Keating Chambers BSA Update

JULY 2025

KEATING CHAMBERS

Welcome

to the first edition of the Keating Chambers BSA Update

> The Building Safety Act 2022 ("BSA") was introduced to transform the building safety legislative landscape in direct response to the Grenfell Tower fire tragedy of 2017 and the recommendations from Dame Judith Hackitt's Building a Safer Future Report. It marks a fundamental change to the culture and responsibilities within the building industry, amends existing legislation, introduces novel remedies and causes of action, enables claimants to pierce the corporate veil and provides for expanded and retrospective limitation periods.

Contractors, construction professionals and product manufacturers (and their insurers) now face potential liability to the owners, subsequent owners and those with an interest in relevant buildings. Parties may no longer be able to hide behind corporate structures to avoid or limit their potential liability for defective construction or products. The expanded and retrospective limitation periods are likely to significantly increase the number of claims, opening the door to remedies and liability for historic defects dating as far back as 1992.

Members of Keating Chambers were heavily involved in representing various parties during the Grenfell Tower inquiry itself and have already acted in some of the leading decisions of the First Tier Tribunal ("FTT"), Upper Tribunal ("UT") and Courts in relation to the BSA. These include the recent decision of the Supreme Court in *URS v BDW* (nature of the duty and limitation period under the Defective Premises Act 1972), the decision of the UT in *Monier Road Limited v Blomfield* (remediation orders), and the decision of the Court of Appeal in *Triathlon* (remediation contribution orders).

In *Triathlon Homes LLP v Stratford Village Development Partnership and Get Living plc*. the Court of Appeal upheld the FTT's decision both that it was just and equitable to make a remediation contribution order ("RCO") and that costs incurred before the BSA came into force fall within the scope of s124. Our next edition will consider some of the longer-term implications of this landmark case.

This is the first of what will become a regular Keating Chambers BSA Update on legal developments in this field, to include articles on topics of interest, case summaries of leading FTT, UT and Court decisions, an A-Z directory of all significant cases as they relate to key issues and an updated summary of the much changing regulatory framework as it is developed by secondary legislation.

The aim is to show-case the breadth and depth of expertise in this new legal area that already exists within Keating Chambers, put our clients at the forefront of these important legal developments as they happen and to inform them of the potential implications of this transformative legislation as it develops. The next edition of the Keating Chambers BSA Update will follow in October 2025, ahead of the Keating Chambers BSA Symposium scheduled for November 2025.

Editors of Issue 1:

Vincent Moran KC

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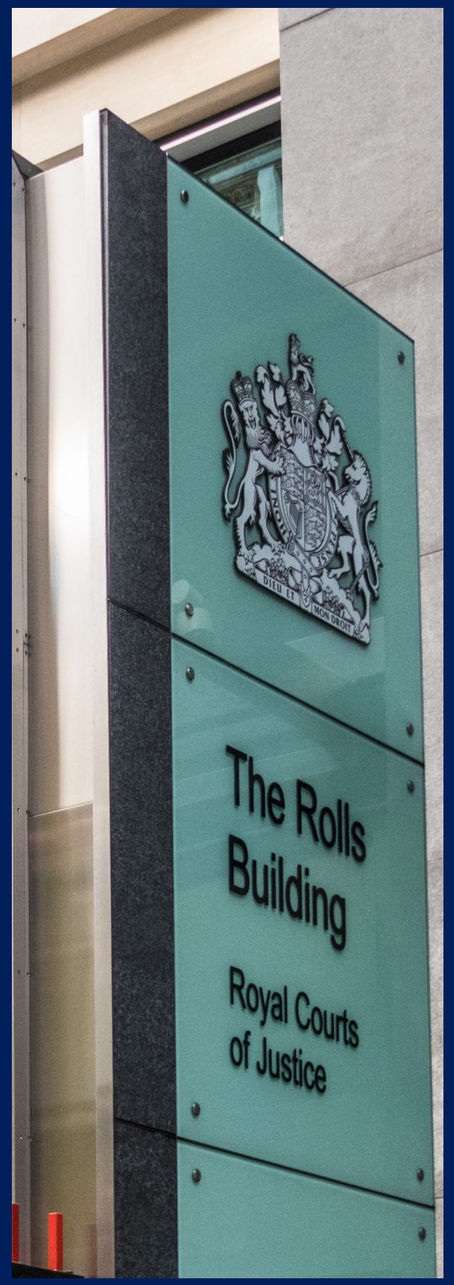
Breaking Update

The Technology and Construction Court's Building Safety Act Working Group has drafted amendments to the Technology and Construction Court Guide (October 2022) concerning proceedings which include claims under the BSA which will appear in the next revision to the TCC Guide.

Details can be found here: Technology & Construction Court Guide revision for applications or claims under the Building Safety Act 2022 - Courts and Tribunals Judiciary

One of those amendments provides for "*a streamlined resolution process in respect of a dispute in which parties may be seeking different orders under the BSA which ostensibly span the jurisdiction of both the FTT and the TCC*". This is a very important development which is likely to be of interest to freeholders, insurers, developers and the whole of the development supply chain. This will revolutionise the case management and determination of claims which span FTT and TCC jurisdictions.

That process is going to be made available soon. Where proceedings are likely to contain claims spanning both the FTT and High Court jurisdictions, parties will be able to use a Form to apply for a CMC for appropriate directions. Once that Form is available, we will share a news update.



Adrian Williamson KC

The Grenfell Tower Phase 2

As the Supreme Court acknowledged in its landmark decision in *URS Corporation Ltd v BDW Trading Ltd* [2025] UKSC 21 the Grenfell Fire on 14th June 2017 has set in motion considerable change in the construction industry – and, of course, substantial amounts of litigation.

In this article, I will attempt to summarise what went wrong at Grenfell with such devastating consequences, and how the Public Inquiry chaired by Sir Martin Moore-Bick analysed these failures and made recommendations to avoid a similar future tragedy.

The then Prime Minister, Theresa May, appointed Sir Martin on 29th June 2017. He decided to divide the Inquiry into two Phases. Phase 1, which reported in October 2019, essentially dealt with the immediate circumstances of the fire. However, the Inquiry was able to conclude that:

"2.13…

a. The principal reason why the flames spread so rapidly up, down and around the building was the presence of the aluminium composite material (ACM) rainscreen panels with polyethylene cores, which acted as a source of fuel.

b. The presence of polyisocyanurate (PIR) and phenolic foam insulation boards behind the ACM panels, and perhaps components of the window surrounds, contributed to the rate and extent of vertical flame spread."

The focus of Phase 2, which opened in January 2020, was upon the long-term failures, principally in the construction industry, which had allowed these dangerously flammable materials to be affixed to a tower block. The Inquiry heard a great deal of evidence, and examined huge numbers of documents between January 2020 and November 2022.

The Phase 2 Report (of what was now a Panel chaired by Sir Martin) criticised numerous parties and rehearsed the evidence in great detail. However, the essence of the matter so far as the construction industry was concerned was clear and obvious from the start. Five parties, or groups of parties, had brought about the tragedy.

The most culpable were the companies who sold the unsafe materials: Arconic, Celotex and Kingspan. There was "systematic dishonesty on the part of those who made and sold the rainscreen cladding panels and insulation products. They engaged in deliberate and sustained strategies to manipulate the testing processes, misrepresent test data and mislead the market" (Phase 2 Report para 2.19). For example, Kingspan:

"knowingly created a false market in insulation for use on buildings over 18 metres in height by claiming that K15 had been part of a system successfully tested under BS 8414 and could therefore be used in the external wall of any building over 18 metres in height regardless of its design or other components… cynically exploited the industry's lack of detailed knowledge about BS 8414 and BR 135 and relied on the fact that an unsuspecting market was very likely to rely on its own claims about the product"

(paras 2.32 and 2.39)

The suppliers got away with this massive and sustained fraud because the testing system, intended to root out defective products, was wholly compromised. The Building Research Establishment ("BRE") was "complicit in that strategy". The BRE's work was "marred by unprofessional conduct, inadequate practices, a lack of effective oversight, poor reporting and a lack of scientific rigour" (paras 2.5 and 2.18). The BRE, which had been privatised in 1997, was far too close to its clients, upon whom it depended for revenue. Other testing and certification bodies, notably the British Board of Agrément and Local Authority Building Control (LABC), failed to ensure that the statements in their product certificates were accurate and based on tested evidence.

Presiding over this unholy alliance of dishonest suppliers and inadequate testing/certification bodies were successive governments. They failed to identify the risks posed by the use of combustible cladding panels and insulation, particularly to high-rise buildings, and to take action in relation to them, in particular by clarifying the applicable regulatory framework. Partly this was due to bureaucratic inertia and ignorance, but politics played a significant part:

"In the years that followed the Lakanal House fire the government's deregulatory agenda, enthusiastically supported by some junior ministers and the Secretary of State, dominated the department's thinking to such an extent that even matters affecting the safety of life were ignored, delayed or disregarded." (para 2.13)

The dangerous materials were then specified by the architects, Studio E, and used by the main contractors, Rydon, and their curtain wall sub-contractors, Harley. These parties were unaware of the risks of using combustible materials in the external walls of high-rise buildings. That was because they "were not familiar with or did not understand the relevant provisions of the Building Regulations, Approved Document B or industry guidance" (para 2.75).

Finally, those who should have spotted the dangers of using these materials were equally ignorant and incompetent:

"RBKC building control did not properly scrutinise the design or choice of materials and failed to satisfy itself that on completion of the work the building would comply with the requirements of the Building Regulations.

Exova was instructed by Studio E on behalf of the TMO to prepare a fire safety strategy for the building in its refurbished form. A draft was prepared but never completed. In particular, it did not include an analysis of the external wall or its compliance with functional requirement B4(1) of the Building Regulations"

(paras 2.76 and 2.77)

The Inquiry made 58 recommendations and the present Government has broadly accepted them. These recommendations are, in the main, fairly anodyne, for example that RIBA should review the changes already made in the education and training of architects to ensure they are sufficient in the light of the Inquiry's findings (recommendation 19). Likewise, the Inquiry suggests that a Cladding Materials Library be created to provide a continuing resource for designers (recommendation 24).

