Neutral Citation Number: [2024] EWCA Civ 651

Case No: CA-2023-001352

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION (ADMINISTRATIVE COURT)
Mr Justice Garnham
[2023] EWHC 2508 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2024

Before:

LORD JUSTICE COULSON
LORD JUSTICE DINGEMANS
and
LORD JUSTICE STUART-SMITH

- -

Between:

The King on the Application of: **1) Redrow PLC** **2) Redrow Homes Limited** **3) HB (WM) Limited**	**Appellants**
- and -	
The Secretary of State for Levelling Up, Housing and Communities	**Respondent**
- and -	
1) Jupiter (Phase 2) Management Company Limited **2) Hemisphere Management Company Limited**	**Interested Parties**

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Andrew Singer KC, Jonathan Ward and Stephanie Hall (instructed by **Macfarlanes LLP**) for the **Appellant**
Tom Richards KC and Harriet Wakeman (instructed by **The Government Legal Department**) for the **Respondent**
Simon Barker KC as Lay Representative for the **First Interested Party**

Hearing Date: 21 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON:

1. INTRODUCTION

1. This is an appeal against the order of Garnham J ("the judge") dated 7 July 2023, in which he dismissed the appellants' renewed application for permission to bring judicial review proceedings to challenge the respondent's decision, dated 26 August 2022, to allocate funds from the Building Safety Fund ("BSF") to the interested parties. This allocation was made in order that major cladding remedial works could be carried out to two high-rise developments which the appellants had developed/built. If the decision was lawful, the appellants are *prima facie* liable to reimburse those sums to the BSF, currently estimated at £30 million. The appeal raises issues as to the proper operation of the BSF.

2. THE BSF AND THE RELEVANT LEGAL MATRIX

2. The disaster at Grenfell Tower in the summer of 2017 led to the systematic inspection and investigation of high rise blocks across the country. Many were identified as having significant defects, in particular resulting from the widespread use of combustible cladding. This led to an urgent need to procure and pay for the necessary remedial works.

3. On 11 March 2020, the respondent announced the BSF. The fullest relevant information concerning the BSF can be found in the document issued by the respondent and dated July 2020 (and updated in July 2022), entitled "*Building Safety Fund for addressing life safety fire risks associated with cladding in high rise building (England only): Fund application guidance for buildings registered in 2020*" ("the BSF guidance"). According to the BSF guidance, the BSF was designed to "fund the remediation of unsafe cladding systems on high rise residential buildings" and "will meet the cost of addressing life safety fire risks associated with cladding on high rise residential buildings where building owners (or other entities for making buildings safe) are unwilling or unable to afford to do so." Those with the legal obligation or right to carry out the necessary remediation works (such as the freeholder or head leaseholder or management company) are called "Responsible Entities". It is they who can apply to the BSF for funding for the necessary remedial works.

4. The BSF guidance emphasises in its second paragraph that its objective is to ensure that residents of high-rise buildings "are safe – and feel safe – in their homes *now*" (my emphasis). It describes the objectives of the BSF as ensuring that:

> "• the historical life safety fire risk associated with cladding on high-rise residential buildings is *addressed quickly and proportionately* so that residents in those homes are safe.
>
> • leaseholder and resident communication and engagement on the project is effective;
>
> • projects are delivered on time and to budget; and

> • cost recovery from those responsible for the installation of cladding is maximised. (My emphasis)."

In addition, underneath the heading 'Driving the pace of remediation and enforcement', the BSF guidance noted that:

> "It is essential that the life safety fire risks associated with cladding are addressed *as quickly as possible* to ensure that residents are safe and feel safe in their homes." (My emphasis)

5. The BSF guidance sets out what will and will not be funded. Included in what will be funded are "legal costs incurred in connection with a successful cost recovery action". A footnote explains that applicants are required to take reasonable steps (where it is possible to do so) to recover remediation costs from others. That links to a later warning that one of the matters that will be assessed when an application is made to the BSF is "the efforts you [the Responsible Entities] have made to recover costs".

6. As to that possible cost recovery from third parties, the BSF guidance stated as follows:

> "As set out above, a number of major residential developers have signed a pledge committing them to remediate life critical fire safety works in buildings over 11 metres that they have played a role in developing or refurbishing over the last 30 years in England. Developers making this commitment have also agreed to reimburse any funding received from government remediation programmes in relation to buildings they had a role in developing or refurbishing.
>
> Where the developer who built or refurbished the building subject to the application is not funding the fire safety works, and where the Responsible Entity is unable to do so, then the BSF will cover all reasonable eligible costs to address the life safety fire risks associated with cladding. More information about the Developer Pledge can be found at https://www.gov.uk/guidance/list-of-developers-who-have-signed-building-safety repairs pledge.
>
> However, *you are required to demonstrate that you have taken all reasonable steps to recover the costs of addressing the life safety fire risks caused by the cladding from those responsible through insurance claims, warranties, legal action etc.* During the application process we will ask for information regarding such steps and may seek further information to satisfy ourselves of the position.
>
> Where you do successfully recover damages relating to the remediation of the risks posed by cladding the government will require Responsible Entities to pay the government any amounts recovered which relate to the remediation of the risks posed by cladding up to the amount provided through the Fund, including funding provided for mitigation measures. The payments to government may be less any unrecovered legal fees that have been incurred when cost recovery efforts are successful.

