Triathlon Homes LLP v Stratford Village Development Partnership: the failure of the Appeal and the practical consequences thereof

The judgment in *Triathlon Homes LLP v Stratford Village Development Partnership [2025] EWCA Civ 846*, handed down by the Court of Appeal on 8 July 2025, marks a pivotal moment in the interpretation and application of the Building Safety Act 2022 ("**BSA**").

This article seeks to both summarise the Court of Appeal's decision and explore the likely practical consequences arising from this landmark judgment.

Background to the Case

The *Triathlon Homes* case concerns a dispute concerning fire safety defects in five residential blocks within the East Village Estate in Stratford, East London. These blocks were originally constructed as part of the Athletes' Village for the 2012 London Olympic Games, with the intention of being converted into permanent housing thereafter. The development of Plot N26, where the five blocks are located, was undertaken by Stratford Village Development Partnership ("**SVDP**"), a limited partnership initially established and owned by the Olympic Delivery Authority. SVDP entrusted the project management to Lend Lease Development Ltd, which in turn commissioned Galliford Try Construction Ltd as the design and build contractor.

Triathlon Homes LLP ("**Triathlon**") is a provider of social housing that holds long leasehold interests in the social and affordable housing units within these blocks. The overall management of the East Village Estate falls to East Village Management Ltd ("**EVML**"), a company established by agreement between SVDP and Triathlon, which is contractually responsible for remedying defects in the blocks. EVML traditionally funded such works through service charges levied on leaseholders.

The Grenfell Tower tragedy in June 2017 prompted widespread reviews of cladding materials in high-rise buildings across the UK. While initial investigations at East Village focused on aluminium composite material (ACM) cladding, subsequent government advice notes led to further scrutiny. By November 2020, serious fire safety defects were identified in the external walls and cladding of the five blocks in Plot N26, specifically relating to non-ACM cladding design and construction. These defects posed a significant building safety risk, necessitating extensive remediation works.

In response, EVML applied to the government's Building Safety Fund (the "**Fund**"), one of the central schemes designed to assist building owners with remediation costs. The Fund approved the blocks for funding, and a Grant Funding Agreement was eventually signed in June 2023, providing up to approximately £27.5 million for the major remediation works. The work, involving the removal and replacement of external cladding, commenced in April 2023.

Crucially, the BSA significantly altered the landscape of liability for such defects. Specifically, paragraph 2 of Schedule 8

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to the BSA introduced a wide-ranging protection: no service charge is payable for fire safety defects if the original developer or an associated company is the landlord or a superior landlord. In this case, SVDP was the developer, and its associated freehold companies (SVPH 1 and SVPH 2, holding the freehold on trust for SVDP) were superior landlords. This meant that Triathlon was no longer liable for its share of the remediation costs through service charges, which amounted to over £16 million.

With Triathlon protected from service charges, and EVML having incurred (or being set to incur) substantial costs for the remediation, the question of who should ultimately bear these costs became paramount.

Triathlon applied to the First-tier Tribunal ("**FTT**") for Remediation Contribution Orders ("**RCO**") under section 124 of the BSA, seeking to compel SVDP and its current owner, Get Living plc (which acquired SVDP in 2014 and is its wealthy parent company), to pay Triathlon's share of the remediation costs to EVML, and to reimburse Triathlon for certain costs it had already paid. The FTT granted the RCOs, leading to the appeal to the Upper Tribunal, which then leapfrogged the case to the Court of Appeal. The appeal raised two primary grounds:

(a) whether the FTT erred in concluding it was "just and equitable" to make the RCOs, and;

(b) whether RCOs could be made for costs incurred before the relevant part of the BSA came into force.

What the Court of Appeal decided

The Court of Appeal, comprising Lord Justices Newey, Nugee and Holgate, unanimously – and with some force – dismissed the appeal, upholding the FTT's decision to grant the RCOs against SVDP and Get Living plc. The judgment addressed in particular detail the two main grounds of appeal: whether it was "just and equitable" to make the RCOs, and whether section 124 of the BSA has retrospective effect, allowing for the recovery of costs incurred before its commencement.