No one could really object to these proposals, but it is hard to believe that they will transform a fragmented, poorly trained construction industry or a largely privatised "system" of testing, certification and inspection. Moreover, the Inquiry has not come up with a convincing way to control bad corporate actors like Kingspan, who continue to operate in plain sight in spite of the Inquiry's stinging criticism (revenue up 6% to €8.6bn; trading profit up 3% to €907m in the year ended 31 December 2024).[1]

Despite the thorough work of the Inquiry, and some subsequent actions on the part of Government, it is difficult to disagree with the "rather gloomy" views expressed by Lord Justice Coulson in his 2023 Keating Lecture.

"116…Almost six years after Grenfell, I see no imminent prospect of real change. There are a number of fundamental difficulties which remain embedded in the system of Building Regulation…

123. Apparently, 15/20 years ago, when those concerned with building safety endeavoured to put pressure on the Government to make the Building Regulations more prescriptive, they were dismissed as naysayers. It was alleged that, when told how weak the current regulatory system was, the relevant official said "Show me the bodies": in other words, show me the evidence that the deregulated system of building regulation does not work. I would respectfully suggest that the dead at Lakanal House and Grenfell Tower have, tragically, proved just that. The present way of doing things, with the double standard and the repeated emphasis on deregulation, has manifestly not worked. It is time to go about things in a radically different way."

Adrian Williamson KC was instructed on behalf of the Bereaved Survivors and Residents on the Grenfell Tower Inquiry Phase 2 Report.

[1] https://www.kingspangroup.com/en/news-insights/kingspan-group-plc-full-year-results-2024/)

Could a Contribution Claim be Founded on an RCO?

Contribution under the Civil Liability (Contribution) Act 1978 ("CL(C)A") may have a significant part to play as actors seek to position themselves on the BSA stage and, in particular, as those first out of pocket seek to pass on their losses to others.

Simon Hargreaves KC

In this article, I will address the technical element of the question, before asking in what circumstances this remedy, as opposed to others, might be required.

Let me first set the contribution scene by reference to the Supreme Court's recent judgment in *BDW Trading Ltd v URS Corporation Ltd* [2025] 2 WLR 1095 [SC]. Assume a triangle with A at the apex and B and C at left and right: A is the party to whom each of B and C is liable in respect of the same damage, and B claims contribution from C.[1] A claim for contribution – albeit a claim in respect of a "liability" [s1(1) CL(C)A] – can, it turns out, only be made by B in respect of an identifiable amount of money to which C can be ordered to make contribution [224-231]. A claim for contribution is a claim for an order for money [224, 227]. B can recover contribution when (s)he (1) has made a payment, or (2) has agreed to make a payment or (3) has been ordered to make a payment [225]. A payment includes carrying out works (a payment in kind) [226]. The amount of contribution is that which is just and equitable having regard to the extent of that person's responsibility for the damage in question [s 2(1) CL(C)A]. The cause of action in contribution both accrues, and time commences under the Limitation Act 1980 ("LA 80"), as follows. Where there is a judgment or an arbitral award, time runs from the date of the order establishing quantum [s 10(3) LA 80]. Where there is a payment, the date is the date the payment is made [232], even if there is a later agreement about the payment ("if earlier" [232]). Where there is an agreement to make payment (in the future), the date is the date of the agreement [232]. Proceedings for contribution may be commenced before the right to contribution has accrued by operation of rules of court in legal proceedings in which A sues B [238].

Let me now turn to s124 BSA. Under s124, the FTT may make a RCO which is an order, in relation to a relevant building, requiring a specified body corporate [B] to make payments to a specified person [A] for the purpose of meeting costs incurred or to be incurred in remedying relevant defects relating to the relevant building. As against this statutory scene, contribution would appear to be available as a remedy as follows. There are four types of person against whom an RCO may be made [s124(3)]. A person of one type against whom an RCO has been made may claim contribution against any of the other types of person. The cause of action will accrue when the RCO is made, and the limitation period is two years from that date. The FTT does not have jurisdiction to determine the claim for contribution, which would have to be determined in the High Court. It will not be possible to claim contribution until an RCO has been made, because until then there will be no identifiable amount of money that C can be ordered to make contribution in respect of, and since the RCO claim is in the FTT, not the High Court, the rules of court permitting an 'anticipatory' claim for contribution do not assist. It is a more difficult question whether a claim for contribution would be available where A's claim against B was settled. After all, the RCO is a discretionary remedy, and who is to say in those circumstances whether B is or ever was "liable" to A for the purposes of s1(1) of the CL(C)A? C would undoubtedly argue that the mere fact that an RCO "may" have been made against B does not mean that B was "liable" for the purposes of the CL(C)A. Nor it would seem does ss1(4) resolve this difficulty because, although that subsection confers in the case where B has settled with A the assumption that the factual basis of the claim by A against B is established, B nonetheless has to establish that B would have been liable to A on that assumption. I propose to leave this question for another day.

Where B is liable to A for an RCO, may B claim contribution from C in circumstances where C is not liable to A for an RCO, but is liable to A under the Defective Premises Act 1972 ("DPA") – which would appear to be the position where A has a legal or equitable interest in the relevant building or any part of it [s124(5)(e)] but not otherwise [ss124(5)(a) – (d)]? There is of course no difficulty under the DPA with the nature of the two liabilities being different. Instead, the question is whether the damage is the "same damage". The concept of "same damage" is difficult territory, the House of Lords in *Royal Brompton Hospital NHS Trust v Hammond (No.3)* [2002] 1 WLR 1397 [HL] having, respectfully, overlooked an opportunity to equate "damage" in the 1978 Act with the most legally mature treatment of "damage" in the common law, namely the concept of "damage" in tort, specifically in the context of accrual of a cause of action in negligence. Instead, the House of Lords trod the difficult path, respectfully, of trying to conceptualise same damage on the one hand, whilst at the same time refusing to be drawn into glosses or other means of definition or clarification on the other, leaving the meaning of "damage" and "same damage" rudimentary, Protean and unpredictable.

Leaving that debate, too, for another day, when considering "same damage" it is necessary to examine with care the two types of damage under consideration. Under the DPA, the "damage" in respect of which the statute provides a remedy to A is simply the defectively uninhabitable dwelling[2] in which A has a legal or equitable interest [ss1(1)(b)] or to whose order said dwelling was provided [ss1(1)(a)]. Under the more convoluted BSA, the "damage" is a mouthful along these lines: the state of a building containing dwellings, being defective, and giving rise to a building safety risk (as defined), in respect of which expenditure on remedial works (or relevant steps (as defined)) is required. On this basis, and provided the relevant dwellings are uninhabitable on the DPA test, it strikes this writer at least as entirely arguable that the damage or some part of it is the "same damage" for the purposes of the CL(C)A. After all, in each case, the dwellings/building-containing-dwellings are/is seriously defective so as to warrant expenditure on remedial works. Even bearing in mind some of the distinctions drawn in *Royal Brompton* between one supposed kind of damage and another when the House ran through some earlier authorities said to have been decided incorrectly, it seems, to this writer at least, unlikely that those sorts of fine distinctions would be drawn here, and there is the further point that it would be consistent with the policy of both the DPA and the BSA that the concept of same damage be given a not ungenerous interpretation, notwithstanding what was said about no glosses, and narrow vs. wide vs. neither, in *Royal Brompton* 23 years ago. The scope of the remediation order ("RO") and RCO remedies is broader than that under the DPA but, to the extent that the remedial works and accompanying cost under each intersect, that presents no difficulty, and the amount of the overlap would comprise the identifiable amount of money to which C can be ordered to make contribution.

But in what circumstances might the remedy of contribution, as opposed to other remedies, actually be required? Let us start by considering the applicant and respondent in a claim for an RCO. The applicant for an RCO is one or more of the five "interested persons" listed in s124(5)(a) – (e). Of those, only "(d) a person with a legal and equitable interest in the relevant building or any part of it" is likely to be of interest to our enquiry, because only that kind of "interested person" will be owed a duty under the DPA so as to enable a claim in contribution to get off the ground. The respondent to an RCO is one or more of the four specified persons listed in s124(3)(a) – (d). Of those, the developer (at (c)), is unlikely to need the remedy in contribution because the developer will have his own direct claim against his supply chain under the DPA. This, after all, was the key DPA point decided in *BDW* [at 159]. The same is true for the landlords at (a) and (b) who have, or had, a legal interest in the dwellings. However, the situation is different for the person "associated" (at (d)) with the developer. That person does not have a DPA claim against the developer's supply chain (unless he has a legal or equitable interest in the building / dwelling) because the dwelling was provided not to his order, but to the developer's order. Accordingly, a person "associated" with the developer may well have need of the claim in contribution.

Simon Hargreaves KC appeared in the Supreme Court for the Respondent in URS v BDW.

[1] And vice versa, but for the purposes of this paper B will be the "contribution claimant" and C will be the "contribution defendant".

[2] On the present law. There is the possibility that *Alexander v Mercouris* [1979] 1 WLR 1270 [CA] will be overruled, with the result that the dwelling need not be uninhabitable, merely defective. See Ramsey J's persuasive consideration of this decision in *Harrison v Shepherd Homes Limited* (2011) 27 Const LJ 709 (TCC) at [144-153]. Whereas it was once thought very likely that Mercouris would be overruled, it is conceivable that that may have changed in the light of BDW.

[3] *Nationwide Building Society v Dunlop Haywards* [2009] PNLR 20 (Comm). B liable in deceit, C liable in negligence. B could recover in contribution the intersection, but not the wider scope (because deceit) of his liability to A.

