



Neutral Citation Number: [2026] UKUT 18 (LC)

Case Nos: LC-2025-120  
LC-2025-125  
LC-2025-129

**IN THE UPPER TRIBUNAL (LANDS CHAMBER)  
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY  
CHAMBER)  
Ref: CAM/26UH/HYI/2023/0003**

**The Rolls Building, 7 Rolls Buildings,  
Fetter Lane, London EC4A 1NL**

**27<sup>th</sup> January 2026**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***CATCHWORDS: Building Safety Act 2022 – remediation contribution order under Section 124 – whether FTT had jurisdiction to make the order on a joint and several basis – whether just and equitable to make the order – meaning of building safety risk – whether certain costs reasonable***

**BETWEEN:**

**EDGEWATER (STEVENAGE) LIMITED AND OTHERS  
(being the Appellants listed in Appendix 1 to this Decision)**

**Appellants**

**and**

**GREY GR LIMITED PARTNERSHIP**

**Respondent**

**Vista Tower,  
Southgate,  
Stevenage, SG1 1AR**

**The President, Mr Justice Edwin Johnson  
16<sup>th</sup> and 17<sup>th</sup> October 2025**

Tom Morris, instructed by Teacher Stern LLP, for the TS Appellants  
Simon Hughes KC and Keith Knight, instructed by Greenwood and Co., for the Greenwood Appellants  
Mark Warwick KC, instructed by Bude Nathan Iwanier, for the BNI Appellants  
Alexander Hickey KC and Jennie Gillies, instructed by DAC Beachcroft LLP, for the Respondent

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The following cases are referred to in this decision:

*BDW Trading Limited v URS Corporation Ltd* [2025] UKSC 21 [2025] 2 WLR 1095  
*Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point* [2025] EWCA Civ 856  
*Triathlon Homes LLP v Stratford Village Development Partnership, Get Living Plc and East Village Management Ltd* [2025] EWCA Civ 846  
*Chief Constable of Cumbria v Wright* [2006] EWHC 3574 (Admin) [2007] 1 WLR 1407  
*R(O) v Secretary of State for the Home Department* [2022] UKSC 3 [2023] AC 255  
*R (PACCAR Inc and others) v Competition Appeal Tribunal* [2023] UKSC 28 [2023] 1 WLR 2594  
*Sutton v Norwich City Council* [2021] EWCA Civ 20 [2021] 1 WLR 1691  
*Jepsen v Rakusen* [2023] UKSC 9 [2023] 1 WLR 1028  
*Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14 [2002] 1 WLR 1397  
*S Franes Ltd v Cavendish Hotel (London) Ltd* [2018] UKSC 62 [2019] AC 249  
*Blue Metal Industries Ltd v Dilley* [1970] AC 827  
*Georgiou v Customs and Excise Commissioners* [1996] STC 463  
*Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ 5  
*Ingenious Games LLP v HMRC* [2019] UKUT 0226 (TCC)  
*Megtian Limited (in Administration) v HMRC* [2010] STC 840

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## Introduction

1. This is my decision on the hearing of three appeals against a set of remediation contribution orders made by the First-tier Tribunal Property Chamber (“**the Tribunal**”) on 24<sup>th</sup> January 2025, pursuant to Section 124 of the Building Safety Act 2022.
2. The remediation contribution orders were set out in a single document, in the format of a single order. I will use the expression “**the RCO**” to refer to the set of orders made by the Tribunal on 24<sup>th</sup> January 2025.
3. The RCO was made on the application of the Respondent, Grey GR Limited Partnership (“**Grey**”), by application notice dated 20<sup>th</sup> April 2023 (“**the RCO Application**”). The RCO Application related to a building known as Vista Tower, Southgate, Stevenage SG1 1AR (“**the Building**”). Grey purchased the freehold interest in the Building from the first respondent to the RCO Application, Edgewater (Stevenage) Limited, in 2018.
4. By the time the RCO Application came to a hearing before the Tribunal there were some 96 respondents to the RCO Application (“**the Original Respondents**”). The RCO Application was heard over ten days between 4<sup>th</sup> and 15<sup>th</sup> November 2024. The decision of the Tribunal on the RCO Application is dated 24<sup>th</sup> January 2025 (“**the Decision**”). For the reasons set out in the Decision the Tribunal determined that the RCO should be made against 76 of the Original Respondents.
5. By the RCO the Tribunal ordered those of the Original Respondents who were specified in the RCO (“**the Specified Respondents**”) to make payments to Grey in the total sum of £13,262,119.08. Under the terms of the RCO the liability of the Specified Respondents to make these payments was declared to be joint and several. The RCO provided that the

payments were to be made for the purposes of meeting the costs incurred or to be incurred in remedying or otherwise in connection with the relevant defects relating to the Building.

