Empire Square: Legal Costs recoverable for RCO proceedings

At the beginning of June 2025, the First-tier Tribunal (Property Chamber) (Residential Property) ("**FTT**") published another decision (*Empire Square* (LON/00BE/HYI/2023/0013 & LON/00BE/BSB/2024/0602)) examining the use of the s.124 jurisdiction under the Building Safety Act 2022 ("**BSA**"). A remediation contribution order ("**RCO**") was made but the most interesting aspect of the decision concerned the award of legal costs relating to the proceedings brought under ss.123 and 124 of the BSA, given the general rule – for FTT proceedings – that each party pays their own costs.

Background to the Case

The *Empire Square* case centres on a large residential development located at 34 Long Lane, London SE1 4NH, constructed between 2004 and 2006. The development comprises 572 apartments distributed across three distinct blocks (East, South, and West) and is served by a shared basement car park.

Initial concerns regarding the external facades, specifically the use of combustible extruded polystyrene (EPS) render, were raised by insurers as early as 2011. Intrusive surveys conducted in 2020 by Facade Remedial Consultants Limited confirmed significant fire safety defects which included issues with the EPS render system, inadequate cavity barriers, and deficiencies in fire stopping. Despite a controversial report from TriFire Limited in October 2020 that deemed interim measures unnecessary, the London Borough of Southwark served Improvement Notices in October 2023. These Improvement Notices highlighted "*significant issues with fire safety*" encompassing various aspects of the building, such as the external wall systems, smoke control mechanisms, internal compartmentation, and fire doors.

The legal proceedings before the FTT thereafter involved two primary applications:

(i)The residential leaseholders sought a remediation order (RO) under section 123 of the BSA against Fairhold Athena Limited, the freeholder.

(ii)Concurrently, Fairhold Athena Limited, as the respondent to the RO also sought an RCO under section 124 of the BSA against The Berkeley Group Holdings Plc, which was the original developer (and a party to the developer pledge).

The Key aspect of the Tribunal's Decision: Costs.

Whilst of interest to all practitioners involved in RO and RCO claims, the decision is most significant because of what it says about the recoverability of costs for such proceedings. In particular for the first time the FTT firmly concluded that it *did* possess the jurisdiction to award legal costs as substantively recoverable costs within an RCO. It did so for the following reasons:

- **Broad Interpretation of Section 124(2) of the BSA:** The FTT noted that section 124(2) broadly defines RCOs as orders for "*meeting costs incurred or to be incurred in remedying, or otherwise in connection with, relevant defects*". The term "costs" is not limited by other definitions in the BSA, and its natural reading therefore includes legal costs. The phrase "*in connection with*" was interpreted as a very wide term, consistent with Parliament's intent to grant broad powers to the Tribunal under the BSA.

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
www.4pumpcourt.com

- **Non-Exhaustive List in Section 124(2A):** The FTT highlighted that section 124(2A) states "*The following descriptions of costs, among others, fall within subsection (2)"* and concluded that this wording clearly indicates that the list of examples (e.g., costs of taking relevant steps, expert reports, temporary accommodation) is not definitive. Therefore, the FTT considered that it was not precluded from finding that other classes of costs, such as legal costs, fall within its power to award.
- **Legal Costs as "Relevant Steps":** The FTT interpreted the legal proceedings themselves, aimed at enforcing Fairhold and Berkeley's obligations under the BSA, as **"relevant steps"** under section 120(4A). These steps are defined as having the purpose of "***preventing or reducing the likelihood of a fire or collapse," "reducing the severity of any such incident,***" or "***preventing or reducing harm to people***." The FTT found that the litigation directly served the purpose of ensuring the building's remediation and safety, thus falling within the scope of "relevant steps."
- **Consistency with Schedule 8:** The FTT drew parallels with paragraph 9 of Schedule 8 to the BSA, which explicitly addresses legal and professional services related to liability for relevant defects. It found that this provision, which limits the recoverability of such costs from qualifying leaseholders via service charges, demonstrates Parliament's awareness of legal costs in the remediation context and uses similar "in connection with" language.
- **Avoiding Absurdity and Injustice:** The FTT found that denying the recoverability of legal costs through an RCO would lead to absurd and unjust outcomes. It would force landlords to either absorb these costs or pass them onto non-qualifying leaseholders, creating a "*pernicious merry-go-round of proceedings and costs*" and undermining the Act's core aim of protecting leaseholders from developer-induced defects. The FTT also pointed out the illogicality of Right to Manage (RTM) companies being deterred from seeking RCOs due to unrecoverable legal expenses, thereby frustrating the very purpose of the BSA.

The FTT therefore found it fair and just to make an RCO for legal costs, noting that the litigation itself had been a catalyst for progress in the remediation. While the exact sum claimed (£308,574.23) could not be assessed by the Tribunal from the papers provided, it ordered a detailed assessment by the county court. The Tribunal also ruled that, even if the costs of the RO proceedings were not considered "in connection with" remediation, the costs directly associated with the RCO application itself were recoverable, as Fairhold was "***pushed into making the RCO application by Berkeley's unreasonable position.***"

The Likely Practical Consequences of this.

The decision to explicitly include legal costs within the recoverable sums under an RCO is a groundbreaking development and marks a significant shift in the balance between parties to proceedings in the FTT. Previously, the recoverability of such costs in RCOs was uncertain (and was thought to be determined in accordance with the decision in Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 209. This recent FTT ruling clarifies that the **"costs incurred or to be incurred in remedying, or otherwise in connection with, relevant defects"** (Section 124(2) BSA) can encompass the significant legal expenses involved in bringing RO and RCO applications.

This ruling is therefore likely to both reduce the financial barrier for potential applicants for ROs and RCOs and may therefore to lead to an increase of such applications.

Written by Sean Brannigan KC and Jennie Gillies

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
www.4pumpcourt.com