> We will not seek to recoup amounts recovered in litigation or settlement which do not relate to the remediation of the risks posed by cladding. Where Responsible Entities have already recovered damages, they should deduct relevant amounts in their applications and provide an explanation as to how this has been calculated. You can show these deductions as part of the 'other requirements' entries in the full works and costs spreadsheet. (My emphasis)."

7. Like many responsible developers, the appellants in this case signed the pledge referred to in the BSF guidance. In their letter dated 5 April 2022, the appellants expressly agreed with the respondent's stated principle that "leaseholders should not have to pay for any costs associated with life-critical fire safety remediation work arising from the design, construction or refurbishment of buildings over 11 metres and above that they live in, and we want to work constructively and in good faith with you and building owners/responsible parties to achieve this." The pledge went on:

> "We are therefore pleased to confirm that we will (as applicable):
>
> - take responsibility for performing, or otherwise at our discretion, funding self-remediation and/or mitigation works to address life-critical fire-safety issues on all our buildings of 11 metres and above in England that we have developed or refurbished (other than solely as a contractor) ("**Our Buildings**"); and
> - to the extent not already withdrawn and/or reimbursed, withdraw Our Buildings from, and/or reimburse, the Building Safety Fund and ACM Funds,
>
> on the basis of the principles set out in the schedule to this letter (the "**Agreed Principles**").
>
> We will work under DLUHC's leadership to establish an approach for determining the nature and scope of remediation and/or mitigation works that is proportionate and consistent, taking into account learning over time, and that involves no betterment beyond what is required to remediate and/or mitigate life-critical fire-safety issues, on the basis of the Agreed Principles".

8. Amongst the Agreed Principles were provisions relating to Claims and Reimbursement to the BSF. As to Claims, it was said:

> "Nothing in these Agreed Principles should be construed as an admission of liability on the part of the Participant Developer.
>
> The full-form documentation [ie the subsequent Deed of Bilateral Contract] will make clear that all civil claims (including under contracts of insurance/warranties and against contractors) available to Participant Developers, building owners/responsible parties, leaseholders and/or residents' management companies remain capable of assertion to their fullest possible extent."

As to Reimbursement to the BSF, it was said:

> "…in respect of Buildings which they played a role in developing or refurbishing, each Participant Developer will commit to reimburse the BSF… for all funding allocated and provided by the BSF…in relation to work completed, in progress or approved, provided [the respondent] applies such reimbursed funds to carry out remediation and/or mitigation works on Buildings of 11-18 metres."

9. Subsequent to the relevant events in these proceedings, on 13 March 2023, the appellants and the respondent signed a Deed of Bilateral Contract ("DBC") to reflect the commitments made in the pledge, and in order to give them contractual force. This was in a standard form, and it was the respondent's intention that the DBC would be agreed by all the developers who had signed the pledge. The DBC is mainly focused on those buildings where the developer has agreed to carry out the necessary remedial works. There are, however, similar reimbursement obligations to those in the pledge (albeit in rather more complicated form) set out at clause 13 of the DBC. The assertion of all civil claims against the parties, also referred to in the pledge, is translated into the DBC at clauses 20.3 and 21.2.

10. The DBC agreed by the appellants on 13 March 2023 was subject to a side letter which provided that they had entered into the DBC without prejudice to the parties' respective positions in these proceedings.

3. THE FACTUAL BACKGROUND

11. It is unnecessary, for the purposes of this appeal, to differentiate between the various appellant companies, and I shall refer to them collectively as "the appellants". They were the developers of two high rise developments in Birmingham, known as Hemisphere and Jupiter 2. Those purchasing long leases in these developments acquired an insurance policy known as the Zurich 10 Year Home Warranty Policy ("the relevant insurance policy"). The particular insurer in respect of Hemisphere and Jupiter 2 was East West Insurance Co Limited, a company who, at all relevant times, has been in administration.

12. Both Hemisphere and Jupiter 2 were found to contain cladding defects which required extensive remedial work. Some of the leaseholders made claims on the relevant insurance policy. On 14 April 2022, the appellants were notified by the insurer that it had accepted liability in respect of the cladding defects at Hemisphere. There was a delay in relation to the insurers' acceptance of liability in relation to Jupiter 2, which was not confirmed until 15 September 2022.

13. By May 2022, the appellants were aware of the buildings across the country which they had developed and which were the subject of applications to the BSF. On 25 May, they wrote to the respondent identifying those buildings where they would reimburse the full amount of BSF funding. In respect of Hemisphere and Jupiter 2, they said:

> "The Agreed Principles attached to our Pledge dated 5th April 2022 state that '…all civil claims (including under contracts of insurance/warranties and against contractors) available to Participant Developers, building owners/responsible parties, leaseholders and/or residents' management companies remain capable of assertion to their fullest possible extent.' We

> confirm that East West Insurance has accepted the claim in respect of the scheme at Hemisphere and we expect will come to the same conclusion at Jupiter 2. This being the case and in accordance with the Pledge, Redrow will not reimburse the BSF in respect of these projects."

There was never any suggestion from the appellants that they would undertake any of the remedial works themselves.