Ground 1: Just and Equitable to Make RCOs

The Appellants (SVDP and Get Living) argued that the FTT erred in concluding it was just and equitable to make the RCOs, particularly given that the major remediation works were already being funded by the Fund. Nugee LJ, delivering the leading judgment, systematically addressed ten sub-grounds of appeal, rejecting them all.

1. Unexpressed Presumption (Ground 1.1): The Appellants contended that the FTT wrongly created an unexpressed presumption that it is just and equitable to make an RCO against a developer or associated entity capable of funding the works. Nugee LJ disagreed, clarifying that the FTT made two distinct, justifiable points.

– First, the policy of the BSA is that primary responsibility for remediation costs should fall on the original developer: a proposition generally accepted and now endorsed by the Supreme Court in *URS Corporation Ltd v BDW Trading Ltd [2025] UKSC 21* (URS).

– Second, as between public funding (the Fund) and those listed in section 124 as potential contributors, public funding is a "matter of last resort." In particular the Court found the FTT was justified in concluding that it was difficult to see why the public should fund the works when the developer and its wealthy associate (Get Living) could afford to do so. However, Nugee LJ noted that the FTT went too far when commenting that it could "never" be just and equitable for certain parties under section 124(3) to avoid liability, and pointed to there being exceptions, especially for loosely connected associates, where imposing costs on them may be unfair despite the public then bearing the burden.

2. **Passing on Costs to Developers (Ground 1.2):** The Appellants challenged the FTT's reliance upon the Leaseholder

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Protections (Information etc.) (England) Regulations 2022 (LPI Regulations) to support its contention that finding that the BSA's policy is for primary responsibility to fall on the developer. It had been argued that Regulation 3 of the LPI Regulations only applies to landlords and does not impose liability on non-landlord developers like SVDP or Get Living. Nugee LJ dismissed this, noting:

– While Regulation 3 might not *directly* apply to SVDP as a non-landlord, it clearly illustrates the policy of the BSA.

– The superior landlords, who held the freehold on trust for SVDP and are associated with the developer, are "responsible landlords" under Regulation 3 such that EVML could, in principle, claim against them, effectively reaching SVDP's assets.

– This alternative, non-discretionary route to recovery against SVDP's trustees was a significant factor in determining the justness and equity of an RCO against SVDP. The fact that Get Living could not be pursued under Regulation 3 did not undermine the FTT's reasoning that it was just and equitable to make an RCO against Get Living as the wealthy parent of the thinly capitalised SVDP – a situation, the Court said, which was precisely targeted by the association provisions.

3. **Triathlon's Motivation (Ground 1.3):** The Appellants argued that the FTT erred by holding that Triathlon's motivation and identity was generally not significant unless malice was involved. Nugee LJ upheld the FTT's approach finding that:

   – Parties with legal rights are generally entitled to pursue them without explaining their subjective reasons.

   – Triathlon, as an owner of long leasehold interests and landlord to many tenants, had a legitimate interest in ensuring the defects were remedied and the funding secured. The FTT had legitimately found it understandable that Triathlon took the initiative given EVML's difficulties in making decisions owing to shareholder disagreements.

   – The identity of the applicant did not alter the fundamental question of whether it was just and equitable for Get Living to make payments to EVML.

4. **The Public Purse (Grounds 1.4 and 1.10):** These grounds challenged the FTT's characterisation of the Fund as a "last resort" and its view that the public purse should not act as an interim funder while claims against third parties (like Galliford Try) are being resolved. Nugee LJ again affirmed the FTT's stance:

   – He reiterated that while ensuring works are done is a purpose of the BSA, another equally important purpose is to determine "who pays."

   – He pointed out that the scheme created by the BSA, particularly in respect of the leaseholder protections, is one of providing mechanisms for costs to be borne by those with connections to the building, with the developer at the top of this hierarchy.

   – The Fund, while crucial, operates outside this statutory hierarchy and is ***not*** intended to displace BSA provisions.

   – The FTT was correct to ask why the public should continue to fund remediation when the developer and its associates are available and able to pay.

   – The argument that the RCO was unnecessary because funding was in place took too narrow a view of the Act's statutory purposes. The Fund's role is temporary, pending recovery from those legally liable, and the Grant

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Funding Agreement itself requires EVML to pursue claims for reimbursement.

