# In light of *Rydon* [2025][1], when public policy is delivered through contract, where is the line between a private law claim and Judicial Review?

## Introduction

1. As a matter of full disclosure and for those unfamiliar with the case, not only did I act for Rydon but I did so in a losing cause.

2. In answer to the question posed by the title, the *Rydon* case has not changed the line (or threshold) between public and private law claims established by the two Privy Council cases *Mercury Ltd v Electricity Corporation of New Zealand Ltd* in 1994 and *State of Mauritius v CT Power Ltd* in 2019. The line being that in deciding whether or not to enter into or terminate a contract and in taking decisions under a contract, a public authority is subject to judicial review but only on the limited grounds of fraud, corruption or bad faith.

3. That threshold excludes most cases from being challenged on conventional public law grounds; and the *Rydon* case, if it has done anything, demonstrates just how hard it is to persuade a court that decisions taken by a public body pursuant to a contract can be challenged by way of judicial review.

4. In the *Rydon* case the issue did not relate to a decision by the public authority to enter into a contract but whether decisions taken by the SoS pursuant to the provisions of the contract entered into by Rydon with the SoS were (a) susceptible to judicial review; or (b) were private law matters.

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[1] [2025] EWHC 2182 (Admin).

5. To cut to the chase, Choudhury J held that the SoS's decisions made under the contract were only amenable to judicial review on the limited grounds of fraud, corruption or bad faith.

6. Choudhury J's decision was not appealed. Had it been, an appeal may have succeeded on that issue (albeit that the judge also found against Rydon on the substantive grounds). But the case was likely to end up in the SC with all the attendant costs and Rydon have the back-stop of a contractual claim.

**What was the case about?**

7. To understand why Choudhury J came to the conclusion that the SoS's decisions were not amenable to judicial review (except on the limited grounds of fraud/corruption/bad faith) you need to understand something about the Building Safety Act, the relevant regulations and the facts of the Rydon case.

8. The claimant, Rydon Group Holdings, was the parent company of Rydon Maintenance Ltd who were the principal contractor for the refurbishment of Grenfell Tower before the fire in 2017.

9. Following the fire, the Government came under significant public pressure to act and did a number of things. First, it set up the Grenfell Tower Inquiry ("**Inquiry**") with Sir Martin Moore-Bick as its Chairman, which started to hold hearings on 21st May 2018. The Inquiry was held in 2 phases with the Phase 1 report published on 30th October 2019 (i.e. before the challenged decisions were taken). There was no criticism of Rydon in the Phase 1 Report. The Phase 2 Report, in which Rydon was heavily criticised, was not published until September 2024 – many months after the challenged decisions were taken.

10. Second, it established funds for the remediation of unsafe cladding on buildings across England. One such fund was the Building Safety Fund ("**BSF**") which was announced on 11th March 2020. It was designed to fund the remediation of buildings over 18 metres in height where their cladding gave rise to fire safety risks.

11. Third, it commissioned Dame Judith Hackitt to conduct an independent review of building regulations and fire safety which led to the Government enacting the Building Safety Act 2022 ("**BSA 2022**").

**The Building Safety Act 2022**

12. The BSA 2022, does a number of things (and has given rise to a significant amount of litigation), including making provision for the remediation of certain defects in self-contained buildings with two or more dwellings that are at least 11 metres high or have at least 5 storeys.

13. Sections 126 – 127 of the BSA 2022 provide for the making of regulations to establish building industry schemes including the remedying of defects in existing buildings or contributing to the costs associated with remedying those defects. Sections 128 – 129 make further provisions for regulations to prohibit prescribed persons from applying for building control approval and/or the development of land even where planning permission has been granted.

14. The regulations made under the BSA 2022 are the Building Safety (Responsible Actors Scheme and Prohibitions) Regulations ("**2023 Regs.**"). These came into force on 4th July 2023.

**The 2023 Regs.**

15. The 2023 Regs establish a scheme known as the Responsible Actors Scheme ("**the Scheme**"). The purpose of the Scheme is to secure the

building industry's responsibility to remedy defects in buildings relating to fire safety and to contribute to the costs associated with remedying such defects.

16. Regs. 6 – 8 set out the eligibility criteria to be a member of the Scheme; and regs. 13 & 14 make provision for the SoS to "invite" eligible persons to apply for membership of the Scheme.

17. Reg. 14(2) provides that where a person is "invited" to become a member of the Scheme, he must within 60 days either enter into a Self-Remediation Contract ("**SRC**") (if he has not already done so) or give notice to the SoS, supported by evidence, that neither he nor any body corporate in the same group is eligible to join the Scheme.

