Neutral Citation Number: [2024] UKUT 59 (LC)

Case No: LC-2024-59

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

FTT REF: LON/00BG/HY1/2023/0022

15 March 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

BUILDING SAFETY – ACCOUNTABLE PERSON – whether a tribunal appointed manager is an accountable person – whether manager's functions which overlap with building safety functions are discharged or continue – Part 4 and Schedule 7, Building Safety Act 2022; section 24(2E), Landlord and Tenant Act 1987 – appeal dismissed

BETWEEN:

SOLOMON UNSDORFER

Appellant

-and-

OCTAGON OVERSEAS LIMITED (1)
CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED (2)
RIVERSIDE CREM 3 LIMITED (3)
CIRCUS APARTMENTS LIMITED (4)
JOSEPHINE SWABY
(ON BEHALF OF THE RESIDENTS' ASSOCIATION OF CANARY RIVERSIDE) (5)

Respondents

Canary Riverside Estate,
Westferry Circus, London E14

Martin Rodger KC,
Deputy Chamber President

29 February 2024

Daniel Dovar, instructed by Wallace LLP, for the appellant
Timothy Morshead KC, instructed by Freeths LLP, for first to third respondents
Philip Rainey KC made submissions in writing on behalf of the fourth respondent
Jonathan Upton made submissions in writing on behalf of the fifth respondent

The following cases are referred to in this decision:

FirstPort Property Services Ltd v Settlers Court RTM Company Ltd [2022] UKSC 1

General Medical Council and others v Michalak [2017] UKSC 71; [2017] 1 WLR 4193

K Group Holdings Inc v Chuan-Hui [2021] 1 WLR 5981

Maunder Taylor v Blaquiere [2003] 1 WLR 379

Moore v Gad [1997] BCC 655

O (a minor), R (on the application of) v Secretary of State for the Home Department [2022] UKSC 3

Orchard v Mooney [2023] UKUT 78 (LC)

Pepper v Hart [1993] AC 593

Royal Borough of Kensington & Chelsea v Lessees of 1-124 Pond House [2015] UKUT 395 (LC); [2016] L&TR 10

Sadeh v Mirhan [2015] UKUT 428 (LC)

Introduction

1. Can a manager appointed by the First-tier Tribunal under section 24, Landlord and Tenant Act 1987, be an "accountable person" within the meaning of section 72, Building Safety Act 2022?

2. That is the question which arises in this appeal against a decision of the First-tier Tribunal (Property Chamber) (Judge Vance and Judge Rushton KC) (the FTT) made on 21 December 2023. It was answered by the FTT as a preliminary question of law in an application made on 4 October 2023 by the first, second and third respondents for a determination under section 75, Building Safety Act 2022 (the 2022 Act) identifying the accountable persons and to select one of them as the principal accountable person in respect of each of the higher-risk buildings comprising the Canary Riverside Estate in East London.

3. The FTT's answer to the question was that a tribunal appointed manager could not be an accountable person within the meaning of section 72, 2022 Act. That conclusion enabled it to answer the first of the questions raised by the application by identifying all those who are accountable persons in respect of the higher-risk buildings on the Estate. The second part of the application, in which the FTT must determine who is the principal accountable person in respect of each of the buildings, remains to be determined.

4. The FTT granted permission to appeal.

5. Canary Riverside is a large mixed estate comprising both residential and commercial premises in the docklands area of East London. It includes five buildings which, because of their size, are classified as "higher-risk buildings" for the purpose of the 2022 Act. These buildings have been the subject of disputes between the owners of the Estate and its residents since at least 2005 and their residential parts have been under the management of a manager appointed by the FTT pursuant to Part 2, Landlord and Tenant Act 1987 since 2016.

6. The appellant, Mr Unsdorfer, was appointed by the FTT as the manager of the Estate in September 2019 to replace Mr Alan Coates who had held that position since October 2016.

7. The first, second and third respondents are all members of the Yiannis Group of companies. Octagon Overseas Ltd, the first respondent, owns the freehold of the Estate. Canary Riverside Estate Management Ltd, the second respondent, holds part of the reversion to a long lease from Octagon now comprising four of the higher-risk buildings on the Estate (Belgrave Court, Berkeley Tower, Eaton House and Hanover House). Riverside CREM 3 Ltd, the third respondent, holds the severed remainder of the reversion to the same long lease comprising Circus Apartments, the fifth higher-risk building. I will refer to the first, second and third respondents as "the Landlords".

8. The fourth respondent, Circus Apartments Ltd, holds a sublease of Circus Apartments from Riverside CREM 3 Ltd for a term of 999 years. It is entitled to use the building as serviced apartments.

9. The fifth respondent named by the Landlords in their application to the FTT was the Residents Association of Canary Riverside, which represents the long leaseholders of the residential buildings on the Estate. For the purpose of the appeal the Association has nominated Ms Josephine Swaby, the fifth respondent, as its representative member.

10. Whether Mr Unsdorfer's appointment should be renewed, and if so on what terms, is the subject of applications to the FTT under section 24, Landlord and Tenant Act 1987 which are due to be heard over eight days beginning on 7 May. The question posed in this appeal is very relevant to the FTT's consideration of those applications and the appeal has therefore proceeded on an expedited basis.

11. Written submissions in support of the Manager's appeal were provided on behalf of the fifth respondent by Mr Jonathan Upton and on behalf of the fourth respondent by Mr Philip Rainey KC. At the hearing of the appeal the Manager was represented by Mr Daniel Dovar and the Landlords by Mr Timothy Morshead KC. I am grateful to all those who have participated.

Part 4 of the Building Safety Act 2022

12. The 2022 Act was enacted following the Grenfell Tower fire of 14 June 2017 and as section 1(1) states, it contains provisions intended to secure the safety of people in or about buildings and to improve the standard of buildings. The Act was preceded by the report of the Independent Review of Building Regulations and Fire Safety, led by Dame Judith Hackitt, and gave effect to many of the report's recommendations.

13. The 2022 Act is in six Parts. Part 1 is introductory. Part 2 creates the post of building safety regulator (the Regulator) and describes its functions. Part 3 amends the Building Act 1984 to confer powers and duties on the Regulator. Part 4 is about higher-risk buildings in England and creates the status of "accountable person" and the duties which go with it which are the subject matter of this appeal. Part 5 is about leaseholder protections and Part 6 contains general provisions.

14. Part 4 of the 2022 Act is titled "Higher-Risk Buildings" and contains provisions about the management of "building safety risks" in relation to such buildings. Most of its substantive provisions came into force on 6 April 2023.

15. "Building safety risks" are risks to the safety of people in or about a building arising from the spread of fire or structural failure or any other matter prescribed by regulations (section 62(1)).

16. A building in England is a "higher-risk building" if it is at least 18 metres in height or has at least 7 storeys, and contains at least 2 residential units (section 65(1)). A residential unit means a dwelling or any other unit of living accommodation (section 115). A higher-risk building is "occupied" if there are residents of more than one residential unit in the building (section 71(2)).

17. Responsibility for the management of building safety risks in higher-risk buildings falls on an "accountable person" and the greater part of Part 4 is concerned with the duties of such a person. One recommendation of the Hackitt report was that there should be a clear duty holder in respect of buildings who can be held to account and will have statutory obligations for building safety. The accountable person is that person.

18. Although the definition of accountable person is quite complex, the basic point is that an accountable person is someone who owns or has obligations to repair any of the common parts of a higher-risk building.

19. The status of accountable person is not granted by a determination of a tribunal or by an agreement between owners or occupiers of the building; it applies by virtue of the 2022 Act, and it carries with it duties, breach of which exposes the accountable person to the risk of criminal sanctions. Nor can the accountable person decline or renounce the status (other than by disposing of the interest or obligation which gives rise to it).

