Remediation Contribution Orders and the Triathlon Homes case

Triathlon Homes LLP -v- (1) Stratford Village Development Partnership (2) Get Living plc (3) East Village Management Limited [2024] UKFTT 26 (PC)

The First-tier Tribunal (FTT) has handed down its decision on a contested Remediation Contribution Order (RCO) under section 124 of the Building Safety Act 2022 (BSA).

The BSA was the Government's legislative response to the Grenfell Tower tragedy. It contains provisions intended to secure the safety of people and to improve the standard of buildings.

What is a Remediation Contribution Order?

A Remediation Contribution Order is one of the leaseholder protections established by the BSA. This is to protect leaseholders in residential buildings from costs associated with remediating historical building safety defects.

A Remediation Contribution Order in relation to a *Relevant Building* means an order made by the FTT requiring a specified body corporate or partnership to make payments to a specified person for the purpose of meeting costs to be incurred in remedying *Relevant Defects* or specified relevant defects relating to the *Relevant Building*.

It is effectively a form of money judgment for a designated purpose. The FTT can only make this order if it is just and equitable to do so.

Background to the case

The case concerns 5 residential blocks in Stratford East London. The blocks were originally developed by the first respondent, Stratford Village Development Partnership (SVDP) to provide accommodation for athletes and officials participating in the London 2012 Olympic Games.

Some of the blocks are owned through subsidiaries by the second respondent, Get Living plc (Get Living) and some are owned by the applicant, Triathlon Homes LLP (Triathlon). Get Living owns the developer SVDP, although it didn't at the time the blocks were first built.

The repair and maintenance of the structure of the common parts of the blocks is the responsibility of the third respondent, East Village Management Limited (EVML). EVML is owned jointly by Triathlon and Get Living.

In November 2020, it was established that there were serious safety defects in the design and construction of the cladding systems adopted for the external facades in the blocks. In response to these discoveries a waking watch was implemented as well as other temporary measures. A programme of work to remedy the defects by removing and replacing cladding is being implemented by EVML and the current timetable means that the works will be completed by August 2025. This work cost £24.5 million and was being funded by public money provided from the Building Safety Fund.

The blocks were *Relevant Buildings* and the defects discovered were *Relevant Defects*.

Glossary

Relevant Building means a self-contained building or part of a building containing at least two dwellings which is at least 11 metres in height, or which has at least five storeys, but excluding leaseholder-owned buildings.

Relevant Defect means a building defect that arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works that also causes a risk to the safety of people in or about the building arising from the spread of fire, or the collapse of the building or any part thereof.

The FTT applications

In December 2022 Triathlon made 5 applications for each of the blocks to the FTT for RCOs. These RCOs (if made) would require SVDP and Get Living to:

- Reimburse expenditure of £1.058 million incurred by Triathlon through service charges paid to EVML in respect of interim safety measures and investigative and preparatory works.
- Pay £153,538 for service charges demanded by EVML, demanded by not yet paid by Triathlon.
- Pay £163,899 costs not yet demanded in service charges.
- Reimburse expenditure of £16.03 million incurred by EVML and which represent Triathlon's share of the total remediation costs.

The FTT granted the RCO's and answered 3 key questions:

1. Could RCOs be made in relation to costs incurred before the commencement of the BSA Act in June 2022? Yes.

The respondents argued that the RCO could not be made in respect of costs incurred before the commencement of the BSA on 28 June 2022. Triathlon argued that section 124 (which grants the FTT the power to make RCOs) was retrospective in effect.

The FTT decided that the protections provided to leaseholders should not be restricted by precise distinctions of time.

Moreover, such an interpretation would create serious inconsistencies between the functioning of s.124 on the one hand, and Schedule 8 on the other, and would discriminate between individual leaseholders in materially identical circumstances. As a reminder, schedule 8 restricts the extent to which the costs of remediation can be charged back to leaseholders via service charge.

Section 124 and Schedule 8 are different routes towards the same destination: the transmission of responsibility for remediation away from individual leaseholders and towards the original developer and its associates.

When making the decision about costs incurred before the commencement of the BSA the FTT referred back to its decision in *Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point* and notes that it is important for the FTT to be consistent and also to consider the purpose of the BSA.

However, it is important to note that this is not completely settled law as permission was granted to appeal the Hippersley Point case earlier this month.

2. Could RCO's be made for costs incurred in preventing building safety risks or is this restricted to repairing a *Relevant Defect*?

The respondents argued that the RCO could not be made in respect of costs incurred for preventing risks (i.e. item 1 in Triathlon's application) as there is a distinction in other parts of the BSA between costs remedying a relevant defect (which can be subject to an RCO) and costs preventing a building safety risk (which can't be subject to an RCO).

The FTT disagreed. Parliament was not likely to have intended the scope of RCOs to depend on fine distinctions between measures taken to remedy a defect or to prevent a relevant risk from materialising. Any measure that causes a building defect to cease being a relevant defect, or which is part of a larger programme of measures for that purpose, is capable of being the subject of an RCO.

3. Was it just & equitable to make the RCO's sought? Yes.

Triathlon argued that if there was a responsible landlord or developer (responsibility is not synonymous with fault) then there was a presumption that it will be just and equitable to make an RCO. The respondents argued that there was no such presumption.

The FTT held that the RCO remedy was non-fault based and was a route to securing funds for remediation works. The policy of the BSA was that primary responsibility for the cost of remediation should fall on the original developer, in this case SVDP. If it was just and equitable to make an order against SVDP, it would also be just and equitable to make an order against Get Living, on which SVDP depended for financial support.

In other words, s124 creates a "hierarchy" or "cascade" of liability with the landlord who was responsible for the relevant defect, or which is associated with a developer which was responsible for it, standing at the top of the list of those liable to meet the costs of remediation. If no such responsible landlord can be found, then liability will pass to the next available landlord in the list.

Read the judgment.

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