18. If the person "invited" to join the Scheme does not comply with his invitation then, after the expiration of 60 days, he is treated as a person who is eligible to join the Scheme but has not joined and will have his name published on the prohibitions list ("**the Prohibitions List**") prepared, maintained and published by the SoS.

19. Where a person is put on the Prohibitions List they are prohibited from (1) carrying out major development of land in England (i.e. development of 10 houses or more); and (2) is subject to a raft of building control prohibitions including sign-off on buildings under construction.

**The Scheme & Self-Remediation Contract**

20. To avoid going onto the Prohibitions List and avoid the prohibitions, Rydon had to become a member of the Scheme; and, in order to become a member of the Scheme, had to enter into a self-remediation contract. The SoS refused to negotiate with Rydon over the terms of the contract and, faced with the stark choice of going out of business or signing the contract, it did so.

21. I should add that Rydon had already begun remediating a number of buildings suffering from defective cladding which were not the subject of this claim before the decisions it challenged were taken.

**Terms of the Contract**

22. Under a self-remediation contract, the signatory to the contract (known as the **Participant Developer**) agrees with the SoS to be bound by the Terms set out in Schedule 1 to the Contract. The Terms contain definitions including a "Designated Participant Developer" as someone who has been:-

> *"the subject of significant criticism in the findings of a public inquiry, or is currently a person whose conduct is under consideration by a public inquiry, regarding their performance or behaviour in connection with building safety matters such that the Participant Developer is reasonably considered by DLUHC to be unfit to carry out or procure the carrying out of Works in accordance with these Self-Remediation Terms and/or the Contract*".

23. It was this definition and the consequences of being designated as a Designated Participant Developer that Rydon was particularly concerned with.

24. The self-remediation contract also identifies buildings requiring remediation and allocates them into various stages from Stage A to D. Ordinarily, the Participant Developer is required to undertake works at its own cost to remediate defects in buildings identified as Stage C buildings but can enter into a funding agreement with another body, such as a residential management company (known as a Responsible Entity), to do the necessary works.

25. However, and here was the sting in the tail that Rydon was most concerned about and which was likely only ever to apply to it, clause 7.7

of the Terms provides that where a Participant Developer is considered by DLUHC to be a Designated Participant Developer, DLUHC can:-

> "*elect in its sole discretion (but acting reasonably) to require the Designated Participant Developer not to undertake or procure the Works at its own cost …and to designate the Participant Developer's Buildings as Stage D Fund Buildings, such that the Participant Developer will reimburse the relevant Fund in accordance with Clause 13*".

26. On 15th September 2023, Rydon entered into the Contract and, as it was entitled to do, requested that 3 buildings requiring remediation (the Cable Street buildings) should be transferred from the Fund to Rydon to allow Rydon to remediate them. That was because, less than 2 months before (i.e. in July 2023), Rydon had learnt that the residential management companies ("**RMCs**") for the Cable Street buildings had submitted an application to DLUHC as far back as July 2020 for funding from the BSF to remediate the buildings and, unbeknownst to Rydon, had been in discussion with DLUHC regarding the scope of those works for over 2 years.

27. The RMCs' application was approved by DLUHC in August 2023 and in September 2023, the RMCs signed the relevant grant funding agreements ("**GFA**") awarding them approximately £10m which Rydon would be required to reimburse unless the buildings were transferred out of the Fund and back to Rydon to remediate.

28. The cost differential between the RMCs remediating the Cable Street buildings and Rydon doing the work was stark. Had the buildings been transferred to Rydon, they would have had to reimburse certain Pre-Tender Support costs ("**PTS**") of £1,346,609 and undertaken the remediation works themselves - which Rydon estimated would cost approx. £2m. i.e. a cost differential of circa. £6.5m between doing the

works themselves and having to reimburse the Fund for the cost of the works being undertaken by the RMCs.

29. On 28th February 2024, the SoS (Michael Gove at the time) made 3 decisions:-

    (1) He designated Rydon as a Designated Participant Developer.
    (2) He directed Rydon not to carry out remediation works to the Cable Street buildings.
    (3) He directed that the Cable Street buildings should not be transferred to Rydon and should proceed to remediation through the BSF, with Rydon reimbursing the Fund.

30. It was these decisions which Rydon sought to challenge.

**SoS's response to the claim**

31. Whilst not apparent from the judgment, the SoS and DHLUC made pursuing the claim slow and difficult. For example:-

    (1) DLUHC took 5 weeks to respond to the PAP letter and refused to disclose any documents, including the GFAs.