20. Section 72(1) defines "accountable person" and is reproduced in full, together with section 73 which defines "principal accountable person", in the appendix to this decision. The key provision is section 72(1), as follows:

> 72 Meaning of "accountable person"
>
> (1) In this Part an "accountable person" for a higher-risk building is—
>
> (a) a person who holds a legal estate in possession in any part of the common parts (subject to subsection (2)), or
>
> (b) a person who does not hold a legal estate in any part of the building but who is under a relevant repairing obligation in relation to any part of the common parts.
>
> This subsection is subject to subsection (5) (special rule for commonhold land).

21. This basic provision is qualified by definitions and exceptions. The most significant of these, for the purpose of this appeal, are the definitions of "common parts" and "relevant repairing obligation".

22. Section 72(6) provides that the "common parts" of a building are the structure and exterior of the building (except so far as they are included in the demise of a single dwelling or of premises to be occupied for the purpose of a business), or any part of the building which provided for the use, benefit or enjoyment of the residents of more than one residential unit. It will therefore normally include both the main structure and installations (lifts, fire alarms, lighting etc) and the internal circulation areas, hallways, corridors, staircases etc which are used by the occupants of more than one flat or apartment in the building.

23. Section 72(6) also contains the following explanation of "relevant repairing obligation":

> a person is under a relevant repairing obligation in relation to anything if the person is required, under a lease or by virtue of an enactment, to repair or maintain that thing.

24. It can therefore be seen that section 72(1) provides two alternative bases on which a person may be accountable.

25. The first is that the person holds a "legal estate in possession" in any part of the common parts. Section 72(6) explains that for this purpose, "possession" does not include the receipt of rents and profits or the right to receive them. To qualify as an accountable person under section 72(1)(a), a person must therefore hold the common parts in hand and must not have let them to someone else. This limb is subject to section 72(2) which provides that a person, referred to as "the estate owner", who holds a legal estate in possession in all or part of the common parts is not an accountable person in two circumstances. The first will typically apply where responsibility for the repair of the common parts has been conferred on a management company, and the second where all repairing obligations relating to the relevant common parts have been taken from the estate owner by an RTM company.

26. The other basis on which someone may be an accountable person is under section 72(1)(b). A person who does not hold a legal estate in any part of the building but who is nevertheless under a relevant repairing obligation in relation to any part of the common parts (such as a management company or an RTM company) will be an accountable person. Circumstances in which this limb will apply will include where one or other of the exceptions in section 72(2) prevents the person who holds the legal estate in possession from being an accountable person. Whether it has a wider application, including to tribunal appointed managers, is the issue in the appeal. It is noteworthy at this stage that there is no equivalent of section 72(2) specifying that where a tribunal appointed manager has responsibility for the repair of the common parts the estate owner is not an accountable person.

27. Section 72(3)-(4) covers the situation in which the common parts of a building are demised by one or more leases in a chain, with the relevant repairing obligation being retained by a landlord further up the chain than the person in possession. In that situation the landlord which is under the repairing obligation in relation to the common parts is treated as being the landlord in possession for the purpose of determining who is the accountable person.

28. Part 4 of the Act imposes duties on the accountable person to take a variety of steps to manage building safety risks. The purpose of the definitions in section 72 is to identify those who are in a position to take those steps. Thus, the essence of being an accountable person is that one must either be in possession of the common parts of the building (including the structure and exterior) or be under a relevant repairing obligation in relation to the common parts.

29. It is possible that more than one person may be an accountable person for a building as, for example, where one estate owner is under a relevant repairing obligation in relation to the structure and exterior of the building, and a different person is under a relevant repairing obligation in relation to the interior common parts. I was told, for example, that Octagon, as freeholder, has retained responsibility for repairs to the foundations of Canary Riverside, but has passed on responsibility for the repair of the rest of the common parts to the other Landlords. To avoid duplication of responsibility and the confusion or delay which might result, section 73 provides for one accountable person to be identified as the "principal accountable person".

30. Where a building has only one accountable person, they are the principal accountable person (section 73(1)(a)). Where a building has more than one accountable person, the principal accountable person is the one who holds a legal estate in possession in the relevant parts of the structure and exterior of the building, or who is within section 72(1)(b) because of a relevant repairing obligation in relation to the structure and exterior of the building (section 73(1)(b)). Once again, the Act seeks to assign responsibility to the person in the best position to take necessary steps to manage building safety risk and assumes that to be the person who controls or is already obliged to repair the structure and exterior of the building.

31. The Higher-Risk Buildings (Key Building Information etc) Regulations 2023, made under section 74, allocate responsibility for different parts of a building which has more than one accountable person. As this appeal does not raise any issue to which the Regulations relate it is not necessary to consider them.

32. Section 75(1)(a) and (b) provides that any interested person may apply to the FTT for it to determine who are accountable persons and who is the principal accountable person as regards a higher-risk building; an application may also be made under section 75(1)(c) to determine the part of the building for which any accountable person is responsible. For this purpose, interested persons include the building safety regulator, anyone who holds a legal estate in the common parts, and anyone who is under a relevant repairing obligation in relation to any part of the common parts. The application which has given rise to this appeal was made by the landlords under section 75(1)(a) and (b) (as the FTT pointed out, it did not ask for a determination under section 75(1)(c)).

33. The appeal raises no issue about the scope of the duties of an accountable person and it is not necessary to refer to these in detail, but I mention them in outline to draw attention to the extent of the duties and the role of the Regulator in ensuring they are complied with.

34. The most significant duty for the purpose of this appeal, because it is where the functions of a manager appointed under section 24, 1987 Act and the duties of an accountable person might be expected to coincide most closely, is the duty of the accountable person under section 84 to take all reasonable steps to prevent a building safety risk materialising or to reduce the severity of any incident resulting from such a risk materialising, steps which "may in particular involve the accountable person carrying out works to the part of the building for which they are responsible".

35. I was told that in this case it is common ground that substantial work is required to the cladding of the buildings at Canary Riverside (which may include its complete replacement). That work is likely to fall squarely within the accountable person's duty under section 84 to take all reasonable steps to prevent a building safety risk materialising. But it would also appear to fall just as squarely in the functions of the Manager under the FTT's Management Order, and indeed the Manager has taken steps to prepare to carry out the work including applications to the Building Safety Fund to cover the very considerable costs.

36. The accountable person's numerous other duties include ensuring that a completion certificate is issued and that the building is registered with the Regulator before it is

occupied (sections 76 and 77); applying to the Regulator for a building assessment certificate (section 79); carrying out an assessment of building safety risks after the building first becomes occupied and at regular intervals thereafter (section 83); preparing a "safety case report" for the building recording risks and steps taken to reduce them (section 85); keeping prescribed information and making it available to the Regulator (sections 88 and 89); and engaging with residents of the building and consulting them on building safety decisions (section 91).

37. Sections 98 to 101 are concerned with enforcement of the accountable person's duties by the Regulator (as well as other duties placed on residents). By section 101, an accountable person commits an offence if, without reasonable excuse, they contravene any requirement of Part 4 or regulations made under it (subject to prescribed exceptions) and the contravention places one or more people in or about the building at a significant risk of death or serious injury arising from a building safety risk. The penalties for such an offence include up to two years imprisonment.

38. Section 102 and Schedule 7 to the 2022 Act strengthen the Regulator's powers by creating a scheme of "special measures". The Regulator is entitled to apply to the FTT under paragraph 4 of Schedule 7 for a special measures order appointing a "special measures manager" for the building. The circumstances in which a special measures order may be made by the FTT are specified in paragraph 4(4) of Schedule 7, as follows:

> The tribunal may make a special measures order if it is satisfied that there has been a serious failure, or a failure on two or more occasions, by an accountable person for the building to comply with a duty imposed on that person under, or under regulations made under, this Part.