6. The Appellants say that the Tribunal were wrong to make the RCO, either in whole or in part. They say that the RCO should be set aside and, depending upon the outcome of the various grounds of appeal, remade, in a reduced form, either as a remediation contribution order against only one of the Specified Respondents or as a remediation contribution order against only two of the Specified Respondents.
7. The Appellants are identified in Appendix 1 to this decision, As there are 75 Appellants, I will refer to individual Appellants, as they were referred to in the Tribunal and in the appeals, as “**R1**”; meaning the First Respondent to the RCO Application and now First Appellant in the appeals, and so on. In Appendix 1 the Appellants are divided into three groups. These three groups into which the Appellants are divided have been referred to in the appeals and before the Tribunal by reference to the solicitors acting for them. I will continue this form of identification:
  - (1) The TS Appellants comprise R1, R4-R11 and R13-R16, all represented by Teacher Stern LLP.
  - (2) The Greenwood Appellants comprise R18-R21 and R23-R25, represented by Greenwood & Co.
  - (3) The BNI Appellants comprise R26-R28, R30-R31, R33-37, R39-43, R45-R47, R49-R54, R56, R59, R61-R62, R64-R67, R69-R77, R79-R82, R84-R88 and R90-94, represented by Bude Nathan Iwanier.
8. On the hearing of the appeals the TS Appellants were represented by Tom Morris. The Greenwood Appellants were represented by Simon Hughes KC and Keith Knight. The BNI Appellants were represented by Mark Warwick KC. Grey, the Respondent to the appeals, was represented by Alexander Hickey KC and Jennie Gillies. I am most grateful to all counsel for their assistance in my consideration of the appeals, by their written and oral submissions.

### **The conventions of this decision**

9. For convenience, I will refer to the appeals themselves as “**the Appeal**”. References to Paragraphs, without more, are references to the paragraphs of the Decision. References to “**the FTT**” are references to the First-tier Tribunal (Property Chamber) as a whole. References to the FTT are to be distinguished from references to the Tribunal. I am using the latter expression to refer to the FTT panel which made the Decision. I will refer to the Upper Tribunal (Lands Chamber) as “**the Upper Tribunal**”.
10. I will be making extensive reference to the provisions of the Building Safety Act 2022 (“**the Act**”) in this decision. References to Sections and Schedules, without more, are references to the Sections of, and Schedules to the Act.
11. Italics have been added to quotations in this decision.

### **The background to the RCO Application**

12. The Decision sets out the background to the RCO Application in detail. What follows is a summary only of the background, taken from the Decision, sufficient to set the scene for what I have to decide in the Appeal.

