property managers or statutory authorities. However, the Property's deficiencies should have been clearly identified by PC on their appointment. A competent fire risk assessment carried out under the Regulatory Reform (Fire Safety) Order 2005 would have highlighted the failings and the need for urgent action.

92. Grenfell did however prompt the Respondent and WMFS to look at high rise buildings in their respective areas. The 2017 contact between PC and WMFS probably led the former to feel relatively "comfortable" about their approach.

93. To the Tribunal, it appears that the WMFS report in January 2019 was a wake-up call to the RTM Company and PC. The Tribunal notes the difficulties presented by the lease in relation to the raising funds however in similar circumstances, other landlords/RTM companies have applied to the Tribunal for a variation of lease terms under section 35 of the Landlord and Tenant Act 1987 to enable interim demands to be issued accompanied by an application for dispensation under section 20ZA of the Landlord and Tenant Act 1985.

94. The Respondent was also aware of the WMFS report and presumably would have noted the 3-month deadline to complete the works. Perhaps to its detriment, the Respondent attempted to work with the RTM Company over a significant period in this matter, however, the WMFS report should have dictated a more rigorous approach. It is noted that the Respondent and WMFS agreed a protocol as to who should take enforcement action. However, this does not change the fact that if an ERA Notice was to be used, justifiably it should have been served by late 2019. If the Property's deficiencies presented an imminent risk, then action should have been taken without any delay or prevarication. Even if the Tribunal takes the HHSRS inspection on 16 December 2019 as the date when the risks became clear to the Respondent, it was still nearly 3 months until the Notice was served. This delay is simply not commensurate with the use an of an Emergency Remedial Action Notice.

95. The use of an Improvement Notice would in the opinion of the Tribunal have been the most appropriate course of action. This would have given the Applicants an opportunity to undertake the works and would have enabled the Respondent to organise contractors and materials in anticipation of any potential non-compliance, which was the justification given by the Respondent for the delay between the date of inspection and the service of the ERA Notice. It should be noted that by virtue of Schedule 3, Part 2 (3) of the Act, if the local housing authority consider that reasonable progress is not being made towards compliance with an improvement notice in relation to the hazard, then they may themselves take the action required; allowing an opportunity for an earlier intervention, if considered appropriate in the circumstances.

96. Under section 45 (6) of the Act, the Tribunal reverses the decision of the Respondent Local Authority to take Emergency Remedial Action. The Emergency Remedial Action Notice dated 10 March 2020 is quashed. The Tribunal considered Mr Taylor's submissions (referred to above) concerning its discretion under section 45 (6) of the Act but is not attracted to the argument that having determined that an Improvement Notice was the most appropriate enforcement action under section 5 (4) of the Act, it should nevertheless confirm the decision to serve a section 41 notice. To ask the Tribunal to make a decision that runs contrary to the Tribunal's actual determination of the issues, is either absurd, or invitation for it to exercise an inherent jurisdiction which the Tribunal simply does not have.

APPEAL

97. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

V Ward

APPENDIX ONE

The relevant sections of the Housing Act 2004 are as follows:

40 Emergency remedial action

(1) If—

(a) the local housing authority are satisfied that a category 1 hazard exists on any residential premises, and

(b) they are further satisfied that the hazard involves an imminent risk of serious harm to the health or safety of any of the occupiers of those or any other residential premises, and

(c) no management order is in force under Chapter 1 or 2 of Part 4 in relation to the premises mentioned in paragraph (a),

the taking by the authority of emergency remedial action under this section in respect of the hazard is a course of action available to the authority in relation to the hazard for the purposes of section 5 (category 1 hazards: general duty to take enforcement action).

(2) "Emergency remedial action" means such remedial action in respect of the hazard concerned as the authority consider immediately necessary in order to remove the imminent risk of serious harm within subsection (1)(b).

(3) Emergency remedial action under this section may be taken by the authority in relation to any premises in relation to which remedial action could be required to be taken by an improvement notice under section 11 (see subsections (3) and (4) of that section).

(4) Emergency remedial action under this section may be taken by the authority in respect of more than one category 1 hazard on the same premises or in the same building containing one or more flats.

(5) Paragraphs 3 to 5 of Schedule 3 (improvement notices: enforcement action by local authorities) apply in connection with the taking of emergency remedial action under this section as they apply in connection with the taking of the remedial action required by an improvement notice which has become operative but has not been complied with.

But those paragraphs so apply with the modifications set out in subsection (6).

(6) The modifications are as follows—

a) the right of entry conferred by paragraph 3(4) may be exercised at any time; and

b) the notice required by paragraph 4 (notice before entering premises) must (instead of being served in accordance with that paragraph) be served on every person, who to the authority's knowledge—

(i) is an occupier of the premises in relation to which the authority propose to take emergency remedial action, or

(ii) if those premises are common parts of a building containing one or more flats, is an occupier of any part of the building; but

c) that notice is to be regarded as so served if a copy of it is fixed to some conspicuous part of the premises or building.

(7) Within the period of seven days beginning with the date when the authority start taking emergency remedial action, the authority must serve—

(a) a notice under section 41, and

(b) copies of such a notice,

on the persons on whom the authority would be required under Part 1 of Schedule 1 to serve an improvement notice and copies of it.

(8) Section 240 (warrant to authorise entry) applies for the purpose of enabling a local housing authority to enter any premises to take emergency remedial action under this section in relation to the premises, as if—

(a) that purpose were mentioned in subsection (2) of that section, and

(b) the circumstances as to which the justice of the peace must be satisfied under subsection (4) were that there are reasonable grounds for believing that the authority will not be able to gain admission to the premises without a warrant.

(9) For the purposes of the operation of any provision relating to improvement notices as it applies by virtue of this section in connection with emergency remedial action or a notice under section 41, any reference in that provision to the specified premises is to be read as a reference to the premises specified, in accordance with section 41(2)(c), as those in relation to which emergency remedial action has been (or is to be) taken.

41 Notice of emergency remedial action

(1) The notice required by section 40(7) is a notice which complies with the following requirements of this section.

(2) The notice must specify, in relation to the hazard (or each of the hazards) to which it relates—

(a) the nature of the hazard and the residential premises on which it exists,

(b) the deficiency giving rise to the hazard,

(c) the premises in relation to which emergency remedial action has been (or is to be) taken by the authority under section 40 and the nature of that remedial action,

(d) the power under which that remedial action has been (or is to be) taken by the authority, and

(e) the date when that remedial action was (or is to be) started.

(3) The notice must contain information about—

(a) the right to appeal under section 45 against the decision of the authority to make the order, and

(b) the period within which an appeal may be made.

42 Recovery of expenses of taking emergency remedial action

(1) This section relates to the recovery by a local housing authority of expenses reasonably incurred in taking emergency remedial action under section 40 ("emergency expenses").

(2) Paragraphs 6 to 14 of Schedule 3 (improvement notices: enforcement action by local authorities) apply for the purpose of enabling alocal housing authority to recover emergency expenses as they apply for the purpose of enabling such an authority to recover expenses incurred in taking remedial action under paragraph 3 of that Schedule.
But those paragraphs so apply with the modifications set out in subsection (3).

(3) The modifications are as follows—

(a) any reference to the improvement notice is to be read as a reference to the notice under section 41; and

(b) no amount is recoverable in respect of any emergency expenses until such time (if any) as is the operative time for the purposes of this subsection (see subsection (4)).

(4) This subsection gives the meaning of "the operative time" for the purposes of subsection (3)—

(a) if no appeal against the authority's decision to take the emergency remedial action is made under section 45 before the end of the period of 28 days mentioned in subsection (3)(a) of that section, "the operative time" is the end of that period;

(b) if an appeal is made under that section within that period and a decision is given on the appeal which confirms the authority's decision, "the operative time" is as follows—

(i) if the period within which an appeal to the Upper Tribunal may be brought expires without such an appeal having been brought, "the operative time" is the end of that period;

(ii) if an appeal to the Upper Tribunal is brought, "the operative time" is the time when a decision is given on the appeal which confirms the authority's decision.

(5) For the purposes of subsection (4)—

(a) the withdrawal of an appeal has the same effect as a decision which confirms the authority's decision, and

(b) references to a decision which confirms the authority's decision are to a decision which confirms it with or without variation.

45 Appeals relating to emergency measures

(1) A person on whom a notice under section 41 has been served in connection with the taking of emergency remedial action under section 40 may appeal to the appropriate tribunal against the decision of the local housing authority to take that action.

(2) A relevant person may appeal to the appropriate tribunal against an emergency prohibition order.

(3) An appeal under subsection (1) or (2) must be made within the period of 28 days beginning with—

(a) the date specified in the notice under section 41 as the date when the emergency remedial action was (or was to be) started, or

(b) the date specified in the emergency prohibition order as the date on which the order was made,

as the case may be.

(4) The appropriate tribunal may allow an appeal to be made to it after the end of that period if it is satisfied that there is a good reason for the failure to appeal before the end of that period (and for any delay since then in applying for permission to appeal out of time).

(5) An appeal under subsection (1) or (2)—

(a) is to be by way of a re-hearing, but
(b) may be determined having regard to matters of which the authority were unaware.

(6) The tribunal may—

(a) in the case of an appeal under subsection (1), confirm, reverse or vary the decision of the authority;

(b) in the case of an appeal under subsection (2), confirm or vary the emergency prohibition order or make an order revoking it as from a date specified in that order.

(7) Paragraph 16 of Schedule 2 applies for the purpose of identifying who is a relevant person for the purposes of subsection (2) in relation to an emergency prohibition order as it applies for the purpose of identifying who is a relevant person for the purposes of Part 3 of that Schedule in relation to a prohibition order.

APPENDIX TWO

Report on Fire Safety from Joy Blakeman Fire Safety inspecting Officer on behalf of the West Midlands Fire and Rescue Authority to Lyndsey Cannon-Leach of Pennycuick Collins dated 9 January 2019 ("the WMFS Report")

Dear Sir/Madam
Letter of Fire Safety Matters
St. Cecilia's High Rise, Okement Drive, Wednesfield, Wolverhampton, WV11 1XD

I visited your premises on 19 November 2018 and evaluated the fire safety provided. I am of the opinion that some people are at risk in use of fire. You have an ongoing duty to ensure the safety of people. The attached schedule sets out what you need to do.

Timescale for Completion

You should complete the work outlined in the schedule as soon as possible, balancing the need for safety against the demands on your business or undertaking. I will visit again and will contact you in approximately 3 months (from the date of this letter) to arrange my next visit. You should complete the actions and outcomes before that visit.

Consequence for Non-compliance

if you do not do the work in the schedule before my next visit (or I find that safety provisions have worsened), the Authority may serve an enforcement notice on you. An enforcement notice would legally bind you to do the work.

Route to Appeal
You can clarify or challenge what you need to do. You can also comment on my visit. Our 'Appeals Challenges and Complaints procedure' tells you how. (Hyperlink given)

Fire Safety Management
The schedule sets out what you need to do to improve fire safety. Taking this advice will help to sustain those improvements.

You should record:

- *the significant findings of your fire risk assessment (ie. what you have done and what you will do to ensure the safety of people in case of fire);*
- *any people identified as being especially at risk; and*
- *the arrangements you have in place to plan, organise. control. monitor and review the fire safety measures you have in place.*

Your fire risk assessment is not suitable and sufficient. For example, section 2.01 is entitled "Significant changes since last assessment" and goes on to include two brief statements one of which states that the caretaker facility has been discontinued since

the last assessment. There is no explanation of how this has been risk assessed or what control measures are in place to ensure that fire safety equipment is still regularly tested or fire precautions maintained. Indeed, it also directly conflicts with a later section 12.6 which states that "Pennycuick Collins is to confirm whether the on-site caretaker is to be involved in routine inspections of precautions". Again. in section 12.7 a caretaker is mentioned (you state that they will ensure that contractors sign in and out etc.) This is very confusing. Your fire risk assessment needs to clearly state whether there is a caretaker on site or not, what his or her duties are and what training they have received. If there is no caretaker facility, then you must state clearly that you have risk assessed this change and what control measures you have put in place to ensure maintenance etc.