If this condition is satisfied a special measures manager may be appointed by the FTT to carry out "the functions of all accountable persons for the building". For as long as the order is in force, the functions of each accountable person are treated as functions of the special measures manager and rights under existing contracts entered into by any accountable person which relate to those functions become rights of the special measures manager.

39. The 2022 Act includes provisions, at section 110 and paragraphs 8 and 9 of Schedule 7, dealing specifically with the subject of tribunal appointed managers and orders under section 24, 1987 Act. These are considered below.

40. Finally, the Secretary of State was given power by section 170(6) to make transitional or saving provisions, but none have been made dealing with the position of a tribunal appointed manager, or allowing an accountable person's track record of non-compliance with building safety obligations before the commencement of the 2022 Act to be taken into account as grounds for the appointment of a special measures manager.

Part 2 of the Landlord and Tenant Act 1987

41. Part 2 of the Landlord and Tenant Act 1987 (the 1987 Act) gives the FTT power to appoint a manager of premises comprising the whole or part of a building containing two or more

flats. The power is to "appoint a manager to carry out in relation to any premises to which this Part applies – (a) such functions in connection with the management of the premises, or (b) such functions of a receiver, or both, as the tribunal thinks fit." Management includes repair, maintenance, improvement or insurance of premises (section 24(11)).

42. In *K Group Holdings Inc v Chuan-Hui* [2021] 1 WLR 5981, at [38], Henderson LJ described the problem which the Act was intended to address as "the failure of the landlord of a multi-tenanted block of flats to perform its obligations."

43. The FTT may only exercise the power to appoint a manager in the circumstances described in section 24(2). There will usually have been some form of mismanagement by the landlord or other person responsible for the management of the premises and the FTT must be satisfied that in all the circumstances it is just and convenient to appoint a manager. Under section 24(2)(a) a relevant person will be in breach of an obligation relating to the management of the premises owed to the tenant under his tenancy; under section 24(2)(ab) unreasonable service charges will have been levied, while under section 24(2)(ac) there will have been a failure to comply with a relevant code of management practice. There is also a more general power under section 24(2)(b), not explicitly based on fault, where other circumstances exist which make it just and convenient for a manager to be appointed.

44. Three broad points are relevant to this appeal. First, that the FTT is given power to appoint a manager to carry out "such functions in connection with the management of the premises" as it thinks fit (section 24(1)(a)). Secondly, it may only make an order where it is satisfied that one of the conditions in section 24(2) is made out, almost all of which depend on the landlord or other person responsible for management of the building having failed to perform to a satisfactory standard. Thirdly, each of those conditions additionally requires the FTT to be satisfied that it is just and convenient to make the order.

45. The Tribunal has emphasised the importance of a manager adhering to the highest professional standards, as is to be expected of an officer of the tribunal. Before any manager is appointed the FTT will wish to satisfy itself that they have the necessary experience, competence and integrity to be entrusted with the role (*Sadeh v Mirhan* [2015] UKUT 428 (LC), at [51]; *Orchard v Mooney* [2023] UKUT 78 (LC), at [19]).

The relationship between Part 4, 2022 Act and section 24, 1987 Act

46. Section 24, 1987 Act has now been amended by section 110, 2022 Act by the addition of new subsections apparently intended to separate the two statutory regimes and to give effect to the recommendation of the Hackett Report that clear lines of responsibility should exist in relation to building safety matters.

47. A new section 24(2ZB) now stipulates that a breach of a building safety obligation owed by an accountable person under Part 4 of the 2022 Act cannot be relied on as a breach of an obligation owed to the tenant for the purpose of satisfying the ground for appointment of a manager in section 24(2)(a).

48. A new section 24(2E) creates a further separation by providing that:

> (2E) An order under this section may not provide for a manager to carry out a function in relation to a higher-risk building where Part 4 of the Building Safety Act 2022 or regulations made under that Part provide for that function to be carried out by an accountable person for that building.

49. Further relevant amendments to section 24 are contained in paragraphs 8 and 9 of Schedule 7 to the 2022 Act, as part of the regime of "special measures" and the appointment of special measures managers. A special measures order is a means by which the Regulator may take responsibility for compliance with Part 4 away from the accountable person and give instead to a special measures manager appointed by the FTT in a procedure comparable to an application under section 24, 1987 Act.

50. Paragraph 8 of Schedule 7, 2022 Act is concerned specifically with the relationship between a special measures manager and a manager appointed by the FTT under section 24, 1987 Act. Paragraph 8(1) provides that where a special measures order is made by the FTT in relation to a higher-risk building at a time when an order appointing a manager under section 24 is in force, paragraph 8(2) applies, as follows:

> (2) The tribunal may amend the section 24 order so as to ensure that the functions to be carried out by virtue of that order do not include any function that the special measures order provides is to be carried out by the special measures manager.

51. Paragraph 9(3) of Schedule 7 inserts a new section 24ZA into the 1987 Act which creates a procedure by which a special measures manager may themselves apply to the FTT for an order under section 24 appointing a manager. The grounds for such an application are specified in the new section 24ZA(4)(b), which provides:

> The appropriate tribunal may only make an order under this section where it is satisfied –
>
> (a) that –
>
> (i) the relevant person is in breach of any obligation owed by the person to the special measures manager by virtue of a special measures order, and
>
> (ii) it is just and convenient to make the order in all the circumstances of the case; or
>
> (b) that other circumstances exist which make it just and convenient for the order to be made.

52. It is not at all clear how the duties of the special measures manager and a section 24 manager are intended to relate to one another, but the opportunity for a special measures manager to seek the appointment of a section 24 manager does not provide a route by which a section 24 manager appointed before the commencement of the 2022 Act may assume responsibility for the functions of an accountable person. That is for two reasons.

53. First, an appointment under section 24ZA is a new appointment, and a newly appointed section 24 manager cannot be given any of the functions of an accountable person (section 24(2E), 1987 Act). The thinking may perhaps be that the new section 24 manager will be responsible for management functions other than those which are also functions of an accountable person (such as in relation to insurance, routine maintenance or the collection of service charges). If so, it is not obvious why those matters are any concern of a special measures manager or why the appointment should have been made conditional on breaches by the accountable person of their obligations under a special measures order, which are unlikely to relate to such matters.

54. Secondly, the defaults by an accountable person which are preconditions to the appointment of a manager under section 24ZA can only occur after the commencement of the 2022 Act. Before a special measures manager can be appointed there must first have been a serious or persistent failure by the accountable person to comply with a Part 4 duty; further non-compliance, this time with an obligation imposed on the accountable person by the special measures order, must then occur before the appointment of a new section 24 manager can be requested by the special measures manager. It is clear, therefore, that whatever section 24ZA is intended to achieve, it is not a transitional provision allowing existing section 24 managers to be accommodated within the new regime of building safety functions.

55. The purpose of the amendments to section 24 was explained in Explanatory Notes prepared under the authority of Parliament by the drafters of the Building Safety Bill. Paragraph 859 explained the background to section 110 and refers to the FTT's power to appoint a manager to take over management functions where a landlord has failed to comply with its obligations. It continues:

> "If that principle were to be carried through into building safety, it could compromise the authority of the Building Safety Regulator. The amendments to section 24 ensure that the new regime is compatible with existing legislation and provides clarity as to avenues of redress for breach of obligations. Under the Act, redress should be sought through the residents' complaints mechanism to the Building Safety Regulator who can arrange for the appointment of a Special Measures Manager if there have been persistent breaches of building safety obligations by the Accountable Person."