Lessons from Two Years of ROs

John McMillan

An RO is an order of the FTT under section 123 of the BSA, requiring a landlord to remedy defects causing a safety risk in a residential building, where certain qualifying conditions are met.

The first RO under the BSA was granted on 9 August 2023, in the case of *2-4 Leighham Court Road*.[1] At the time of writing, less than two years later, the FTT has awarded another 14 ROs. That is an impressive caseload for a new remedy. For context, in the period from October 2023 to September 2024, there were only 11 contested trials in the London TCC.[2]

FTT decisions do not act as a precedent and do not bind later tribunals. The only UT decision on ROs which does act as precedent came recently in *Monier Road Ltd v Blomfield & Ors* [2025] UKUT 157 (LC) (which resulted in an RO being reduced in scope and is discussed elsewhere in this issue). Nevertheless, the FTT decisions show an emerging body of practice, which is instructive to anyone involved in RO proceedings. Some tentative lessons from the cases are set out in this article.

Leaseholders win; landlords lose

The FTT has only once refused to grant an RO and that was on jurisdictional grounds (the respondent was not a relevant landlord[3]). Leaving that decision aside, every application for an RO has been successful.

The interesting question is not why applicants have been successful in these cases. One of the main purposes of the BSA is to compel landlords to carry out remedial works, and so it would be surprising if the FTT were refusing relief to tenants. Instead, the interesting question is why, given the near inevitability of the FTT granting an RO, these disputes do not settle.

The answer may be that settling these disputes is challenging. An RO requires a landlord to actually carry out remedial works. A landlord facing an application cannot just put its hand in its pocket to make the dispute disappear.

The FTT is willing to make an order even where a landlord has said it is willing to carry out the required works, essentially in order to hold the landlord's feet to the fire (see *Space Apartments* and *8 Artillery Row*[4]). The FTT has been willing to make a suspended order, where another party (the developer) was already in the process of undertaking remedial works (see *Empire Square*[5]). A landlord wishing to avoid contested proceedings may be compelled to agree an RO by consent (as in *Prince Park Apartments*[6]).

Unfettered discretion

The limits of the FTT's discretion to make an RO remain unclear. In *Chocolate Box*, it was suggested that the FTT would consider whether making an order was "just and equitable", i.e. the test for making an RCO, despite the phrase not appearing in s123 of the BSA.[7] However, in *Empire Square*, it was suggested that the discretion is in fact "unfettered" and the FTT should ask itself "what the best answer is in this application, to achieve remediation of the relevant defects in the building for the safety of leaseholders."[8]

It is submitted that the tribunal in *Empire Square* is correct in a strict sense: the BSA does not fetter the FTT's discretion. Nevertheless, the absence of an express fetter does not prevent the FTT from developing its own practice as to when orders will be granted, and tribunals should not disguise their decision making process by appealing to the unfettered nature of their discretion. It is notable that, despite stating that its discretion was unfettered, the tribunal in *Empire Square* nevertheless attempted to formulate its own test for when an order would be appropriate. It may be that the contours of the discretion will only become clear when a tribunal refuses to grant an RO on discretionary grounds.

Flexible and pragmatic orders

When making remediation orders, the FTT faces the following difficulty: how to ensure that remedial works are carried out properly when the applicants (usually leaseholders) may be unable to verify that themselves? Tribunals have devised a number of solutions.

The FTT has decided that it can retain jurisdiction until the completion of works, so that it can adjust the scope or timing of its order (see *8 Artillery Row*[9]). After the works, the landlord may be required to produce a Fire Risk Appraisal of External Walls pursuant to PAS 9980: 2022 showing that risk has been reduced to an acceptable level (see, e.g., *Purbeck House*[10]).

More controversially, tribunals have also required landlords to obtain a Form EWS1: External Wall Fire Review for the property after completion of the works (*8 Artillery Row*[11]). An EWS1 form is a document required by lenders when considering offering mortgages for high-rise residential buildings. Requiring landlords to obtain such a form does not sit easily within the scheme of the BSA, which is intended to protect against safety risks, not economic ones.

There are limits to how far orders can go. A tribunal has decided that it could not require a landlord to use certain materials so as to accord with the aesthetic preferences of leaseholders (see *Smoke House & Curing House*[12]).

The works specified in ROs range from the minimally defined as in *Spur House* ("Install new external wall system … to be compliant with Building Regulations in force at the time of installation"[13]) to the comprehensive as in *Vista Tower* (where a full schedule of remedial works was appended to the order[14]).

It's a success

While the jurisdiction to make remediation orders is still developing, it has already shown itself to be a success. It is suggested that, in this context, success is a numbers game. The object of the ROs is to force landlords to remedy building safety risks and to do so quickly. That is what the FTT has been diligently doing.

John McMillan has acted in fire-safety disputes in the High Court and FTT.

[1] LON/00AY/HYI/2022/0005 & 0016
[2] https://www.judiciary.uk/wp-content/uploads/2025/02/TCC-annual-report-23-24-Final-006.pdf
[3] Thanet Lodge LON/00AE/BSA/2024/0007, 0500 & 0502
[4] LON/00AP/HYI/2022/0017 and LON/00BK/BSA/2024/0004
[5] LON/00BE/HYI/2023/0013 and LON/00BE/BSB/2024/0602
[6] LON/00AG/BSA/2024/0009
[7] CHI/00HN/HYI/2023/0008 (1)
[8] LON/00BE/HYI/2023/0013 and LON/00BE/BSB/2024/0602
[9] LON/00BK/BSA/2024/0004
[10] HAV/00HN/BSA/2024/0001 and 0002
[11] LON/00BK/BSA/2024/0004
[12] LON/00BG/HYI/2023/0024 (appealed on other grounds)
[13] LON/00BA/HYI/2023/0017
[14] CAM/26UH/HYI/2022/0004

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Triathlon Homes LLP v Stratford Village Development Partnership & Others

[2025] EWCA Civ 846

Alexander Nissen KC

Jonathan Selby KC

This was, effectively, a leapfrog appeal to the Court of Appeal (Newey, Nugee and Holgate LLJ) against the decision of the FTT (made up of the President of the UT (Lands Chamber), Edwin Johnson J, and its Deputy President, Martin Rodger KC) who had to consider applications for an RCO under s124 of the BSA. It was the first major case in that context, heard in conjunction with an appeal in *Adriatic Land 5 Ltd v The Long Leaseholders at Hippersley Point*. The Court of Appeal described the FTT's decision as "thorough and careful" and the submissions from all counsel as "well-argued".

There were two grounds of appeal, both of which were dismissed. Ground 1 was that the FTT erred in concluding that it was just and equitable to make RCOs against SVDP and Get Living in ten respects. Ground 2 was that the FTT were wrong to conclude that an RCO could be made in respect of costs incurred before s124 came into force on 28 June 2022.

By way of reminder, the facts were these. The applications concerned the cost of rectifying fire safety defects in five tower blocks in the former Olympic Village in Stratford, London ("the Blocks"), one application per Block. They were made by Triathlon Homes LLP ("Triathlon"), who is the long leaseholder of all the social and affordable housing in the Blocks.

The Blocks had been developed by the First Respondent ("SVDP"), which is a limited partnership whose three partners are ultimately owned (through subsidiaries) by the Second Respondent ("Get Living"). SVDP is also the beneficial owner of the freehold to the development.

Get Living did not own SVDP at the time the development of the Blocks was undertaken: at that time, the development was owned by the Olympic Delivery Authority ("the ODA").

Through subsidiaries, Get Living also owns the long leases to all the private rented housing in the Blocks.

There was no dispute between the parties that the "jurisdictional" or "gateway" requirements which need to be met before an RCO can be made had been satisfied. There were "relevant defects" in a "relevant building". Triathlon is an "interested person" and both SVDP and Get Living can be a "specified body corporate or partnership". The principal issue between the parties was whether it was "just and equitable" to make the order sought in respect of the remedial work that is currently being carried out to the Blocks.

Ground 1 – Just and Equitable

When dealing with the respects in which it was said that the FTT had erred, each of which the Court of Appeal rejected, the Court made the following points:

1. The policy of the BSA was to place primary responsibility on the developer and, as between the landlord and the developer, the developer sits at the top of the hierarchy: [61]. The Supreme Court in *URS v BDW* accepted that a central purpose of the Act was to hold those responsible for building safety defects accountable: [61].

2. The FTT was justified in making the point that public funding was a matter of last resort: [63]. The Building Safety Fund stands outside the BSA as a potential funder of remedial works and in fact pre-dates it: [88]. If, as the FTT concluded, it was prima facie just and equitable for SVDP as developer and Get Living as associate to pay, then it was not a reason not to make an RCO that the works were being funded by the Fund: [88].

3. Since the BSA has taken away the contractual right of the management company to look to service charges for funding, it put in place mechanisms to enable those costs to be passed to others. Section 124 was one of those mechanisms. There is no reason to think that the Building Safety Fund was intended to displace the provisions of the BSA: [64].

4. There may be cases where it would not be just and equitable to make an RCO even if the result was to leave the costs to be funded by the public. Examples may include associated companies, engaged in an entirely different business, who had nothing to do with the development, or a charitable company in which a common director had given his time voluntarily: [65].

5. The FTT was right to refer to Regulation 3 of the 2022 Regulations as demonstration of the clear illustration of the policy that costs should fall on the original developer. It was not relevant, for that purpose, that Triathlon itself could not have invoked Regulation 3: [69/70].

6. It was not necessary for the FTT to resolve any issues as to Triathlon's motivation for making the applications. Parties who have legal rights and remedies are entitled to pursue them without having to explain why they do so. Absent malice or the like, subjective reasons for litigating are usually irrelevant: [78].

7. The fact it was Triathlon, rather than EVML or the Secretary of State, who sought the order did not change the nature of the order sought, or the answer to the question whether it was just and equitable to make such an order: [80].