    (2) Following the service of the claim on 9th May 2024, the SoS's initial response on 11th June was in effect to say that the claim was not amenable to judicial review because it was a private law claim for breach of contract. It did not engage with the merits at all.

    (3) Lang J subsequently directed an oral permission hearing and the SoS to file Amended Summary Grounds of Defence to address the merits.

    (4) Rydon had to take out an application for disclosure of documents.

    (5) When documents were finally disclosed, it was done in a piecemeal fashion and they were heavily and often wrongly redacted leading to the SoS having to un-redact key docs.

(6) The piecemeal nature of disclosure resulted in the Facts and Grounds having to be amended and re-amended.

(7) The SoS constantly sought extensions of time with the Amended Summary Grounds of Defence only finally served on 26th September 2024.

(8) At the oral permission hearing on 10th December 2024, Lang J was critical of the SoS's disclosure and required the reasons for redaction to be explained and justified in a witness statement made by a GLD solicitor.

(9) The SoS's Detailed Grounds of Defence then took until 6th February 2025 to be served.

(10) 5 days before the substantive hearing on 24th June 2025, the SoS (now Angela Rayner) re-considered the challenged decisions and made new decisions and directions that Rydon should remain a Designated Participant Developer etc.

(11) The night before the hearing, the SoS disclosed further documents that should have been disclosed months before.

**Amenability to judicial review**

32. The issue was not whether the decisions were amenable to judicial review – even the SoS accepted they were – but whether they could be challenged on the full range of public law grounds or whether the grounds were limited to fraud, corruption or bad faith.

33. The argument for contending that the decisions were not simply decisions taken in a private law capacity and subject to the full range of public law remedies were, in essence:-

(1) The BSA and 2023 Regs provide the statutory architecture for the Scheme and the Scheme is given effect to by the Contract and the Terms which the legislation mandates.

(2) This was not an arm's length negotiated contract but one which Rydon was compelled to enter into to avoid the prohibitions which would automatically apply if it did not enter into the contract.

(3) The contract was, therefore, not a "commercial" contract but a mechanism for achieving a statutory objective such that decisions taken by the SoS under the contract were subject to challenge on the full range of public law grounds and not simply corruption, fraud and bad faith.

34. Choudhury J rejected those arguments relying on the dicta in *Mercury* and *State of Mauritius* and the Court of Appeal's judgment in *Hampshire County Council v Supportways Community Services* [2006] EWCA Civ 1035. He held that:-

(1) The contractual context need not be purely commercial for the limited scope of judicial review to apply because political and other considerations may be taken into account.

(2) The fact that a contracting party is a public body or that the contractual obligation is framed by reference to a statutory duty is insufficient to render that obligation a public law duty and a nexus is required between the contractual obligation and the public law power.

(3) The challenged decisions were taken pursuant to the terms of the Contract/Terms and the context was contractual.

(4) The Contract/Terms were agreed through negotiation with the HBF (albeit that Rydon was not a member of the HBF and did not take

part in any negotiations – indeed when they tried to, they were told to take it or leave it).

(5) The public objective of establishing a self-remediation scheme did not diminish from the contractual context as that objective was part and parcel of what a public authority could take into account in negotiating the terms of a contract and how those terms would be applied.

(6) The statutory architecture for the Scheme and Terms did not render public the contractual obligations arising out of those terms.

(7) None of the decisions were taken pursuant to statutory/prerogative powers and were taken in the exercise of contractual powers.

(8) The existence of a broad statutory power to establish the Scheme did not impose public law obligations in respect of contractual rights giving effect to that scheme, the decisions were not taken pursuant to any statutory power and there was no nexus between the contractual provisions under which the decisions were made and any statutory power to attract wider public law remedies.

(9) The severe consequences to Rydon of not signing up to the Scheme/Terms did not change the character of the Contract which was the subject of extensive negotiations with the HBF, albeit that those negotiations were "lop-sided" in favour of Government, because the intent to establish a self-remediation scheme was an aspect of the public interest the SoS was entitled to take into account.

(10) The absence of any commercial market for the contract Rydon entered into did not detract from the fact that there was a contract, the terms of which were agreed after a process of negotiation.

**The take aways**

35. Public authorities entering into commercial contracts are subject to judicial review when exercising their powers to negotiate those contracts and in the exercise of their rights under the contract.

36. However, the scope for judicial review remains limited to fraud, corruption or bad faith.

37. The *Rydon* case has not changed the law in that regard but is an example of how context is everything and perhaps demonstrates how hard it is to challenge the decisions of public bodies where those decisions are taken pursuant to contractual terms.

**24th June 2026**

**John Litton KC**

**Landmark Chambers**