14. On 8 June 2022, the respondent replied, saying:

> "For Jupiter 2 and Hemisphere, the Department's objective remains that works continue at pace and without disruption. Noting the prospects of successful insurance claims on these projects, we will continue to run these projects through the BSF, and will expect Redrow to reimburse the Department for the costs of BSF eligible works, with any insurance proceeds to be netted off from Redrow's reimbursement once such proceeds are made available to the Department. **I would be grateful if you could confirm that this is your understanding of next steps on these projects**."

15. On 16 June 2022, the appellants replied:

> "**Hemisphere and Jupiter 2**
>
> Redrow does not accept your proposals. The warranty provider, East West Insurance Limited, has accepted claims by leaseholders for the LCFS remedial works and is obligated to procure these works. As such, funds should not be provided to the Management Company.
>
> It is Redrow's understanding that any application to the BSF placed an obligation on the applicant to exhaust all other avenues of funding prior to procuring the necessary remedial works. On the basis a third party has agreed to fund/undertake the LCFS works, the respective BSF applications should be withdrawn by the applicant. If not withdrawn, they should be refused by the BSF.
>
> For the avoidance of doubt, Redrow fully reserves its position in respect of the above developments, including it's any perceived obligation to repay the BSF."

16. On 4 July 2022, the respondent emailed in reply to say:

> "We have noted your comments on the insurance claims for these buildings. Having assessed the available evidence, the Department and its delivery partner (Homes England) do not agree that funding from insurance claims is available to fund the remediation of these buildings and allow works to start on their expected start dates. Given that you have indicated that Redrow are unwilling to take on the works for these buildings, we will be continuing with the BSF awards. As part of Redrow's commitments under the Pledge, we will expect you to reimburse the Department for the costs of BSF awards for these buildings, less any proceeds from the insurance claims."

17. On 11 August 2022, the respondent wrote again to deal with a possible change in the situation, namely the suggestion that, if the allocation of funds from the BSF were not made, the appellants would undertake the works themselves:

> "Apologies for the delay in coming back to you. We've been considering the position for these two buildings, and investigating further the evidence which you've supplied on the warranties.
>
> With regard to the warranties, we understand that in neither case is sufficient funding available which would allow the buildings to meet their anticipated start dates (as below). Having spoken to the management companies and the leaseholders, we're confident that the Department would be able to recover proceeds from successful Zurich warranty claims should the Department continue with the BSF grant.
>
> I wanted to ask you to confirm your approach to the projects. Our understanding from the call on 14 July is that (in the event the Department decided not to proceed with our funding award) Redrow would be willing to be take over responsibility for carrying out all life critical fire safety works recommended by a PAS 9980 FRAEW and other relevant assessments for the two buildings, including meeting the conditions set out in Ben's 9 May letter (reattached for ease). In particular, this would include reimbursing all costs incurred or irrecoverably committed to by the applicants to date, and meeting the estimated start and completion dates for the project, as below:
>
> - Hemisphere – start 17 October 2022, completion 15 April 2024
> - Jupiter 2 – start 22 September 2022, completion 17 December 2023
>
> I'd be grateful if you would be able to confirm your position with respect to the above in writing as soon as possible."

18. An additional complication was also introduced by the solicitors instructed by the insurers, East West. In a letter dated 12 August 2022 to the appellants, they acknowledged their acceptance of the liability to the leaseholders in respect of Hemisphere, but went on to say that the appellants had an obligation to carry out the identified remedial works and that, if they did not, the insurers had a contractual right to claim an indemnity against the appellants for all the reasonable costs incurred in procuring the works. They said they also had the right to bring a claim against the appellants in the name of the leaseholders for breach of the Defective Premises Act 1972. It does not appear that the respondent had sight of this letter at the time.

19. On 22 August 2022, Macfarlanes, the appellants' solicitors, wrote to the respondent to identify the issues that had arisen in respect of Hemisphere:

> "5 However, Redrow:
>
> 5.1 does not consider itself to be obliged to carry out or fund remediation work in circumstances where liability for carrying out or funding such remediation work has been accepted by insurers under insurance policies; and

> 5.2 considers that any attempt to require Redrow to fund or carry out remediation work in those circumstances would be inconsistent with:
>
> 5.2.1 the approach which has been adopted to providing funding from the Building Safety Fund; and
>
> 5.2.2 the principles on which the Pledge Letter is based.
>
> 6 In this context, Redrow is concerned that you may be proposing, in circumstances where the Insurer has accepted liability for the remediation work under the Policy:
>
> 6.1 to fund remediation work at the Development from the Building Safety Fund, and to seek to recover the costs of the remediation work from Redrow pursuant to the arrangements which Redrow is seeking to agree with you following the issue of the Pledge Letter; or
>
> 6.2 that Redrow carry out the remediation work."

The letter went on to identify the proposed solution:

> "13 It is clear to Redrow that it is not appropriate for the Building Safety Fund and the arrangements envisaged under the Pledge Letter to be used in a way that allows the Insurer to avoid its admitted liability to carry out or fund life-critical fire safety remediation work at the Development.
>
> 14 Under the circumstances, Redrow considers that you should contact the Insurer to require it to comply with its obligation to undertake or fund the undertaking of the remediation work."

The letter concluded by saying that the appellants understood that the insurers were about to confirm acceptance of liability in respect of Jupiter 2 and that the same principles would therefore apply to that building too. As noted above, that happened on 15 September 2022.