8. One of the purposes of the BSA was to ensure works that are required are actually done. But another purpose is to deal with the "who pays" question for which the BSA provides a complex set of answers: [87].

9. The BSA does not contemplate that taxpayer funding, through the Building Safety Fund, should provide the solution to the problem. Instead, it provides for costs to be allocated between those who have relevant connections to the building: [87].

10. It was not unfair for Triathlon to take advantage of its ability to apply for an RCO instead of pursuing other claims or potential claims available to it. The policy that the costs of remediation should primarily fall on developers was not intended to await the outcome of other claims but to be available from the outset: [97].

11. The funding provided by the Building Safety Fund was not an out-and-out grant: [110]. It was only intended as temporary funding pending recovery from those who can be made legally liable: [111]. One cannot infer that the public bodies concerned had no interest in RCOs being made where appropriate: [112].

Ground 2 - Retrospectivity

The FTT was right to conclude that an RCO could be made in respect of costs incurred before s124 came into force.

Passages from the Supreme Court's decision in *URS v BDW* (notably (84) to (87) and (273/4)), were self-evidently strongly in favour of s124 being given a retrospective interpretation. Even though that was not technically part of its ratio, it was a carefully considered statement of the position which ought to guide the Court of Appeal unless it was convinced that it was wrong: [149].

It was not wrong. Ssection 124 had to be interpreted so as to give effect to the purpose of Part 5 of the BSA. It was consonant with the purposes of the BSA to interpret s124 as providing the statutory mechanism for leaseholders who have already paid service charges for costs that would now be caught by Schedule 8 to seek to pass on those costs that had already been incurred: [151].

Any unfairness arising from the fact that this remedy may be applied to payment of service charge made, say, 25 years ago was capable of being addressed by the requirement that it be just and equitable to make the order: [153].

A retrospective construction makes the BSA work as a whole. If s124 cannot be used to pass on costs incurred before the commencement of the Act, a management company with no income other than service charges may be left without an obvious remedy: [154].

Newey LJ added some additional reasons of his own for concluding that s124 was retrospective.

Jonathan Selby KC was instructed by Mishcon de Reya LLP (with Cecily Crampin) for the Appellants. Alexander Nissen KC was instructed by Gowling WLG (UK) LLP for the First Respondent (with Paul Letman).

URS Corporation Ltd (Appellant) v BDW Trading Ltd (Respondent)

[2025] UKSC 21

David Sheard

URS Corporation Ltd (Appellant) v BDW Trading Ltd (Respondent) **[2025] UKSC 21 is one of the most important construction cases to be heard by the Supreme Court in recent memory, and provides some valuable insight into how the courts are likely to approach issues arising under the BSA going forward.**

The case concerned developments that had been carried out by BDW in the late 2000s. A number of the buildings had been found to contain alleged structural defects, which were assumed to have been safety-critical. Upon discovery of the defects, BDW pro-actively carried out temporary propping followed by remedial works, without any claims having been made against it (indeed, BDW itself having been the party to discover the defects in the first place). It sought to recover its costs of doing so from URS, the engineer responsible for the relevant structural designs. Claims were then made by BDW to recover its losses in negligence and, following the coming into force of the BSA, also under the Defective Premises Act 1972 ("the DPA") and the Civil Liability (Contribution) Act 1978 ("CL(C)A"). In doing so, BDW relied upon the retrospective extension of the DPA limitation period from 6 to 30 years for historic claims that had been brought about by s135 of the BSA.

URS argued that it could not as a matter of law be responsible for losses suffered by BDW as a result of what URS said were BDW's own voluntary actions. It also contended that BDW as a developer could have no direct cause of action under the DPA, and that BDW had no cause of action under the CL(C)A in the absence of any claim that had been the subject of an ascertained liability by way of admission, settlement agreement or judgment. Further, whilst s135 of the BSA might have retrospective effect for the purposes of enabling previously time-barred claims under the DPA to be pursued, URS argued that this was the limit of any such retrospectivity—s135 did not 'change history' or result in other claims being revived which depended on the collateral application of the revised limitation period under the DPA.

The Supreme Court, however, disagreed with URS on all fronts.

As to the claim in negligence, first ignoring the impact of s135 of the BSA, the Court understandably lacked sympathy for any argument that URS, as the party ultimately responsible for the assumed safety-critical defects, should not be expected to shoulder the costs burden of the necessary remedial works. There was no bright line rule of law, as URS contended, that expenditure incurred 'voluntarily' could not ground a claim in damages for negligence. Rather, 'voluntariness' was a factor relevant to a consideration of causation and mitigation, which would ultimately turn on the particular facts of each case and depend upon the reasonableness of the actions taken. On the assumed facts of this case (which will frequently arise in the context of cladding remediation), the Supreme Court made clear in any event that BDW was not acting 'voluntarily', as a result of the potential consequences of not acting and the moral pressure on BDW to effect repairs, as well as the fact that BDW did have a legal liability to homeowners under the DPA (regardless of the existence of a procedural time-bar).

As to s135 of the BSA, the Court had little difficulty in applying the clear wording of the statute in concluding

> 'the case represents an important victory for those who have 'done the right thing' without waiting to be forced to do so'

that the retrospective extension of the limitation period from 6 to 30 years for historic DPA claims is to be treated as always having been in force. That is so whether the question of whether a DPA claim is or has ever been time-barred arises in the context of a direct claim under the DPA itself, or in another context where the DPA limitation period is relevant (such as in the context of a claim in contribution). This was also consistent with one of the key aims of the BSA, which was to ensure that those directly responsible for building safety defects are held to account. This did not mean, however, that the retrospective change in law would affect a consideration of the reasonableness as a matter of fact of BDW's actions, at the time at which they were taken.

Of particular significance for the industry is the Court's confirmation that BDW, as the party to whose order the dwellings were provided, was owed a duty under s1(1)(a) of the DPA. This was so regardless of the fact that it also *owed* duties under the DPA in accordance with s1(4). In addition, the fact that BDW had long-since sold its proprietary interest in the dwellings was no bar to recovery under the DPA in circumstances in which the relevant remedial works had been carried out at BDW's cost in any event. Given the significantly extended limitation period under the DPA, as well as the fact that any attempt to exclude liability for DPA claims will be void, such claims are likely to become an important tool on the developer's arsenal going forward.

Finally, the Court confirmed that the simple fact of having carried out the remedial works was sufficient to ground a claim in contribution (assuming that the other requirements of the CL(C)A can be established, namely the existence of a common liability for the same damage). This is obviously right as a matter of principle—it would be an odd state of affairs indeed if the indolent developer sued to judgment were to have the benefit of a claim in contribution against its supply chain, but the pro-active developer were not.

Accordingly, the Court has provided a clear steer that those ultimately responsible for building safety defects can expect to bear the cost burden of fixing them, and the case represents an important victory for those who have 'done the right thing' without waiting to be forced to do so.

David Sheard appeared in the Supreme Court for the Respondent in URS v BDW.

Monier Road Limited v Blomfield & Others

[2025] UKUT 157 (LC)

Smoke House and Curing House, Remus Road, London

Jonathan Selby KC

The jurisdiction to make an RO under s123 of the BSA is vested solely in the FTT. One of the features of the FTT is that it is an "expert" tribunal whose panel members have expertise on the substantive issues. Because of its expertise and because it frequently deals with litigants in person, the FTT is a very proactive tribunal.

The present case gives clarity as to what an application for an RO is. It is also an example of where the FTT exceeded its powers.

Relevant Facts

The case concerned two buildings which join around a central courtyard. The landlord had procured a FRAEW, which advised that the timber cladding and insulation to the external walls around the courtyard needed to be removed and replaced with non-combustible cladding.

The tenants were unhappy with the pace of remediation and applied for an RO against the landlord.

At what was meant to be the final hearing, the FTT, through their expert member, raised a number of issues which were not before it, including concerns that there were a number of potential other fire safety issues ("*the additional items*").

It then adjourned the hearing and ordered the landlord to produce expert evidence on those items.

At the adjourned hearing, the FTT heard from the landlord's experts, who gave evidence, consistent with the FRAEW, that the additional items did not give rise to any further defects or remediation works. The expert evidence was never materially challenged.

The Decision of the FTT

The FTT nevertheless decided that the additional items were relevant defects that needed remediation. The decision also contained six pages explaining why the development was a higher-risk building even though the FTT accepted that this issue was outside their jurisdiction and did not form any part of their operative decision.

The landlord appealed to the UT.

The Decision of the UT

The UT made clear that an application for an RO does not involve or require the FTT to carry a building safety audit; the FTT's role is to adjudicate on the issues that have been raised before it. That is consistent with our adversarial system and the fact that an application for an RO must identify the defects to the building for which an order is sought: see regulation 2(3)(c) of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022.

However, the UT recognised that there are circumstances in which the FTT may raise issues of its own initiative.

Before it does so, the FTT must consider, as a matter of discretion, whether or not to raise those issues with the parties in accordance with the guidance given in *Sovereign Network Homes v Hakobyan* [2025] UKUT 115 (LC).

The types of case where it will be appropriate to do so are:

- where the issue goes to the FTT's jurisdiction;
- where the rule being applied expressly requires a particular issue that has not been addressed by the parties to be considered; or
- in order to clarify a party's case.

Another example in the context of ROs is where the Tribunal is concerned that there might be an obviously dangerous defect, although the UT recognised that the likelihood of that happening should be "vanishingly small".

Once the FTT decides that it is appropriate to raise a new issue, it must follow a fair procedure. In particular, the FTT must raise the point and leave it to the parties to decide whether or not to amend their case.

Thus, the UT decided that the FTT should never have raised the additional items because: they had not been raised by either party; the parties' cases were clear; the additional items had already been addressed by the FRAEW; and they were not the sort of matters which it would normally be appropriate to raise.

The UT also found that the procedure which the FTT adopted, having raised the additional items, was unfair, in particular because the applicants were not given the opportunity to amend or serve evidence; and the onus was put on the landlord to produce evidence.