Also, in the 'Significant Changes' section you state that "fire extinguishers were de-commissioned and removed from site in 2016'. You need to state that you have risk assessed this and what control measures are in place. Whilst it is wise not to have fire extinguishers where residents can set them off, during my visit found that the main electrical intake room in the ground floor looked like it was used as a kind of workshop and storeroom for the on-site caretaker person. There are also 2 further store rooms being used by a 'maintenance or caretaker' type person, one of which had a petrol lawn mower inside, an empty can of petrol, gas blow torch, turpentine and flammable aerosol cans being stored. This is a significant finding (not mentioned in the fire risk assessment) and needs related control measures to be explained. If you have an on—site caretaker using rooms in this manner, I suggest you risk assess this situation again and re-examine the need for fire fighting equipment (and relevant training) so that he/she could possibly extinguish a small fire to prevent it becoming a larger fire. We also usually expect to find a fire extinguisher in the lift motor room for safeguarding of maintenance contractors (relevant persons). This would fall under Article 13 of the Fire Safety Order as the caretaker (even if they are a volunteer) will be a relevant person undertaking work duties on the premises and should be safeguarded.

I cannot tell if the action plan in your fire risk assessment has been completed and signed off (there were no columns for anyone to sign to show completion of tasks). During my visit, I found that some of the issues did not appear to have been done. The fire risk assessment was dated August 2017. It was November 2018 when I visited so I would have expected all works in the action plan to have been completed and signed off.

Your fire risk assessment states that, although the ground floor bin room is constructed partially of timber cladding, there is adequate protection between this and the building. What is this protection? When I visited, there was no door between the bin room inside the building and the outside timber & PVC clad extension. It was in effect all one room. This should be labelled as a significant finding with an explanation and related control measures. Section 6.11 states that whilst there is no fire alarm. there are smoke detectors fitted on the landings which provide early warning of fire. However, you state earlier in the fire risk assessment that there is a Stay Put policy in

place (section 2.1). A stay put policy should not involve smoke detection in the common areas as this will only confuse residents. Also, the detectors were domestic ones that are used inside domestic homes. These are not suitable for common areas of such premises. The building should be so designed that compartmentation is sufficient for a stay put policy. which means that smoke detectors are not required in common areas. As we would not expect to find such a situation. this is a significant finding which requires further explanation.

Section 8.1.5 in relation to travel distances states "the distance is approximately 20m". This does not tell the reader any useful information as it does not state from where to where.

Section 8.1.6 related to 'Suitable protection of escape routes'. It mentions that internal walls to the protective shaft are fire resistant but does not mention any fire doors. I found many issues with many fire doors that are in place to protect the route. particularly the fire doors on the stairs (see items below).

Section 14.4 'Annual Maintenance of Dry Riser' states that a copy of the test certificate for 2014 was seen and that no further information was made available regarding testing since. This is alarming to read. Why has It not been added to the action plan as an action for the managing agent to produce a recent service certificate? When I carry out my re-visit would like to see the most recent annual service certificate.

Section 17 of the Fire Risk Assessment is confusing. It mentions "on site review conducted to check doors — comments relating to non-fire doors removed as not applicable". There is no explanation of which doors the review checked. This fire risk assessment is of the common areas (as stated on the front cover) so I would like to know what doors were checked? I found many issues with many fire doors in common areas (see items below). This comment should be explained further.

You should review your fire risk assessment regularly especially if:

- *i. there is reason to suspect that people are not safe in case of fire, or*
- *ii. there has been a significant change to the preventive and protective measures you have taken in case of fire.*

Where in consequence of any such review. changes to your safety measures are required, you should make those changes.

The Fire Risk Assessment is dated 15 August 2017. It states on page 6 that it should be reviewed if any incident of fire occurs or if a flat ls leased or sold to a resident with a known disability. West Midlands Fire Service attended a tfre on 13 November 2018 in the bin room on the 18th floor. The caller had stated that there was thick smoke in the corridor. This is worrying and, in light of this, a review of the Fire Risk Assessment should be carried out.

In addition, Wolverhampton Homes representatives have visited several residents on 26 November 2018 and confirmed that there were at least 2 with disabilities (one of which was an oxygen user). Again, the Fire Risk Assessment should be reviewed in light of this

.

Alternative Solutions

If you want to use a different solution to bring about safety from fire, please contact me to discuss an action plan. An action plan might enable you to apply an equally appropriate safety solution to better meet your needs. Any alternative solution you propose must meet the 'outcome(s)' stated in the schedule.

Further Recommendations

I recommend that the plastic trunking encasing cables all around the ground floor be replaced with metal trunking. This is because in the event of a fire the plastic trunking would melt and cables would drop down, becoming a strangulation hazard for firefighters. We do not enforce this (as the premises is not a new build, therefore Building Regulations cannot be historically applied) but strongly recommend it, in order to protect firefighters.

Many High-Rise premises have phased out use of gas. I recommend that the freeholder & management company should thoroughly risk assess (using expert advice) the use of gas and take action to ensure that this premises can carry piped gas safely and if they can be assured of this, include it as a significant finding in their Fire Risk Assessment with the control measures that that make it acceptable. for example, is the gas engineer you use registered?

There are domestic smoke alarms on the ceilings throughout the common areas. The Fire Risk Assessment mentions this but also mentions that the premises has a 'stay put' policy. The fire action notices in the building do inform residents that it is a stay put policy. In the case of purpose-built flats over 4 storeys which have a stay put policy, one would not expect to find smoke detectors in common areas. in any case, domestic smoke alarms are not appropriate in common areas of sleeping accommodation.

Yours faithfully

Important Information - schedule referred to in letter

Notes to this schedule:

The government guidance most suitable to your premises is Fire Safety Risk Assessment Sleeping Accommodation which can be found at hyperlink given
Before you make certain changes to the premises. you may have to apply for approval from statutory bodies and/or others having interest in them. if you have doubt about the need for approval. you should ask the relevant body. For example. you may have

to apply for approval from a Building Control Body to make material alterations (see: hyperlink given).

You might also need to apply for the property owners' permission or for listed building consent (see: hyperlink given) among others.

Item 1

Outcome.
This work is necessary to provide sufficient escape routes (corridors. stairs and doors) for people.

Suggested Action
Any gaps in the walls, floors or ceilings of any rooms that are adjacent to escape routes must be filled with a suitable fire-resisting substance so that if a fire occurs, smoke and flame will be contained for a sufficient amount of time for the means of escape to be used easily and effectively Whilst a fire is still in its early stages. Please see list of issues below for specific details.

General issues:

- *Electric/gas meter cupboards in general are in poor repair. Many don't close properly and as a result some are open and easily accessible by any persons (e.g. on floor 12). Many have holes or gaps in the fire-resistant boarding or doors around them or boarding that is coming away from the wall (e.g. Flat 115). There are too many to mention individually below. I would recommend them all being inspected and repaired or replaced as necessary.*
- *Pink foam has been used in electrical/gas cupboards to fill holes. Holes should be filled with appropriate fire stopping (such as mineral wool and fire-retardant mastik).*
- *On all floors (except floors 9 & 10. where they are filled) there are 1 or 2 holes drilled into the brick on the wall between the lift and the corridor door (FD.03 doors) which could possibly go through to the lift shaft (although this couldn't be ascertained at the time of the visit). I would recommend these be fire stopped.*
- *The bin chute rooms (apart from floor 19 which has an air vent going through the corridor by the escape stair) have large holes at the top of the wall by the chute. I cannot ascertain where these go. This needs to be examined and appropriate fire stopping carried out if necessary, particularly as a fire on 13/11 18 in a bin chute room on floor 18 resulted in thick smoke in the corridor.*
- *Many of the bin hatch chute seals are damaged. This is in 'spite of the current Fire Risk Assessment (dated 17 August 2017) stating that "the smoke seals on the (refuse chute) hatches are deteriorating and require*

replacement" and giving a 3-month target date from then for the work to be done.

- *The lifts are clad in plywood for aesthetic purposes.*

Specific Floors:

- *Floor 19: There is an air vent between the bin room and the corridor adjacent to the escape stair- this could possibly compromise the entrance to the escape stair if there was smoke in the bin chute room. There are also cables in this room going through to somewhere, but I cannot ascertain where or if they are fire stopped. They are not protected.*
- *Floor 19: Dry Riser cupboard has polystyrene being used as fire stopping (wall between the cupboard and the corridor ceiling).*
- *Floor 17: Seals are damaged in the bin room.*
- *Floor 9: The cables from the mains electrical service cupboard go out under a false ceiling so I cannot ascertain whether separation is adequate where they feed into domestic flats or across other wall divisions etc.*
- *Floor 8: Bin chute has been 'patched' with a rubber panel and this has burnt through leaving a hole from fire damage. Rubber is not an appropriate fire resisting material.*
- *Floor 6: Bin chute has been 'patched' with a rubber panel. Rubber is not an appropriate fire resisting material. There are cables in this bin chute room going out through the holes above the chute. I cannot ascertain exactly where they are going or if they are fire stopped at all. They are not protected.*
- *Floor 5: Bin chute has been 'patched' with a rubber panel. Rubber is not an appropriate fire resisting material.*
- *Floor 3: The area below bin chute has been boarded over (does this hide damage?) This must be checked.*
- *Floor 2: Bin chute has been 'patched' with a rubber panel.*
- *Floor 2: Electric/gas cupboard doors have been replaced with plywood.*
- *Floor 1: Area below bin chute has been boarded over (does this hide damage?) This must be checked.*
- *Floor 1: The cables from the mains electrical service cupboard go out under a false ceiling so I cannot ascertain whether separation is adequate where they feed into domestic flats or across other wall divisions etc. In addition, there was no signage on the cupboard and ply wood had been fixed to the top of the frame.*
- *Ground Floor: The single escape stair does not lead directly to a final exit (as it ideally should). Therefore, it is most important to provide a protected route from the foot of the stairway enclosure to the final exit from the foyer (see page 81 & figure 35 of the Government guide, 'Fire Safety Risk Assessment: Sleeping Accommodation").*

- *Ground Floor: Flats 119 and two others (with no numbers on doors) are in a dead-end situation. The travel distance to the final exit from the furthest flat is acceptable as it is 10M (l have not been inside the flat to measure the travel distance inside). This could be mentioned as a significant finding in the fire risk assessment. It is important that this dead-end corridor is a protected route. The corridor FD on the dead-end route has no vision panel in it.*
- *Ground Floor: 2nd caretaker store room has compartmentation issues.*

<u>Reason</u>
People using the location may be affected by a fire in one of the adjoining rooms. This means that people may not be able to reach safety before being afected by fire and/or smoke.

Item number 2

Outcome

This work is necessary to make sure that escape routes (corridors. stairs and doors) can be safely used whenever they are needed.