20. On 26 August 2022, the respondent sent the relevant decision letter. It said:

> "Thank you for your letter of 22 August 2022. The Department has noted the contents and will respond substantively shortly.
>
> In the circumstances, the Department has decided to enter into Grant Funding Agreements in relation to the Developments at Hemisphere and Jupiter 2 (both in Birmingham). In accordance with the terms of the pledge, the Department expects Redrow to reimburse the Department for all funds paid out under the terms of the GFA, where those are not reimbursed by the applicant in accordance with the GFA."

There was no reply to that letter.

21. Finally on the facts, I note that, on 30 October 2023, the insurer wrote to the leaseholders at Jupiter 2 to say, amongst other things, that:

    (a) "To the extent that the insured defects are covered by the works being carried out using BSF funding have no cost to Policy holders, no further indemnity under the Policy in respect of those works is payable";

    (b) [The insurer] "does not currently anticipate that it will be required to provide an indemnity in relation to these works, due to (i) the BSF funding received, and (ii) the obligations of the Developer (Redrow) to reimburse the BSF funding and remediate fire safety defects."

22. In other words, the insurers appeared to be saying that they would not be paying out to the leaseholders under the relevant insurance policy because of the decision to fund the works out of the BSF, and the appellants' liability to reimburse the BSF those sums. Although that argument may not be sound in law (see, by analogy, *Design 5 v Keniston Housing Association Ltd* [1986] 34 B.L.R. 92), the appellants' position at the appeal hearing was that this assertion by the insurer – where the fact of the payment out of the BSF was now being used as a defence - is what they had striven to avoid by bringing this challenge in the first place.

4. THE CLAIM AND ITS PROCEDURAL HISTORY

23. The appellants issued their claim form seeking judicial review of the decision on 22 November 2022. This followed an exchange of pre-action protocol correspondence. The claim sought the quashing of the decision on the grounds that: (i) the respondent acted unlawfully in making his decision; (ii) the respondent failed properly to identify the reasons for the decision; (iii) the decision was irrational. That latter point is no longer pursued. In response, the respondent introduced two fresh points, concerned withstanding and delay.

24. The application was refused on the papers by Eyre J. He found that the appellants had sufficient standing because of the potential financial consequences for them arising out of the decision. He rejected the delay point in isolation, saying that he would not have found that the claim had not been brought promptly if it had been otherwise meritorious. However, he considered that there was no merit in the application, noting in particular that it appeared to be based on a mistaken view as to the nature and effect of the BSF guidance.

25. The application was renewed and, following a hearing, was refused in a short *ex tempore* judgment by the judge at [2023] EWHC 2508 (Admin). He agreed with Eyre J as to the status of the BSF guidance. He said that the decision to make the payment was not even arguably unlawful. He emphasised, as Eyre J had done, the importance of speed in the circumstances which had arisen.

5. THE ISSUES

26. There are two grounds of appeal: the alleged unlawfulness of the decision, and the unfairness of the procedure. The Respondent's Notice raises two more issues: whether the appellants have the necessary standing, and whether there has been a delay in

bringing the claim. It seems to me that those two issues logically arise for decision first, before the two grounds of appeal.

6. ISSUE 1: STANDING

27. In order to have the necessary standing, an applicant such as the appellants must have "a sufficient interest in the matters to which the application relates": see s.31(3) of the Senior Court Act 1981. That interest must be satisfied by reference to the subject matter of the proposed claim: see *R v Inland Revenue Commissioners Ex parte National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617, 648E per Lord Scarman. As Sedley LJ put it in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498; [2008] Q.B.365 at [61]:

> "What modern public law focuses upon are wrongs - that is to say, unlawful acts of public administration. These often, of course, infringe correlative rights, but they do not necessarily do so: hence the test of standing for public law claimants, which is interest-based rather than rights-based."

28. The respondent pointed to the fact that these were applications by interested parties for BSF funding, which in turn led to a decision by the respondent to grant that funding to the interested parties. It is submitted, therefore, that the appellants were strangers to the decision, and had no business seeking to interfere with it. The respondent also argued that a developer which had committed to reimburse the BSF in respect of a funding decision may have a sufficient interest to challenge that decision, but that, because the appellants had expressly not committed in respect of Hemisphere and Jupiter 2, they had no basis for interfering with the decision in any respect.

29. The appellants submitted that they have the necessary standing as a result of their clear contingent financial interest in the funding awards. The appellants did not accept the contention that they could not challenge the decision whilst simultaneously maintaining their refusal to reimburse the BSF. They noted that Eyre J considered that the appellants' financial interest in the decision was sufficient to give them standing to challenge the decision. This issue was not re-argued before the judge because the judge indicated that he did not need to hear from Counsel for the respondent during the renewal hearing.

30. I respectfully agree with the view of Eyre J. The respondent's decision to allocate funds from the BSF in this case may end up costing the appellants £30 million: the respondent certainly expects the appellants to reimburse that sum to the BSF. The appellants have no contractual right to challenge that funding decision because the DBC was not in existence on 26 August 2022 and the provisions in the pledge, which are not in any event contractually binding, do not offer an obvious way in which the developer can object to reimbursement after a decision has been taken to fund a relevant remedial scheme out of the BSF. Thus the appellants' only recourse in the autumn of 2022 was judicial review. In all those circumstances, it is unrealistic to suggest that the appellants have no interest in the decision and no standing to challenge it.