As for the fact that the FTT had made findings which were unsupported by the evidence, the UT identified two broad principles.

First, the FTT must decide the case by reference to the evidence before it. That does not mean that expert evidence has to be accepted but there do have to be reasons in the evidence not to accept it. But, as the UT said: "*Why the FTT disagreed with that evidence we do not know*".

Secondly, the FTT cannot use its expertise and form its own opinion in a way that is contrary to the evidence. As the UT said "*expertise is not evidence, and the possession of expert knowledge does not enable the FTT to ignore evidence without giving reasons for doing so.*" However, if the evidence before the tribunal is contrary to the tribunal's knowledge and experience, the tribunal ought to draw to the attention of the witnesses the experience which seems to them to suggest that the evidence given is wrong, and the tribunal ought not to prefer their own knowledge or experience without giving the witnesses an opportunity to deal with it. But as the UT found: "*We really have no idea why the panel's expertise led it to contrary conclusions; nor have the parties.*"

The UT then made clear that the FTT's decision was not only unfair but also substantively wrong and set the FTT's decision aside, also stating that the FTT ought to have reviewed its decision so as to remove the six pages about the development being a higher-risk building.

Conclusion

The basic principles of natural justice apply to proceedings in the FTT as much as they do to any other court or tribunal. However, anyone appearing before the FTT needs to be prepared for the fact that it is a proactive court.

Jonathan Selby KC has appeared in the Court of Appeal, High Court, Upper Tribunal and First-Tier Tribunal on building safety matters. He was Special Legal Counsel to the Secretary of State for the DLUHC – Building Safety from 2023 to 2025 and is currently a member of the Building Safety Working Group.

Harry Smith

The Central, 163-165 Iverson Road

LON/00AG/BSA/2024/0008

Case Summary

Leaseholders applied for an RO under s123 of the BSA in respect of The Central, 163-165 Iverson Road. It was common ground that the pre-qualification criteria were met, i.e. the application was made by an "interested person"; the respondent was a "relevant landlord"; the building was a "relevant building" and contained "relevant defects".

The leaseholders benefited from Premier Guarantee policies of insurance and, via a participation agreement, ceded control of the tribunal proceedings to the underwriter, AmTrust. Relying on these matters, the landlord submitted that (1) the leaseholders were entitled under the policies to be indemnified in respect of the cost of rectifying the relevant defects, and (2) in view of that, the tribunal should exercise its discretion to refuse an RO.[1]

In support of those submissions, the landlord argued that to accede to the application would be contrary to the policy of the BSA: A supplier is excluded if:

- Parliament's intention in enacting the BSA was (so it was said) to ensure that dangerous buildings were made safe, not to give insurers a windfall by transferring their obligations to landlords.
- Similarly, it was argued that, in view of the participation agreement, the "real" applicant was AmTrust, i.e. an insurer seeking to shift its liabilities elsewhere, and that the application should be viewed in that light.

In response, the leaseholders submitted that:

- The means available to leaseholders (including insurance monies) were irrelevant to whether an RO should be granted. Applications under s123 are not means-tested.
- Even if the availability of insurance might, in principle, be relevant, in the present case the effect of Schedule 8 to the BSA was that the leaseholders were not liable to fund remediation works via the service charge. Thus, they had suffered no loss capable of being indemnified under the policies.
- Further, AmTrust had not accepted cover without qualification; had not waived any of the terms of the policies; and had not in fact carried out remedial works. Moreover, the landlord was the only party which was entitled under the leases to carry out works to the external fabric of the building. Consequently, if an RO was not made, the tribunal could have no confidence that the relevant defects would be rectified.
- The provision of financial assistance by AmTrust to the leaseholders to enable them to pursue their claim and ensure that the landlord was held to its responsibility to remediate dangerous defects was consistent with the policy of the BSA.

The tribunal granted the leaseholders' application, stating:

"we agree with [the leaseholders'] first point that the primary focus in making a remediation order is not on who pays or the parties' respective means, but rather ensuring that relevant defects are remedied."

The decisive factors identified by the tribunal in exercising its discretion to make an RO included the facts that (1) the property remained un-remediated, notwithstanding the significant delay which had elapsed since the discovery of relevant defects in July 2019, and (2) the only party permitted to carry out repairs under the terms of the leases was the landlord.

In contrast, the supposed availability of insurance was not given significant weight. The tribunal stated:

"given the wide (and unfettered by statute) discretion of the tribunal, we accept that issues such as the existence of the insurance policy might be something that can be taken into account as part of the tribunal exercising its discretion, but we put it no higher than that."

The tribunal also stated that "[t]here would appear to be much force in [the leaseholders'] submission that the liability under the policy no longer arises by virtue of schedule 8 to the 2022 Act". However, in view of the tribunal's primary conclusions, above, it was unnecessary to decide this point.

Commentary

To some, the decision in The Central might seem a relatively unsurprising application of the principle that the FTT's jurisdiction under s123 is to be "practically focussed on ensuring the defects are remedied in a responsible fashion" (Vista Tower at [122]). However, the decision was criticised by Walder and Lam in "Unintended consequences of the Building Safety Act 2022" (Estates Gazette, 7 June 2025, p.42):

"The implications of [the decision] seem obvious. Insurers will now seek to avoid liability on any policy of insurance that contains an exclusion clause where the sums due are referenced to the insured's liability to pay, on the basis the 2022 Act has extinguished any liability to pay. … this ruling … appears to have given carte blanche to insurers to either avoid or stop paying out on policies, and direct their resources to pursuing freeholders and landlords using the names of the lessees."

This assessment is not especially convincing. As noted above, the tribunal did not decide the Schedule 8 point; even if it had, FTT decisions do not give rise to binding precedent. Moreover, it is not necessarily the case that a landlord would have no recourse in the scenario posited by the authors. The landlord might itself have appropriate insurance. Given the tribunal's view that there was "much force" in the leaseholders' argument on Schedule 8, taking out such insurance might now be prudent.

Conversely, if (as the authors contend) Schedule 8 does not extinguish the liability of insurers under policies of this kind, then a landlord might seek relief from the adverse financial impact of the RO by claiming contribution from the insurer under the Civil Liability (Contribution) Act 1978. The viability of such a claim is, as yet, untested.

In an interesting postscript, the landlord applied for permission to appeal on the ground that the tribunal had failed to exercise its discretion consistently with the landlord's rights under Article 1 of Protocol I to the European Convention on Human Rights. The argument, as articulated in the landlord's application, was that:

"because of the already potentially ruinous effects of the BSA on the freeholder, any exercise of discretion against it ought to be tempered, and where there is third party culpability (such as an insurer who accepts liability to remedy a defect), and furthermore that third party would receive a windfall, a restraint on the exercise of that discretion ought to be imposed if the effect is to further penalise the freeholder."

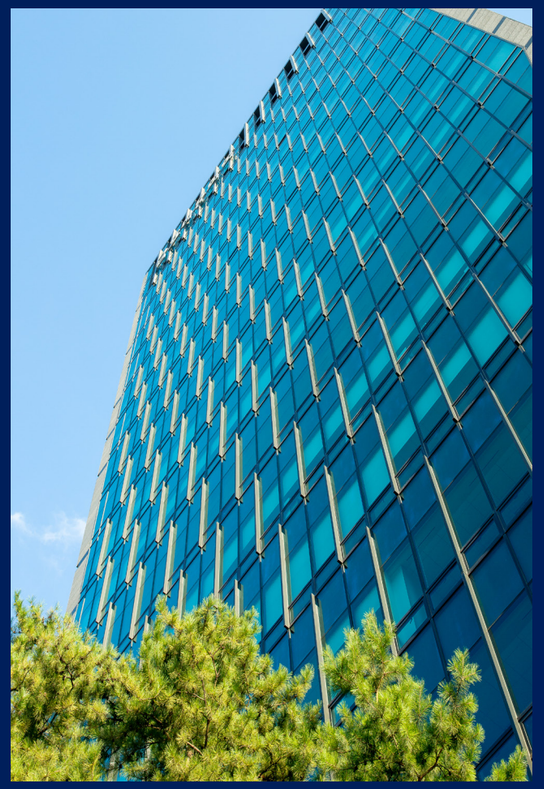
The issues raised by this argument are not straightforward. However, unfortunately for the landlord, the point had not been pursued before the FTT. Thus, as the observed when refusing permission to appeal, the tribunal "cannot be said to have overlooked something relevant to the exercise of its discretion." However, the possible influence of similar arguments on future applications under ss123-124 should not be overlooked.

Harry Smith appeared in The Central as counsel for the leaseholders.

[1] The landlord also argued that the participation agreement was champertous and contrary to the Damages-Based Agreements Regulations 2013. These arguments were rejected by the tribunal and are not addressed here as they do not concern the BSA.

Grey GR Limited Partnership v Edgewater (Stevenage) Ltd & Others

(CAM/26UH/HYI/2023/0003)



Introduction

The definition of "Vista" includes an outlook or view of a lengthy series of events. It is perhaps appropriate then that it is relation to "Vista Tower" in Stevenage that the views of various tribunals and courts in relation to many of the new provisions of the BSA are to be considered, and the prospects for future claims or defences tested.

Vista Tower was originally an office block, built in the 1960s and known more prosaically as Southgate House. It is 49.5 metres high, comprising 16 storeys.

Paul Bury

In the mid-2010s, a company known as Edgewater (Stevenage) Limited ("Edgewater") was incorporated by a Mr Dreyfuss, and Edgewater purchased the freehold of Vista Tower in July 2014. The property was marketed for investors as a conversion to residential accommodation comprising 73 flats, and leases for terms of about 250 years were entered into with various tenants. In 2018, the freehold was then sold by Edgewater to Grey GR Limited Partnership ("Grey"), who acted on behalf of the Railpen Group, operating a pension fund on behalf of railway workers.