56. The commentary on section 24(2E) and section 24(2ZB) is uninformative. Paragraph 858 simply paraphrases the latter provision: "a tribunal cannot appoint a manager under section 24 where the breach of obligations complained of by tenants is a breach of the Accountable Person's building safety obligations". Nor "when appointing a manager under section 24" can the tribunal confer on the manager "any building safety functions which are due to be carried out by an Accountable Person".

57. The Explanatory Notes do not directly address the situation which exists at Canary Riverside where a manager with responsibility for the maintenance of the building and compliance with statutory obligations was appointed by the FTT before the commencement of the 2022 Act. That possibility is alluded to at paragraphs 1598 to 1601 of the Notes, where it is explained that the power to amend a section 24 management order given to the FTT by paragraph 8 of Schedule 7 will "ensure there is no overlap of functions

of the two types of managers in situations where two separate managers have been appointed". This contemplates that an order under section 24 may already be in force in relation to a building at a time when the FTT makes a special measures order; in those circumstances the FTT may amend the section 24 order to avoid duplication of functions as between the section 24 manager and the special measures manager. For that combination of circumstances to exist the section 24 order must have continued to have effect after the commencement of Part 4, and the tribunal appointed manager must have been performing functions under the management order which are functions of an accountable person under Part 4. The only functions given to a special measures manager by an order under paragraph 4(2) of Schedule 7 are those of accountable persons and the separation of functions contemplated by paragraph 8(2) must therefore be a separation of building safety functions which have previously been included in the section 24 order and are now included in the special measures order. This appears to be confirmed by the example given after paragraph 1601 in the Explanatory Notes, which refers to an application being made for a special measures manager to be appointed at a time when an existing manager appointed under a section 24 order "is carrying out functions which relate to the fire and structural safety of the building".

58. The effect of these amendments, and in particular the new section 24(2E), 1987 Act are the subject of argument in the appeal. They demonstrate conclusively that Parliament had not lost sight of the FTT's jurisdiction under Part 2, 1987 Act to appoint a manager with a wide range of functions and responsibilities when it created the status of accountable person. They also seem to me to envisage that, after the commencement of the 2022 Act, a section 24 manager may have continued to perform functions which Part 4 provides are to be carried out by an accountable person and which Schedule 7 envisages will be taken over by a special measures manager if they are appointed.

The Landlords' application under section 75, Building Safety Act 2022

59. The Landlords' application to the FTT of 4 October 2023 sought a determination under section 75(1), 2022 Act identifying the accountable persons and the principal accountable persons in relation to the higher-risk buildings on the Estate. The application stated that the Landlords considered themselves to be accountable persons under both section 72(1)(a) and section 72(1)(b). It also suggested that the Manager was also arguably an accountable person under section 72(1)(b) "as he is under relevant repairing obligations under the management order".

60. The application proposed that Octagon, the freeholder, was the most appropriate person to be the principal accountable person. The application also suggested that the Manager was arguably a principal accountable person.

61. By the time matter came before the FTT for hearing the Landlords' position had changed. They argued that they alone were accountable persons and that the Manager was not. For his part, the Manager did not admit that the Landlords were accountable persons and argued that he was an accountable person and should be designated by the FTT as the principal accountable person. The Residents Association and Circus Apartments supported the Manager's claim to be designated the principal accountable person.

62. The Landlords issued their application under section 75, 2022 Act at a time when the Residents' Association and Circus Apartments had each applied separately under section 24, 1987 Act for the extension and variation of the existing order, or for a new order, and the Manager had applied for different variations. The applications were originally to be heard together but when some were delayed the FTT made use of a scheduled hearing to determine whether, in principle, a manager appointed by it under section 24, 1987 Act could be an accountable person. Although both the Manager and the Residents' Association opposed that course, its good sense is obvious. If the answer to the question of principle is negative, it will inevitably bear on the functions which the Manager can be re-appointed to perform and perhaps even on whether he should be re-appointed at all.

The FTT's decision

63. The FTT first recorded that all parties agreed that because the Manager does not hold a legal estate in any part of the buildings, he does not fall within section 72(1)(a) - the first limb of the definition of accountable person. If he is an accountable person it can only be because he satisfies the requirements of section 72(1)(b) i.e. that he is "under a relevant repairing obligation in relation to any part of the common parts".

64. The Manager undoubtedly had repairing obligations in relation to the common parts and the FTT therefore considered whether these were "relevant repairing obligations" within the meaning of section 72(6). That required that they be obligations "under a lease or by virtue of an enactment".

65. The FTT held that the Manager's repairing obligations were not "under a lease" because, in accordance with the Court of Appeal's analysis of Part 2 of the 1987 Act in *Maunder Taylor v Blaquiere* [2003] 1 WLR 379, the Manager's rights and duties derive from the tribunal's order appointing him although they may in part be defined by reference to a lease.

66. The FTT also accepted the Landlords' case that the Manager was not under an obligation to repair the common parts "by virtue of an enactment". It considered that those words were apt to refer to statutory repairing obligations, such as (it suggested) under regulation 4 of the Management of Houses in Multiple Occupation (England) Regulations 2006; they were not intended to refer to obligations imposed by an order of a tribunal exercising a jurisdiction under statute. No statute imposed obligations on the Manager to repair the common parts of the Estate and his repairing functions were not "by virtue of an enactment". In reaching that conclusion the FTT relied on the statement in the Explanatory Notes that the purpose of section 110 was to "ensure that building safety is kept discrete from other management functions" by preventing the FTT from appointing a manager under section 24, 1987 Act to carry out building safety functions.

67. The FTT rejected the Manager's submission that, notwithstanding section 110, he could be appointed under section 24 to carry out functions that include repairing obligations falling within the remit of an accountable person. It concluded that a manager appointed under section 24 cannot be an accountable person for the purpose of Part 4 of the 2022 Act. It then addressed a submission by the leaseholder's counsel, Mr Upton, that the 2022

Act does not affect existing management orders. At paragraph 80 of its decision it said this:

> "We do not accept that submission. Nothing in s.24(2E) suggests that it only prohibits new s.24 orders from requiring a manager to carry out building safety risk functions which are functions of an AP. We agree with Mr Morshead and Mr Bates that there was no need for express provision to be made for s.24(2E) to take retrospective effect because the duties in Part 4 of BSA 2022 Act did not subsist before its enactment, and so cannot have featured in any extant management order."

68. The FTT then made the determinations under section 75, 2022 Act which the Landlords had requested, finding that Octagon is an accountable person for all five higher-risk buildings on the Estate under section 72(1)(a) (having regard to section 72(3) and(4) and its repairing obligations regarding structural elements), Canary Riverside Estate Management Ltd and Riverside CREM 3 Ltd are each accountable persons section 72(1)(a) in respect of the buildings of which they hold long leases (because they are in possession of the common parts), and Circus Apartments Ltd is an accountable person in respect of Circus Apartments under section 72(1)(a), because it holds the legal estate in possession of some of the common parts.

The arguments on the appeal

69. There was no dispute between the parties on the proper approach to statutory interpretation. The Tribunal's task is to identify the meaning of the words used by Parliament in the light of their context and the purpose of the provision. In *O (a minor), R (on the application of) v Secretary of State for the Home Department* [2022] UKSC 3, at [30], Lord Hodge DPSC stressed the primacy of the language enacted by Parliament, read in its immediate and wider statutory contexts, and the secondary role of external aids to interpretation. Although I was also reminded of *Pepper v Hart* [1993] AC 593, the only extract from Hansard to which I was referred was at best peripheral to Mr Morshead's argument and did not seem to me to be sufficiently specific or material to meet the stringent test which would allow it to be admitted. In any event, I have not found the language of section 72 to be ambiguous such as to make reference to Hansard necessary or permissible.