Suggested Action
Ensure that door-sets that can resist fire and smoke for 30 minutes are provided in the following locations:

General/all floors:

- *All of the old corridor and stair fire doors (the ones painted red) have only 2 hinges. I would recommend that this be looked into (as it is standard practice for fire doors to have 3 hinges) and would direct the Responsible Person to page 124 of the Government guide: Fire Safety for Sleeping Accommodation which has a section entitled 'fire resisting door furniture' and states in relation to 'hinges': "To ensure compliance with their rated tire performance, fire-resisting doors must be hung with the correct number, size and quality of hinges. Normally a minimum of three hinges is required, however the manufacturer's instructions should be closely followed. BS EN 1935(37) including Annex B, is the appropriate standard. " If the appropriate standard cannot be proved, then the fire doors should be replaced. If the appropriate standard can be proved, (in spite of this departure from standard expectations). this must be written into the Fire Risk Assessment as a significant finding along with evidence of the proof attained.*
- *The glazing in the fire doors is 'mitre glazing'. This is non-standard glazing.*

Again, I would direct the RP to page 124 of the CLG government fire safety guide to Fire Safety in Sleeping Accommodation' which has a paragraph on 'Glazing in Fire Resisting Doors'. which states that "glazing should never reduce the fire resistance of the door" and that the glazing should be purchased from a supplier who can provide "documentary evidence that the door continues to achieve the required rating".

If the appropriate standard cannot be proved. then the mitre glazing should be replaced. If the appropriate standard can be proved. in-spite of this departure from standard expectations, this must be written into the Fire Risk Assessment as a significant finding along with evidence of the proof attained.

- *Many of the fire doors have non-fire rated handles (Including domestic internal door handles). It appears that original fire rated handles have been replaced by non-fire rated ones.*

Again, I will direct the Responsible Person to pages 124-126 of the Government's Fire Safety in Sleeping Accommodation guide, which shows a diagram of a fire resisting door (figure 65) on page 126 and states "Door handles and locks — see BS EN 1906(92) Annex C and BS EN 12209(91) Annex A respectively for timber information Door handles and locks should be tested as part of door set — see BS EN 1634-1 (35)" and on page 125 states that workmanship on fire resisting doors can be "undermined by inadequate installation" and that it is "important that installers with the necessary level of skill and knowledge are used".

- *Some corridor fire door frames have had holes drilled through for cables. This will have compromised the required fire rating of the door frame.*

Floor 19:

- *FD on stair (19.01) has damage to frame.*
- *FD corridor by stair is missing screws in handle furniture.*

Floor 18:

- *FD on stair (18.01) has a lot of damage to the frame and door.*
- *Dry Riser cupboard door has no strips/seals.*
- *FD 18.03 is not closing fully Into the frame all of the time.*

Floor 17:

- *FD on stair (17.01) is fitted with a domestic gate (or 'tee') hinge & doesn't fit into the frame properly.*
- *Dry riser cupboard appears to have a plywood repair panel in it.*
- *FD 17.05 the hinges repairs have created a hole in the frame.*
- *FD 17.03 not closing fully into frame.*
- *Non-fire rated handles on some fire doors - see general issues.*

Floor 16:

- *FD 16.03 non-standard door handle and not closing properly into frame*

Floor 15:

- *FD on stair (15.01) has damage to door frame by hinge.*
- *FD 15.02. It was VERY DIFFICULT to open this door as the non-standard door handle was sticking. It took me several attempts. This was a fire door leading to the escape stair, so I was very concerned. This should be dealt with as a matter of URGENCY as the door should be easily operable by people in the case of an emergency.*

Floor 14:

- *FD 14.05 has a hole in the door frame where it has been chiselled out to make a recess for a door ball catch in 2 places (only one is being used. therefore leaving a hole in the other location).*
- *FD 14.03 is not closing fully into the frame.*

Floor 13:

- *FD 13.01 (stair) has damage to frame by self-closer.*
- *FD 13.03 has damage on frame by hinges and not closing fully into frame.*

Floor 12:

- *FD 12.01 (stair) has damage to frame and door and glass and also has non-standard door handle.*
- *Bin chute room fire doorframe has had an inappropriate repair.*
- *FD 12.05 has an inappropriate door handle and is not closing fully into the frame.*
- *FD 12.03 fire door is split and has had an inappropriate repair.*
- *FD 12.02 has had an inappropriate repair to door frame (soft ply wood).*

Floor 11:

- *FD 11.01 (stair) has an inappropriate door handle.*
- *FD 11.02 one hinge is broken in half.*

Floor 10:

- *FD 10.01 (stair) has damage on door by hinge and frame is damaged at lower end.*
- *FD 10.04 has had a repair done to the fire door and sticks on the floor.*
- *FD 10.03 the hinge has been pulled out and set proud of the frame.*
- *FD 10.02 has damage on the door by the hinge.*

Floor 9:

- *FD 9.01 (stair) has damage to fire door and frame by hinge.*
- *FD 9.06 has damage by hinges.*

- *Mains Electrical cupboard door has rising butt hinges. I suggest RP checks if these are allowed on this type of door as they are no longer classed as self-closing devices.*
- *FD 9.03 is not fitting fully into frame.*

Floor 8:

- *FD 8.01 (stair) has damage by hinge and has inappropriate handle.*

Floor 7:

- *FD 7.01 (stair) the hinge has been packed out.*
- *FD 7.05 has an extra hole chiselled out in the frame for a ball catch, although only one has been used, therefore leaving a hole.*

Floor 6:

- *FD 6.01 (stair) has damage to door and frame.*

Floor 5:

- *FD 5.01 (stair) has damage to door.*

Floor 4:

- *FD 4.01 (stair) has damage by hinges and not always closing fully into the frame.*

Floor 3:

- *FD 3.05 has damage by hinge.*
- *Bin chute FD is loose.*

Floor 2:

- *FD 2.01 (stair) has damage on door and lots of chiselled out areas on the frame for door ball catches that aren't there.*
- *Electric/gas cupboard doors have been replaced with plywood.*
- *FD 2.03 hinges are missing screws.*

Floor 1:

- *FD 1.01 (stair) has a gate (or tee) hinge and has been compromised by drill holes in it by the self-closer.*
- *FD 1.06 has a gate (or tee) hinge.*
- *FD 1.03 has a gate (or tee) hinge.*
- *FD 1.02 has a gate (or tee) hinge and an inappropriate handle.*

Ground Floor:

- *The single escape stair does not lead directly to a final exit (as it ideally should). Therefore, it is most important to provide a protected route from the foot of the stairway enclosure to the final exit from the foyer (see page 81 & figure 35 of the Government guide mentioned previously). Therefore,*

the fire doors in the ground floor must be able to prevent spread of fire and smoke for at least 30 minutes in order to protect this escape route.

- *FD GF 03 (stair) has hole drilled through the door frame where cables pass through. There is no vision panel in this fire door.*
- *FD ground floor caretaker store (by stair) has damage to the frame and damage to strips and seals. The store contains a petrol lawnmower. empty petrol can, gas blow torch, turpentine. aerosols and paints. This is obviously a very high-risk room and is on what should be a protected route (as the stair does not lead directly to a final exit but comes out right next to this room). Therefore, it is extremely important that the fire door can perform to the required standard. Any flammable substances should also be stored appropriately in line with DSEAR Regulations etc. (for example in cabinets). It may be more appropriate to store flammable substances such as petrol in a secure outside store.*
- *2nd caretaker store room door does not appear to be a fire door and there is damage to the frame. The corridor FD on the dead-end part of the escape route has no vision panel in it.*
- *The mains electrical room has no 'keep locked shut' sign on it.*

The term 'door-set' refers to the complete element as used in practice:

- *the door leaf or leaves*
- *the frame in which the door is hung*
- *hardware essential to the functioning of the door-set.*
- *intumescent seals and smoke sealing devices. In the case of double-doors you should ensure that they close without affecting the operation of the seals.*

<u>Reason</u>
Doors may not be capable of preventing the spread of tire for long enough for people to escape because either it cannot be ascertained that they are in fact fire doors or gaps, holes, damage. missing parts or inappropriate repairs have impaired the integrity of the doors so that 30 minutes' fire resistance cannot be guaranteed.

Item number 3

<u>Outcome</u>
This work is necessary to provide sufficient escape routes (corridors, stairs and doors) for people.

<u>Suggested Action</u>
Ensure that everyone can evacuate quickly and safely by removing the break glass tube from the rear final exit door.

<u>Reason</u>
The rear Ground Floor final exit has a push bar but also has a break glass tube. I would question the need for the break glass tube as having a push bar exit usually indicates

that a large number of people may have to be able to escape quickly and easily. Fire exit doors should be easily operable with one hand movement. The break glass tube could delay people escaping quickly and safely from fire.
Item number 4

Outcome
This work is necessary to provide sufficient escape routes (corridors, stairs and doors) for people.

Suggested Action
Ensure that everyone can evacuate quickly and safely by providing a green manual override button for the automatic main entrance/exit doors in the foyer.

Reason
The main entrance/exit doors are automatic. There is no manual override button provided. If electrical supply were disrupted by a fire, the doors may not be operable in the usual way. This could delay or prevent people escaping quickly and safely from fire.

Page 128 of the Government Fire Safety Risk Assessment Guide to Sleeping Accommodation states in relation to Electronic Door Control Devices: 'In premises where there may be large numbers of people, the devices should only be considered when linked to a comprehensive automatic fire detection and warning system in accordance with BS 5839-1 .16. There should be an additional means of manually overriding the locking device at each such exit (typically a green break-glass point).
As there cannot be an automatic fire detection and warning system in this premise (due to the stay-put policy, it is even more important to provide a manual override button).

Item number 5

Outcome
This work is necessary to make sure that escape routes (corridors. stairs and doors) can be safely used whenever they are needed.
Suggested Action
Ensure that everyone can evacuate quickly and safely by providing an appropriate handle on FD 15.02 (corridor ire door leading to the escape stair on the 15" floor).

Reason
It was very difficult to open the corridor fire door on the 15"' floor that leads to the escape stair, as the non—standard door handle was sticking. it took me several attempts. This should be dealt with as a matter of some urgency as the door should be easily operable by people in the case of an emergency. This could delay or prevent people escaping quickly and safely from fire.
Item number 6

Outcome
This work is necessary to make sure that escape routes (corridors, stairs and doors) can be safely used whenever they are needed.

Suggested Action
Indicate the nearest way out (in case of fire) with fine exit signs that comply with BS 54F. Exit signs must be visible for people that might need to refer to them.

Reason
The safe routes to evacuate the premises In case of fire were not obvious in the corridors. People who do not know the building will take longer to find a safe way out in an emergency, if the nearest exit is not clear to them. I am aware that in your Fire Risk Assessment, you say that as there is only one staircase in these flats, signage is not considered necessary. However, I disagree as I believe that there will be many visitors to residents in these flats who might not know the building. in addition. as the corridor runs around all four sides of the floor, it can be rather confusing to find the escape stair. I myself, as a visitor who was unfamiliar with the building, did not find it straight forward to find the escape stair.

Item number 7

Outcome
This work is necessary to reduce the risk of the spread of fire.

Suggested Action
Reduce the number of flammable substances stored on the premises in the caretaker's stores or store them more appropriately and in line with DSEAR regulations. Also, examine 'DiY' electrics in second caretaker store room and replace with appropriate electrical installation.

Reason
These practices could encourage a fire to start or spread. A fire could then grow unhindered in the caretaker's store rooms. People would then be exposed to a significant fire.

Item number 8

Outcome
This work is necessary to reduce the risk of the spread of fire.

Suggested Action
Remove the plywood outer lining on the outside surface of the lift doors and frames. Ensure that wall linings do not support the spread of fire.

Reason
Fire could spread more rapidly along the doors of the lift because they are lined with plywood (for aesthetic purposes). A fire could spread and make the escape route unsafe for people to use.

Item number 9

Outcome
This work is necessary to reduce the risk of the spread of fire.

Suggested Action
Address the issues in the bin room.
This includes lack of suppression system or fire plates to prevent spread of fire or smoke from the main bin room upwards into the bin chute. It also includes the issue that the bin room extends out into a timber and PVC clad extension on the side of the building. There is no separation between the inside of the main bin room and the timber/PVC extension attached to the side of the building, therefore this could encourage fire spread. It also includes the issue that unprotected cables are situated across the roof of the bin room, directly above the main bins.