A series of investigations were carried out into fire safety at Vista Tower from 2019 on. The issues identified included: (i) on "Wall Type 1" (render applied to concrete façade), the use of PIR insulation (ii) on "Wall Type 2" (UPVC glazed elevations with spandrel panels consisting of EPS insulation), the use of combustible insulation; and (iii) on all elevations, issues with vertical cavity barriers and cavity barriers around openings. Issues also were identified with the internal compartmentation of the property.

Grey obtained £327,000 in funding from the Building Safety Fund in June 2020 for pre-tender support. It appears that ultimately funding of over £12.4 million was obtained under a Grant Funding Agreement (the "GFA") between Grey and Homes England, with an obligation for Grey to pursue the legal remedies available to it.

The RO Application - Secretary of State for Levelling Up, Housing and Communities v Grey GR Ltd Partnership, CAM/26UH/HYI/2022/0004, 216 Con. L.R. 1

The application for an RO was brought by the Government in November 2022 against Grey under s123 of the BSA. The FTT reached its decision in April 2024.

The decision was in keeping with the approach of the FTT to ROs before, and since. Although the FTT has approached ROs on the basis that it has a wide discretion as to whether or not to award an RO, it has done so in every case that has been before it to date. The mission-focussed approach of the FTT is shown in paragraph 130 of the judgment, which notes that the *"whole focus of the BSA is on leaseholder protection"* and that 57 leaseholders have asked the FTT to make the RO. Perhaps most strikingly, the RO was ordered despite the fact that Grey had entered into a remedial works contract and the works had already commenced. Notwithstanding this, the FTT determined that the RO would function as a "backstop" in the event that there were any issues, and on which the applicants/leaseholders (who may not all be parties to the building contract) could rely in due course.

Many commentators have noted that this approach means that it would be a very rare indeed where a relevant defect is established, and an RO is not granted in respect of that defect. As the FTT itself put it at [121]: *"if the pre-qualification criteria set out in s123 apply and there are relevant defects we consider that it is likely that the tribunal will make an order, subject to the facts of each case."*

The subsequent decisions of the FTT in relation to ROs have borne this out.

The RCO Application - Grey GR Limited Partnership v Edgewater (Stevenage) Limited and others, CAM/26UH/HYI/2023/0003, 218 Con. L.R. 66

Following on from the RO, and in light of its obligations under the GFA, Grey sought to claim RCOs against 96 separate respondents including Edgewater and parties said to be "associated" within the meaning of s124(3)(d) of the BSA. The reason for casting the net this wide was that Edgewater was an SPV with limited assets, but was part of a "group" of companies with common directors or shareholders referred to in marketing materials at the time of sale.

RCOs were awarded against 76 of the respondents, on a joint and several basis. The reasoning is set out in a detailed schedule to the judgment, but in the main, the only respondents against whom an order was not made were those which had no links in terms of not featuring as part of the "group" in the marketing provided when the Claimant bought Vista Tower, or had investors who were not involved in any way, or were not engaged in the business of property development or ownership. The practicalities of enforcing against any or all of the 76 respondents on a joint and several basis, and the relative culpability of any one respondent, are not explored in the judgment.

The Tribunal found that the *"the just and equitable test in section 124 of the Act is deliberately wide 'so that the money can be found'"*. Some may have thought that the "just and equitable" test would be used negatively as a brake on the number of respondents falling within the broad definition of association, against whom an order can be made. But the Tribunal did not primarily use the "just and equitable" test to bring in an assessment of culpability. Indeed the approach of ensuring *"the pot is filled"* indicates that the test can be used *positively* as a basis on which to make an order in a borderline case.

The Tribunal's decision is also noteworthy in relation to the approach to a "relevant defect," confirming (consistent with case-law relating to ROs) that non-compliance with Building Regulations at the time of construction was not the correct approach. The test was much wider, and involved consideration of whether the construction was

non-compliant with current standards, if it followed from those standards that a "building safety risk" as specified in s120 of the BSA existed.

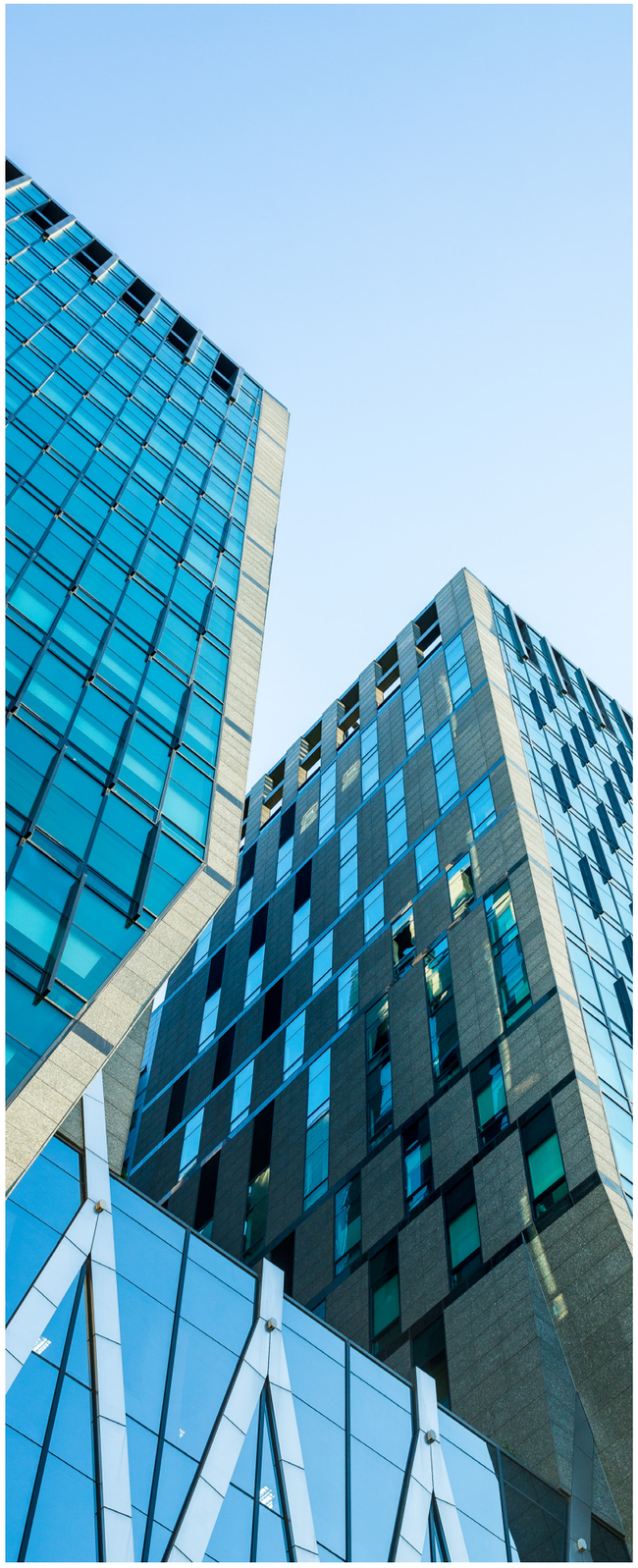
In addition, in relation to whether there was a "building safety risk", although the respondents argued that a risk that had been found to be "tolerable" pursuant to a fire safety expert report under the PAS 9980 standard (which the fire safety experts had agreed), the relevant risk for the purposes of s120(5) of the BSA was anything above a "low" risk.

It is understood that these points will be addressed on appeal to the UT. One of the issues which will be interesting to consider is the apparent disconnect between the promotion of PAS 9980 by the Government as an appropriate basis on which to assess "risk" and adopt remedial works (including by adoption of the same into the Self-Remediation Terms with various developers), and the approach of the FTT. Moreover, the approach of the FTT may also give rise to a potential problem for respondent developers where, in proceedings in the High Court where they seek to reclaim sums paid out under an RCO against the builders, designers or other parties involved in the construction of the property, the High Court may well apply a different approach to the question of whether a "defect" has arisen under the relevant contracts and appointments, or the appropriate remedial scheme.

Building Liability Orders

Finally, the RCO judgment also indicates that Grey has issued separate proceedings in the High Court for a Building Liability Order ("BLO") under s130 of the BSA, although it appears that those proceedings do not include claims against the builder or architect (or their associates). The judgment indicates that the BLO proceedings have been held up due to service issues in Switzerland. If those issues are overcome, then Vista Tower may also give one of the first indicators of the outlook for applications for a BLO.

Paul Bury has been involved in numerous high-profile building safety disputes to date, including LDC v Downing Construction Ltd [2022] EWHC 3356 (TCC), Bridport House ([2024] EWHC 3449 (TCC)), the Tesco Woolwich litigation, and has several cases currently progressing in the FTT, and further litigation, arbitration and adjudication cases relating to downstream claims.



Legislative and other developments (from 1 January 2025 to 30 June 2025)

James Frampton

Click the links below to read the articles.

2 July 25

MHCLG Guidance for Responsible Entities: Developer Remediation Contract (for buildings of 11m+.

1 July 25

Reforms announced to the Building Safety Regulator, including a new fast track process, to accelerate housebuilding.

29 June 25

Government's first progress report on the Grenfell Tower Inquiry: Phase 2 recommendations.

21 May 25

Construction Products Reform Green Paper consultation closed.

24 April 25

Building Control Independent Panel members appointed. This followed the Grenfell Tower Inquiry recommendation to set up a panel to carry out a review of whether to change the way in which building control is delivered in England.

4 April 25

MHCLG Departmental Minute on contingent liability arising from the EWS1 Professional Indemnity Insurance Scheme.

1 April 25

Fire and building safety ministerial responsibility transferred from the Home Office to MHCLG.

24 March 25

Building Safety Levy, technical consultation.

2 March 25

Amendments to Approved Document B on fire safety (Vols 1 and 2) came into effect.