31. It should be noted that this type of issue will not arise in the future, because the relationship between developers and the respondent is now governed by the DBC. Moreover, clause 13.18 of the DBC offers at least a limited route for challenge to a BSF allocation. Clause 13.18(B) sets out a ground for challenge where an amount is claimed that is "manifestly ineligible for funding according to the rules of the Fund". That will mean that in future any challenge to funding will be a private law claim under the DBC. Although Mr Richards KC, on behalf of the respondent, maintained that this claim was, in reality, a private law challenge, I consider that the terms of the side letter clearly took the subject matter of these proceedings outside the scope of the subsequent DBC, at least until these proceedings are resolved. It can therefore make no difference to the question of standing in this case.

32. Furthermore, I was not persuaded by Mr Richards that there could be any difference in principle between a situation where, on the one hand, a developer challenges a decision to allocate funds where it has expressly refused to reimburse the BSF and, on the other, where it challenges that decision having already agreed to reimburse the BSF. In any event, the latter position seems to me to be most unlikely to arise in practice: if a developer is objecting to the lawfulness of a particular BSF decision, it would appear counter-intuitive for that developer also to commit to reimburse the BSF in respect of that same funding decision.

33. It is not difficult to think of other examples where, pre-DBC, a decision by the respondent to allocate funds from the BSF, with the clear threat that those monies would subsequently be recovered from the developer, could be amenable to judicial review by the developer. One might be where the developer had agreed to carry out the relevant remedial works, but a decision is then taken to allocate funds out of the BSF, in a far greater sum, to a third-party contractor. Another example might be where funds are allocated from the BSF, with the threat of a claim for full reimbursement from the developer, in circumstances where all the independent reports indicate that there are no defects in the building in question. Whilst those examples are far removed from the facts of this case, they demonstrate that, pre-DBC, a developer in the position of the appellants would have the necessary standing to challenge the decision on the usual public law grounds.

34. For those reasons, I conclude that the appellants have the necessary standing to bring this claim.

7. ISSUE 2: "PROMPTLY"

35. A judicial review claim form must be filed "promptly and in any event not later than 3 months after the grounds to make the claim first arose": CPR r.54.5(1). Just because it was made within the 3 months does not mean that the claim was filed promptly: see *Maharaj v National Energy Corp of Trinidad and Tobago* [2019] UKPC 5; [2019] 1 W.L.R. 983. If the court concludes that there has been undue delay, permission will be refused: s.31(6)(a) of the Senior Courts Act 1981.

36. The decision was communicated to the appellant's solicitors on 26 August 2022. The estimated start dates for the remedial works were 22 September (Jupiter 2) and 17 October (Hemisphere). The appellants sent a pre-action letter on 19 October 2022. By then, work had started at Jupiter 2, with more than £10m of funding paid, whilst at Hemisphere, a works contract had been signed with a proposed start date of 9 January

2023 (not the October date previously identified in the correspondence), and more than £1m had been paid by way of pre-tender support. The respondent argues that, in all these circumstances, the appellants failed to act promptly.

37. In response, the appellants say that the decision letter was very short and promised that, in respect of the detailed points that Macfarlanes had raised in their letter of 22 August (paragraph 19 above), the respondent would "respond substantively shortly". Mr Parkins of the appellants said in his witness statement that the appellants waited to see that substantive response, which he anticipated would set out the reasons for the decision. It was only when that response was not received by around the beginning of October that Macfarlanes were instructed to prepare and issue the pre-action protocol letter of 19 October 2022.

38. I consider that, in all the circumstances, the claim was brought in accordance with r.54.5(1). In my view, the claimant was entitled to wait, at least for a period, in order for the respondent to reply, as they had promised they would, to the letter of Macfarlanes of 22 August 2022. It is unfair to criticise the appellants, as Ms Wakeman did during the course of her otherwise measured submissions, on the basis that the missing reply must be regarded as irrelevant because the appellants were able to put together the pre-action protocol letter without it. A party seeking to bring judicial review is entitled to wait for a promised reply, but must also be conscious of the need to act promptly when that reply continues not to materialise. In my view that is what happened here.

39. Furthermore, it is not irrelevant, when considering delay, that the respondent's reply to the pre-action protocol letter should have been served by the respondent 14 days later, on 2 November 2022. On 31 October 2022 the respondent wrote to say that it could not meet that date "given unavoidable constraints on availability during this time" and said it would "endeavour to respond on 11 November 2022". When Macfarlanes objected to this delay, the respondent wrote again on 8 November 2022, this time to say that, given the sums at stake and the potential consequences, it was not unreasonable for the respondent to be unable to respond within 14 days. Of course, those same factors which the respondent said required time for proper consideration (the sums at stake and the potential consequences of the challenge) were also relevant to the appellants, who were bringing the challenge in the first place.

40. I also conclude, on the evidence before the court, that the alleged delay on the part of the appellants had no significant effect. At one point, it appeared to be suggested in the papers that, if a judicial review claim had been made earlier, either the entering into of the contracts, or the start of the works, may have been delayed. But Ms Wakeman properly eschewed that argument, and in my view, she was quite right to do so; the evidence pointed firmly the other way. Indeed, the respondent's skeleton argument said at paragraph 33 that "the appellants knew that the decision would be unaffected by any substantive response to [the letter from Macfarlanes]". In other words, the respondent was committed to the course of action set out in the decision letter, and so too were the interested parties. An earlier pre-action protocol letter sent, say, at the end of September or beginning of October, would therefore have made no difference 'on the ground'.

