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BUILDING SAFETY ACT – REMEDIATION CONTRIBUTION ORDERS - RESPONDENTS' APPEAL DISMISSED IN VISTA TOWER

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SUMMARY

In Grey GR Limited Partnership v Edgewater (Stevenage) and others, the Upper Tribunal has dismissed the respondents' appeal against the First Tier Tribunal decision granting a remediation contribution order ("RCO") under s124 Building Safety Act 2022 ("BSA") against 75 respondents.

THE FTT DECISION

As we reported in a previous Insight, the owner of Vista Tower ("Grey") applied for an RCO against the original developer of the building and 95 others who qualified as "*associated persons*" by having had shared directors in the relevant period between 2017 and 2022. The owner sought an order that the respondents pay the past and future costs of fixing the fire safety defects (estimated at over £20 million). The FTT granted that order, on a joint and several liability basis, against 75 respondents.

THE APPEAL

Certain of the respondents appealed on the following grounds.

I. Whether the Tribunal can issue RCOs making multiple respondents jointly and severally liable for the same total sum, or whether it must issue a separate order against each respondent for a specifically defined sum.

II. Whether the Tribunal went wrong in its approach to the "*just and equitable*" test, because in relation to many of the respondents, it had not been demonstrated that the respondent either participated in the relevant development or received remuneration from it, and the Tribunal had wrongly required respondents to prove why an order should not be made against them.

III. The threshold for a "*building safety risk*" in s120(5) BSA.

IV. Whether an order should include elements of the remedial costs which were agreed by the experts to have been disproportionate.

THE JUDGMENT

One order or several?

The respondents contended that both the language of s124 (speaking of "*an order*" against "*a specified body and partnership*" requiring it to make "*payments of a specified amount*") and the nature of the just and equitable assessment (which implicitly involved consideration of the position of each individual respondent) required that the Tribunal decide, as against each respondent, whether to issue an order and, if so, in what amount.

The Upper Tribunal disagreed. On a formal level, under the Interpretation Act 1978, the singular references in s 124 BSA could be read as plural, and a comparison with s130 BSA was of limited assistance given that the jurisdiction under s124 is more flexible than that under s130. More importantly however, the President laid stress on the purpose of s124, which includes ensuring that funds are available for remediation of defects, and noted that a construction which precluded the imposition of joint and several liability would raise serious operational problems. In particular, if the Tribunal made different orders against different respondents, ordering payment of specific sums which together added up to the total remediation cost, and it then turned out that certain respondents were either formally insolvent or just impecunious, there would be no practical remedy for the applicant. While the respondents suggested various mechanisms to resolve that issue, the President was not convinced that they would work and therefore concluded that a jurisdiction to issue orders on a joint and several liability was consonant with the legislative scheme and purpose.

Application of the "just and equitable" test

The Vista Tower case was the first in which the applicant took advantage of the very broad definition of "*associated persons*" in s121 BSA and joined in nearly a hundred respondents, all of whom technically met that definition, but the vast majority of whom neither played a role in the development nor made any money out of it. Those respondents contended both in the FTT and the Upper Tribunal that in the absence of the "*touchstone*" of participation or remuneration, it could not be just or equitable for them to be held liable for the cost of repairs. The FTT had found this not to be a necessary element, and instead had found many of the respondents liable on the basis of broader connections with the developer entity, or its directors, or their families.

The Upper Tribunal approved this approach. While the applicant had an initial burden of putting forward a case on just and equitable, it could be very short and simple. In this case, Grey's case against respondents 2 to 96 was contained in a single line of the Particulars asserting that they were part of a "wider corporate structure" which included the developer. In respect of most of the

respondents, the FTT had found that to be true, finding in the evidence various links in addition to the fact of common directors. The Upper Tribunal were of the opinion that the respondents were in an analogous position to the parent company in the Triathlon case. Those were findings of fact with which the Upper Tribunal would not interfere. S124 imposed no requirement for proof of participation in the development or remuneration from it.

What is a building safety risk?

The developer had contended in the FTT that whether something causes a "*building safety risk*" depends on whether the risk was tolerable, having regard to the other features of the building. That was consistent with the fire safety experts' approach, that a situation rated "*Medium:tolerable*" under the PAS 9980 standard would not be a building safety risk. The FTT disagreed, finding that that "*any risk above 'low' risk… may be a building safety risk.*"

On appeal, the developer returned to this argument. The Upper Tribunal rejected it again, and in so doing went even further than the FTT. S120 defined "building safety risk" tightly, requiring a risk (i) *"to the safety of people"*, (ii) *"in or about the building"*, (iii) *"arising from"*, (iv) *"the spread of fire"* or *"the collapse of the building or part of it"*. There was no justification for imposing any kind of external gradation or limit on the level of risk to qualify the definition. The President found that neither the Explanatory Notes to the BSA nor the PAS 9980 standard were of any assistance in interpreting the provision. As a result, even a "low" risk could be a building safety risk (recognising that the level of risk would be relevant in assessing what remedial action is required).

Should an RCO include "disproportionate" remedial costs?

The case involved complex technical evidence as to the necessity, reasonableness and proportionality of the remedial scheme adopted. The fire and architectural experts agreed that insofar as it involved the removal of combustible insulation, the remedial scheme to one wall type went beyond that which was strictly necessary, or was not proportionate.

The FTT had found that remedial works or costs should be included in an order if they were within a reasonable range of responses or costs. The experts' agreement that certain works were not proportionate carried significant weight, but other factors were also relevant. These included the advice from the PAS 9980 assessor that the relevant wall was "High risk", the requirements of the Building Safety Fund process, the desire to avoid decanting residents, and pressure from the government in the remediation order proceedings. In the circumstances, the FTT found that the building owner was justified in pressing ahead with the cautious remedial scheme recommended by its professional advisers.

The Upper Tribunal again agreed with that approach:

"The first, and most obvious difficulty with the Appellants' case is that Grey had advice, in the January 2023 FRAEW Report, that it should proceed with the Removal Works. Given that this was

advice from the specialist fire engineering company which had been engaged by Grey to carry out an investigation and assessment of the external works required by reference to PAS9980, it is difficult to see how the Tribunal went wrong in concluding that it was reasonable for Grey to proceed with the Removal Works."

Combined with various other reasons which the FTT found which influenced Grey in adopting the more expensive remedial solution, that meant that Grey's approach was reasonable and therefore the costs should be included in the order.

IMPLICATIONS

This decision is very much in line with previous decisions and expectations. It is a valuable appellate confirmation of the FTT's approach to the exercise of the RCO jurisdiction, including the central "just and equitable" test. As we noted in our previous Insight, the FTT decision provided helpful guidance on the approach the Tribunal is likely to take in RCO proceedings. By confirming the FTT's approach, and adding its own guidance for parties brought into RCO cases on the basis of the association provisions, the Upper Tribunal decision strengthens that guidance and contributes to the consistent approach that the Courts are taking to this new legal remedy.

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