2 March 25

Amendments to Approved Document B (fire safety) Circular 01/2025 recording corrections to prior drafts.

26 Feb 25

Construction Products Reform Green Paper published and consultation commenced.

May 25 – Building Safety Remediation: monthly data release **(published 26 June 25)**

- 5,176 residential buildings 11m or higher identified with unsafe cladding (124 increase form April 2025).
- 2,482 (48%) have started or completed remediation works.
- 1,754 (34%) have completed remediation works.

Building Safety Act A to Z

Jennie Wild

A

Accountable person (higher-risk building)
(UTT) *Unsdirfer v Octagon* [2024] UKUT 59 (LC): For the purpose of s72(1) of the BSA an "accountable person" for a higher-risk building did not include a manager appointed under section 24 of the Landlord and Tenant Act 1987. By virtue of s72(2) of the BSA, most RTM companies were an accountable person.

Ancillary orders
Lessees of flats at 419 High Road, Space Apartments, N22 8JS v Avon Ground Rents Ltd (FTT) (LON/00AP/HYI/2022/0017): Ancillary orders, necessary to make a s123 Remediation Order effective and workable, could be made by the Tribunal [74].

Associated (s124/125, s121)
Triathlon Homes LLP v Stratford Village Development Partnership & Ors (FTT) (LON/00BB/HYI/2022/0018-22): An associate might exist between beneficiaries of a trust and their trustees, between current and former partners and their partnerships, between directors and their companies, and between companies with common directors or controlling interests [38].

Associated (s130(4), s131)
381 Southwark Park Road RTM Company Limited & Ors v Click St Andrew Limited (In Liquidation) & Anor (2025) 219 Con LR 29: Click Group Holdings controlled or did control Click St Andrews within the meaning of s131(4) of the BSA because Click Group Holdings held all the shares of Click Above Limited and Click St Andrews was a wholly owned subsidiary of Click Above Limited. Holdings controlled Click St Andrews indirectly in the sense that it was able, through the corporate structure, to secure that the affairs of Click St Andrews were conducted in accordance with its wishes [7]. *BDW Trading Ltd v Ardmore Construction Ltd & Ors* (2025) 219 ConLR 1: For the purpose of s131 BSA the precise and carefully confined definition of "associate" was relatively extensive on account of the definition of "the relevant period" [13, obiter].

B

Building Liability Order (Quantification)
381 Southwark Park Road RTM Company Limited & Ors v Click St Andrew Limited (In Liquidation) & Anor (2025) 219 Con LR 29: the Court was not required to quantify the relevant liability at the point of making a BLO, particularly in circumstances where the Court had no figures to enable it to do so [29].

Building Safety Fund (s123)
SoS v Grey GR Limited (Chocolate Box) (FTT) (CHI/00HN/HYI/2023/0008): The obligation on a landlord to undertake BSA works did not only arise on receipt of BSF funding. There was no hint in the statutory provisions that funding played any part. A failure to make progress on BSA works due to seeking funding weighed heavily when considering whether to make a Remediation Order [259].

Building Safety Fund (s124)
Triathlon Homes LLP v Stratford Village Development Partnership & Ors (FTT) (LON/00BB/HYI/2022/0018-22): When deciding whether it was just and equitable to make an RCO, the Tribunal gave some weight to the possibility that there was uncertainty if the BSF refused further help [268]. It was difficult to see how it could ever be just and equitable for a party falling within s124(3) and able to fund remediation works to be able to claim that the works should instead be funded by the public purse. The public purse should not act as an interim funder and underwriter of the risk of failure, while claims against third parties wended their way to a conclusion. Public funding was a matter of last resort [278].

Building Safety Risk (s120(5))
Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers) (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): For the purpose of s120(5) of the BSA, any risk above "low" risk might be a "building safety risk". A low risk was the ordinary unavoidable fire risks in residential buildings and/or, in relation to PAS 9980, was an assessment that fire spread would be within normal expectations [72].

Building Safety Risk (s130(3)(b))
381 Southwark Park Road RTM Co Ltd v Click St Andrews Ltd (2024) 218 Con LR 258: Breaches relating to fire and structure posed a building safety risk within the meaning of s130(3)(b) of the BSA [198], [219].

C

Corporate Veil
Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers) (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): The power to make RCOs against associated companies was a radical departure from normal company law, but it did not pierce the corporate veil because it did not expose the individual members to unlimited personal liability [351]; *Triathlon Homes LLP v Stratford Village Development Partnership & Ors* (FTT) (LON/00BB/HYI/2022/0018-22): The power to make RCOs against associated bodies corporate and partnerships eroded and elided corporate identity and deprived it of some of its main advantages, but did so for specific purposes and within specific limits [252].

Costs
Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers) (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): The tribunal was not generally a cost-shifting jurisdiction and should not be taken to be encouraging a costs application in the context of an RCO [389].

D

Developer
Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers) (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): The developer was a key target of an RCO, at the top of the hierarchy of liability [232, 350].

I

Impecuniosity
Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers) (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): Impecuniosity was not a significant reason for or against making an RCO [352].

Information Order (Respondent)
BDW Trading Ltd v Ardmore Construction Ltd & Ors (2025) 219 ConLR 1: An IO can only be made against the "original body" which had a relevant liability, and not an associated company, which was contrary to the example in the BSA Explanatory Notes [17].

Information Order (Relevant Liability)
BDW Trading Ltd v Ardmore Construction Ltd & Ors (2025) 219 ConLR 1: Information Orders under s132 BSA may only be made where "it appears to the court… that the body corporate is subject to a relevant liability". It was not necessary to have already established liability (albeit there was no difficulty if had been by judgment, award, adjudication decision or admission) but potential liability was not sufficient. There should be no question at all of adopting anything like trial procedures to determine the

question – applications should be short and uncomplicated. IOs might be made sparingly where liability was in issue [25, 27, 29].

Information Order (Scope)

BDW Trading Ltd v Ardmore Construction Ltd & Ors (2025) 219 ConLR 1: Information and documents to enable the applicant to identify associates of the respondent. In appropriate cases, also matters concerning the financial position of the associate [40, obiter].

Insurance

Tobias & Ors v Grosvenor Freeholds Limited (The Central) (FTT) (LON/00AG/BSA/2024/0008): The potential availability of Premier Guarantee insurance in respect of "relevant defects" was not given significant weight by the FTT when exercising its discretion to make a remediation order.

J

Just and Equitable (s124)

Triathlon Homes LLP v Stratford Village Development Partnership & Ors (FTT) (LON/00BB/HYI/2022/0018-22): The power was discretionary and should be exercised having regard to the purpose of the BSA and all relevant factors. The purpose included to ensure that where a development was carried out by a thinly capitalised or insolvent development company, a wealthy parent company or other wealthy entity which was caught by the association provisions could not evade responsibility by hiding behind the separate personality of the development company [237] [266]. *Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers)* (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): The s124 BSA just and equitable test was deliberately wide so that money could be found. The jurisdiction may be protean. It was helpful to ask whether the relevant remedial works/costs were within a reasonable range of responses [83, 349].

Just and Equitable (s130)

381 Southwark Park Road RTM Company Limited & Ors v Click St Andrew Limited (In Liquidation) & Anor (2025) 219 Con LR 29: FTT considerations in Triathlon Homes LLP considered [9 – 15]. The indicators were in favour of making an order in respect of the holding company, because it was the holding company and had a common directing mind [15, 25]. However, a BLO must only relate to a relevant liability within the meaning of the BSA, and was not a "gateway" to the recovery of all losses [26 - 28].

L

Landlord's Certificate

Will & Anor v G&O Properties (FTT) (LON/00AT/HYI/2022/0003): The Tribunal had no jurisdiction to make an order determining whether a relevant landlord had failed to comply with the requirement to provide a Landlord's Certificate confirming whether or not the landlord met the contribution condition (ie a net worth of £2,000,000) and/or whether or not they (or an associate) were responsible for a relevant defect, as required by the Building Safety (Leaseholder Protections) (England) Regulations 2022.

Limitation (s135)

BDW Trading Ltd v URS Corporation Ltd [2025] UKSC 21: The retrospective limitation period established by section 135 of the BSA was not restricted to actions brought under s1 Defective Premises Act 1972, but could equally apply to actions merely dependent on s1, such as a claim for damages in negligence or for contribution [103, 113, 114, 163, 295, 297, 304]. (Obiter) The retrospective limitation period did not apply to s2A of the Defective Premises Act 1972 because it was not a "relevant provision" already in force [269].

P

Parties (to main claim, BLO)

Willmott Dixon Construction Ltd v Prater (2024) 214 Con LR 164: the BSA did not require a party against whom a Building Liability Order (s130) is sought to be made a party to the main claim/substantive claim, or to participate in those proceedings. However, if a BLO was contemplated it would generally be sensible and efficient for the party against whom the order was sought to be made a party and for the BLO application to be heard together with the main claim [17], [18], [21], [22], [24], [25]. In *381 Southwark Park Road RTM Co Ltd v Click St Andrews Ltd* (2024) 218 Con LR 258 the Court confirmed that there was no requirement on a party to claim a BLO within existing proceedings: "the circumstances in which it might be just and equitable to make the order may not arise until after proceedings to establish a relevant liability are concluded and a BLO could be sought against a corporate body that did not even exist at the time of those proceedings" [31].

Prejudice (s123)

Lessees of flats at 419 High Road, Space Apartments, N22 8JS v Avon Ground Rents Ltd (FTT) (LON/00AP/HYI/2022/0017): Where a respondent to a claim for a Remediation Order pursuant to s123 BSA engaged with the process and was willing to complete works the Tribunal considered the balance of prejudice which would be caused by, on the one hand, making the order and, on the other hand, not making it. The Tribunal concluded that the greater prejudice would be caused to the lessees if no order were made [59-64].