5. **Pursuing Other Claims (Ground 1.5):** The Appellants argued that the FTT erred by not requiring Triathlon to pursue other available claims (e.g., against contractors like Galliford Try) first, especially since the works were already funded. Nugee LJ found that:

   – The BSA, particularly section 124, provides a new, independent, and largely non-fault-based remedy designed to secure funding without applicants having to await the outcome of complex, lengthy, and expensive litigation against third parties.

   – The FTT was entitled to conclude that the policy of the BSA was for primary responsibility to fall on developers, and that this should not be contingent on the resolution of other claims.

6. **Context of Fund Applications (Ground 1.6):** The Appellants claimed the FTT had failed to consider that the Fund applications were made at Triathlon's request and that the parties had been working on the basis that the works would be funded through the Fund. Nugee LJ considered that argument to be of limited relevance, finding:

   – The fact that all parties cooperated to secure public funding did not, by itself, determine whether it was just and equitable for the developer and its parent to ultimately bear the costs.

   – There was no suggestion that Triathlon had promised not to apply for an RCO or was estopped from doing so.

7. **No Expectation by the Fund (Ground 1.7):** The Appellants argued that the FTT failed to consider that the Fund provided funding irrespective of the BSA's position, implying public authorities did not expect SVDP and Get Living to forward fund. Nugee LJ considered this to be neutral factor, noting:

   – The Grant Funding Agreement explicitly requires the applicant (EVML) to use "*all reasonable endeavours*" to pursue claims against responsible parties (including developers and manufacturers) and to repay recovered monies to the Fund, demonstrating a clear public interest in reimbursement and reinforcing the FTT's view that the Fund is a temporary measure.

   – Arguments about discouraging investment in new housing were speculative and not supported by the BSA.

8. **Changing Identity of Beneficial Owners (Ground 1.8):** The Appellants contended that the FTT wrongly gave no weight to the changing identity of SVDP's beneficial owners, particularly because the East Village development was initially a public funded project. Nugee LJ agreed with the FTT that this was irrelevant:

   – Get Living's predecessor (QDDAV) acquired SVDP it acquired both its assets and its liabilities, and subsequent investors also willingly assumed the risks.

   – The fact that SVDP was initially publicly owned did not alter the current commercial reality or the application of the BSA.

   – The FTT's reasoning that Get Living, as the wealthy parent, was precisely the target of the association provisions was cogent.

9. **Terms of Grant Funding Agreement (Ground 1.9):** This ground alleged that the Grant Funding Agreement expressly prohibited a claim against Get Living. Clause 4.3.1(d) stated that EVML "*shall not claim the cost of any Qualifying Expenditure funded by the Funding from any Leaseholder*" and "Leaseholder" was defined to include any person controlling a party to a Lease Document (which included Get Living's subsidiaries). Nugee LJ accepted

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the argument made on behalf of EVML that clause 4.3.1(d) should be interpreted as only preventing EVML from pursuing claims against leaseholders *in their capacity as parties to the lease*. To interpret it otherwise, preventing claims against a developer or its associate simply because they also happened to own a flat in the building, would make no commercial sense and would cut across the BSA's policy. Thus, the agreement did not preclude an RCO against Get Living in its capacity as a developer's associate.

In summary, the Court of Appeal found no error in the FTT's exercise of discretion regarding the "just and equitable" criterion. The FTT's reasoning, grounded in the BSA's policy of holding developers accountable and treating public funding as a last resort, was deemed sound.

Ground 2: Retrospectivity of Section 124

The second major ground of appeal concerned whether BSA, section 124 has retrospective effect, allowing RCOs to be made for costs incurred before its commencement on 28 June 2022. This point was crucial for approximately £1.1 million of Triathlon's claims. The FTT had concluded that section 124 ***did*** have retrospective effect.

Here Lord Justice Nugee, supported by Lord Justices Newey and Holgate, agreed with the FTT: while acknowledging the general presumption against retrospectivity in legislation, the Court emphasised that this presumption can be displaced if Parliament's intention is clear, especially when the unfairness of not doing so is significant.

