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What will sway the court in applying the "*just and equitable*" test following Triathlon Homes?

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Building Safety Act 2022, s. 124

"(1) The First-tier Tribunal may, on the application of an interested person, make a remediation contribution order in relation to a relevant building if it considers it just and equitable to do so.

(2) "Remediation contribution order", in relation to a relevant building, means an order requiring a specified body corporate or partnership to make payments to a specified person, for the purpose of meeting costs incurred or to be incurred in remedying, or otherwise in connection with, relevant defects (or specified relevant defects) relating to the relevant building."

(emphasis added)

Batish v Inspired Sutton Ltd, 13 January 2023

Paragraph 50:

"Inspired Sutton Limited was the developer and the landlord under the lease at the qualifying time. Accordingly, by reference to paragraph 10 of Schedule 8, the costs are not to be regarded as relevant costs to be taken into account in calculating the amount of the service charge. The Tribunal are satisfied that there are no mitigations or other matters to be taken into account in the exercise of its discretion in this case. The Applicants are therefore entitled to a remediation contribution order in their favour."

Triathlon Homes LLP v Stratford Village Development Partnership & Others

- First instance: [2024] UKFTT 26 (PC)
- Cout of Appeal: [2025] EWCA Civ 846
- Going to the Supreme Court but not on just and equitable

Triathlon: What was decided? (1)

FTT, paragraph 237: the power to make a RCO is discretionary and should be exercised having regard to the purpose of the 2022 Act and all relevant factors

> *"The Act has two principal goals: that buildings that require remediation are remediated as quickly as possible, and that those not responsible for the defects that require remediation do not pay for it":* see *Zampetti v Fairhold Athena Ltd*, 5 June 2025, paragraph 205

FTT, paragraphs 246 and 271 and CofA, paragraph 78: absent malice or some other motivation which might be said to taint the applicant's case, the motivation of the applicant for seeking the RCO is irrelevant. But what may be relevant is whether the applicant has a legitimate interest in pursuing an application.

FTT, paragraph 251 and CofA, paragraph 119: no weight should be placed on the fact that Get Living was not the owner of the development at the time that it was carried out. That's the risk they took when they purchased SVDP.

Triathlon: What was decided? (2)

FTT, paragraphs 256 and 279: the ability or inability of a respondent which is treated as responsible for the purposes of the Act to pass on liability to some other party who may be responsible under the general law is not a matter to which much weight should be given.

FTT, paragraph 261 and CofA, paragraph 97: the ability of the applicant to pursue other remedies against others (eg for breach of contract or under the DPA) is irrelevant. Parliament intended that an application for a remediation contribution order should provide a route to securing funding for remediation works without the applicant having to become involved in, or to wait upon the outcome of other claims arising out of the relevant defects, which might involve complex, multi-handed, expensive and lengthy litigation.

Triathlon: What was decided? (3)

FTT, paragraphs 265 and 278 and CofA, paragraphs 61, 69 and 70: The fact that SVDP was the developer carried a lot of weight. The policy of the BSA is that primary responsibility for the cost of remediation should fall on the original developer.

FTT, paragraph 266: SVDP depends on Get Living for financial support. The obvious purpose behind the association provisions is to ensure that where a development has been carried out by a thinly capitalized or insolvent development company, a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedying the relevant defects by hiding behind the separate personality of the development company.

Triathlon: What was decided? (4)

FTT, paragraphs 270, 273, 276-278 and CofA, paragraphs 62-64, 87-89, 110-112: the public should not have to pay for work (through the Building Safety Fund) when there was a well resourced commercial entity which could be made liable under the BSA. Public funding should be a matter of last resort.

When might it not be just and equitable to make a RCO?

CofA, paragraph 65:

"Suppose a case where a director of a landlord was also a director of other companies which have no other connection with the landlord or its group; such companies might have had nothing to do with the development and be engaged in entirely different businesses, or might include a charitable company to which the director had given his time voluntarily. It is not obvious that it would always be just and equitable to make RCOs against such associated companies even if the effect of refusing to do so was to leave the costs to be borne by the public."

Grey GR Limited Partnership v Edgewater (Stevenage) Ltd & Others, 24 January 2025 (Vista Tower, RCO Proceedings)

Paragraph 349:

"We accept [the] general submissions (in line with Triathlon) that the just and equitable test in section 124 of the Act is deliberately wide "so that the money can be found" and the jurisdiction may be protean. Different considerations may be relevant and different approaches may be just and equitable in different cases. It appears one of the main purposes of this new jurisdiction is to ensure that the "pot is filled promptly" so that remedial work can be carried out and/or public money from grant funding can be recovered promptly, as he suggested, where it is just and equitable to do so."

Any more relevant factors from *Vista Tower*?

Note paragraph 350: "*We are … in no doubt that a RCO should be made against [the developer] in view of the nature of their residential conversion works and the relevant defects in this building. We would say that even if it were not for the negative factors noted above…*"

Paragraph 232: Even if the developer had made no or modest profits from the Development, it would still have been just and equitable to make a RCO

Paragraph 352: Impecuniosity or otherwise of any of the Respondents is not a significant reason for or against making an order in this case

When might it not be just and equitable to make a RCO? (1)

Paragraph 357: *"We are not persuaded that there is an automatic presumption that any associate must be made liable unless they can show good reasons why they should not have to pay, particularly where they are associated only by common directorship. We agree that some circumstances will suggest additional linking factors (which may be short of linkage with the development or evidence of abuse) and those may call for an explanation and/or evidence of countervailing factors."*

When might it not be just and equitable to make a RCO? (2)

Paragraph 358: there is no need for something akin to a tracing exercise to make an associate liable, *"at least in a case like this"*

Paragraph 360: "*It does not follow that a RCO should be made against every such Respondent. However, … whether this was a wider corporate or group structure, we take that as a relevant consideration. We give this sensible scope; we do not accept that only ultimate beneficial ownership by a single person would be sufficient. We mean that some or all of the same relevant beneficial owners are involved (with or without others) and/or there are other factors of similar significance to indicate a wider corporate structure or connection such that a very substantial RCO may be just and equitable.*"

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ANY QUESTIONS?

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