Principal Accountable Person (ss73 and 75)

Brompton Estates Nominees No.1 Limited & Anor v Wall Properties Limited (FTT) (LON/00AW/BSG/2024/0001): There was no guidance in the BSA as to how the Tribunal was to determine which accountable person was appropriate to be the principal accountable person. The parties had agreed that the respondent would be the most appropriate given it was under a repairing obligation in relation to the structure and exterior surfaces of the majority of the building and the common parts generally within related floors, which was consistent with the provisions and purpose of Part IV of the BSA [17-18].

R

Relevant Defect

Grey GR Limited Partnership v Edgewater (Stevenage) Limited & Ors (Vista Towers) (2025) 218 ConLR 66 (FTT) (CAM/26UH/HYI/2023/0003): A "Relevant defect" for the purpose of s120 of the BSA was not confined to cases of non-compliance with the Building Regulations [68].

Relevant Landlord

Mirchandani v Java Properties International LLP [2025] (FTT) (LON/00AE/BSA/2024/0007, 0500 and 0502): Under s123(3) of the BSA (for the purpose of an RO application), a "relevant landlord" was a "landlord under a lease of the building, who is required, under the lease or by virtue of an enactment, to repair or maintain anything relating to the relevant defect". Section 123(3) required the landlord to have a repairing obligation, and a landlord had no such obligation where management functions had been transferred to an RTM company by virtue of s96 of the Commonhold and Leasehold Reform Act 2002.

Relevant Liability (s130, BLO)

Willmott Dixon Construction Ltd v Prater (2024) 214 Con LR 164: Whether there was a "relevant liability" within the meaning of s130 of the BSA might not simply be a matter of law or one that flows inexorably from judgment in the main claim [18], [21], [22], [24], [25].

Remediation Contribution Order (s124)

Arjun Batish & Ors v Inspired Sutton Limited & Ors (FTT) (LON/00BF/HYI/2022/0002): It was just and equitable to make an RCO if the lessees paid for the cost of works which ought to have been met by the respondent. An RCO could be made in relation to service charge costs incurred and paid prior to s124 and Schedule 8 coming into force [48 - 50]. *Triathlon Homes LLP v Stratford Village Development Partnership & Ors* (FTT) (LON/00BB/HYI/2022/0018-22): An RCO could be made in respect of costs incurred before 28 June 2022 [73] and in respect of costs incurred in preventing risks from materialising or reducing the severity of building safety incidents (such as a walking watch) [122].

Remediation Contribution Order (s27A Landlord and Tenant Act 1985)

St John Street Property Services Limited v Riverside Group Limited (FTT) (LON/00AU/LSC/2021/0255): The potential availability of an RCO was not taken into account when determining whether a social housing lessee was

required to pay a service charge pursuant to s27A(1) of the Landlord and Tenant Act 1985 in respect of cladding remediation costs, even where there were strong grounds for such an application, in circumstances where an application had not yet been made. It could not be said that the prospect of an RCO being made meant that the service charges otherwise payable were not reasonable or should be reduced [161 – 165].

Remediation Order (s123)

White & Ors v Kedai Limited (FTT) (LON/00AY/HYI/2022/0005 & 0016): The focus of the BSA was on building safety and the improvement of standards. There was no guidance in the BSA as to how the FTT should assess the risk to the safety of people in or about the building, or the scope of the works required to remedy relevant defects, or the standard to which remedial works should be carried out. The wording of the BSA was in deliberately broad terms, to enable the FTT to find the best and most practical, outcomes-focused solutions to myriad circumstances [66] [77]. It was an evidenced-based exercise, led predominantly by inspection reports and expert evidence, but also informed by the FTT's own experience and expertise. Once the FTT determined that relevant defects existed, it was for the Tribunal to make an order to remedy those defects within a specified time [81].

SoS v Grey GR Limited Partnership (Vista Tower) (FTT) (CAM/26UH/HYI/2022/0004): Remediation Order made even though works had started. The Tribunal had both the power and a discretion as to whether to make a Remediation Order [117]. It was not difficult to image circumstances in which experts and leaseholders agreed that some relevant defects remaining in a building represented a tolerable risk relative to the difficulty of remedying them [119]. A Remediation Order was a novel remedy. The focus was on remediation of life-threatening building safety defects in tall residential buildings rather than redress for non-compliance with a legal obligation. If the pre-qualification criteria were met and there were relevant defects, it was likely that the Tribunal would make an order, subject to the facts of each case. The facts of the case, the works required and the situation of the parties were more relevant to the exercise of discretion than unreasonable delay or political motivation [121-122].

SoS v Grey GR Limited (Chocolate Box) (FTT) (CHI/00HN/HYI/2023/0008): The approach to the exercise of discretion cannot be far from "just and equitable". Given that "equitable" essentially means fair, the test cannot be far from one of justice and fairness [255].

Li Jing v Avon Ground Rents Limited (FTT) (LON/00BK/BSA/2024/0004): If satisfied that the statutory criteria in s123 BSA are met, the Tribunal's starting point was that a Remediation Order should be made: other considerations were secondary [149 - 150].

Blomfield & Ors v Monier Road Limited (Smoke House) (FTT) (LON/00BG/HYI/2023/0024): The Tribunal had no power under s123 to specify which materials or contractors were to be utilised in the remedial works [48] [55].

SoS v Grey GR Limited Partnership (Focus Apartments) (FTT) (CAN/42UD/HYI/2023/0007): A Remediation Order served as "a backstop", reassuring the applicant and leaseholders that the remaining remedial works would be carried out within a reasonable time [18]. Given the inherent risks (or probabilities) of delay in construction projects it was unrealistic to place a deadline that was the same or shortly after the estimated completion date. A deadline of six months after the estimated completion date was imposed [26-28].

Responsible Actors Scheme

R (on the application of Rydon Group Holdings Limited) v Secretary of State for Levelling Up Housing and Communities [2025] EWHC 3234 (Admin): there was an arguable case with a realistic prospect of success that decisions made by the SoS in relation to the Responsible Actors Scheme, established by Regulation 5 of the Building Safety (Responsible Actors Schemes and Prohibitions) Regulations 2023 (which were made in exercise of the powers conferred by ss126, 127, 128, 129 and 168 of the BSA), were amenable to judicial review [25] [62].

Responsible Landlord

Triathlon Homes LLP v Stratford Village Development Partnership & Ors (FTT) (LON/00BB/HYI/2022/0018-22): Any landlord (or any right to manage company or leaseholder owned management company) which paid or was liable to pay the costs of a relevant measure which would have been recoverable from leaseholders but for paragraph 2(2) of Schedule 8, had the right to pass those costs on to a "responsible landlord" pursuant to regulation 3 of The Building Safety (Leaseholder Protections) (Information etc) Regulations 2022. The recipient of such a notice could appeal to the FTT, but only on the limited grounds that they were not a responsible landlord or that the sum claimed was more than the cost incurred. There was no right of appeal on the ground that it was not just and equitable for the responsible landlord to have to pay [39].

S

Schedule 8

Lehner v Lant Street Management Company Limited (UT) [2024] UKTU 0135 (LC): A headline list of questions a decision maker should address when determining whether service charges were payable in respect of work to which the leaseholder provisions may apply were set out at [45]. On the facts, the lease was a qualifying lease and the leaseholder was not liable to pay the service charges as they related to cladding remediation.

Schedule 8 (legal or other professional services)

Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point [2023] UKUT 271 (LC): Paragraph 9 of Schedule 8 provided protection against service charges which would otherwise be payable in respect of legal or other professional services relating to the liability or potential liability of any person incurred as a result of a relevant defect, including the cost of obtaining legal advice, or in connection with proceedings before a court or tribunal, arbitration or mediation.

Schedule 8 (retrospective effect)

Adriatic Land 3 Limited v Residential Leaseholders of Waterside Apartments (FTT) (MAN/30UG/LSC/2021/044): The provisions of Schedule 8 did not restrict a leaseholder's liability for service charges incurred, demanded and paid before 28 June 2022 [13]. *Adriatic Land 5 Limited v The Long Leaseholders at Hippersley Point* (UT) [2023] UKUT 271 (LC) (appeal outstanding, see [2024] EWCA Civ 1381): From 28 June 2022, no service charge was payable in respect of Qualifying Services, regardless of when the costs were incurred or when the relevant service charge became due [160, 165, 170].

Specified Building

BDW Trading Ltd v Ardmore Construction Ltd & Ors (2025) 219 ConLR 1: A BLO concerned a relevant liability "relating to a specified building" (s130(2)). Therefore, a BLO could not make associated companies liable for the entire liability of the original body across a number of developments. Discrete orders would need to be made [13, obiter].

Storey

Blomfield & Ors v Monier Road Limited (Smoke House) (FTT) (LON/00BG/HYI/2023/0024): A rooftop garden was a "storey", such that the building was a higher risk building under BSA Part IV [62]. Government guidance (which suggested a garden was not a storey) was not followed, and did not constitute a reliable method of interpretation of law [74]. (NB. The Government's webpage states that the Ministry of Housing, Communities and Local Government is currently consulting relevant stakeholders on a proposal to amend the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations to make clear that roof gardens should not be considered a storey: https://www.gov.uk/guidance/criteria-for-determining-whether-an-existing-building-is-a-higher-risk-building-during-building-work).

T

Timing (BLO application)

Nothing in s130 BSA made it a precondition to the making of a BLO that the relevant liability of the "original body" (s130(2) BSA) needed to already have been established. BLO applications could be made before the trial of the original body's liability, could proceed in tandem with the litigation against the original body or, in a given case, be convenient to defer consideration until after trial against the original body *(BDW Trading Ltd v Ardmore Construction Ltd & Ors* (2025) 219 *ConLR 1 [14, obiter]; Willmott Dixon Construction Ltd v Prater* [2024] EWHC 1190 (TCC), 214 ConLR 164; *381 Southwark Park Road RTM Company Limited v Click St. Andrews Limited* [2024] EWHC 3179 (TCC)).

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