41. In those circumstances, I consider that the delay until the pre-action protocol letter of 19 October was reasonable and justified. After that, any delay was the responsibility

of the respondent and the time they took to reply to the pre-action protocol letter. Accordingly, I conclude that the claim was made promptly in all the circumstances. I therefore turn to the two substantive grounds of appeal.

8. ISSUE 3: THE LAWFULNESS OF THE DECISION

(a) The BSF Guidance

42. An issue arose below as to the relevance or otherwise of the BSF guidance. It was the appellants' case that, in the absence of any other guidance of any kind as to how allocations from the BSF might be made, the BSF guidance for those making applications was also relevant to how the respondent would make decisions when operating the BSF. They argued that those affected by the exercise of the respondent's power to make decisions allocating funds from the BSF were entitled to assume that the respondent would follow the guidance, unless there was a good reason not to do so.

43. I did not understand Mr Richards to challenge that approach on appeal. He did not take Eyre J's preliminary observations about the BSF guidance, with which the judge agreed, as saying that the guidance was irrelevant to the judicial review claim. It was his primary submission that, although a challenge could arise on the usual public law grounds by reference to the BSF guidance, no such challenge could in fact arise here, because the decision of 26 August was in accordance with that guidance.

44. To the extent that there remained any issue about this, I consider that the appellants' approach is correct. This is not a case where a public body has set out a formal or detailed policy statement to which it must subsequently be held. However, given that the BSF guidance is the only guidance available, all those with an interest in a decision by the respondent in respect of BSF funding are entitled to assume that the decision will be made in accordance with the BSF guidance and general principles of good administration, unless there are good reasons why not. Furthermore, I consider that clause 13.18(B) of the DBC, referred to above, strongly supports that approach. That permits a challenge to a particular item if it is "manifestly ineligible for funding according to the rules of the relevant Fund". How would anyone know whether or not an item was "ineligible" according to the rules of the BSF? The only eligibility criteria are those set out in the BSF guidance produced by the respondent in July 2020 and updated in July 2022.

45. So the real question is whether the respondent followed the BSF guidance. It is said by the appellants that, in two important ways, he did not do so.

(b) The Position of the Insurers

46. The first complaint is that the decision failed to take into account the position of the insurers. They had accepted liability in respect of Hemisphere and, at the time of the decision, were (correctly) anticipated to be on the point of accepting liability for Jupiter 2. The complaint is that this acceptance was not given sufficient importance when the decision was taken and that, in consequence, the respondent failed to comply with the BSF guidance. It is said that the allocation from the BSF should not have been made at a time when the claim against the insurers was ongoing but unresolved. In the course of his oral submissions, Mr Singer KC expanded on this,

saying that the money should not have been allocated from the BSF because it could not be shown that the interested parties were "unable" to pay for the remedial works, and that their inability to pay was a necessary condition to allocation of funding (see the second paragraph of the BSF guidance set out at paragraph 6 above). Putting this point another way, in a subsequent submission, Mr Singer said that the interested parties were "technically able to pay" because they had the backing of the insurers.

47. For a number of reasons, I reject those submissions.

48. First, I consider that the appellants' submissions on this point mischaracterise the detail of the BSF guidance. That can be best seen at paragraph 34 of his skeleton argument, where (in language which mirrored the pre-action protocol letter of 19 October) Mr Singer said:

> "The appellants submit that the BSF guidance makes clear that funding will only be granted in circumstances where building owners or other legally responsible entities are unwilling or unable to afford to carry out remedial works, all reasonable steps have be taken to recover the relevant costs from insurers under applicable policies, *and that those steps have proven unsuccessful*." (My emphasis).

In my view, that is an inaccurate precis of the BSF guidance. In particular, the words which I have italicised cannot be found anywhere in the BSF guidance. On the contrary, the BSF guidance required the Responsible Entities to demonstrate only that they had taken "all reasonable steps" to recover the costs of the works from those responsible (through, amongst other things, insurance claims). The BSF guidance did not require the Responsible Entities to demonstrate they had pursued all other claims to final resolution and financial recovery, or that it was only if the claims against third parties, such as the insurers, had finally failed, that they could make a claim under the BSF.

49. Secondly, this misreading of the BSF guidance can be traced back to the appellants' email of 16 June 2022 (paragraph 15 above), where they state that the Responsible Entities had to "exhaust all other avenues of funding" before being able to make a claim on the BSF. Again, that is not what the BSF guidance says. What was necessary was the taking of all reasonable steps; the guidance certainly did not require pursuit of third parties to the point of exhaustion before an application for funding could be made.

50. Thirdly, both Mr Richards and Mr Barker KC rightly relied on those paragraphs in the BSF guidance (set out in the fourth and fifth paragraphs of those passages cited at paragraph 6 above) which expressly envisage that the making of unresolved claims against third parties may well co-exist with the carrying out of remedial works pursuant to BSF funding. That is why the BSF guidance refers to the requirement that the Responsible Entities pay the government any amounts recovered "up to the amount provided through the Fund". It seems to me that that envisages the very opposite of a requirement that third parties be pursued to exhaustion before a valid application under the BSF can be made and granted. On the contrary, the BSF guidance expressly anticipates that such claims may be ongoing at the time of the application, the allocation and the works themselves, and that whilst this would not

affect the allocation of funds from the BSF, the Responsible Entities must pay any sums recovered from the third parties back to the BSF.