13. The Building, which is now known as Vista Tower, was built, from the early 1960s, for the Stevenage Development Corporation. It was used as offices and known as Southgate House.
14. R1 acquired the freehold interest in the Building on 17<sup>th</sup> July 2014 for a price of £3,950,000. R1 acquired the Building for the purposes of carrying out a redevelopment of the Building, by its conversion into residential flats. R1 then commissioned the carrying out of the conversion works (“**the Development**”). In the course of 2016/2017 R1 sold off the new flats in the Building, created by the Development, on long leases at premiums in the total sum of £15,633,725.
15. On 20<sup>th</sup> June 2018 R1 sold the freehold interest in the Building to Grey. The price paid by Grey was £587,650. The Building was one of some 200 or more residential buildings acquired by Grey as a portfolio of ground rent investments for the Railpen Group. The Railpen Group is a pension fund operated mainly for railway workers, with about 500,000 members. Grey became the immediate landlord of tenants of the flats in the Building. There were no intermediate leases.
16. As converted, the Building is 49.5 metres high. It has 16 storeys, including what is described as a mezzanine level in part of the double-height ground floor. The ground floor level includes two pedestrian entrances, a large open-sided car park area, plant rooms and bin storage. There are 73 flats in the Building.
17. The basic frame of the Building is composed of concrete floor slabs supported by columns. The Building is rectangular in plan, with narrower north and south elevations. It has two staircases, one at each end. It had a sprinkler system in the flats but, according to the Decision, this had not been commissioned. For the purposes of one of the grounds of the Appeal the key features of the Building are three of its external walls, which have the following design features. The south, east and west elevations of the Building are glazed and had two main external wall types in alternating horizontal strips. During the investigations and the remedial works which have given rise to the RCO Application, the following features of these two main wall types emerged:
  - (1) Type 1 was a cavity wall built above each floor slab. The external face was render applied to pre-existing concrete façade panels. The wall had a blockwork inner leaf. Where the wall enclosed a flat, foam insulation had been injected into the cavity through holes drilled in the blocks or the mortar between them. I will refer to this type of wall as “**the Type 1 Wall**”.
  - (2) Type 2 was a UPVC window frame system sitting above wall type 1, with glazing and intermittent blanking panels. The blanking panels were UPVC sheets either side of expanded polystyrene with an MDF core. Where the wall enclosed a flat, foil-faced insulation had been installed behind the blanking panels. I will refer to this type of wall as “**the Type 2 Wall**”.
18. As is well-known, the Grenfell Tower tragedy on 14<sup>th</sup> June 2017 prompted investigations and widespread concern about fire safety in high residential buildings, particularly those constructed or converted in recent decades. In December 2018, the Building (Amendment) Regulations 2018 came into force. These amended the Building Regulations 2010 (which had included provisions requiring such matters as adequate resistance to the spread of fire) so as to prohibit the use of combustible materials in external walls of buildings at least 18 metres high. On 20 January 2020, the Consolidated Advice Note (“**the CAN**”) was published to combine 22 guidance notes produced since the Grenfell Tower tragedy. The

CAN required the removal of all combustible material, to comply with the new building regulations.

19. In June 2020, Grey applied to the Building Safety Fund (“**the BSF**”) for funding for remedial works based on the CAN. In July 2020, Tuffin Ferraby Taylor (“**TFT**”), property consultants, were instructed by Grey, in relation to the Building and other buildings in Grey’s portfolio, for the purposes of investigating and determining what remedial works were required. In September 2020, TFT produced their proposed strategy to assess the relevant buildings for compliance and, where deficiencies were discovered, to endeavour to access the BSF and undertake all necessary upgrade works. Given the difficulty of specifying remedial work adequately in advance of full opening-up, TFT recommended a two-stage design and build procurement approach.
20. The course of the subsequent investigations and works is set out in detail, in the Decision. I do not need to repeat that account in this decision. For the purposes of one of the grounds of appeal however, it is important to note that the Government withdrew the CAN on 10<sup>th</sup> January 2022. The reason given for this withdrawal was the CAN had, so it was said, been wrongly interpreted and had driven too cautious an approach to building safety, going beyond what was necessary in safe buildings. In the place of the CAN the BSI published building safety standard PAS9980:2022 (“**PAS9980**”), which was a new code of practice for appraising the fire risk of external wall construction/cladding on blocks of flats. In June 2022 a fire engineering company called CHPK Limited (“**CHPK**”) was instructed to carry out an investigation and assessment of the external works required by reference to PAS9980.
21. Again, it is not necessary to go into the detail of the investigations and works, subsequent to the withdrawal of the CAN, which can be found in the Decision. For the purposes of this summary, I need only mention the following events.
22. On 1<sup>st</sup> August 2022 reports prepared by reference to PAS9980 were sent to the BSF for several properties in Grey’s portfolio, including the Building. On 17<sup>th</sup> August 2022 the BSF responded to these reports, asking for application forms for each of the relevant properties to transition from the CAN to the PAS9980 standard. I take this reference to transition to mean that the application forms were required to be reformulated by reference to the PAS9980 standard. In October 2022 Grey withdrew its application to the BSF, which had been based on the CAN, and re-submitted the application by reference to the PAS9980 report.
23. On 2<sup>nd</sup> November 2022 the Secretary of State for the Department then known as Levelling Up, Housing and Communities applied to the FTT for a remediation order against Grey in respect of the Building, pursuant to Section 123 (“**the RO Application**”).
24. On 24<sup>th</sup> February 2023 the BSF confirmed that all of the works said to be required by the PAS9980 report in respect of the Building were eligible for funding. Grey engaged a company called Lancer Scott Limited as the contractor to design and implement the works required to remedy the defects identified in the PAS9980 report.
25. By letter dated 19<sup>th</sup> September 2023 Grey was informed that, subject to conditions, funding totalling £12,443,565.93 (including VAT and pre-tender support paid earlier) towards the costs of the remedial works had been approved. On 15<sup>th</sup> December 2023 Grey entered into a full design and build contract with Lancer Scott Construction West Limited for the external remedial works to the Building.

