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Specialist Construction Solicitors

# Construction Law Update

## Significant contributions: Tribunal makes RCO against developer and over 70 related entities

**First Tier Tribunal applies the "just and equitable" test for Remediation Contribution Orders, clarifying just how far the web of association extends for shared liability.**

Established by the Building Safety Act 2022, Remediation Contribution Orders ("**RCOs"**) are a key legal tool for ensuring that responsible parties share in the cost of remediating building safety defects.

Unlike Remediation Orders, which automatically require a landlord to fix proven defects, the Tribunal must be persuaded it is "just and equitable" to make an RCO.

The recent First Tier Tribunal ("**FTT**") decision in *Grey GR Limited Partnership v Edgewater (Stevenage) Limited and Others* provides much-anticipated guidance on how the Tribunal will apply the "just and equitable" test for RCOs, especially when assessing liability across interconnected networks of associated companies.

### Key takeaways:

- **The original developer will be the main target when imposing an RCO.**
- **Whether it is "just and equitable" for an associated person to contribute is highly fact sensitive. The Tribunal will look for clear linking factors beyond a common directorship (e.g. common branding, family connections, financial dealings).**
- **As to which defects/costs should be included in an RCO, the test is not whether a cost is strictly necessary to comply with Building Regulations but whether it falls within a '*reasonable range*' of responses to address the safety risks.**

### Factual background

The case concerns Vista Tower, a 16-storey former office block in the centre of Stevenage. In 2014, Edgewater (Stevenage) Limited ("**Edgewater**") bought the building to convert into residential flats.

The building hit the news when post-Grenfell inspections found it had combustible materials in its external walls, inadequate fire stopping and other fire safety defects. The government took legal action against the building's freeholder, Grey GR Ltd Partnership ("**Grey**") and, in April 2024, the FTT issued one of the first ever Remediation Orders requiring Grey to fix the defects.

Before the Remediation Order was granted, Grey had started an extensive programme of remediation works supported by Building Safety Fund grants. Grey then used the new and largely untested RCO process set out in Section 124 of the Building Safety Act 2022 (the "**BSA**") to claim its costs back from the original developer Edgewater as well as 95 other respondents. The respondents were said to qualify as "associated persons" under the BSA by virtue of their shared directorships.

The FTT has now ruled on the RCO application, ordering 76 of the original 96 respondents to jointly and severally contribute £13.2 m towards Grey's remediation costs, despite the associated companies having no direct ownership or construction role.

### Main legal points considered

S.124(1) of the BSA empowers the FTT to make an RCO provided "*it considers it just and equitable to*

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*do so.*" The decision in this case provides helpful analysis on how the FTT will exercise its discretion, both in relation to the scope of remediation works and who should be liable to contribute towards them.

**1. Did Grey act reasonably in incurring the costs to be included in the RCO, such that it was "just and equitable" to recover them?**

The respondents contended that several of the defects listed in the RCO application did not meet the criteria of "relevant defects" under the BSA and Grey's remediation program was excessive and greatly disproportionate.

The FTT did not support this view.

When it comes to the question of what costs should be included in an RCO, a "*relevant defect*" is not limited to compliance with the Building Regulations in force at the time, but encompasses any safety risks that pose a threat to safety of the building or the people in or around the building. The scope is wide, and anything over a "*low risk*" could be included in the remediation package.

The FTT said that it is helpful to ask whether the remediation works/costs were "*within a reasonable range*" of responses to deal with the issue, the range being "*…deliberately wide*" to capture all relevant work.

On this test, it was appropriate to include in the quantum the cost of investigation work, expert reports, design development, temporary safety measures, permanent remediation works, project management and consequential works, even though the latter were not technically "*relevant defects*" under the BSA.

The FTT also took into account:

- The fact that the remedial works were particularly challenging with many variations.
- Grey's desire to avoid decanting occupants from the building and reduce harm to those occupants while defects were being remediated.
- The fact that the Secretary of State had chosen Vista Tower as an example of a building where remedial works were to be carried out immediately and had placed Grey under *"serious pressure"* to deliver.

On these facts, the FTT determined that the repair work costs would amount to approximately £13.2 million.

**2. Would it be "just and equitable" to impose the costs on the respondents?**

Applying the decision in *Triathlon Homes v Stratford Village Development (2024)*, the FTT determined that 76 of the 96 respondents should be included in the RCO, for these reasons:

- **RCO are not fault-based**; **they are a remedy designed to secure funds for remediation works.** Proof of fault is not required of the party ordered to pay.
- **Primary responsibility lies with the original developer.** Developer Edgewater was top of the hierarchy of liability for whom there was *"no doubt that a RCO should be made."*
- **There was no automatic presumption an associate company of Edgewater would be liable.** The broad association provisions under section 121 of the BSA had the potential to catch *"very remote associates"* who might only be associated by virtue of a common director. In the FTT's view, it would not be "just and equitable" to make an RCO in those circumstances.
- **Clear "linking factors" were required to justify making an RCO against associates**. These might include common business names (e.g. use of the "Edgewater"

brand), familial connections between directors and shareholders, involvement in the property sector, deals struck between companies, profit and funding flow, control and influence, or suspiciously opaque or unreliable corporate records.

- **Where linking factors are present, "*countervailing factors"* could persuade the FTT that it was not just and equitable to make an RCO**. The associate may be able to show a good reason why it should not have to pay, for example, where external parties hold more than 50% of shares. Each case is fact-sensitive and a matter for the FTT's discretion.

- **Lacking the financial means to pay is not a significant reason for not making an RCO**. Whilst the FTT noted that Edgewater had few assets, it followed *Triathlon* in confirming that a company's financial position held little sway in determining whether it would be "just and equitable" to make an RCO.

- **Even well-funded landlords (like Grey) can pursue developers for costs**. The FTT rejected arguments that Grey's financial capacity as a Building Safety Fund recipient should exempt others from liability.

- **It was just and equitable to have the parties jointly and severally liable for the RCO.** Given the *"fluid, disorganised and blurred"* corporate network, the FTT determined that a single RCO making multiple respondents "jointly and severally" liable was more equitable than individual cost-share orders.

**Comment**

Although fact-sensitive and not binding in later cases, this FTT decision sheds welcome light on how the "just and equitable" test will be handled in RCO applications. It's evident that the range of reasonable remediation costs is wide, and that developers and sufficiently linked associated companies will be squarely in the Tribunal's sights when it comes to imposing liability to pay for them.

The FTT acknowledged that such a wide network of liability breaks from standard company law, but the Building Safety Act is designed to fast-track funding for building safety work, even if relatively loosely connected parties are captured.

Several Remediation Orders have already been made, potentially paving the way for more RCO applications from the respondents to such orders. The FTT stressed that each case will be judged on its own merits. As more RCO applications come through, the clearer the guidance will become on how Tribunals approach them.