Reason
A fire could grow unhindered in the main bin room and spread upwards through the bin chute and outwards into the bin room extension (which is timber and PVC). People would then be exposed to a significant fire. In addition, electrical cables in the bin room would then melt and could affect electrics in the premises and/or promote fire spread along the cables into the premises.

Item number 10

Outcome
This work is necessary to ensure that fire doors are maintained. repaired or replaced appropriately.

Suggested Action
Ensure that enough competent people are appointed to help you to maintain fire doors.

Reason
Not enough competent people have been appointed to help you adequately maintain fire doors and frames. (This is apparent due to the proliferation of inappropriate handles, hinges, repairs etc. throughout the premises). This means that you cannot rely on your fire safety systems and that people would be at risk in case of fire.

Item number 11

Outcome

This work Is necessary to help people understand what to do if fire breaks out.

Suggested Action
Provide fire action notices that explain your fire procedure and what you want people to do in case of fire where people will see them. The notices informing people not to use the lift in case of an emergency were adhered to the side of the lift door frame and therefore not visible to people approaching from that side. On some floors. there was no fire action notice by the lift (floors 3, 7, 9) or it was peeling off (floor 4).

Reason
Without instruction or information, people may respond badly to fire (or not at all), which would put them at risk.

Reviewed Decision

1. On 19 October 2020, the Respondent requested permission to appeal the Tribunal's decision.

2. There were four grounds specified in the application:

   Ground 1: The Tribunal failed to make any determination about whether the hazards at St Cecilia's gave rise to an imminent risk of serious harm.

   Ground 2: Alternatively to ground 1, if the Tribunal did make a determination that the hazards at St Cecilia's did not rise to an imminent risk of serious harm, then (a) its reasons for reaching that conclusion were wrong and (b) in reaching that conclusion it failed to have regard to the facts and matters which had been relied upon by the Respondent in support of its conclusion that such a risk existed.

   Ground 3: The Tribunal erred in concluding that an Improvement Notice was the most appropriate enforcement action:
   a) because it reached that conclusion without first having made a determination of the imminence of the risk of serious harm;
   b) because, in reaching that conclusion, it relied upon its own conclusion that ERA was inappropriate because of the delay that had occurred after the Respondent first became aware of the existence of a hazard at the Premises;
   c) because its decision was based upon its view that the Respondent 'should have organised contractors and materials in anticipation of any potential non-compliance' with an Improvement Notice
   d) because it failed to have any regard, or any sufficient regard, to the magnitude of the risk of serious injury, and to the Applicants' historic failures to undertake works at St Cecilia's to remove the hazards.

   Ground 4: Failure to Exercise Discretion

<u>GROUNDS 1, 2 and GROUND 3(d)</u>

3. After reviewing the decision, the Tribunal was satisfied that an appeal was likely to be successful in respect of Grounds 1, 2 and 3(d), and hereby:

   (a) determined that it will review its decision under Rules 53 and 55 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in respect of Grounds 1, 2 and 3(d); and

   (b) stays the implementation of the whole of its decision.

Scope of the Review

4. Under Rule 55(1)(b); and section 9 (4) (b) of the Tribunals Courts and Enforcement Act 2007, the Tribunal advised the parties that it intended:

   (a) To review paragraphs 90-96 of the Decision to provide:

      (i) Amended reasons for its determinations concerning whether the hazards at St Cecilia's gave rise to an imminent risk of serious harm.

      (ii) Amended reasons in respect of the specific matter raised by the Respondent under Ground 3(d).

GROUND 3 (a)-(c)

2. In respect of Grounds 3 (a)-(c), the Tribunal determined that:

   (a) it will not review its decision; and

   (b) permission be refused.

Reason for the Decision

3. The Tribunal determined on the facts and evidence before it, for the reasons set out in paragraphs 90-95 of the Decision, that service of an Improvement Notice was the appropriate enforcement action in respect of the Category 1 hazards that existed at the premises. The Respondent has raised no legal arguments in support of the application for permission to appeal on grounds (a)-(c). (The submission at paragraph 35, that the Tribunal failed in its duty to give adequate reasons in relation to RTM's historic conduct not amounting to a sufficient reason for preferring ERA over an Improvement Notice, is within the scope of the review referred to in paragraph 4 (a)(ii) above).

GROUND 4

4. In respect of Grounds 4, the Tribunal determined that:

   (a) it will not review its decision; and

   (b) permission be refused.

Reasons for the Decision

5. The original Decision was made by the Tribunal exercising the discretion afforded to it by s45(6) of the 2004 Act to confirm, reverse or vary the local housing authority's decision. The Tribunal determined on the facts and evidence before it that the appropriate enforcement action was service of an Improvement Notice and therefore reversed the Respondents decision to issue an ERA notice. The Tribunal did not determine that service of an Improvement Notice was only marginally preferable to serving an ERA notice.

6. The Respondent's submissions (summarised at paragraph 88 of the original Decision), concerning the extent of the Tribunal's discretion under s45(6) to confirm the ERA notice, notwithstanding its determination that it was not the appropriate enforcement action, were considered by the Tribunal and rejected for the reasons set out in paragraph 96. That is, that the Respondent was, in effect, seeking a form of equitable relief. The Tribunal was entitled to make those determinations on the facts, evidence and legal submissions before it.

Further Directions in respect of grounds 1, 2 and 3(d)

7. Both parties were invited to make further representations in respect of the specific matters the Tribunal intended to review under Grounds 1, 2 and 3(d).

8. Both parties made further submissions.

The Parties' further submissions.

The Applicants

9. Submissions on behalf of the Applicants were made by Mr Robin Hacking, the Chair of the RTM Company. Principally, Mr Hacking set out the actions of the Applicants (principally the RTM Company), WMFS and the Respondent in respect of the hazards identified in the WMFS report over four specific periods.

    a) Period One, September 2014 — 9 January 2019
    b) Period Two, 9th January 2019 — 19th December 2019
    c) Period Three, 19th December 2019 — 10th March 2020
    d) Period Four, 10th March 2020 — 6th June 2020.

Period One - September 2014 to 9 January 2019

The Applicants

10. On taking on responsibility for St Cecilia's in September 2014, the RTM Co and its managing agents, Pennycuick Collins ("PC"), were able to begin addressing an unprecedented list of problems created by years of neglect by the freeholder which included: Security, lift safety, fire safety, decoration costs, roof failures and leaks, arrears of service charge, Illegal interest charges and many others.

11. During what the Applicants allege was a period of inaction and neglect of their duties by the Respondent and WMFS, the RTM Company and PC conducted a number of reviews of fire safety via Fire Safety Risk Assessments which were produced by PC and reviewed by WMFS. A number of fire safety issues were identified and corrected during this period as a result of these Fire Safety Risk Assessments.

12. The Applicants endorse the Tribunal's comments in paragraph 92 of the decision to the effect that they did take comfort of the contact between themselves and WMFS in 2017. Between September 2014 and January 2019 there was no suggestion that any Category 1 hazards existed arising from the Fire Safety Risk Assessments and the discussions with and representations from WMFS.

13. Paragraph 3.9 of page A6 of the Respondent's first bundle acknowledges The Respondent's duty "to maintain a record of building compliance" and the Applicant does not dispute that the Respondent has a duty of inspection, regulation and enforcement in relation to the common areas in high rise blocks. But in respect of St Cecilia's from September 2014 (and probably from before that date) to 9 January 2019, it failed in its duty of inspection and therefore in its duty to maintain records of compliance as not a single inspection took place during this period. This failure was in spite of: —

    a) Change of responsible person from Ryan Construction to St Cecilia's RTM Co/PC in September 2014.
    b) Grenfell Tower fire 14 June 2017.
    c) St Cecilia's flat fire August 2016.
    d) Secretary of State's Direction 17th May 2018.
    e) WMFS report November 2018.

    In the opinion of the Applicants, any one of these events should have been a necessary and sufficient cause to remind the Respondent of its duties of inspection and identification of hazards; there is no inspection-based evidence as to whether a Category 1 risk existed during this period. A significant reason for this is the Respondent's failure to carry out its duties of inspections in the face of 5 events which indicated that they were necessary in addition to being required by their general duties and responsibilities.

14. The Applicants state that the historic failure of the Respondent to inspect, regulate and enforce between September 2014 and 9 January 2019 is at least as great a deficiency than the failure to identify the hazards (which may or may not have been present at that time) by the Applicants and WMFS during their normal process of discussing and implementing the actions indicated in the various Fire Safety Risk Assessments which had been conducted. The Respondent's comments regarding "*the Applicants' historic failures to undertake works at St Cecilia's to remove the hazards" in ground 3) d* are unfair and prejudicial.

Period Two - January 2019 to 19 December 2019

The Applicants

15. The Applicants summarise some of their activities during this period as follows:

a) A frequent and regular series of meetings with WMFS and subsequently jointly with the Respondent's staff and WMFS. During these meetings it was repeatedly made clear that the Applicants would be able to raise funds to undertake a programme of fire safety from February/March 2020 and not before for the following reasons;

i. Restrictions in the leases at St Cecilia's.
ii. The regulatory framework under which the Applicants were functioning.
iii. That the 2019 service charge demands had already been determined and communicated to leaseholders by 1 December 2018 for collection on 1 January 2019, as required by statute, (8 days before WMFS had issued its report).

b) A wide-ranging review of suppliers' proposals to address the issues raised by the WMFS report was undertaken, followed by a tendering and approval process to identify the preferred solutions and cost them. As a result of this the Applicants prepared and approved at their board meeting in November 2019, a service charge increase of circa 100% to enable the items considered to be most important to be undertaken in 2020.

c) As required, the Applicants issued the hugely increased service charge invoices for 2020 to leaseholders on 1 December 2019 for payment on 1 January 2020 so that the Fire Safety improvements required could be started in February/March 2020 as soon as collections were received in sufficient quantity.

d) Throughout this period, the Applicant sought relief from the unrealistic timetable indicated in the WMFS report (3 months) to complete all the required actions and continually pleaded for the required improvements to be prioritised by either WMFS or the Respondent.

16. The Applicants note that at the time of preparation of these submissions - 27 November 2020 - the Respondent has yet to complete a tranche of ERA identified works which is a fraction of the total requirements identified in the WMFS report, 11 months after it took responsibility for that tranche. Secondly, the Applicants also note that after some delay, WMFS and the Respondent rejected a proposed timetable of 5 years for the work with priorities set by WMFS/the Respondent in spite of the fact that in March 2018, the Respondent, in a joint Public Announcement with Wolverhampton Homes, had identified a 5-year programme to undertake similar work on The Respondent's publicly owned estate of high rise properties.