26. On 17<sup>th</sup> January 2024 Grey entered into a grant funding agreement (the “GFA”) in relation to the funding provided by the BSF. Grey entered into the GFA with the Homes and Communities Agency (trading as Homes England), using the published template form of grant funding agreement. Clause 5.4 of the GFA provided as follows:

*“...the Applicant shall use all reasonable endeavours to pursue reasonable remedies available to it in respect of any litigation and/or claim relating to the design and construction of the Building and/or manufacture of any part or parts of the Building or any materials or components used and installed at the Building where the remediation of any defective Building design or as to any construction, materials or components relates to Works in respect of which Funding is provided pursuant to the terms of this Agreement or any litigation and/or claim relating to the specification and installation of the same on the Building (including, without limitation, any claims against insurers, any relevant contractors and/or manufacturers and/or warranty providers with any liability in relation to the Building)...”*

27. Clause 5.4.3 of the GFA requires Grey to account to Homes England for any amount received in respect of such “*Litigation Remedies*”, or at least the amount referable to the elements funded, subject to further provisions.
28. The external remedial works started in January 2024. Under the terms of the contract with Lancer Scott, and under the terms of the GFA, the works were due to be completed in September 2025.
29. Turning back to the RO Application, as made by the Secretary of State against Grey, the RO Application was heard by the FTT over two days, in March 2024. The decision of the FTT on the RO Application is dated 29<sup>th</sup> April 2024. For the reasons set out in the decision the FTT determined that a remediation order should be made. The remediation order itself (“**the RO**”) is dated 10<sup>th</sup> May 2024 and, subject to various supplementary provisions in the order, required Grey to remedy the relevant defects in the Building by 9<sup>th</sup> September 2025, by carrying out the works specified in a schedule to the RO.
30. I should also mention that, in parallel with the RCO Application, Grey has also commenced proceedings in the High Court (Technology and Construction Court), against R1, R16 and R17, for a building liability order pursuant to Section 130. Those proceedings in the High Court have not yet come to trial.

### **The RCO Application**

31. Grey made the RCO Application on 25<sup>th</sup> April 2023. The original respondents to the Application were the TS Respondents (R1 and R3-R16), R2 and R17. The Greenwood Respondents, the BNI Respondents and the remainder of the Original Respondents were joined later, by amendment, as respondents to the Application.
32. The hearing of the RCO Application took place over ten days before the Tribunal between 4<sup>th</sup> and 15<sup>th</sup> November 2024. Grey, the TS Respondents, the Greenwood Respondents and the BNI Respondents were all represented by counsel. The Tribunal heard evidence from a number of witnesses of fact, and from expert witnesses in the disciplines of fire safety, architecture and quantum.

