NEW SQUARE Chambers

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REMEDIATION CONTRIBUTION ORDER UPHELD BY UPPER TRIBUNAL – EDGEWATER (STEVENAGE) LIMITED & OTHERS V GREY GR LIMITED PARTNERSHIP

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Yesterday, Edwin Johnson J (President of Lands Chamber) handed down the next in a series of judgments on the Building Safety Act 2022 ('BSA') in an appeal from a decision of the First-Tier Tribunal on a Remediation Contribution Order ('the RCO') that was made against 76 respondents on 24.01.25 concerning the Vista Tower in Stevenage. The case stood out because of the sheer number of respondents to the RCO application being sought and the judgment which made them jointly and severally liable to pay Grey circa £13.3M.

Vista Tower was a tall 16 storey building built in the sixties containing 73 residential flats with the basic frame consisting of concrete floor slabs supported by columns. However, on investigation by the local authority in early 2019, the presence of PVC window/spandrel panels with combustible filler had been assessed as a category 2 hazard. Whilst applications were made to the Building Safety Fund, an expert recommended a change in the fire alarm system and, in the interim, a waking watch. This stayed in place until the fire alarm system installation in June 2021. During this process, the government changed its guidance from the Consolidated Advice Note (known as 'CAN') to the BSI published building safety standard PAS 9980:2022 which brought in a new code of practice.

After a remediation order was obtained by the local authority against Grey on 29.04.24, the latter applied to the FTT for an RCO under s.124 of the BSA in compliance with the terms of the grant of funding agreement from the Building Safety Fund which required Grey under cl 5.4 to *"…use reasonable endeavours to pursue reasonable remedies available to it in respect of any litigation and/or claim relating to the design and construction of a Building and/or manufacture of any part or parts of the Building."* The experts report concluded that the building was a 'medium' and 'tolerable' risk.

The appellants at first instance had argued that firstly, there was no jurisdiction to make an RCO on a joint and several basis and that the RCO should not be made in any event as it was not just and equitable to do so.

During the appeal to the UT, the appellants doubled down on those points arguing the FTT had no jurisdiction to make a single RCO against a large body of respondents making them jointly and severally liable to make specified payments. The appellants relied on the singular construction of the terms of s.124 of BSA of a RCO which is *"an order requiring a specified*

body corporate or partnership." They argued a number of such orders could be made against individual entities but not a group order as here.

This ground of appeal was rejected as this was a matter of statutory construction and followed the guidance given in *R(O) v Secretary of State for the Home Department* [2022] AC 255 at [29]-[31] per Lord Hodge DPSC, *R(PACCAR Inc and Others) v CAT* [2023] 1 WLR 2594 at [40]-[41] per Lord Sale JSC and *Adriatic Land 5 Limited v Land Leaseholders at Hippersley Point* [2025] EWCA Civ 856 at [145-176] per Nugee LJ. Particular regard was given, following *Adriatic*, to the purpose of the legislation.

The appellants further attempted to rely on the decision of the Court of Appeal in *Sutton v Norwich City Council* [2021] 1 WLR 1691 (in which Marcus Croskell represented the successful local authority) where multiple notices for housing and building safety breaches were served on the director Mr Sutton and the associated company but where Newey LJ did not suggest a financial penalty was jointly and severally liable. This appears to have been a bad point as the notices in that case were sufficiently different and distinct as to not cause a cross-liability between the director and the company.

In rejecting the appeal on this ground, the construction of the statute was not considered to be so restricted by the singular use of the words in s.124 of the BSA. Further, when importing the provisions of s.6(c) of the Interpretation Act 1978, such *"words in the singular include the plural and words in the plural include the singular."* [124]-[167] The assessing tribunal going forward will need to consider on a case-by-case basis in relation to each respondent what constitutes a just and equitable outcome.

The second ground of appeal was also rejected, namely that that by making the RCO the FTT were wrong and should have undertaken a costly and laborious task of identifying if each respondent participated in or were in direct receipt of remuneration from the development with a clear nexus to the relevant defects. At paragraph 177, Edwin Johnson J set out part 1 of the test (which for brevity is not repeated here) which should be applied before part 2, namely whether it was just and equitable to make the RCO against the relevant respondents. The UT refused to give concrete guidance on part 2 because the factors were likely to be too broad and wide, but did warn about overstating the initial burden on the order's applicant(s).

Ground 3 was also rejected. This was based on characterisation of the risk being *"tolerable"* and in those circumstances, the FTT should not have concluded that this was a *"building safety risk"* and that only those risks that were *"intolerable"* would meet that threshold. S.120(5) provides a definition for *"building safety risk" as:*

"a risk to the safety of people in or about the building arising from-

(a) the spread of fire, or
(b) *the collapse of the building or part of it;"*

The relevant risk is closely defined. It must be *"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"*. It will also be noted that the risk identified in paragraph (a) of the subsection is not just a risk of fire, but a risk of the spread of fire. A *"relevant defect"* is defined under s.120(2) as:

> *(a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and*
> *(b) causes a building safety risk."*

Therefore, it was held at paragraph 240 that a building safety risk cannot exist unless there is a defect in relation to the relevant building which has caused that building safety risk. The UT found it unnecessary to impose any kind of external graduation or limit on the level of risk. The decision of the FTT was upheld that a medium and tolerable risk in this case was sufficient to qualify as a building safety risk.

Under ground 4, the appellants sought to argue that the FTT wrongly concluded that it was just and equitable to include in the RCO costs of replacing the Type-1 Wall in its entirety, i.e. the removal of combustible foam insulation which had been injected into the Type-1 Wall. This ground was more general in nature factually seeking to challenge the findings of the FTT. This was rejected on a more traditional ground under Lewison LJ's judgment in *Fage UK Limited v Chobani UK Limited* [2019] UKUT 0226 (TCC) at 114]-[116]. At [114] he states:

> *"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:*
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> *i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
> *ii) The trial is not a dress rehearsal. It is the first and last night of the show.*
> *iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*
> *iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

This appeared to be a ground based on fact only for which the reviewing court has no discretion save if the decision was wrong at law. As the UT found this was not an error of law, the ground was rejected.

Judgment in full is available here:

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