The Respondent

17. Between 9th January 2019 and 19 December 2019, the Respondent was distracted by administrative and organisational issues and continued to fail to inspect the common areas in spite of strong evidence that inspection was necessary as indicated in the WMFS report which had been in the Respondent's possession since November 2018. They did, however, conduct an internal inspection of 14 flats in November 2018 which was discussed with the Applicants at a meeting called by the Respondent in the Civic Centre on 15 March 2019. Ultimately an inspection of the common areas was undertaken on 15 December 2019. In more detail: -

    a) Initially, the Respondent attended meetings with WMFS and the RTM Co/PC but in the second half of 2019 when the Applicants were finalising their plans to address the Fire Safety issues from early 2020, the Respondent started cancelling meetings and instead held a series of private meetings with WMFS from which the Applicants were specifically excluded.
    b) The Respondent was heavily engaged with WMFS throughout 2019 to agree a local version of the nationally agreed protocol with the WMFS.
    c) During 2019, the Respondent engaged with MHCLG regarding best practice in investigation and enforcement relating to complex high rise buildings.
    d) The Respondent was involved with external lawyers to understand the legal responsibilities of the various parties connected with the building in relation to the leases and the several regulatory frameworks which had a bearing on the building.
    e) The Respondent contacted other local authorities to inform their approach to investigating St Cecilia's. Most were apparently assessing the buildings on a flat by flat basis rather than the building as a whole. The Respondent's management of the St Cecilia's project and private sector housing changed during August 2019.
    f) At a meeting in the Civic Centre on 15 March 2019, called by the Respondent to discuss a survey they had undertaken in November

2018, it became apparent that the Respondent was relying on this survey to determine the need for actions across St Cecilia's flats at large. The Applicants assert that this survey is seriously flawed for a number of reasons identified below and they have contracted for an invasive survey of a sample of flats to be undertaken when COVID restrictions are lifted.

i. The Respondent refused and still refuses 2 years after the inspections to send reports to individual leaseholders who are clearly responsible as defined by the lease for the internal items identified by the Respondent as requiring action.
ii. Generalisations on compartmentalisation between flats have been incorrectly drawn by the Respondent in spite of the fact that none of the flats inspected are adjacent either vertically or horizontally. The assumption, for example, around weaknesses in sealing round soil pipes are in contradiction to the evidence given by the Respondent's witness, Simon Bamfield of Wolverhampton Homes.
iii. The summary information provided to the RTM Co, but not provided to the leaseholders, is challenged for accuracy in some respects by some of the leaseholders of the flats inspected.

h) On 19 December 2019, the Applicants were summoned to a meeting by the Respondent to be told that ERA was being taken starting in January 2020 to address three issues of Fire Safety compliance in the evacuation route from the building. This was a major error of judgement for the following reasons: -

i. The Respondent was fully aware, or should have been fully aware, of the Applicants' commitment, consistently stated throughout 2019, that it would have funds to undertake priority Fire Safety items from February/March 2020, which included the items identified by the Respondent as identified for ERA.
ii. The Respondent was fully aware, or should have been fully aware, that the Applicants had already conducted during 2019 the necessary tenders and approvals for the work packages needed to be undertaken.
iii. The Respondent, by failing to keep up their attendance at meetings with the Applicants specifically arranged for their benefit, had lost touch with the Applicants' intentions, capabilities and plans.
iv. Having excluded itself from receiving necessary and important information from the Applicants, the Respondent failed to check the then capabilities and intentions of the Applicants prior to issuing its ERA intentions.

v. The Respondent had failed to make adequate preparations for undertaking the work it had earmarked for ERA at the time it announced its intentions and timescales.
vi. The Respondent promised on 19 December 2019, a start in January 2020 for the ERA when it was fully aware, or should have been fully aware since they were acting as an expert, that this timescale was completely unachievable.

18. During this period, following receipt of the WMFS report on 9 January 2019, the Applicants properly completed the arrangements to prepare for undertaking works at St Cecilia's to remove hazards identified in this report as a result of which it was fully able to undertake this work from early 2020 as it had consistently reported throughout 2019. There is no case for suggesting historic failure of the Applicants during this period in relation to Ground 3 d) of the appeal since it had energetically pursued its plans for addressing the hazards identified in the WMFS report in as short a timescale as was possible bearing in mind the financial and legislative constraints.

19. However, the Respondent continued its failure to inspect and its actions during this period did not make a significant contribution to the removal of the hazards until they inspected the premises on 15 December 2019. The Applicant says that having failed to properly monitor the Applicants' preparations and plans for Fire Safety upgrades throughout 2019, the Respondent was unaware that the hazard they lately identified circa 16 December 2019 would have been addressed by the Applicants' work programme immediately at the start of 2020.

20. The Respondent failed to recognise and take account of the fact that it was ignorant of the Applicants' plans and capabilities at the time it ruled out an Improvement Notice and took no steps to repair that error by making proper enquiries.

21. Further, the Respondent failed to take into account its own lack of preparation and preparedness to undertake ERA at that time in determining the most appropriate Enforcement Action.

22. The Applicants also says that in November 2018, the Respondent having studied the WMFS report should have immediately undertaken an inspection of St Cecilia's. In the light of the Applicants' known and acknowledged inability to undertake substantial new actions prior to early 2020 because of financial and regulatory restrictions, it would have been appropriate to enforce ERA on any Category 1 hazards in that period. Contrarily, having neglected their duties of inspection right up to the opening of the window of viability for the Applicants to undertake any remedial action, namely at the start of 2020, it was entirely contradictory to take ERA at that time. However, as the Respondent explained in the 19 December 2019 meeting, it had come to the conclusion that it had to do something.

23. The Applicants assert that by the end of December 2019, as a result of the substantial level of preparation they had undertaken and the complete lack of preparation by the Respondent, an Improvement Notice would have been the most effective and timely way to address the Remedial Action identified and in its desire to be seen as doing something the Respondent wrongly placed an action on itself of ERA rather than place an action on the Applicants via an Improvement Notice having finally identified the urgent actions to be undertaken.

Period Three - 19 December 2019 to 10 March 2020

The Applicants

24. The Applicants were faced with a significant and urgent re-planning exercise following the announcements by the Respondent in the meeting of 19 December 2019, including that the likely costs of the ERA would be £85,000 or £714 per fiat which would be re-charged to the leaseholders.

    a) The service charge demands had to be re-issued prior to 1 January 2020 to remove the one-off service charge so that the leaseholders would not be charged twice for the ERA.
    b) Refunds were arranged for a handful of leaseholders who had already paid the 1 January payment early to assist the RTM Co's cash flow.
    c) The physical work programme was recast to remove replacing the stairwell doors, vents and ground floor reconfiguration now being undertaken by the Respondent and some additional work from the WMFS report was added in its place.
    d) The result of a programme to identify a more cost-effective proposal for upgrading fire doors was finalised and in February 2020 a pilot fire door ordered, installed and inspected by a third party and snagged to confirm compliance.
    e) In early March 2020, 11 more fire doors for the lobbies on floors 1 — 3 were installed.

The Respondent

25. The Respondent failed to live up to its promises made in the meeting of 19 December 2019.

    a) The Respondent issued Notices of Intent to enter the building for the purpose of ERA on 20th December 2019.

b) On 29 January 2020, the Respondent issued a Public Briefing Note which stated that the urgent work at St Cecilia's would commence in February 2020 and not in January 2020 as promised on 19 December 2019.

c) On 1 March 2020, residents received a hand delivered letter from the Respondent saying that the stairwell fire doors would be removed in March in preparation for new doors to be fitted in April. This would have contravened fire regulations and was fortunately not implemented by the Respondent. On 10 March 2020, the Respondent issued Section 21 Notices stating that the ERA would begin in April 2020 being the third start date notified since the meeting of 19 December 2019.

Conclusion

26. During this period, the Applicants continued to implement the plans for fire safety improvements it had prepared during 2019 as amended to remove the Respondent's promised work programmes. There are no grounds for accusing the Applicants of historic failures during this period. The Respondent repeatedly slipped start dates from January to February to April and left an 85-day gap between its notification of a Category 1 Hazard on 19 December 2019 and the issue of ERA Notices on 10 March 2020.

27. The Applicants say that, the 13-month gap between the Respondent's first sight of the WMFS report in November 2018 and the 85-day gap between 19 December 2019 and the issuing of ERA Notices casts doubt on whether the Respondent really believed that Emergency Action was necessary.

28. The Applicants ask the Tribunal to take into consideration not only what the Respondent says on 19 December 2019 but how the Respondent behaved during the entire period from November 2018 to March 2020 in considering its response to the Respondent's appeal.

29. The Applicants also say that the lack of any physical installation by the Respondent in this period proves the absence of preparedness by the Respondent to take ERA on 19 December 2019 when it made the decision to do so. It was almost as though deciding on ERA was an end in itself rather than a means to an end, and the Respondent sank into the same state of inaction after the decision as it had exhibited before the decision.

30. The Applicants also say that their successful implementation of a cost reduced compliant lobby fire door in February 2020 and the subsequent ordering and installation of a further 11 lobby fire doors in this period was proof that their consistent assertions of readiness with effect from February/March 2020 were honest and true and proves that they were better prepared to undertake the Remedial Action under an Improvement Notice rather than the Respondent under

a section 21 Notice of ERA on 19 December 2019 when the Respondent made its flawed decision to undertake ERA.

31. The Applicants reasserts in the light of this further evidence that the decision to undertake ERA by the Respondent was precipitate and ill-judged and had been taken without a proper investigation into the preparedness and capability of the Applicant and The Respondent to deliver the work required.

32. The Applicants also says that the events of the period from 19 December 2019 to 10 March 2020 provide strong evidence that if the Respondent had conducted a proper and thorough assessment of the relative capabilities and relative preparedness of the Applicants and the Respondent at that time then the Respondent would have inevitably concluded that an Improvement Notice was the appropriate action because it would have ensured that the work required was undertaken sooner.

Period Four - 10 March 2020 to 6 June 2020

The Respondent

33. Throughout this period the Respondent continued to fail to take any practical Remedial Action on site:

    a) On 20th March 2020, the Respondent confirmed in writing that because of COVID, the ERA had been put on hold/delayed. No future start date or estimated start date was given.
    b) At this time, Government guidelines made clear that COVID restrictions did not apply to emergency work.
    c) On 20 May 2020 the Respondent attempted unsuccessfully to strike out the Applicants' appeal to the Tribunal.
    d) On 27 May 2020, the Respondent suggested they would soon be able to start the ERA.
    e) On 8 June 2020, the Respondent re-issued section 21 ERA Notices which said that they would have started delivering materials to site on 3 June 2020.
    f) On 6 June 2020, the Respondent finally started the ERA.

The Applicants

34. The Applicants continued to work through its modified work programme for 2020 throughout this period and sought to take back in-house the ERA which the Respondent had not yet started and had given no indication of a start date, as follows:

a) On receipt of the email informing the Applicants that the Respondent had put on hold/delayed the ERA, the Applicants resurrected proposals from William Gough (ground floor reconfiguration), Tudor Maintenance (vents) and calculated and documented the costs and processes for upgrading the stairwell fire doors based on the solution being implemented for the lobby fire doors.

b) Having reached the last day for appeal against the Section 21 ERA Notices and with no further indication of a start date from the Respondent for the ERA, the Applicants sought to remove the log jam by appealing to the Tribunal to bring the work back in-house for the following reasons:-

    i. There was no alternative start date available from the Respondent and no indication as to when one might be available.
    ii. At the date of the appeal, the Applicants had already installed 12 lobby fire doors and had a further 12 doors on site which it could have immediately transferred to the more important ERA work.
    iii. Quotations were being finalised with William Gough and Tudor Maintenance.
    iv. The overall cost of bringing the work in-house was significantly less than the Respondent's estimated costs which would release additional funds to complete further requirements from the WMFS report.

    Note,— the shortage of funds is the single largest impediment to the completion of outstanding Fire Safety upgrades.

c) Throughout the period the Applicants continued to progress Fire Safety upgrades and by the time the Respondent started the ERA work, the Applicants had installed 24 lobby fire doors, 4 more than the entire requirement of the ERA which the Respondent was just about to start.

Conclusion

35. The Applicants say that at the very moment when an Improvement Notice became a better Enforcement Action than ERA, the Respondent exercised the wrong judgement based on a weak and out of date analysis of the facts and status of the various parties at that time and saddled itself with responsibility for ERA that it could not deliver in an acceptable timescale because of lack of preparation.