51. Fourthly, on the facts, it could not be said that the interested parties had not taken all reasonable steps in relation to their claims against the insurers. Indeed, that was not suggested in the pre-decision correspondence. By late August/early September 2022, they had obtained two admissions of liability on the part of the insurers, one in respect of each building. It is impossible to see what more they could reasonably have done. If insurers who are in administration do not pay out, or if they subsequently say that they will not pay, then that is a dispute which may take years to resolve. That is what has happened here. Such resistance by the insurer did not in law prevent the interested parties from making a claim under the BSF, and did not prevent the respondent from making a lawful decision to allocate the appropriate funds from the BSF.

52. Accordingly, I consider that the respondent was entitled to conclude that, although liability in respect of Hemisphere had been accepted by the insurer, and although acceptance of liability on Jupiter 2 was imminent, the more important fact was that an unqualified promise to reimburse, much less actual hard cash, had not been made. The interested parties had taken all reasonable steps to recover sums from the insurer but there was no reason to believe that any proceeds of the policy would be forthcoming in time for the projected start date for the works, or within any period that would enable the proceeds to be used to fund the timely carrying out of the works (and every reason to think they would not be). By late August 2022, I am in no doubt that the delays on the part of the insurer did not render the interested party's ineligible for funding from the BSF.

(c) Urgency

53. The second complaint, leading on from the first, is that the respondent, and subsequently the judge, wrongly prioritised the urgency of the works over everything else. Mr Singer complained that the BSF guidance did not make "speed a trump card".

54. In my view, whilst it may not necessarily be a "trump card" in every situation, the need for speed will be a significant factor in any decision to allocate funding under the BSF. That is because the whole basis for the BSF was the need urgently to address the cladding issues revealed by the Grenfell Tower disaster. That is why, as set out in the italicised passages at paragraph 4 above, the objective of the BSF is to resolve the problems "quickly", so that residents were and felt safe "now", and why it is said that the problems will be addressed "as quickly as possible". The need to act with speed is therefore baked into the whole rationale for the BSF. So here, whilst it was never suggested that it was a "trump card", speed was an important factor for the respondent to take into account when considering whether the interested parties had taken all reasonable steps in pursuing others, and when taking the decision of 26 August 2022.

55. Mr Singer also argued that the respondent "should and could have waited" until the position with the insurer had resolved, and said that the respondent should have taken a more active role in pursuing the insurer. I reject those criticisms. There is no legal or factual basis for them. A position had been reached in which no money had been forthcoming from the insurer, who was also suggesting (although the respondent did not see the letter of 11 August noted at paragraph 18 above) that they were entitled to an indemnity from the appellants in any event. That could not, either as a matter of

law or common sense, be a proper reason for delaying a decision on the application by the interested parties for funding under the BSF. Moreover, the respondent was in no better or worse position than the appellants in seeking to obtain monies from the insurer.

56. Further, the submission that further delay was appropriate was, by the date of the decision, impractical. By 26 August 2022, the respondent and the interested parties were essentially committed to significant remedial works at both buildings. Both contracts would have had long lead-in times. It would have been wrong (and doubtless expensive) for that commitment to have been abandoned by the respondent at the very last moment, simply because the insurer had admitted liability but was not paying out. Both the respondent and the interested parties were entitled to say that enough was enough, and that an acceptance of liability, without any payment and without any detailed commitment as to when any payments may be made, was simply not enough to jeopardise the carrying out of the remedial works.

57. Accordingly, I agree with the judge that, once the respondent had concluded that the interested parties had taken all reasonable steps in pursuing the insurer, the need to act quickly was inevitably a significant factor in the respondent's decision-making process. It provides a second reason why the decision was not unlawful.

(d) Summary in Respect of Lawfulness

58. For the reasons that I have set out, I consider that the decision of 26 August 2022 was lawful. To the extent that the BSF guidance was relevant (and I think it was), the decision was in accordance with that guidance. The interested parties had taken all reasonable steps to pursue the insurer, and by the end of August 2022, the urgency of the remedial works was such that a funding decision was required. I therefore reject the first ground of appeal.

9. ISSUE 4: THE FAIRNESS OF THE DECISION

59. The appellants also complain about the fairness of the decision. They say that they were not able to participate fairly in the process leading up to the decision and/or proper reasons for the decision were not provided. I deal with each of those points in turn.

(a) Participation

60. When I gave permission to appeal in this case, I said that "collaboration/cooperation between the respondent and the relevant developers is likely to be required if the BSF is to work". I remain of that view. In many ways, as demonstrated by the present case, the respondent and the appellants should co-operate because they have a common interest in ensuring that all liable third parties contribute what they owe, so as to reduce the burden on the public purse, and on those developers who have signed the pledge and the DBC.

61. So when I granted permission to appeal, I thought that this may be the most important point in the appeal. However, having been through the correspondence in the supplemental bundle for the purposes of this hearing, as summarised above, it seemed to me that, on analysis, the non-cooperation allegation could not be pursued in respect

of any period prior to the sending of Macfarlanes' letter on 22 August. Mr Singer properly accepted that proposition when I put it to him during the course of argument.

