

Hallings Wharf Judgment: Significant Decision on Remediation Contribution Order

The First Tier Tribunal (FTT) has handed down a significant new judgment concerning Remediation Contribution Orders (RCOs), in *Secretary of State for Housing, Communities and Local Government v EDR Builders (1) Hollybrook (UK) Limited (2) LON/00BB/BSB/2024/0011*.

In granting the first RCO in respect of an application made by central Government, in the sum of £3,682,997.78, the FTT provided important guidance on various novel issues in this jurisdiction, in particular regarding the principles applicable to recoverability where it is alleged the works actually carried out could/should have been done more cheaply ('alternative schemes'), and the recoverability of litigation costs.

Background

The application relates to Hallings Wharf Studios, Channelsea Road, London E15 2SX.

The first respondent was the developer, in liquidation, no RCO was ultimately sought or made against this party. The second respondent (Hollybrook) was associated with the developer through various common directors.

By the start of trial, all the 'relevant defects' claimed had been effectively conceded by Hollybrook, on the basis of the obiter judgment given by Mr. Justice Edwin Johnson in *Edgewater (Stevenage) Limited and Others v Grey GR Limited Partnership [2026] UKUT 18 (LC) [AB1.1]* on the low bar for assessing 'building safety risk' (though Hollybrook reserved its right to seek permission to appeal should the test for relevant defect change).

The key issue in proceedings was whether the sum sought was recoverable/should be ordered at all, and/or whether it should be reduced, as Hollybrook contended that the works could and should have been carried out more cheaply (an 'alternative scheme' argument).

Hollybrook also challenged the claim brought for litigation costs, argued there had been betterment, argued the claim for VAT would lead to double recovery for the Government, and challenged various items on a quantum basis, as not having been incurred in remedying the relevant defects.

Judgment

The FTT made the following determinations, some of which may have significance for future RCO claims:

1. The FTT has for the first time considered the principles applicable to circumstances where an RCO respondent alleges that the works could and should have been done more cheaply. The FTT broadly accepted the SoS's arguments, finding that:

a. This issue is to be initially/primarily considered at the stage of considering whether costs are incurred in remedying (or otherwise in connection with) relevant defects under section 124(2) (paragraph 58).\

b. The test is whether the works were "reasonable", in particular, whether the remediation carried out was within "the band of reasonable responses" to the defects, and if it was, "the fact that it could have been done more

cheaply is not of itself a basis for reducing the amount of an RCO” (paragraph 55).

c. Applying the principles from *Plough Investments v. Manchester CC* [1989] 1 EGLR 244 (summarised at paragraph 56), when considering whether costs are incurred in remedying relevant defects, “unless the works in question can properly be branded as unreasonable, it does not matter for the purposes of s.124 whether an alternative scheme might have satisfactorily addressed the fire safety risk at a lower cost” (paragraph 58).

d. The FTT found that the works carried out in this case were within the range of reasonable responses (paragraph 68).

e. In respect of the relevance of this issue to ‘just and equitable’, the FTT found that at a broad level, the exercise of discretion in determining whether it is ‘just and equitable’ to make an order, should not be used to defeat the purpose of section 124(2) in ascertaining the sums incurred, and whilst a tribunal will have considered whether costs falling within section 124 are reasonable, “that does not mean that is the end of the matter and that just and equitable considerations play no part” (paragraph 155). Though the FTT found it was just and equitable to make an RCO for the full sum claimed (excluding litigation costs) in this case.

2. The FTT considered the recoverability of litigation costs, following a late amendment by the SoS seeking such costs, made following the judgment in *Empire Square*. The FTT found (at paragraphs 146-149):

a. It was doubtful that section 124(2) could be construed so as to include litigation costs.

b. *Empire Square* can in any event be differentiated, as the building in that case had not been remediated at the time of the RCO, whereas in this case the remediation had already occurred.

c. In any event, the FTT would not have found it just and equitable to make an order for litigation costs given the late stage at which the amendment was sought.

3. Other determinations of note:

a. The FTT considered that it was not unreasonable for the RTM company to “not to start again and re-evaluate the project by reference to PAS:9980 in circumstances where there does not appear to have been any obligation to do so – and to do so would inevitably have resulted in further delay” (paragraph 51). As such the failure to obtain a PAS:9980 assessment prior to undertaking the remedial works, did not undermine the RCO application (paragraph 53).

b. The FTT found there were doubts as to the adequacy and/or viability of the alternative schemes presented by Hollybrook. In particular, and of potential relevance to future cases, the FTT, whilst not making firm findings on interpretation, in considering the potential application of Building Regulation 7(2) (prohibiting the use of certain combustible materials as part of an external wall), considered the definition of “building work” under Building Regulation 3, and found that, at a minimum there was doubt as to the viability of Hollybrook’s alternative scheme (paragraphs 87-95).

c. The FTT rejected Hollybrook’s argument that making an RCO for VAT would lead to double recovery for the Applicant (paragraphs 118-123).

d. The FTT found it was just and equitable to make an order against Hollybrook (Hollybrook did not call evidence or make submissions disputing the SoS’ submission that there was a close connection between the developer (First Respondent) and Hollybrook (paragraph 162)).

e. The FTT rejected Hollybrook’s claim for betterment, finding that there was insufficient evidence as to the extent of any betterment or the value to be attributed to it (no expert valuation advice had been adduced) (paragraphs 167-175).

The FTT made an RCO for all sums claimed by the SoS, bar litigation costs.

[Alexander Burrell](#) was instructed as junior counsel for the Secretary of State, led by Timothy Dutton KC of Maitland Chambers, and instructed by Walker Morris LLP.

Read the full judgment [here](#).