70. Mr Dovar prefaced his submissions by referring to what Lord Briggs JSC said in *Settlers Court RTM Co Ltd v First Port Property Services Ltd* [2022] 1 WLR 519, SC, at [54], that:

> 'It is well established that the court will lean against a construction of legislation which produces absurd or unworkable results, if there is an alternative construction which does not do so.'

71. Mr Dovar submitted that the Manager was an accountable person because he was under repairing obligations in relation to the common parts as a result of the FTT's management order and those obligations were both "under a lease" and "by virtue of an enactment" and were therefore relevant repairing obligations. The FTT had taken too narrow a view of

the statutory language and had paid insufficient regard to the "absurd" consequences of finding that a tribunal appointed manager could not be an accountable person.

72. He suggested that the exclusion of a tribunal appointed manager from the status of accountable person produced such an absurd and inconvenient result that it cannot have been the intention of Parliament. The consequence of the FTT's construction, Mr Dovar submitted, was that "managers of higher risk buildings would at a stroke be stripped of the majority of their management responsibilities, in particular those relating to the most serious risks in the building". Management of those parts of a building which represented the greatest safety risk would revert to the original landlord. A professional manager, vetted by the FTT before appointment and held by it to high professional standards, would be replaced by a landlord whose past conduct had warranted them being stripped of the management of their own property.

73. If the landlord then failed to adhere to its duties as accountable person, the leaseholders would be obliged to seek redress through the Regulator, as they are unable themselves to seek an appointment of a special measures manager. Meanwhile, the manager would be left to manage the parts left to them. The divide between the Part 4 duties and those retained by a section 24 manager were far from clear and would at the very least necessitate a high degree of co-operation and co-ordination between the manager and the landlord. Mr Dovar referred to what Lord Briggs had said in *Settlers Court*, at [50], about "the very real problems of making workable a shared management concept in relation to estate facilities"; these were "so great as to amount to absurdity" if the statute there under consideration (the Commonhold and Leasehold Reform Act 2002) was construed in such a way as to require different interests to co-operate in managing the same property.

74. The FTT itself had acknowledged the 'significant practical consequences' of its decision in this case, including the 'risk of disagreement' between the Manager and the principal accountable person over how the cladding-removal works should be progressed.

75. As for the statutory language, in the context of the management regime of the 1987 Act it was perfectly possible to refer to a manager's obligations as being conferred "by virtue of" the 1987 Act. Given the consequences of the alternative construction, that reading should be preferred.

76. For the same reason, Mr Dovar submitted that it was apt to view a manager's obligations as arising "under a lease". In *K Group Holdings Inc v Chuan-Hui* [2021] 1 WLR 5981 at [56], in considering whether the statutory provisions regulating service charges applied to a tribunal appointed manager, Henderson LJ had analysed the manager's rights as arising both under the tribunal's order and under the lease itself:

> "It is true that the manager's right to recover the charges is dependent upon the order made under section 24, but in a case (such as the present) where the manager is directed to operate the service charge machinery in the lease, it also remains true to say that the charges are paid under the lease. The important point, in my judgment, is that the provisions contained in an order made under section 24 of the 1987 Act are superimposed on the existing contractual framework of the lease, …'

77. The Residents' Association made submissions supportive of the Manager's appeal, settled by Mr Upton. He additionally suggested that a specific provision excluding managers from being accountable persons would have been included if that had been intended. He acknowledged that section 24(2E) precludes a management order from imposing the statutory obligations of an accountable person on a manager but submitted that it does not preclude an order under section 24 imposing general management functions (which may include a "relevant repairing obligation"). Nor does it prohibit a manager from being an accountable person or from being responsible in that capacity for managing building safety risks. Where a manager is under relevant repairing obligations, and is therefore an accountable person, compliance with the building safety functions would be enforced by the Regulator under the 2022 Act, and not through the FTT, which would achieve the statutory objective of a single duty holder and enforcement route.

78. Further written submissions in support of the appeal were made on behalf of the fourth respondent, Circus Apartments Ltd, by Mr Rainey KC. He submitted that the Manager plainly has all the obligations of the Landlords in respect of repairs. There is a sufficient nexus or connection between those obligations and the order appointing the Manager for those obligations to be said to be "under a lease" or "by virtue of an enactment". Moreover, a manager is in an analogous position to an RTM company; nothing in section 72 says specifically that an RTM company may be an accountable person but it is clear enough from section 161, 2022 Act and section 30E, Landlord and Tenant Act 1985 that an RTM company does have that status. That is because the acquisition of the right to manage confers repairing obligations of the RTM company "by virtue of an enactment".

79. For the Landlords, Mr Morshead KC submitted that the FTT's decision had been correct and that the statutory scheme envisaged that a tribunal appointed manager would have no role to play concerning building safety. The obligations imposed on the accountable person were onerous and on its true construction section 72 "protected" a manager from them. As performance of the functions of the accountable person was backed by criminal sanctions, Mr Morshead KC submitted that they could only be imposed by clear language. It was ironic, he suggested, that the Manager in this case should be so anxious to assume those functions for himself.

80. The legislative purpose which could be discerned from the structure of Parts 4 and 5 and from the Explanatory Notes was to allocate responsibility for those new functions to the freeholder or other person with repairing obligations closest to the top of the chain of property interests, and to maintain a clear demarcation between those functions (with their own regulator and enforcement regime) and other property management functions including those of a tribunal appointed manager.

81. The statutory duties in respect of building safety created by Part 4 were entirely new and did not depend on any contractual allocation of repairing obligations. Where the functions of the accountable person overlapped with a manager's duties it had been necessary for Parliament to decide which was to take priority, and Mr Morshead KC suggested that it was clear from section 110 and from paragraph 8 of Schedule 7 that the manager was intended to "yield" to the accountable person. He vigorously resisted any suggestion that a manager's functions could coexist with those of the accountable person (a possibility which he referred to as a "third way"), even for a temporary period between the commencement of the 2022 Act and the manager seeking directions from the FTT. That

would subvert the intention that there should be a single duty holder who could be held to account for building safety.

82. The Manager's obligations did not arise "under a lease". His powers and duties come from the management order, as the Court of Appeal had explained in *Maunder Taylor v Blaquiere* [2003] 1 WLR 379. Nothing which Henderson LJ said in *K Group v Chuan-Hui* was directed to the question whether a tribunal appointed manager was appointed "under a lease" for the purposes of section 72 of the 2022 Act.

83. Nor did the manager's repairing obligations arise "by virtue of an enactment". That expression was a reference to repairing obligations imposed by statute including, most relevantly, sections 9A, 10A and 11, Landlord and Tenant Act 1985 (which imply covenants on the part of a landlord concerning fitness for human habitation, compliance with prescribed repairing requirements, and repair of the structure and exterior of the dwellings and buildings containing them). Mr Morshead KC acknowledged that the context in which that expression was used was critical to its meaning. Nevertheless, in *General Medical Council and others v Michalak* [2017] UKSC 71 (when considering whether the right to apply for judicial review arises "by virtue of an enactment"), the words "by virtue of an enactment" were said to be "… directed to cases in which specific provision is made in legislation …" (Lord Kerr JSC at [33]).

84. Mr Morshead KC also relied on sections 47A(3) and 49A(3), 1987 Act, which had been inserted by section 113, 2022 Act, as demonstrating that the drafters of the 2022 Act did not treat tribunal appointed managers as appointed by virtue of a statute (instead referring to their appointment as being "by virtue of an order of any court or tribunal"). Similarly, the heading of section 110, 2022 Act refers to managers "appointed under" the 1987 Act, not "by virtue" of it.

