HAWKSWELL KILVINGTON
Specialist Construction Solicitors

Construction Law Update

Too far, too bad - a Cautionary Tale of Tribunal Overreach in Building Safety Disputes

Tribunal criticised for exceeding its remit and including unsupported remediation measures, prompting a partial reversal on appeal.

Under section 123 of the Building Safety Act 2022 ("**BSA**"), the First-tier Tribunal ("**FTT"**) can order a landlord to fix specified building safety defects, if an application is made by someone with an interest in the affected property.

In *Monier Road Ltd v Nicholas Alexander Blomfield and others [2025]*, the Upper Tribunal ("**UT**") reviewed an FTT decision that was said to have gone beyond its remit in ordering remediation of items not included in the original application or supported by evidence. The UT agreed that the FTT had overstepped its powers, including by making unsupported findings about what might qualify as a "storey" under building safety legislation.

Key takeaways:

- **Tribunals don't have the power to extend Remediation Orders beyond the specific defects identified in the application or supported by the evidence.**
- **Clearly documenting and evidencing all relevant defects at the application stage can help keep Tribunal proceedings focused and avoid unexpected complications.**
- **It remains unresolved whether rooftop gardens should be classified as a storey when determining if a building meets the height and storey criteria under the higher-risk buildings regime.**

Background

The dispute arose from fire safety issues at Smoke House and Curing House, two wings of a single mixed-use residential and commercial building in East London ("**the Property**").

In November 2023, 29 leaseholders, led by Mr Blomfield, sought a Remediation Order requiring the freeholder, Monier Road Ltd ("**MRL**"), to carry out fire safety works, specifically the removal and replacement of timber cladding and combustible insulation in the courtyard area. The works would ensure compliance with fire safety regulations and help secure an EWS1 B1 rating, which would allow the flats to be sold or mortgaged.

About a year before the application, MRL asked a fire safety engineer to carry out a fire risk assessment of the external walls at the property. The resulting report ("the **Fire Safety Report**") recommended four actions, the most important being that the timber cladding and other combustible materials in the courtyard should be removed and replaced with non-combustible alternatives.

The FTT Hearing

At the FTT hearing in March 2024, the Tribunal granted the Remediation Order but went further by including additional items—such as works to the balconies, bin stores and courtyard floor area—that were neither part of the original application nor supported by the Fire Safety Report and other evidence.

The FTT also took the view that the roof garden at the Property should be counted as a storey when assessing whether the block qualified as a higher-risk building ("**HRB**"). The BSA defines an HRB as a building with at least two residential units that is taller than 18 metres or has at least seven storeys. This is important as HRBs have greater safety requirements imposed on them, including registration with the Building Safety Regulator and stricter oversight for remediation and refurbishment works.

HAWKSWELL KILVINGTON LIMITED

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB
Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk

MRL appealed the inclusion of the additional items, arguing they were not properly before the Tribunal and, in any event, were not relevant defects based on the evidence. MRL argued that their inclusion amounted to a breach of natural justice.

Held

The Upper Tribunal partly allowed MRL's appeal and set aside the inclusion of the additional items in the Remediation Order. It found that the FTT had overstepped its powers for several reasons:

- While the FTT can address new defects not listed in the original application if they become clear during the case, it must follow a fair process and give both parties the chance to present evidence.
- In this instance, the FTT raised and included the additional items without giving the parties an opportunity to address them or provide supporting evidence. The UT called this a "*serious procedural irregularity*."
- The FTT offered no valid reason for disregarding the expert opinions in MRL's Fire Safety Report and did not explain why it reached different conclusions without referring to relevant guidance, practical examples or previous cases.
- The FTT also had no authority to decide whether the building was a higher-risk building, so there was no obligation to submit the Remediation Order to the Building Safety Regulator.

The UT also criticised the FTT for causing unnecessary confusion and distress among the leaseholders and for damaging the relationship between the parties by suggesting, without evidence, that the building remained unsafe.

Analysis

The case confirms that Tribunals can only add new defects to a Remediation Order if they follow a fair process, in particular allowing all parties to respond and represent evidence. If a party chooses not to pursue a particular point, the Tribunal cannot impose it on its own.

While construction professionals cannot control an unexpected direction taken by a Tribunal, they can avoid gaps in understanding by making sure all defects are clearly identified and supported by evidence from the beginning.

Finally, the Upper Tribunal did not resolve whether a rooftop garden counts as a storey for defining a higher-risk building. While some secondary legislation could be read to include a usable roof garden in the storey count, government guidance published in 2023 states that open rooftops such as rooftop gardens should not be included. As the FTT had no authority to make a binding interpretation, this remains an open question for future cases.