The FTT's approach under BSA 2022, Section 124 : "defects", "building safety risk" and "just and equitable"

As is now well known, section 124 of the Building Safety Act 2022 (the "**BSA**") confers jurisdiction on the First-tier Tribunal (Property Division) ("**FTT**") to make a Remediation Contribution Order ("**RCO**") "*for the purpose of meeting costs incurred or to be incurred in remedying or otherwise in connection with, relevant defects*". An RCO can be made against a person "associated with" a landlord or developer if the FTT considers it "*just and equitable to do so*".

On 24 January 2025 the FTT published its decision in the case of *Grey GR Partnership Limited v Edgewater (Stevenage) Limited and ors*[1]. This sets out important guidance for practitioners in relation to:

- The meaning of "defect" in section 120(2);
- What amounts to a "building safety risk" for the purposes of s.120(5); and
- Factors relevant to the determination of whether it is just and equitable to make a section 124 RCO order against an associated company.

This decision also provides helpful confirmation (building on that already set out in *Secretary of State for Levelling Up Housing and Communities v Grey GR Limited Partnership*[2] (paragraph 130) and *Triathlon Homes LLP v Stratford Village Development Partnership (1) Get Living Plc (2) East Village Management Limited (3)*[3] (paragraph 261)) that the section 123 and 124 jurisdictions are fundamentally non-fault based remedies.

The Facts

Grey GR Partnership Limited (the "**Landlord**") is the landlord of Vista Tower (high-rise residential accommodation that is a relevant building for the purposes of the BSA) which it purchased from Edgewater (Stevenage) Limited (the "**Developer**") in 2018.

Investigations subsequent to the Landlord's purchase of the Building were alleged to have revealed fire safety defects. Most of the internal defects had been remediated in 2023 at the Landlord's expense, and a successful application to the Building Safety Fund ("**BSF**") had been made for the external wall remediation. Those works, which had been the subject of an application for a remediation order under s.123 of the BSA[4], were continuing at the date of trial.

The Landlord argued that it was entitled to an RCO in relation to (1) the costs already incurred investigating the defects and the remediation of the internal defects; (2) costs in relation to the external wall remediation works; and (3) future unquantified costs in relation to the admitted relevant defects to the compartmentation walls between the flats. The RCO was claimed from the Developer and, by the time of the hearing, from 90 associated companies (the "**Associates**").

It was common ground that section 121(5)(a) applied. It was argued that it would be just and equitable to make an RCO against all of the respondents, but on a joint and several basis, because it was not for the Tribunal or the Applicant to prove how the financial arrangements of the Associates were organised. The Respondents argued that no RCO should be made on the grounds that it would not be just and equitable to do so, and that many of the defects identified did not constitute "relevant defects" under the BSA and/or the remediation scheme which was being implemented was

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

excessive and grossly disproportionate.

"Just and Equitable" and Associated Companies

The FTT made RCOs against the Developer and 75 of the Associates (in a 133-page decision), holding that the Developer and its Associates were to be regarded as *"higher in the hierarchy of liability than…the [Landlord] (let alone the taxpayer or leaseholders")*.

It was reiterated that the Developer was the *"key target, at the top of the hierarchy of liability (or waterfall)"* and that there was *"no doubt that a RCO should be made… in view of the nature of their residential conversion works and the relevant defects"*. However, the FTT pointed to further factors which it considered made it just and equitable to make an order against the Developer, which included the extent of its knowledge of combustible materials in the external wall before the Building was sold to the Landlord, and its failure to take any steps to remedy defects when the Building was already occupied. The FTT noted that it would have considered it just and equitable to make an RCO *"even if no or modest profit had been made"*. In any event, the FTT noted that it considered the profit figure identified by the Developer (£1.5m) was not a modest sum.

In relation to each of the Associates which were made party to the RCO, the FTT made the following observations of more general application:

1. There is no automatic presumption that any associate must be made liable unless it can show good reasons why it should not have to pay, particularly where it is associated only by common directorship.
2. The association provisions under section 121 had the potential to catch *"very remote associates"* who might be *"completely unrelated companies who are operated by others and merely happened to have the wrong director at the wrong time"*. This was not a factor which the FTT considered arose on the facts, but it implicitly suggested that it would be unlikely to be just and equitable to make an RCO in those circumstances.
3. In order to establish that it is just and equitable to make an RCO against an associate, the FTT will have regard to whether there are "additional linking factors" to justify making an RCO. The additional linking factors could be *"short of linkage with the development or evidence of abuse"*.
4. Where there are "additional linking factors" it would be for a respondent to provide "*an explanation and/or to evidence countervailing factors"* in order to persuade the FTT that it was not just and equitable to make an RCO. The FTT stressed that each case is fact- sensitive and a matter for the FTT's discretion. In this case those additional linking factors were noted to include:

   a. the use the "Edgewater" brand;

   b. the familial links between the Associates and the extent to which the common directors had day-to-day control (whether or not they delegated to others) over how the Associates were run; and

   c. the nature of the Associate's business (i.e. whether it "*involved the property, property development and/or building sectors*") – as illustrated by the fact that no RCO was made against a registered charity and a wholesaler of clothing and footwear).