Discussion

85. While I do not agree with the whole of the FTT's analysis of Part 4, I have no doubt that it was correct when it determined that the Manager is not an accountable person for the purpose of Part 4, 2022 Act. That conclusion seems to me to reflect the clear intention of Parliament and the proper construction of section 72.

86. Before considering the key definition of "relevant repairing obligation" in section 72(6) it is helpful to look first at the structure of section 72 as a whole. It begins in sub-section (1) by identifying two circumstances in which a person will be an accountable person; they must either be a person who holds a legal estate in possession in any part of the common parts, or they must be a person who does not hold a legal estate, but who is under a relevant repairing obligation in relation to any part of the common parts. A third category is identified in sub-section (5), almost as an afterthought: a commonhold association will be the accountable person for a higher-risk building on commonhold land. Section 72 does not provide for any other person to be an accountable person.

87. Section 72(2) then identifies two exceptions to section 72(1)(a). A person who would otherwise fall within section 72(1)(a) is not an accountable person if someone else, who does not have a legal estate, is under a relevant repairing obligation in relation to all of the

relevant common parts, or if all repairing obligations relating to the relevant common parts have become functions of an RTM company. The first of these exceptions is apt to cover a management company or other third party whose status is conferred by the occupational leases in the building; it cannot have been intended to refer to a tribunal appointed manager (nor was that suggested) because the relevant obligation must be included "in each long lease of which the estate owner is lessor". The second exception is self-explanatory and is limited to the case of an RTM company, but it should be noted that the requirement is that the RTM company has "all repairing obligations", and not "all relevant repairing obligations".

88. Section 72(3) and (4) go together and provides a further exception by means of a statutory deeming, the effect of which is that the estate owner with relevant repairing obligations who is furthest up a chain of leases is treated as holding the legal estate in possession in the common parts.

89. No other exception to section 72(1) is identified; in particular, an estate owner who falls within section 72(1)(a) is not prevented from being an accountable person by the fact that a manager has previously been appointed under section 24 to carry out all of the estate owner's obligations. Thus, if a tribunal appointed manager can be an accountable person, it will be in addition to the freeholder or other estate owner, not in substitution for them. That contrasts with the other circumstances where a third party has the relevant repairing obligations and for which specific exceptions are made in section 72.

90. In this case it is agreed that section 72(1)(a) does not apply to the Manager, because he does not hold a legal estate. If the Manager is an accountable person, it can only be because he falls within section 72(1)(b), which requires that he be under a relevant repairing obligation. A person is only under a relevant repairing obligation if they are required, "under a lease or by virtue of an enactment", to repair or maintain the subject of the obligation.

91. The Manager is under extensive repairing obligations in relation to the common parts of the Estate. By paragraph 4(e) of the FTT's management order (the most recent iteration of which is dated 16 September 2019) he was given "the power and the duty to carry out the obligations of the Landlord contained in the Leases … and in particular … the Landlord's repair and maintenance obligations". By paragraph 5(b) the Manager was directed by the FTT "to manage the premises in accordance with … the respective obligations of all parties – landlord and tenant – under the Leases and in particular with regard to repair, decoration, provision of services to the Premises …". The order also includes a schedule of functions which includes, at paragraph 16, undertaking major works required under the terms of the leases. The occupational leases themselves require the Landlords to "maintain" the common parts (which includes improving, rebuilding, renewing and replacing them), and to maintain fire alarms and fire-fighting equipment.

92. The determinative questions are therefore whether these obligations of the Manager are either "under a lease" or "by virtue of an enactment".

93. The expression "under a lease" seems to me to refer to an obligation imposed by a lease, whether by the contract itself or by the acquisition of the estate created by the contract or

the reversion to it, and not to extend to obligations imposed or assumed by some other less direct route. It may be that the meaning depends on the context in which it is used, and in different contexts the words "under a …" might signify a tighter or a looser connection. It is used here specifically of repairing obligations ("a person is under a relevant repairing obligation in relation to anything if the person is required, under a lease ... to repair or maintain that thing"). In that context it is obvious the obligations being referred to are obligations imposed by the lease itself and the definition is not apt to describe the obligation of a tribunal appointed manager to comply with the terms of the order appointing them. That view is, as the FTT pointed out, consistent with the operation of the statutory scheme, as explained by the Court of Appeal in *Maunder Taylor v Blaquiere.*

94. In *Maunder Taylor* the issue was whether the manager's claim to recover service charges was impeached by the leaseholder's right to set off a claim for damages he had against the landlord. Aldous LJ explained the statutory scheme at [41]:

> "In my view the purpose of Part II of the 1987 Act is to provide a scheme for the appointment of a manager who will carry out the functions required by the court. That manager carries out those functions in his own right as a court-appointed official. He is not appointed as the manager of the landlord or even of the landlord's obligations under the lease. That being so, Mr Maunder Taylor was a court-appointed manager appointed to carry out those duties required by the order appointing him."

He continued, at [42]:

> "In this case the duties and liabilities laid down in the order are defined by reference to the lease, but do not alter his capacity. In my view Mr Maunder Taylor's right to the money arose from his appointment not from the lease. It follows that there was no mutuality between his claim and that of Mr Blaquiere. That being so, set off is not possible."

95. The same understanding of how section 24 is intended to operate is implied in the drafting of section 47A(3), 1987 Act, inserted by section 113, 2022 Act.

96. I therefore do not accept Mr Dovar's characterisation of the effect of an appointment under section 24. He submitted that "the manager is inserted into the lease" and the obligations contained in the lease become those of the manager. That is not how section 24 operates. The functions which are taken on by the manager are those and only those which the FTT determines the manager should have. Section 24(5)(a), to which Mr Dovar referred, provides only that an order "may provide – (a) for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager; …". It is the FTT, through the order it considers it just and convenient to make, which imposes obligations on the manager, not the lease. Nothing said by Henderson LJ in *K Group v Chuan-Hui* about the source of the tenant's underlying obligation to pay for services provided by the manager detracts from that analysis.

97. The FTT would therefore be perfectly entitled to confer functions on the manager which are different from those conferred on the landlord by the lease. But in view of the statutory

objective of ensuring that each higher-risk building has a clearly identified duty holder in relation to building safety matters, it is very unlikely that the status of accountable person can have been intended to turn on the precise terms of an order under section 24 appointing a manager.

98. Mr Rainey KC referred to *Royal Borough of Kensington & Chelsea v Lessees of 1-124 Pond House* [2015] UKUT 395 (LC), a case under section 20ZA, Landlord and Tenant Act 1985, in which the question was whether costs of work had been incurred by a local authority "under" a framework agreement or "under" subsidiary "call-off contracts". The Tribunal (Judge McGrath, Chamber President FTT) accepted that the costs of work were incurred "under" the framework agreement after considering whether there was a "sufficient factual nexus between the subject matter of the agreement and the works themselves". There was a "sufficient nexus" as the various agreements could not be viewed in isolation. The *Pond House* case supports the view that context is important, but it is not otherwise of assistance. The requirement that there must be a "sufficient nexus" does not help in determining what is or is not sufficient in this context.

99. Nor can the repairing obligations conferred on the Manager by the FTT's order be said to be obligations arising "by virtue of an enactment". Once again, it is the order and not either the lease or the Act which imposed duties on the Manager. The order itself is clearly not an enactment (by section 23(2), Interpretation Act 1978 an "enactment" means primary or secondary legislation). I agree with Mr Morshead KC that this is mainly a reference to repairing obligations implied by statute into certain leases or tenancies of residential property, such as section 11, Landlord and Tenant Act 1985, which requires a landlord to maintain the structure and exterior of the property. It is also apt to refer to the position of an RTM company.