36. The Respondent's position became worse when it failed, unlike the Applicants, to find a way to work during COVID restrictions. The Applicants further say that its

appeal was an opportunity for the Respondent to review its decision, transfer the ERA back to the Applicants at a lower cost to Leaseholders by way of an Improvement Notice and reserve its position on ERA.

37. The Applicants assert that at this time, the Respondent's priorities changed from addressing hazards to protecting its exposure to costs that it was increasingly unable to justify and may no longer be recoverable from the Leaseholders in the event the (Applicants') appeal succeeded.

38. It aggressively sought to strike out the appeal thereby avoiding scrutiny by an independent third party and undertook a concerted and co-ordinated attack on the Applicants' alternative, even though these proposals were compliant with regulations hence abusing its position as a regulator to protect its position as a service deliverer of the ERA from being exposed to the risk of unjustifiable costs being unrecoverable from the Leaseholders.

SUMMARY

Ground One

39. In the light of the above, the Applicants assert that, whatever the hazards were at St Cecilia's, whether they gave rise to an imminent risk of serious harm (a Category 1 hazard of the most serious classification), or some less serious hazard of a lower classification; on 19 December 2019, an Improvement Notice served on the Applicants would have had a significantly greater chance of quickly and successfully removing the hazard than the section 21 ERA Notice served by the Respondent.

The Applicants cite the following reasons: -

a) The actions required to remove the hazard had been well known and fully understood by all the relevant parties, WMFS, the Respondent, the Applicants, since 9 January 2019, the date by which all the parties were fully conversant with the WMFS report.
b) On 19 December 2019, the Applicants were fully prepared and funded to start the work, including addressing the hazard early in 2020, having spent 2019 reviewing suppliers' capabilities, seeking tenders and consulting Leaseholders. Proof of this is provided by the actual work delivered by the Applicant between 1 January 2020 and 6 June 2020. For example, the implementation of 24 fire doors in the lobbies.
c) On 19 December 2019, the Respondent had conducted no effective preparation to undertake the required work and it is a fact that they were unable to start the work until 6 June 2020. The mitigation of this delay from April, the third date that had been published as a start date, as a result of COVID restrictions is unconvincing. The COVID

restrictions did not apply to emergency work. This work had been classified as urgent by the Respondent who has massive resources and is acting as an expert, yet has presented no evidence of any attempt to establish a way to work through that COVID period as many ordinary citizens had to do.

d) The Respondent is preoccupied with whether there were hazards and whether they gave rise to a risk of serious harm long after it was known by all the parties what the hazards were and how to remove them; at which point the priority was by what enforcement method would this hazard be most effectively and speedily removed. The greater the hazard, the more effectively and speedily it needed to be removed and yet at the very time the Respondent determined the hazard to be Category 1 on 19 December 2019, they chose an enforcement method - ERA with all the known delays of the Respondent procuring a solution as yet undetermined rather than an Improvement Notice when the Applicant had already undertaken the tendering and selection processes to identify and secure a solution which was all ready to go.

Ground Two

40. The Applicants refers the Tribunal to its comments in Ground One. Whatever the classification of the hazards at St Cecilia's were, they were fully understood by all the parties as was the work necessary to address them.

a) On 19 December 2019, the Applicants, having prepared thoroughly and conscientiously throughout 2019 were in a position to undertake the work at the start of 2020.

b) On 19 December 2019, the Respondent, having concentrated its activities on administrative and organisational matters throughout 2019, rather than preparing the practical steps to undertake the work if it proved necessary was in no position to start the work as promptly.

c) Undertaking an inspection and declaring a Category 1 hazard between 15 December 2019 and 19 December 2019 did not change any of the facts, namely that the Applicants were at that time in a better position to undertake the necessary work and should have been allowed/obliged to do so by the issue of an Improvement Notice. Thus, keeping the possibility of ERA for the Respondent in reserve whilst monitoring the Applicants' progress and properly preparing for any future requirement of ERA.

d) Paragraphs *11* to *17* of the Application for Permission to Appeal are completely without merit:

11 There is a very great contradiction when an alternative enforcement option would yield a more timely result.

12 The Respondent acknowledges here that their delay could be construed as a lack of conviction as to whether or not a risk existed.

The Respondent confirms its knee-jerk reaction to establishing that a Category 1 risk existed by making the wholly unconnected decision for ERA in one day without a proper analysis of the alternatives.

The behaviour of the Respondent throughout implies that Category 1 hazard equals ERA. Whereas a Category 1 hazard may lead to that conclusion after due consideration in many cases, it clearly did not apply in this particular case.

13 The Respondent was obliged to take enforcement action but there is no requirement to take a particular form of enforcement ction and in this case the wrong one was selected.

14 All the facts necessary for the Tribunal to conclude that an Improvement Notice was the correct enforcement decision were available on the 19 December 2019, namely that the Applicant was in a better position to successfully respond to an Improvement Notice than the Respondent was to undertake a Section 21 ERA.

15 To the contrary, the Respondent can never have intended to commence the ERA in January 2020 because it is acting as an expert and knows, or should have known, that this was completely undeliverable. This raises the question of whether this claim of a January start, then a February start, then an April start was deliberately manipulated to stymie the Applicants from undertaking this work or whether it was merely a result of incompetence.

The Respondent's primary submission, regarding time to organise the work, being entirely irrelevant to the question as to whether a Category 1 Hazard existed and whether that hazard poses a risk of serious harm is, in itself, irrelevant. The question is, did that extended time to prepare make an improvement notice the correct enforcement decision and the answer to this is, clearly, yes.

16 This is an artificial construct which erroneously seeks to imply some general restriction on the use of ERA based on the fact that the Tribunal is taken to have concluded that there was no imminent risk of serious harm simply because of the delay in serving an ERA. To repeat, the Applicants say that the delay in serving and delivering an ERA was inevitable, bearing in mind the lack of preparation by the Respondent prior to issuing it, and it is this delay, coupled with the substantial delay between the issuing of the WMFS report in January 2019 and the

announcements of December 2019, which ensured that the Applicants had time to properly prepare for the action eventually identified as the ERA by the Respondent, whereas the Respondent had failed to undertake any such preparation.

17 But ERA should not be contemplated in cases with what the Respondent describes as “acceptable delays" when there is an alternative competent form of enforcement action without these delays.

41. Paragraphs 18 — 28 are irrelevant in the context of the argument that the specific categorisation of the risk on 19 December 2019 was by that time of subsidiary importance to the selection of the most effective enforcement Action. This should clearly have been an Improvement Notice because of the preparedness of the Applicant to discharge the Improvement Notice and the lack of preparedness of the Respondent to undertake the Section 21 ERA.

42. Following the Applicants’ appeal in April 2020, the Respondent had an opportunity to review and correct their decision of 19 December 2019 and issue an Improvement Notice at that time when it was even clearer that the Applicant was in a better position to undertake the work and the Respondent was still not in a position to do so.

43. By attempting to strike out the Appeal and persisting with an inferior and inappropriate strategy the Respondent lays itself open to the charge of being more concerned with its own reputation and financial exposure than the safety and financial wellbeing of the leaseholders of St Cecilia’s.

Ground 3 (d)

44. With regard to historic delays in addressing hazards, the Respondent cannot rely on this opinion which in any case is not accepted in perpetuity. From September 2014 to 9 January 2019 together with WMFS and the Respondent, the Applicants accepts its share of criticism for the limited Fire Safety improvements undertaken in that period. However, the Applicants reassert that it would be unfair and prejudicial to single out their historic behaviour during this period.

45. From 9 January 2019, on receipt of the WMFS report, the Applicants have pursued resolutions to the issues raised in that report in a thorough and most vigorous manner to the extent that it was in a position to fund and begin delivery of these solutions from February/March 2020 and the Respondent was aware of this. Any accusation of historic delays can be more accurately and fairly attached to The Respondent during this period.

46. Paragraphs *29 - 35* of the Application for Permission to Appeal;

29a But, the failure of the Respondent to select the correct form of enforcement action resulted in a delay to the hazard (however severe) being properly dealt with.

29b See paragraphs 44 and 45 above.

31 By the 19 December 2019 the choice of the most appropriate enforcement action was the primary consideration not the category of the hazard.

32 But what would have been an even more highly material factor in selecting the appropriate enforcement action is what enforcement action in the current circumstances extant in December 2019 would ensure the quickest and most effective removal of the hazard.

33 The last sentence is another example of the Respondent making a completely inaccurate statement. The Applicants refer the Tribunal to paragraphs 64 and 74 of the Applicants' bundle and statement of case.

In paragraph 64 the Applicants clearly rejects the Respondent's reasons for not issuing an Improvement Notice.

In paragraph 74, the Applicants say *"WCC should have afforded the RTM Co the opportunity to do the works within the ERA Notices themselves and that an Improvement Notice would have been more appropriate."*

Mr Hacking's closing statement in the Tribunal hearing, item 4, Improvement Notice *"Bearing in mind the lack of meaningful action by the Respondent in 2019, the only Notice which would have been appropriate to the circumstances in December 2019 was an Improvement Notice."*

The Respondent is therefore wrong to suggest that *"no other form of enforcement action was suggested by either party to be appropriate."* The Tribunal did not fetter its own discretion as to what was the most appropriate form of enforcement action.

The determination for an ERA has to be taken against a very high bar, therefore it is entirely appropriate for the Tribunal to take into consideration such matters as an inherently unnecessary but significant delay between identifying the Category 1 Hazard and serving the ERA but the Tribunal can also take into consideration in this case the Respondent's previous delay in inspecting the premises and judging the

severity of any hazards when the WMFS report had indicated to the Respondent that significant fire safety improvements were necessary as early as November 2018.

34 With regard to the Respondent's reluctance to step in and undertake works if reasonable progress was not being made towards complying with an Improvement Notice, then the Applicants make the following comments.

Firstly, the Respondent is funded by public money to enable it to discharge these duties when they arise.

Secondly, being properly prepared to step in and take further action in the event of an unsatisfactory performance with regard to the discharge of an Improvement Notice is a funded, regulated and duty of the Respondent and therefore should need no canvassing of parties to a Tribunal for it to take place.

Thirdly, the suggestion that the Respondent, with its huge buying power, is unable to negotiate to receive plans and quotations for work at zero cost from its suppliers lacks credibility.

Finally, it is not unrealistic, as the Respondent claims, for the Tribunal to expect some basic business acumen from the Respondent in preparing for the possibility of an unsuccessful end to an Improvement Notice. Presumably, the Respondent has to take precautions in all cases where it issues an Improvement Notice and it is funded to do so.

47. With regard to the WMFS's three months deadline to comply with its report's recommendations it has already been established that a relatively small proportion of this work, namely the ERA being undertaken by the Respondent, is still incomplete 11 months after the Respondent committed to undertake the work. The entirety of the report's recommendations probably amount to a cost of £600,000 to £800,000 at a conservative estimate. It is therefore clearly an impossibility for this work to be completed in three months. Applications to the Tribunal for variations of lease terms under Section 35 of the Landlord and Tenant Act 1987 would not change that reality.

48. The Respondent's attempt to leverage their opinion regarding the RTM's historic conduct is a blame game which adds no value to the resolution of the important matters that have been outstanding. The Applicants are surprised that the Respondent takes such a negative view of the Applicant's performance in spite of the huge progress that has been made across a wide variety of security, health and safety actions undertaken at St Cecilia's during their short period of tenure.

The Respondent's submissions

49. The submissions of the Respondent are largely in response to those of the Applicants above.

50. The Respondent's states that it's approach has been to confine itself to submissions upon the evidence that was adduced before the Tribunal at trial (both through oral evidence and through the documents which were contained in the trial bundle).