### **The Decision**

33. The Decision is dated 24<sup>th</sup> January 2025. The Decision is lengthy, and has attached to it two schedules, the first of which is also lengthy. I will need to come back to the Decision when I come to consider the grounds of appeal, but for present purposes, I can summarise the Decision in the following terms.
34. At Paragraphs 1-38 the Tribunal set out the basic background to the RCO Application and, at Paragraphs 39-50, the procedural history. The Tribunal then dealt with the hearing itself, including representation and the witnesses who gave evidence at the hearing, in Paragraphs 51-62.
35. The Tribunal summarised the relevant law in Paragraphs 63-79. In this section of the Decision the Tribunal took the time to deal with two particular issues of construction which had arisen. The first issue was the meaning of “defect”, in the expression “relevant defect” in Section 120(2). The Tribunal rejected the argument of Mr Morris, for the TS respondents (as they then were) that it was reasonable to interpret defect as meaning building work which did not comply with the Building Regulations 2010, as at 9<sup>th</sup> October 2014. The decision of the Tribunal in this respect is not in issue in the Appeal, but I note that the Tribunal concluded that non-compliance with the building regulations was merely one way, and not the only way, in which something could be a defect for the purposes of the Act.
36. The second issue concerned the meaning of “building safety risk”, in Section 120(5), which is in issue in the Appeal. The Tribunal recorded the argument of Mr Morris in the following terms, at Paragraph 71:
- “71. Second, Mr Morris argued that whether something causes a “building safety risk” for the purposes of section 120(5) depends on whether the risk is tolerable, having regard to the other features and characteristics of the building. The fire safety experts had opined that, when assessing the risks associated with fire safety of external walls under PAS9980, a “medium” fire risk that is considered to be “tolerable” would not be a building safety risk. Mr Morris argued for this narrow interpretation, particularly in view of the interference (by Schedule 8 to the Act) with private/property law rights in preventing or limiting recovery of service charges relating to relevant defects.”*
37. The Tribunal did not accept this argument. They expressed their view in the following terms, at Paragraph 72:
- “72. We think the better view is that any risk above “low” risk (understood as the ordinary unavoidable fire risks in residential buildings and/or in relation to PAS9980 as an assessment that fire spread would be within normal expectations) may be a building safety risk. Section 120(5) describes a risk to the safety of people arising from the spread of fire or collapse, not a risk reaching an intolerable or any other particular threshold. We do not think “collapse” indicates the risk must be of catastrophic fire spread, as was suggested. It need only be a risk to the safety of people arising from the spread of fire in a tall residential building.”*
38. At Paragraphs 80-90 the Tribunal considered the general arguments, and what they referred to as Applicant factors. The Tribunal then turned to the technical aspects of the dispute, at Paragraphs 91-172. This included analysis of the issues in relation to the Type 2 Wall and the Type 1 Wall.

39. The analysis and conclusion of the Tribunal in relation to the Type 1 Wall are in issue in the Appeal. The work which had been done in relation to the Type 1 Wall involved the removal of the combustible foam insulation which had been injected into the Type 1 Wall. The essential question which arose was whether the remedial works which had been carried out in this respect were reasonable. This question was not necessarily an easy one, for the reason explained by the Tribunal at Paragraph 143:

*“143. The agreement between the experts, that from a purely technical perspective the remedial works for wall type 1 were not proportionate, has very significant weight. However, they acknowledged that the scope of the remedial works may have been affected by other factors. Do these justify what was done?”*

40. The Tribunal proceeded, at Paragraphs 144-165, to review the chronology of the work which was done in relation to the Type 1 Wall, and to consider what other factors there were. I will need to consider this part of the Decision in detail, when I come to the relevant ground of appeal. For present purposes however, it is sufficient to record that the Tribunal concluded, on the basis of their analysis at Paragraphs 144-165, that there was sufficient to justify the work which was done in this respect. The Tribunal expressed their conclusion at Paragraph 166, in the following terms:

*“166. Ultimately, as Mr Hickey and Miss Gillies pointed out, the residents of Vista Tower had been living in unsafe conditions since they took up occupation and then throughout the earlier attempts to check/reduce the scope of the remedial works and costs (for example, changing from the CAN to PAS, considering in 2020 and 2021 whether new frames could/should be spliced into the window frames at junctions with compartment walls rather than replacing all of the frames, and seeking to avoid decanting). It seems each investigation of a different part of the building had thrown up unexpected variations, challenges or new uncertainties. The Secretary of State had selected Vista Tower to use as an example to require that remedial works be carried out for this type of high risk building without further delay, to minimise the continuing risk to residents. At this stage and in the circumstances of this case, we consider that it was reasonable to press on with the remedial works based on the CHPK report.”*

41. The Tribunal then proceeded, at Paragraphs 173-192, to consider other items of costs which Grey was seeking to include in its claim for a remediation contribution order. At Paragraphs 193-348 the Tribunal embarked on a lengthy review of the case of the Original Respondents and the evidence, including a detailed review of the evidence of each of the factual witnesses called by the Original Respondents.