62. For the avoidance of doubt, therefore, I should make plain that any suggestion that the appellants were denied the opportunity to properly participate in the process prior to 22 August 2022 is unfounded. The extracts from the correspondence that I have set out at paragraphs 13 - 19 above demonstrate the extensive communications between the parties in the run-up to the decision. The appellants were given every opportunity to make their case in relation to the allocation of funds from the BSF. I consider that the respondent was right to involve them in the process, but could not reasonably have done more to accommodate them. As to the separate failure to address the Macfarlanes' letter of 22 August, that becomes part of the complaint that reasons for the decision were not provided. I deal with below.

(b) Reasons

63. I accept that the complaint about the absence of reasons has a little more force, really for the reasons already noted in Section 7 above. There I emphasised the absence of the substantive response which had been promised in the decision letter of 26 August, but which was never provided.

64. However, I take the view that the decision letter must be read in the context of the earlier correspondence. The test is that "the reasons must be ones which are understandable to those who will receive those reasons": see Woolf LJ in *Ward v Secretary of State for the Environment* [1990] 59 P.&C.R.486 CA at 487. When considered in that light, I consider that the appellants were well aware of the reasons for the decision.

65. In summary, in the pre-decision correspondence, the respondent had made it clear that:

    i) The interested parties had taken all reasonable steps in pursuing other sources of funding. Nowhere in any of the correspondence between the respondent and the appellants did either side suggest to the contrary;

    ii) The insurer's position did not need to delay the remedial works, because any recovery from them could be "netted off" against the funds paid out by the BSF (see in particular the email of 8 June, at paragraph 14 above);

    iii) The respondent was proposing to fund the works through the BSF (see in particular the emails of 8 June and 4 July, at paragraphs 14 and 16 above) because the appellants had never indicated that they were willing to carry out the works themselves;

    iv) Following a telephone call which suggested that, if funding from the BSF was not proceeded with, the appellants might in fact undertake the works themselves, the respondent gave the appellants a final opportunity to agree to do so (see the email of 11 August, at paragraph 17 above);

    v) There was a clear timetable for the start of these major works which had been advertised in full (see the email of 11 August, at paragraph 17 above), and so

everyone was aware that a decision, one way or the other, was urgently required;

vi) In consequence of Macfarlanes' letter of 22 August, when the final opportunity to undertake the works themselves was rejected on behalf of the appellants, the decision to allocate the funding from the BSF was confirmed.

So, whilst the respondent should have provided the promised detailed response to the Macfarlanes' letter of 22 August, I reject the suggestion that the decision was unlawful because of the absence of proper reasons. The decision was the culmination of a transparent process in which the appellants had been involved throughout, and which was simply the confirmation of the respondent's earlier statements in the emails of 8 June and 4 July that they would be continuing with the BSF awards for the reasons they set out in those communications.

66. I should deal with two other points from Mr Singer's oral submissions on this topic. First, he argued that the respondent's reply to the pre-action protocol letter, dated 11 November, set out at paragraph 25 a series of reasons for the decision which, he said, were *ex post facto*, and for which there was no earlier evidence. I reject that submission. In my view, the points made at paragraph 25 of the pre-action protocol response were very similar to - and in some respects precisely the same as - the points which I have identified in my summary of the pre-decision correspondence in paragraph 65 above. It is unnecessary to go through that comparison exercise line by line; it is sufficient to say that I am satisfied that the reasons identified in that paragraph had all been explained to the appellants in the correspondence prior to 26 August.

67. Mr Singer also complained that the absence of reasons in the decision letter meant that the respondent had not taken into account the appellant's objection to the proposed decision (or at least there was nothing to suggest that they had taken that objection into account). The objection, when boiled down to essentials, was that, because the insurer had accepted liability, it should be pursued to fund the works, and an allocation should not be made from the BSF while that issue remained outstanding. Paragraph 13 of the Macfarlanes' letter contains the same complaint, albeit put in a more lawyerly way, namely that "it is not appropriate for the Building Safety Fund and the arrangements envisaged under the pledge letter to be used in a way that allows the insurer to avoid its admitted liability".

68. But on any view, that complaint had featured front and centre in the correspondence which I have summarised at paragraphs 13 to 19 above, and the respondent had answered it, saying that it was content to make the allocation and "net off" any sums received from the insurers subsequently. So that principal objection had not only been considered, but substantively answered, long before the decision letter of 26 August 2022.

69. For these reasons, I therefore reject the second ground of appeal.

10. CONCLUSIONS AND DISPOSAL

70. For the reasons set out in Section 6 above, I conclude that the appellants had the necessary standing to bring this claim. For the reasons set out in Section 7 above, I

consider that the claim was brought promptly. For the reasons set out in Section 8 above, I consider that the decision was lawful and accorded with the BSF guidance. For the reasons set out in Section 9 above, I consider that the decision was fair: in particular the appellants were able to (and did) participate in the process and were aware of the reasons why their principal objection to the BSF funding allocation had failed.

71. If my Lords agree, I would therefore dismiss this appeal.

LORD JUSTICE DINGEMANS

72. I agree.

LORD JUSTICE STUART-SMITH

73. I also agree.