51. The Respondent considers that Mr Hacking has, at various points in his submissions, attempted to introduce new evidence of various matters. In almost all cases, the evidence is of doubtful relevance to the issues which the Tribunal has to decide (including in particular his description of the progress of works after the Respondent made its decision to take ERA). But in any event, there has been no permission from the Tribunal for new evidence to be adduced, the only permission having been to the parties to make further representations. In circumstances in which the evidence was not adduced at trial, it has been introduced now without permission, it is of minimal or no relevance to the issues in the case, and the Respondent has not had the opportunity to test it, it is submitted that the proper approach is for the Tribunal to disregard it.

52. The final general observation made by the Respondent to make about Mr Hacking's submissions is that their general theme is to attempt to deflect the criticism of the RTM Co and PC's historic conduct in relation to fire safety at St Cecelia's which was contained in the Respondent's Skeleton Argument for trial and instead to blame and criticise WMFS and or the Respondent. The Respondent states that they adduced this evidence of the Applicants historic handling of fire safety related matters at St Cecelia's, including in particular their dilatory response to the WMFS report in January 2019, because this evidence helps to explain why the Respondent thought it appropriate to take ERA rather than serving an Improvement Notice. The conduct of the Respondent and / or WMFS, about which Mr Hacking makes complaint over so many pages, is irrelevant to this question.

Imminent Risk of Serious Harm

53. The Respondent notes that the Applicants' representations do not challenge the Respondent's assertion that an imminent risk of serious harm existed at St Cecilia's as a result of the various matters which are summarised in paragraphs of the Application for Permission to Appeal, and more fully set out in Parts 4, 5 and 6 of their Statement of Case and consider that the Applicants challenge has been only to the particular enforcement action selected by the Respondent. The Respondent submits that the Tribunal's decision on this issue should be that an imminent risk of serious harm did indeed exist and that there is no other

conclusion that is properly available to the Tribunal on the unchallenged evidence of the Respondent.

What was the appropriate enforcement action.

54. In support of its submission that ERA was the appropriate course of action, and that service of an improvement notice was not, the Respondent relies upon the chronology of events which was set out in its skeleton argument for trial. The Tribunal is again invited to consider that chronology, and the documents which are referred to within it which the Respondent considers show the following:

    a) "Serious shortcomings by PC / SC RTM in connection with their Fire Safety Risk Assessments" prior to the end of 2018
    b) The WMFS report of was damning. Serious deficiencies were identified, and urgent remedial action was requested in respect of it. Despite the breadth of defects identified, it was not until March 2019 that the RTM Co gave consideration to obtaining any quotations for remedial works, and even at that stage the quotations which were to be sought related only to the repair of fire doors. Other serious defects (ground floor reconfiguration / blocked ventilation) were not addressed at all at that time;
    c) Repeated requests by WMFS and the Respondent for provision of a programme of remedial works during the spring and summer of 2019 were to no avail, and were met with a defensive approach in which the need for the works was challenged. Eventually, by August 2019, the Applicants clearly communicating to WMFS that it simply did not have the financial wherewithal to embark upon a scheme of remedial works. It was not until after WMFS adopted a hard line (23 September 2019 [D310]) that SC RTM and PC set about committing to a scheme of remedial works which would have addressed many of the matters which the subject of the s.41 notices. But even then, there was further delay. It was not until the RTM Co's Directors Meeting in on 23 October 2019 that it was resolved to take action in respect of stairwell doors during 2020, and it was not until the Directors Meeting on 28 November 2019 that (it is claimed) it was resolved to attempt to address during the same year (2020) the issues concerning smoke ventilation and reconfiguration of the ground floor lobby;
    d) None of these resolutions were communicated to WMFS or the Respondent;
    e) At about the same time as the RTM Co resolved to embark upon these works (28 November 2019), PC produced a Fire Risk Improvement Strategy (3 December 2019) which acknowledged that funding was not available to enable the works to be undertaken
    f) By the time that the service charge budget was issued to leaseholders on 11 December 2019, quotations for the works had still not been obtained,

and therefore no s.20 consultation process had been embarked upon. Nor had any prospective application for dispensation been made.

55. The Respondent notes that Mr Hacking has attempted to address these submissions by considering the chronology of events by reference to four different periods, identified above.

56. The Respondent considers that events which occurred during the latter two periods are either of peripheral or no relevance to the questions which the Tribunal must determine. It will be recalled that, having concluded following its HHSRS inspection on 19 December 2019 that there was a Category 1 hazard which involved an imminent risk of serious harm, the Respondent's duty under s.5(4) of the Housing Act 2004 was to decide upon the most appropriate of the various enforcement actions which were available to them, and to take that action. The decision that the Respondent made, on 20 December 2019, was to proceed with ERA.

57. Although the appeal takes place by way of re-hearing, that is not the same thing as a hearing de novo which the Respondent states was succinctly summarised in the Australian decision *Coulton v. Holcombe* [1986] HCA 33:

'The phrase "the appeal will be way of re-hearing" is well understood: it is not a hearing de novo as a new trial is. Instead, on an appeal by re-hearing, the appellate court or tribunal is to determine the issues, its members considering for themselves the issues the trial judge had to determine and the effect of the evidence he heard as appearing in the record of the proceedings before him, but applying the law as it is when the appeal is heard not as it was when the trial occurred'.

58. In the present case, because of the specific provision in s.45(5)(b) of the Housing Act 2004, the Tribunal is permitted to have regard to 'matters of which the authority were unaware'. The Respondent's primary submission is that this language does not permit the Tribunal to have regard to evidence of any matters which occurred after to the date of the Respondent's decision. This is because the answer to the question whether the Respondent's decision was or was not correct cannot be affected by events which occurred subsequently, and which therefore could not have been known to them.

59. In the alternative, the Respondent submits that s.45(5)(b) does not detract from the fact that the focus of the appeal must be upon the correctness of the Respondent's decision at the time when it was made and having regard to the evidence that was then available to it. This proposition is supported by the decision of Judge Elizabeth Cooke in *Herefordshire Council v. Martin Rohde* [2016] UKUT 39 (LC). That decision concerned an appeal under s.255(11) of the Housing Act 2004 against an HMO Declaration. Section 255(11) contains language which is (in

so far as relevant) identical to that in s.45(5)(b). In *Rohde,* the Tribunal had inspected the premises. By the time of that inspection the premises had been cleared out and it appeared to the Tribunal that there was no evidence of occupation by more than two persons. On this basis, the Tribunal revoked the declaration. On appeal to the Upper Tribunal, Judge Cooke held:

'The First-tier Tribunal is to deal with the appeal by way of a re-hearing. It must look at the evidence, but it can also take into account new evidence of which the local authority was unaware, according to section 255(1)(b). So it is looking at matters afresh; but what it is looking at is the local authority's decision. The First-tier Tribunal may confirm or reverse that decision, and if it reverses the decision it can then revoke the HMO declaration. The First-tier Tribunal in this case did not follow the path laid out for it in section 255(11). In formal terms, it erred by revoking the HMO Declaration without first confirming or reversing the local authority's decision. But more fundamentally, it made a decision solely on the basis of the physical state of the property in February 2015, rather than taking into account all the evidence available to the local authority in addition to its own later inspection.'

60. For this reason, the Respondent focusses primarily upon the two earlier periods referred to the Applicants.

Period One – September 2014 to 9 January 2019

61. The Respondent accepts that there is evidence that the Applicants and PC applied themselves to addressing various problems which existed at St Cecilia's during this period however there were demonstrable and serious shortcomings in connection with their Fire Safety Risk Assessments prior to the end of 2018.

62. As for Mr Hacking's submission that the Applicants took comfort as result of the contact between WMFS and PC in 2017, the Respondent considers that they should not have done so, for the following reasons:

    a) Firstly, responsibility for fire safety in buildings of this nature is devolved to the responsible person, namely PC, and so it was PC's responsibility and no-one else's to carry out proper fire risk assessments
    b) Secondly, it is clear from the context in which the 2017 meeting took place (there had been a fire in Flat 7), as well as from the minutes of the meeting and subsequent email exchanges that the focus of the meeting was upon WMFS's ability to access the building for the purpose of getting to and extinguishing a fire. It is patently not the case that a full fire risk assessment of the building was undertaken by WMFS at this time; responsibility for that at all material times remained with PC.

63. In these circumstances, the Respondent considers that the Applicants' statement that between September 2014 and January 2019, there was no suggestion that any category 1 hazards existed arising from the Fire Safety Risk Assessments and the discussions with and representations from WMFS, does nothing to advance their case but on the contrary, supports the Respondent's case. The nature of these category 1 hazards was such that they must plainly have existed during the period in question: they did not appear on 18 November 2018. They should have been identified in the Applicants' Fire Risk Assessments. No relevant inspections were undertaken by the Respondent during the period in question. During the hearing, Mr Hacking did not put his current criticism of the Respondent to any of the Respondent's witnesses as he should have done, and so the Tribunal has not had the opportunity of hearing any detailed evidence about the systems which were in place to ensure that WMFS and WCC discharged their respective duties under the Housing Act 2004 and the Fire Safety Order 2005.

64. The evidence that the Tribunal does have on this issue is the joint working protocol between WMFS and the Respondent. From this, it is apparent that consistent with LACORS guidance, the lead enforcement role in respect of communal areas of purpose built blocks of flats fell to WMFS and not the Respondent. In these circumstances, the Respondent views Mr Hacking's suggestion that the hazards 'may not have been present' during this period as extraordinary. One of the principal deficiencies was in the layout of the ground floor common parts.

Period Two – 9 January 2019 to 19 December 2019

65. In respect of this period, the Respondent observes Mr Hacking invites the Tribunal to conclude that following receipt of the WMFS report on 9 January 2019, the Applicants completed the arrangements to prepare for undertaking works at St Cecilia's to remove hazards identified in the report and was fully able to undertake this work from early 2020. The Respondent does not agree that this was the case; the report requires compliance within a three month period and there was not a Directors' meeting of the RTM Company until 14 March 2019, two months later. The scope of the works discussed did not encompass those required in the WMFS report and the requirement for quotes was not acted upon for a further three months.

66. In the opinion of the Respondent, this six month delay is sufficient to demonstrate that the Applicants were not 'energetically pursuing' any scheme of remedial works. At this time, PC were making it abundantly clear to WMFS (who in turn communicated the information to the Respondent) that they were simply not in a position to proceed with the works at the pace that WMFS required. There was no reassurance that the works would be completed within a reasonable period of time.

Continuing, the Respondent notes, that it was not until the Directors' meeting on the 23 October 2019 that it was finally agreed that works to stairwell doors should be factored into the 2020 service charge budget. No approval was given for the budget to include any other works. It was not until 28 November 2019 that the Directors agreed that more extensive works, including alternations to the ground floor lobby should be included.

67. It was further noted that the lease provisions constrain the RTM Company from raising service charge funds quickly and therefore considering all these factors, the Respondent concludes the RTM Company would have not been able to undertake the remedial works described in the ERA within a reasonable timeframe.

Period Three –19 December 2019 to 10 March 2020

68. The Respondent does not consider that the Tribunal can be satisfied with the scheme of repair relating to the fire door sets and in any event, it had not been proposed at the time when ERA was decided upon.

Period Four –10 March 2020 to 6 June 2020

69. The Applicants' representations relating to this period concern the pace at which ERA was undertaken once impacted by the COVID restrictions, and procedural events which occurred after the appeal to the Tribunal. The Respondent does not consider that any of these matters are relevant to the correctness or otherwise of its's decision to take ERA on 20th December 2020.

Conclusions

70. The Respondent considers that it is plain that the Category 1 hazards that existed at the Property created an imminent risk of serious harm.