In particular, and perhaps unsurprisingly, the Court referred extensively to the Supreme Court's judgment in *URS*, which, while primarily concerning section 135 (extension of limitation periods), contained clear guidance about the general purposes and retrospective nature of Part 5 of the BSA. That opinion had explicitly stated that "***All four sets of provisions [in Part 5] have retrospective effect"*** and that "***Retrospectivity is central to achieving the aims and objectives of the BSA***". The Court also pointed out that Lord Leggatt in *URS* had noted that Parliament clearly intended to enable claims against those responsible for defects even when work was completed many years ago, and that the unfairness to potential defendants was considered a "***necessary price of achieving an important policy goal.***"

Building on that Nugee LJ found that the FTT's reasons for imposing retrospectivity were persuasive, stating that:

- **Language of Section 124(2):** The phrase "*costs incurred or to be incurred*" is broad and does not impose a temporal limitation, although this alone was not determinative.
- **Purpose and Structure of Part 5:** The BSA's purpose is to protect leaseholders from financial risk and ensure those responsible for defects are held accountable. Denying retrospectivity would create "*serious inconsistencies*" and "*haphazard patterns of protection*." For instance, leaseholders who had already paid for remediation before the BSA came into force would be left without a statutory remedy, unlike those who had not yet paid and were protected by Schedule 8. This would "penalise" responsible leaseholders or landlords who had already acted to remedy defects.
- **Coherence of the BSA:** If a management company (like EVML) incurred costs before the BSA came into force but could not recover them through service charges (owing to Schedule 8's protections for leaseholders) and also could not use section 124 retrospectively, it would be left with a significant shortfall and no obvious remedy. This would be inconsistent with Parliament's intention.
- **Safety Valve:** The "just and equitable" discretion in section 124(1) acts as a safety valve against potential unfairness arising from retrospectivity, allowing the FTT to tailor orders to specific circumstances.

Lord Justice Newey, in his concurring judgment, further highlighted that section 124 allows a "fresh liability" to be imposed on past conduct, which is generally less objectionable than removing already accrued rights. The discretion afforded to the FTT under the "just and equitable" test is a crucial distinction from Schedule 8, which has no comparable provision, making retrospectivity more palatable.

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Accordingly, the Court of Appeal firmly established that section 124 of the BSA has retrospective effect, allowing RCOs to be made in respect of costs incurred before its commencement, thereby providing a broader scope for accountability and leaseholder protection.

Likely Practical Consequences of the Decision

What, then, are the practical consequences of all this? It seems to us that the decision both reinforces the fundamental principles of the BSA and clarifies key aspects of its operation. We think that there are five key likely practical consequences of that:

1. **Enhanced Accountability for Developers and their Associates**

   The judgment unequivocally – and really quite firmly – reinforces the concept/policy choice that original developers and their associated entities should and will be held primarily responsible for the costs of remedying historical building safety defects. In particular the Court of Appeal's endorsement of the FTT's view that the BSA creates a "hierarchy or cascade of liability" with the developer at the top is powerful. We envisage those words featuring in many submissions and judgments to follow. This means that even if the developer itself is a thinly capitalised special purpose vehicle (SPV) or has undergone changes in ownership, its wealthy parent companies or other associated entities (as broadly defined by the BSA) are firmly within the scope of potential RCOs.

   The Court's rejection of arguments based on the changing identity of beneficial owners or the initial public ownership of SVDP underscores a strict approach: acquiring a development company means acquiring its liabilities, foreseen or unforeseen. This will likely lead to increased scrutiny during corporate transactions involving property developers, with greater due diligence on past projects and potential building safety liabilities. In particular purchasers of development companies will need to factor in the risk of RCOs, even for defects in buildings completed many (up to 30) years ago.

   This enhanced accountability is intended to shift the financial burden away from innocent leaseholders and onto those deemed responsible for the original construction or who have benefited from the development. It also means that developers cannot simply "walk away" from their legacy issues, even if they no longer directly own the buildings. This should incentivise developers to proactively address defects and to ensure high standards of building safety from the outset, knowing that the long arm of the BSA can reach them and their corporate associates years down the line.

2. **Broader Scope for RCOs and Leaseholder Protection**

   The Court's decisive ruling on retrospectivity is perhaps the most impactful aspect of the judgment. By confirming that RCOs can be made for costs incurred *before* section 124 of the BSA came into force, the judgment significantly broadens the scope of potential claims and the protection afforded to leaseholders. This resolves a critical ambiguity that could have created a two-tier system of protection, leaving some leaseholders in identical buildings without a remedy simply because their landlords had acted promptly to address defects before the BSA came into force.