100. No tribunal order or judicial decision is required for an RTM company to acquire the right to manage under the Commonhold and Leasehold Reform Act 2022. It is conferred by the statute on completion of the qualifying steps. As Lord Briggs JSC explained in *Settlers Court*, at [17]: "… a qualifying RTM company is entitled to acquire the right to manage the relevant premises (i.e. the qualifying premises within which at least half its members are qualifying tenants), provided only that it follows the specified procedure …". That is a good example of a repairing obligation acquired "by virtue of an enactment" and is fundamentally different from position of a manager appointed under section 24 by the FTT. The analogy drawn by Mr Rainey KC with the route by which an RTM company acquires the status of an accountable person is not persuasive.

101. Mr Upton suggested that the correct question to ask in this context was "by virtue of what is the manager obliged to repair the common parts". That enquiry was modelled on a question asked by Peter Gibson LJ in *Moore v Gad* [1997] BCC 655 when considering whether money which a company director was liable to pay for wrongful trading under a discretionary order made under section 214, Insolvency Act 1986, was "a sum recoverable by virtue of an enactment" within the meaning of section 9, Limitation Act 1980. If the question to be asked in this context is "by virtue of what is the Manager liable to repair the common parts", the answer to my mind is "by virtue of the order of the FTT" and not "by virtue of section 24, 1987 Act".

102. I do not think there is any doubt about the meaning of section 72(6), but were there to be, I agree with the submission of Mr Morshead KC that the principle against doubtful penalisation would justify a narrower rather than a wider interpretation of "accountable person". I do not agree with Mr Upton's submission that, in the absence of some specific exclusion, an unrestricted interpretation of the phrase is appropriate. The applicable principle is explained in *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed, (2020) at section 26.4 as follows:

> "It is a principle of legal policy that a person should not be penalised except under clear law. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account."

103. The main argument advanced by Mr Dovar in support of treating the Manager's obligations as arising either under the leases or by virtue of the 1987 Act was the improbability that Parliament intended "at a stroke" to strip tribunal appointed managers of their existing responsibilities for maintaining the common parts of higher-risk buildings and to cause building safety responsibilities to revert immediately on the commencement of the 2022 Act to the delinquent landlord whose past default had led to the making of a section 24 order. That was an absurd and unworkable result and compelled a wider interpretation of the expression "relevant repairing obligation" in section 72(6).

104. Mr Morshead KC disputed that there was anything improbable, let alone absurd, in Parliament having intended that (to the extent of any overlap) the new regime of building safety obligations should entirely replace any former scheme of management. He nevertheless agreed with Mr Dovar that the consequence of a section 24 manager not being an accountable person within section 72 was that, from the commencement of the 2022 Act on 6 April 2023, building safety functions ceased to be functions of the Manager and reverted to the Landlords in their capacity as accountable persons.

105. If Mr Dovar and Mr Morshead are right that, if a section 24 manager cannot be an accountable person, responsibility for building safety matters reverts "at a stroke" to the landlord whose default led to the making of the section 24 order, there would be something to be said for viewing that outcome as absurd. But neither of them was able to point to any provision of the 2022 Act which has the suggested effect on existing orders.

106. Part 4 was clearly drafted with some appreciation that managers may in the past have been appointed by the FTT under section 24 to undertake functions which, after the commencement of the 2022 Act, have become functions of the accountable person. Section 110 deals specifically with the division between the existing and new regimes as far as the future is concerned. By the new section 24(2ZA) any breach of a building safety obligation may not be relied on as a ground for the appointment of a manager under section 24. By the new section 24(2E) an order under section 24 may not confer functions on a section 24 manager where Part 4 provides that those functions are to be carried out by an accountable person. But neither section 24(2ZA) nor section 24(2E) purports to have any effect on orders which have already been made. No order made before the commencement of Part 4 could have been based on a breach of a "building safety obligation" as that expression is defined in section 24(ZZC). Nor does section 24(2E) rewrite existing orders

or cause them no longer to apply. It is directed solely to the content of orders which have not yet been made and is concerned only with what they may not contain.

107. Any possible doubt about the restricted application of section 24(2E) is dispelled by paragraph 8(2) of Schedule 7. As discussed above (paragraphs 50 and 57-58), this presupposes the continued effectiveness of section 24 orders made before the commencement of the 2022 Act, and the inclusion in them of functions which can be conferred on a special measures manager by a special measures order made under paragraph 4 of Schedule 7. If section 24(2E), or anything else in Part 4, had the effect of depriving a section 24 manager of building safety responsibilities conferred by an order made before 6 April 2023, why would it have been necessary for paragraph 8(2) to authorise the FTT to amend the original section 24 order when appointing a special measures manager to ensure no overlap in their functions? Section 24(2E) has prevented any such overlap since it came into force, so any section 24 order which the FTT may wish to amend under paragraph 8(2) can only be an order made before the commencement of the 2022 Act. The only functions that a special measures manager may be required to carry out are functions which Part 4 imposes on an accountable person. It follows that, insofar as functions conferred on a manager by a section 24 order made before the commencement of the 2022 Act became functions of an accountable person when the Act came into force, nothing in the Act took those functions away from the section 24 manager "at a stroke" or within any specified period.

108. The FTT dismissed an argument by Mr Upton, which he repeated in his written submissions and which Mr Rainey KC supported, that the 2022 Act does not affect existing management orders. The FTT rejected that argument on the grounds that "nothing in section 24(2E) suggests that it only prohibits new section 24 orders from requiring a manager to carry out building safety functions which are functions of an AP". I disagree that that is the effect of section 24(2E), because it would be inconsistent with paragraph 8(2) of Schedule 7.

109. In my judgment the coherent operation of Part 4 is not interfered with, and no intolerable result is produced, if the definition of "relevant repairing obligation" in section 72(6) is given the straightforward, unforced meaning attributed to it by the FTT. On that basis a section 24 manager is not an accountable person and is not required by Part 4 to carry out the duties of an accountable person. That is why section 72 does not excuse the estate owner from being an accountable person where there is already a tribunal appointed manager, as it does in 72(2) where a management company or an RTM company is responsible for all repairs. But for so long as an order made by the FTT before the commencement of the 2022 Act continues in force, the manager remains obliged to comply with it, including by the performance of any functions which Part 4 confers on the accountable person which are already functions of the manager under the order. When the order expires responsibility for all management functions will return to the landlord. If an application is made to vary or extend the order, any new order the FTT may make will take away from the manager those functions which Part 4 confers on the accountable person and these will then revert to the landlord. This is the third way, to which Mr Morshead KC took such exception, but which seems to me to be the correct construction of Part 4.

110. I acknowledge that, on this construction, for a period of time a manager may be required to carry out functions concerning the maintenance of the building and compliance with statutory obligations concerning health and safety, which are also building safety obligations of the accountable person within Part 4. There is nothing new in those functions, as the manager will have been carrying them out since the management order was made. It cannot have been intended that the manager should stop doing so straightaway, rather than arranging an orderly handover to the accountable person. But nor does this interpretation make the manager an accountable person or require him to discharge any of the obligations in Part 4 which are not already provided for by the management order (the order will not, for example, have required the manager to register the building with the Regulator, as section 78 requires the accountable person to do). From the commencement of the 2022 Act the landlord or other estate owner who satisfies section 72(1) will have become an accountable person and will be required to comply with the obligations which that status imposes (breach of which is an offence).