71. The only question to be determined is whether ERA was the correct decision to take in light of:

a) the magnitude of the risk and the seriousness of the harm which might result.
b) The RTM Company and PC's historic failure to conduct thorough fire risk assessments which (had they been undertaken thoroughly) would have been bound to identify the defects which gave rise to the need to take ERA.
c) The extremely slow response of those parties to the WMFS report served in January 2019. By the end of 2019, the only work that had been undertaken was the installation of a green button to automate the entrance door to the Property. Progress towards undertaking other

works was almost non-existent, with the only quotations obtained having been for fire door repair replacement.

d) The fact that the Applicants had repeatedly emphasised in their communications with WMFS (which were communicated to the Respondent) that they were simply not in a financial position to undertake works within a reasonable timeframe, and they had not subsequently informed WMFS or the Respondent of any alteration in that position.

72. The Respondent submits that the result of the Tribunal's review should be that it concludes that there was an imminent risk of serious harm, and that the decision to take ERA was the correct one.

The Tribunal's comments in respect of the further submissions

73. The Applicants' further submissions appear in the main to be prompted by appeal ground 3 (d) and the Respondent's comments with regard to "*the Applicants' historic failures"*. A chronology is provided of the interaction between the parties and WMFS. The Tribunal was already aware of this background as the submissions for the hearing were comprehensive.

74. The Tribunal would reiterate the comments made in the original decision with regard to the Applicants' actions prior to the WMFS report, that the early Fire Risk Assessments carried out by PC were seriously deficient and were admitted to be so during the hearing. However, the contact with WMFS in 2017, did not alert PC to these deficiencies. Whether it should have done or not, is not a matter for this Tribunal but it undoubtedly did not lead PC to question their approach.

75. Following the "bombshell" of the WMFS report in January 2019, the RTM Company and PC changed their approach but were limited by factors outlined in the decision and also in the Applicants' submissions. The Applicants comments that on 19 December 2019 it was fully funded to start "the work" in reality meant that some works could be started. In this, the Tribunal agrees with the Respondent.

76. The Respondent's submissions state that the Applicants' submissions are an attempt to introduce new evidence and are of doubtful relevance. The Tribunal agrees with the latter, and in any event, the essence of much of what has been said by the Applicants was heard by the Tribunal during the hearing.

77. The Respondent states that the Applicants' representations do not challenge the Respondent's assertion that an imminent risk of serious harm existed at the Property. The Tribunal does not accept this proposition. The Applicants' agree that category 1 hazards existed at the Property but are firmly of the opinion that an Improvement Notice was the most appropriate method of enforcement.

78. The Tribunal notes the Respondent's comments in connection with the Applicants' procurement of the works and would again reiterate that evidence of this nature was heard at the hearing. The bundles submitted for the hearing contained a total of approximately 1,200 pages.

Decision incorporating the Tribunal's response to the Grounds of Appeal. The following paragraphs replace paragraphs 90 to 96 of the original decision.

79. The appeal of the Respondent's decision to serve the Notice is, as already stated, by way of re-hearing but may be determined having regard to matters of which the Respondent authority were unaware section 45 (5) of the Act.

80. It is clear to the Tribunal, and to the parties, that significant hazards related to fire were present in what is a vulnerable building. The Grenfell tragedy was a wake-up call to all those involved with high rise residential buildings whether they be residents, landlords, property managers or statutory authorities. However, the deficiencies present within the building should have been clearly identified by PC on their appointment. A competent fire risk assessment carried out under the Regulatory Reform (Fire Safety) Order 2005 would have highlighted the failings and the need for urgent action. Unfortunately, the 2017 contact between PC and WMFS probably led the former to feel relatively "comfortable" that their approach was appropriate in terms of fulfilling their responsibilities and statutory obligations

81. To the Tribunal, it appears that the WMFS report in January 2019 was a wake-up call to the RTM Company and PC. The Tribunal notes the difficulties presented by the lease in relation to the of raising funds however in similar circumstances, other landlords/RTM companies have applied to the Tribunal for a variation of lease terms under section 35 of the Landlord and Tenant Act 1987 to enable interim demands to be issued accompanied by an application for dispensation under section 20ZA of the Landlord and Tenant Act 1985.

Ground 1: The Tribunal failed to make any determination about whether the hazards at St Cecilia's gave rise to an imminent risk of serious harm.

Ground 2: Alternatively, to ground 1, if the Tribunal did make a determination that the hazards at St Cecilia's did not rise to an imminent risk of serious harm, then (a) its reasons for reaching that conclusion were wrong and (b) in reaching that conclusion it failed to have regard to the facts and matters which had been relied upon by the Respondent in support of its conclusion that such a risk existed.

82. In consideration of the likelihood of an occurrence that could cause harm from the threats from exposure to uncontrolled fire and associated smoke at the Property and spread of harm outcomes, the Tribunal notes the deficiencies which

contribute to both likelihood and spread of harm outcomes and agrees that a category 1 fire hazard was present at the Property. However, the fact that a category 1 hazard is present does not of itself mean that an imminent risk of serious harm is automatically present. For the avoidance of doubt, a category 1 hazard may be present in circumstances where there is no *imminent* risk of serious harm.

83. The Respondent points to the assessment of the hazard showed a representative scale point of 1:100 for the likelihood and argue that this means that an imminent risk of serious harm was present. Likelihood is defined in Chapter 2 of the Operating Guidance, paragraph 2.19-2,20:

"The probability of an occurrence that could cause harm that would prove fatal or require some form of medical treatment (Class 1 to Class IV). For the purposes of the Housing Health and Safety Rating System, this is the probability of an occurrence during the twelve months following the assessment".

84. To put it another way, a likelihood of 1: 100, means that for 100 dwellings in exactly the same condition with the same deficiencies, having regard to the vulnerable age group for fire (the over 60s), over the next 12 months, at least one of those persons would need some form of medical treatment; as a consequence of a harmful occurrence arising from fire. The fact that an HHSRS assessment produces a likelihood of 1:100 of a harmful occurrence does not go to the imminence of the risk; it merely indicates the chances of it occurring within the 12-month period. In ordinary language 'imminent' means a good chance that the harm will be suffered in the near future, as indicated at paragraphs 83 in the original decision of this Tribunal.

85. The Tribunal did not consider that the evidence presented by the Respondent allowed it to conclude that there was an 'imminent risk' of such harm, having regard to the lengthy timescales and conduct of the Respondent and WMFS prior to the emergency remedial action being taken.

86. The Tribunal does not therefore accept that its conclusion for reaching this decision was wrong (Ground 2 (a)).

87. In respect of Ground 2 (b) – "*in reaching that conclusion it (the Tribunal) failed to have regard to the facts and matters which had been relied upon by the Respondent in support of its conclusion that such a risk existed* – the Tribunal considers that the Respondent's actions were not commensurate with the taking of ERA – i.e. remedial action in respect of the hazard concerned as the authority considers immediately necessary in order to remove the imminent risk of serious harm within subsection (1)(b).

88. The WMFS report confirmed that the Property was inspected on the 19 November 2018. The letter stated that the works in the schedule should be undertaken as soon

as possible, *balancing the need for safety against the demands on your business or undertaking***.** A site visit was to be undertaken in three months time and the works should be completed before the site visit. It took just over 7 weeks to get the report to PC, plus the 3 months to undertake the work so in total 3 months and 7 weeks.

89. The approach taken by WMFS was via informal letter as opposed to service of an enforcement notice, which was available under Article 30, the Regulatory Reform (Fire Safety) Order 2005. They took no enforcement action despite the continued non-compliance with the requirements of the report.

90. A joint inspection by the Respondent and WMFS was undertaken on the 7 March 2019. However, it was not until joint meetings between the Respondent and WMFS on 11 and 14 November 2019, that consideration of any formal enforcement action was considered. This was almost 12 months after both the Respondent and WMFS were aware of the fire safety concerns.

91. In addition, the Tribunal notes that the Respondent undertook a sample inspection of 14 flats in November 2018. The inspection team included the Senior Environmental Health Officer, the Fire Safety Consultant working for Wolverhampton Homes, and a Health & Safety advisor. The Respondent confirms that the Fire Consultant and the Health & Safety advisor concentrated on the structural fire resistance and they also undertook a wider assessment in respect of the 29 Hazards contained within the HHSRS - which included Fire. It is stated that the common parts were not fully inspected because WMFS were leading on enforcement of these areas at the time, so no HHSRS Assessment of the common areas was carried out at that time. However, for the purpose of the Operating Guidance, Chapter 2: 2.04-2.05 states that for the purpose of the HHSRS inspection, a dwelling includes common parts and Chapter 5 Application of HHSRS in multi occupied dwellings: 5.03, further states that the common parts form part of the assessment. Therefore, they should have been included. Even if those involved in the inspection did not put their minds to the common parts, they would have entered the building through the main entrance and would have been aware of the stairs discharging into a non-protected route.

    If the Respondent did not consider the common parts at that stage, they would have been put on notice when WMFS consulted on their findings or at the latest when they received a copy of the WMFS report. In addition, they undertook a further joint site inspection on the 7 March 2019.

92. The fire safety issues that were identified during the November 2018 inspections closely reflected those that were present when the ERA Notice was served on the 10 March 2020. The Tribunal appreciates that there is a joint protocol and WMFS was the lead body in relation to this type of building, however, neither the conduct of the Respondent or WMFS, since the November 2018 inspection demonstrates

the level or urgency that is needed to support the view that there was an imminent risk. At the meetings between the Respondent and WMFS on the 11 and 14 November 2019, it was agreed that formal enforcement action would be taken by the Respondent. However, an inspection was not undertaken until 16 December 2019 – over a month later. The ERA Notice dated the 10 March 2020, stated that the date on which the remedial action was taken / proposed to be taken was 3 March 2020 until 1 June 2020. This represented a further delay of 85 days from the date of inspection to service of the ERA Notice. The Tribunal therefore determines that the fire hazard at St Cecilia's did not represent an imminent risk of serious harm.

Ground 3: The Tribunal erred in concluding that an Improvement Notice was the most appropriate enforcement action:
d) because it failed to have any regard, or any sufficient regard, to the magnitude of the risk of serious injury, and to the Applicants' historic failures to undertake works at St Cecilia's to remove the hazards.

93. As stated in the original decision, the use of an Improvement Notice would have given the Applicants an opportunity to undertake the works and would have enabled the Respondent to organise contractors and materials in anticipation of any potential non-compliance, which was the justification given by the Respondent for the delay between the date of inspection and the service of the ERA Notice in any event. Whilst the Respondent had cause to be concerned at the Applicants' lack of progress, they were, following the WMFS report in January 2019, facing up to, and dealing with some of, the issues. The Tribunal would reiterate that by virtue of Schedule 3, Part 2 (3) of the Act, if the local housing authority consider that reasonable progress is not being made towards compliance with an improvement notice in relation to the hazard, then they may themselves take the action required; allowing an opportunity for an earlier intervention, if considered appropriate in the circumstances.

94. The use of an Improvement Notice would therefore in the opinion of the Tribunal have been the most appropriate course of action.

95. Under section 45 (6) of the Act, the Tribunal reverses the decision of the Respondent Local Authority to take Emergency Remedial Action. The Emergency Remedial Action Notice dated 10 March 2020 is quashed. The Tribunal considered Mr Taylor's submissions (referred to in the original decision) concerning its discretion under section 45 (6) of the Act but is not attracted to the argument that having determined that an Improvement Notice was the most appropriate enforcement action under section 5 (4) of the Act, it should nevertheless confirm the decision to serve a section 41 notice. To ask the Tribunal to make a decision that runs contrary to the Tribunal's actual determination of the issues, is either absurd, or invitation for it to exercise an inherent jurisdiction which the Tribunal simply does not have.

APPEAL

96. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

V Ward