   Of course, this means that leaseholders who have already paid significant sums towards remediation through service charges, or whose landlords have incurred such costs, now have a clearer path to seek reimbursement or contribution from developers and their associates. This may lead to a surge in applications for RCOs, or notices under the LPI Regulations, as management companies and leaseholder groups seek to claw back monies already spent.

3. **Clarification of the Building Safety Fund's Role**

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The judgment provides crucial clarity on the relationship between RCOs and the Fund, the interplay between which has caused confusion. The Court very firmly established that the Fund is a "matter of last resort" and not intended to displace the primary responsibility of developers and their associates. This is a significant blow to arguments that RCOs are unnecessary if public funding is already in place. The Court's reasoning is clear: the public purse should not act as an "interim funder" or "underwriter of the risk of failure" while responsible parties (developers and their associates) retain significant funds.

This means that even where a building's remediation is being funded by the Fund, developers and their associates can still be compelled to reimburse the Fund. This will be welcome news for the Government, as it ensures that public money is not used to shield those who should ultimately bear the costs. It incentivises the pursuit of RCOs as a means of replenishing the Fund, allowing it to support remediation in other buildings. For developers and their associates, this means that securing public funding for a project does not absolve them of their potential liability; they may still be required to step in and cover costs, either directly or indirectly through reimbursement of the Fund. This clarification reinforces the Government's stated policy of making the industry pay for the remediation of historical defects.

4. **Impact on Contractual Arrangements and Litigation Strategy**

The decision underscores that the BSA's statutory remedies, particularly RCOs, operate independently of existing contractual arrangements and do not require applicants to exhaust other potential claims (e.g., against contractors or insurers) first. The FTT's view, endorsed by the Court of Appeal, is that section 124 provides a "new and independent remedy" designed to secure funding without waiting on "complex, multi-handed, expensive and lengthy litigation."

This has significant implications for litigation strategies. Parties seeking remediation costs may now prioritise RCO applications owing to their non-fault-based nature and the ability to secure funding more swiftly. While developers and their associates may still have recourse against contractors or sub-contractors and consultants through separate litigation (e.g., under the Defective Premises Act 1972, with its extended limitation periods), this will not delay or prevent the imposition of an RCO. This could lead to a more streamlined process for securing remediation funds, but potentially to a proliferation of subsequent claims as those made liable by RCOs seek to recover their losses from other parties in the construction supply chain. It also means that contractual clauses attempting to limit liability or allocate risk may be overridden by the statutory powers of the BSA, reinforcing the public policy imperative behind the Act.

5. **Increased Importance of the "Just and Equitable" Test**

While the judgment establishes a strong presumption that developers and their associates should bear remediation costs, it also reaffirms the critical role of the "just and equitable" discretion granted to the FTT under section 124(1). The Court acknowledged that there might be exceptional circumstances where it would *not* be just and equitable to make an RCO, even against a wealthy associated entity. This "safety valve" ensures that the FTT retains flexibility to prevent genuinely unfair outcomes. Respondents to RCO applications still have an opportunity to present compelling arguments as to why, in their specific circumstances, an order would not be just and equitable (consistent with the FTT's decision in Vista Tower). Factors such as the nature of the association, the degree of connection to the defect, and the overall context of the case will remain relevant. There will be continued, albeit more focused, litigation on the precise contours of the "just and equitable" test, with parties needing to demonstrate truly exceptional circumstances to avoid an RCO. Imaginative, thoughtful and detail orientated advocacy will be required.

Conclusion

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The *Triathlon Homes* judgment provides much-needed clarity and reinforces the robust nature of the BSA. It solidifies the principle of developer and associate accountability, broadens the reach of RCOs to include retrospectively incurred costs, clarifies the supplementary role of the Building Safety Fund, and streamlines the path to securing remediation funding. While the "just and equitable" test remains a crucial safeguard, its application will now be viewed through the lens of Parliament's clear intent to protect leaseholders and make those responsible pay. The practical consequences will be felt across the property sector, driving a renewed focus on building safety compliance and financial responsibility for historical defects.

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