111. It is possible, as in this case, that the section 24 order may prohibit the estate owner from carrying out functions which the order confers on the section 24 manager, but even if it does not do so expressly, there is potential for an uncomfortable and impractical overlap between the responsibilities of the manager and the landlord. Some simple transitional provisions could have avoided the uncertainty which will inevitably be created by this overlap, but none have been provided. I recognise that the objective of a clear division of responsibility and a single route for enforcement of building safety obligations is not achieved for so long as this overlap exists. But the overlap is temporary and will continue only until management orders which pre-date the 2022 Act expire or the FTT makes another order in relation to the same building, which it may do either on the application of the manager, or of the landlord, or of another interested person.

112. Section 24(9A) requires that, on an application by a landlord, the FTT may not vary or discharge a management order unless it is satisfied that that will not result in a recurrence of the circumstances which led to the order being made, and that it is just and convenient to do so. Thus, if a manager does not apply to the FTT for directions, the onus will be on the landlord to satisfy the FTT that it can be trusted to perform the obligations of which it may previously have been in breach. On such an application it will be relevant that for so long as the landlord is prevented by the terms of the order from complying with its Part 4 obligations it is at risk of prosecution, except to the extent that the management order itself provides it with a reasonable excuse for not doing so. That factor will have to be taken into consideration when determining whether it is just and convenient to vary the existing order.

113. I recognise that there is a potential impasse between section 24(2E) and section 24(9A), the first prohibiting any new or modified order which has the effect of conferring building safety functions on the manager, and the latter preventing the FTT from modifying or discharging an order on the application of the landlord unless it is satisfied that the circumstances which led to the making of the management order will not recur. In the absence of transitional provisions, and for so long as the FTT is not satisfied that the section 24(9A) conditions for modification or discharge are met, the only way to resolve this impasse may be for the FTT to make no order on an application by the landlord, leaving the manager to continue to perform the functions originally conferred by the order

until either the manager themselves or another interested person applies for discharge or modification free of the section 24(9A) restrictions.

114. When a management order expires no new order made by the FTT may require the manager to perform functions which Part 4 imposes on the accountable person. Mr Dovar hinted that at Canary Riverside, because the FTT is being asked to vary the existing order (by extending it), rather than make a new order, it might be possible to avoid the restrictions in section 24(2E). Although I heard no argument on that proposition, the FTT will not be able to confer functions on the Manager which Part 4 provides are to be carried out by an accountable person and it appears to me to be far-fetched to suggest that it has power, by extending the Manager's term, to continue functions falling into that category which the Manager already has.

115. In this case the FTT is due to hear an application to vary or continue the management order in a few weeks' time, so it is not necessary to consider whether a manager whose appointment predates the 2022 Act and whose functions overlap with those of the accountable person for the purposes of Part 4 should make their own application to the FTT for further directions. That question will only be of concern to section 24 managers of higher-risk buildings whose appointment is due to continue. I doubt that there is any obligation on a manager to make their own application to the FTT, but practical considerations may make it impossible for them to continue without seeking further directions. In this case, for example, the Manager's application to the Building Safety Fund for financial assistance in carrying out remedial work to the exterior cladding of the buildings was unsuccessful because the manager is not an accountable person. Whatever course a manager decides to take, it is likely to be prudent to inform the Regulator (notwithstanding that they have no jurisdiction over tribunal appointed managers) and the landlord (who will have functions to perform under Part 4).

Disposal

116. In summary, I am satisfied that the FTT was correct in its conclusion that the Manager is not an accountable person for the higher-risk buildings at Canary Riverside. He is nevertheless obliged by the management order to continue to carry out the functions conferred on him by the order, notwithstanding that those include building safety responsibilities which are also duties of the accountable person under Part 4 of the 2022 Act. He is not obliged to carry out building safety functions which are not required of him by the management order.

117. There is no appeal from the remainder of the FTT's determination as to the identity of the accountable persons, and they are under the obligations imposed by Part 4, notwithstanding that they may be prohibited by the management order from performing some of them.

118. It is open to any of the parties to apply to the FTT for it to modify or discharge the management order to eliminate the duplication of functions which currently exists.

119. For these reasons I dismiss the Manager's appeal.

Martin Rodger KC,

Deputy Chamber President

15 March 2024

Right of appeal

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

Appendix

72 **Meaning of "accountable person"**

(1) In this Part an "accountable person" for a higher-risk building is—

(a) a person who holds a legal estate in possession in any part of the common parts (subject to subsection (2)), or

(b) a person who does not hold a legal estate in any part of the building but who is under a relevant repairing obligation in relation to any part of the common parts.

This subsection is subject to subsection (5) (special rule for commonhold land).

(2) A person ("the estate owner") who holds a legal estate in possession in the common parts of a higher-risk building or any part of them ("the relevant common parts") is not an accountable person for the building by virtue of subsection (1)(a) if—

(a) each long lease of which the estate owner is lessor provides that a particular person, who does not hold a legal estate in any part of the building, is under a relevant repairing obligation in relation to all of the relevant common parts, or

(b) all repairing obligations relating to the relevant common parts which would otherwise be obligations of the estate owner are functions of an RTM company.

(3) Subsection (4) applies where—

(a) under a lease, a person ("the estate owner") holds a legal estate in possession in the common parts of a higher-risk building or any part of them ("the relevant common parts"), and

(b) a landlord under the lease is under a relevant repairing obligation in relation to any of the relevant common parts.

(4) For the purposes of this section and section 73—

(a) the legal estate in possession in so much of the relevant common parts as are within subsection (3)(b) is treated as held by the landlord (instead of the estate owner), and

(b) if (and so far as) the landlord's actual legal estate in those common parts is held under a lease, the legal estate in possession mentioned in paragraph (a) is treated as held under that lease (and, accordingly, subsection (3) and this subsection may apply in relation to it).

(5) Where a higher-risk building is on commonhold land, the commonhold association is the accountable person for the building for the purposes of this Part.

(6) For the purposes of this section—

"common parts", in relation to a building, means—

(a) the structure and exterior of the building, except so far as included in a demise of a single dwelling or of premises to be occupied for the purposes of a business, or

(b) any part of the building provided for the use, benefit and enjoyment of the residents of more than one residential unit (whether alone or with other persons);

"commonhold association" and "commonhold land" have the same meaning as in Part 1 of the Commonhold and Leasehold Reform Act 2002 (see sections 34 and 1 respectively);

"long lease": for the meaning of "long lease" see section 115;

"possession": a reference to "possession" does not include the receipt of rents and profits or the right to receive the same;

"relevant repairing obligation": a person is under a relevant repairing obligation in relation to anything if the person is required, under a lease or by virtue of an enactment, to repair or maintain that thing;

"RTM company" has the same meaning as in Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 (right to manage).

(7) The Secretary of State may by regulations amend this section (other than this subsection).

73 **Meaning of "principal accountable person"**

(1) In this Part the "principal accountable person" for a higher-risk building is—

(a) in relation to a building with one accountable person, that person;

(b) in relation to a building with more than one accountable person, the accountable person who—

(i) holds a legal estate in possession in the relevant parts of the structure and exterior of the building, or

(ii) is within section 72(1)(b) because of a relevant repairing obligation (within the meaning of that section) in relation to the relevant parts of the structure and exterior of the building.

(2) For the purposes of this section—

(a) the reference to "the relevant parts of the structure and exterior" of a building is to its structure and exterior except so far as included in a demise of a single dwelling or of premises to be occupied for the purposes of a business;

(b) the reference to "possession" does not include the receipt of rents and profits or the right to receive the same.

(3) Subsection (1)(b) is subject to section 75(2) (powers of tribunal where more than one accountable person is within subsection (1)(b)).