   5. Impecuniosity was not a relevant factor.

   6. It was relevant to have regard to the extent of the Developer directors' shareholding in an associated company and the involvement of external investors; the interests of external investors need to be given *"great weight"*. No RCOs were made against those Associates where external parties held more than 50% of shares.

"Relevant Defects" & "Relevant Steps"

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

The decision also provides helpful guidance in relation to the definition of a "relevant defect" (which has wider application beyond section 124) and how the FTT will approach disputes regarding the extent and scope of remediation works.

The statutory definition of the term "relevant defect" is included at s.120(2) and provides that:

> "*Relevant defect", in relation to a building, means a defect as regards the building that—*
>
> (a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and
>
> (b) causes a building safety risk".

Section 120(5) also defines "building safety risk" in relation to a building as

> "*a risk to the safety of people in or about the building arising from—*
>
> *(a) the spread of fire, or*
>
> *(b) the collapse of the building or any part of it".*

The FTT rejected the argument that the term "*a defect as regards the building*" in s.120(2) ought to be construed narrowly as meaning building work that did not comply with the relevant Building Regulations applicable when the relevant works were completed. Instead *"non-compliance with those building regulations is merely one way, not the only way, in which something can be a "defect" for these purposes".*

The FTT also resisted the submission that a "building safety risk" will only exist where a PAS 9980 assessment has identified a fire risk that is not considered to be "tolerable". The FTT opined that a better view was that:

> *"any risk above "low" risk (understood as the ordinary unavoidable fire risks in residential buildings and/or in relation to PAS 9980 as an assessment that fire spread would be within normal expectations)* ***may*** *be a building safety risk. Section 120(5) describes a risk to the safety of people arising from the spread of fire or collapse, not a risk reaching an intolerable or any other particular threshold. We do not think "collapse" indicates the risk must be of catastrophic fire spread, as was suggested. It need only be a risk to the safety of people arising from the spread of fire in a tall residential building".*

The respondents also argued that the scope of works which had been undertaken by the Landlord was disproportionate. The Landlord asserted that it had instructed and acted upon the advice of consultants (and had changed the original scope of works under the Consolidated Advice Note to align with PAS 9980) but it was suggested that the approach taken was still overly cautious and the fire safety and architectural experts appointed by the parties were agreed that some aspects of the works undertaken were not proportionate. The FTT noted that, when considering whether it would be just and equitable to make or include certain costs in an RCO, it was helpful to ask whether the relevant remedial works/costs were within a reasonable range of responses/costs, having regard to the circumstances of each case. The FTT considered that it was reasonable for the scope of works to have been based on the PAS 9980 report which had been obtained. In relation to this (and potentially of relevance in other cases) the FTT considered that:

- whilst the approach taken under the PAS 9980 was cautious, it was not an unreasonable stance to have taken in 2022 and 2023 given the infancy of PAS 9980, and the Landlord's choice of adviser was reputable and sensible;
- the Landlord had been placed under *"serious pressure"* by the s.123 proceedings initiated by the Secretary of State to set out its case in relation to relevant defects;

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

- the Landlord had acted reasonably in having, in part, relied upon the rigours of the BSF grant funding process to test the advice it had received in the PAS 9980 report;
- the Landlord had received advice from another fire engineer which suggested that the PAS 9980 report was not sufficiently cautious and/or was optimistic;
- the decision not to revisit the design was influenced by the need to serve an Initial Notice before October 2023, in order to avoid falling into the new Building Safety Regulator scheme which was anticipated to be delayed at inception owing to teething problems; and
- the scope of works was influenced by the Landlord's desire to avoid decanting leaseholders from the Building: a factor which had not been considered by the respondents' experts.

The cost of works which were ancillary to the remediation of "relevant defects" – where recommended by a fire safety engineer or required for the purposes of building control – were also held to be recoverable.

No deductions were applied in respect of funding received from the Building Safety or Waking Watch Relief Fund, on the basis that the FTT considered that the Landlord should account to the government for any funding received in respect of which it received payment under an RCO.

The hearing of the Landlord's application commenced on 4 November 2024, and therefore the relevant provisions included the amendments to the BSA implemented by the Leasehold and Freehold Reform Act 2024, which had been brought into force. For some of the costs claimed this was considered significant – and the FTT included costs (for instance in relation to sprinklers and fire doors) on the basis that amounted to reasonable "relevant steps" pending remediation of the other defects.

Alexander Hickey KC and Jennie Gillies both appeared on behalf of Grey GR Limited Partnership, instructed by DAC Beachcroft LLP, in relation to both the Remediation Order and the RCO proceedings in the FTT.

Alexander Hickey KC and Jennie Gillies are also instructed on behalf of Grey GR Limited Partnership in the High Court proceedings, listed for trial later in 2025, where the remedies claimed include those under section 130 of the BSA. Ben Pilling KC and Richard Nicholl are instructed by Teacher Stern LLP on behalf of the Developer in the High Court proceedings.

[1] CAM/26UH/HYI/2023/0003

[2] CAM/26UH/HYI/2022/0004

[3] [2024] UKFTT 26 (PC)

[4] Reported at *Secretary of State for Levelling Up Housing and Communities v Grey GR Limited Partnership* [CAM/26UH/HYI/2022/0004]

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