42. At Paragraph 349 the Tribunal came to their decision on whether it was just and equitable to make a remediation contribution order. The reasoning of the Tribunal is set out in Paragraphs 349-381. For the reasons set out in this part of the Decision the Tribunal concluded that it was just and equitable to make the RCO. The essential conclusions of the Tribunal can be found in Paragraphs 373-376, in the following terms:

*“373. In view of the general and specific linking factors noted above, and the additional specific reasons noted in Schedule 1 below, we consider it just and equitable to make, and have decided to make, a RCO in the joint and several terms described below against the Respondents marked “Yes” in the last column of Schedule 1 below. In relation to these companies, the linking factors outweigh the factors against making an order.*

374. *There is real force in Mr Hickey's argument that it should be for these Respondents (or the relevant members of the Frankel and/or Dreyfuss families) to ensure that sufficient funds are found, when there has been no real explanation in relation to the sources of their funds and their businesses, including those who are said to have independent investors who have not been declared at Companies House, and the publicly available (and disclosed) information is opaque. Having provided only limited information as to why they say it would not be just and equitable to make an order against them, it appears just and equitable to make them all responsible. We hope they will be able to arrange for those more closely linked to pay so that independent investors do not suffer, but in this case these Respondents must know that they are each liable for the entire sum if the others do not pay.*
375. *For the avoidance of doubt, we would include these Respondents whether or not R17 is also made the subject of a RCO in future.*
376. *We are not satisfied that it would be just and equitable to make such a RCO against those marked "No", for the reasons explained in this decision and/or the table."*

43. The reference to Schedule 1 is a reference to the first of the two schedules attached to the Decision. Schedule 1 to the Decision ("**Schedule 1**") lists all 96 of the Original Respondents, and contains three columns. The first column gives the number of the Original Respondent. This is the same numbering as I am using to identify the individual Appellants. The second column sets out a brief statement of the Tribunal's reasons for deciding whether the particular Original Respondent should be included in the RCO. The third column sets out, by a "Yes" or a "No", the actual decision of the Tribunal on whether the Original Respondent should be included in the RCO, with a few exceptions for Original Respondents who were no longer parties to the RCO Application and, in one case (R17), an exception because the decision was deferred.
44. In this section of the Decision the Tribunal also dealt with the argument of certain of the Original Respondents that the Tribunal could not and should not make a single remediation contribution order because this was not permitted by the terms of Section 124. The Tribunal could only, so it was argued, make individual orders against each of the Original Respondents against whom a remediation contribution order was to be made and, in the case of each of the Original Respondents, could only make an order for payment of a specified and separate share of the total sum found to be payable. Alternatively, even if a single remediation contribution order was permissible, and if the Tribunal were minded to grant relief pursuant to Section 124, it was not just and equitable to make such a single order. Instead, so it was argued, the Tribunal should make individual orders against each of the relevant Original Respondents, in each case for a specified and separate share of the total sum found to be payable.
45. The Tribunal rejected these arguments, at Paragraphs 378-381. The essential reasoning of the Tribunal can be found in Paragraphs 379-380:

*"379. When these submissions were made, we asked about section 6 of the Interpretation Act 1978, which provides that in any Act, unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular. Mr Morris warned by reference to Bennion on Statutory Interpretation (8th Ed.) [19.12] that this can give rise to uncertainty. We do not agree with his submission that the natural and ordinary meaning of the wording only allows a singular order, and this cannot be joint and several*

*because those or similar words are not spelled out. We do not accept that a contrary intention appears from “payments” (an order against a single respondent may be more likely to require several payments in respect of different matters or times, so using the plural here makes sense), section 124(3) or the other wording of the Act. Nor do we accept that reading the Act in the way it would normally be interpreted creates uncertainty. We consider that a single RCO (or a number of RCOs in a single document) may be made against specified bodies corporate or partnerships and such order(s) may require them to make payments jointly and severally if the tribunal considers that just and equitable in a given case.*

380. *Further, we accept the submission from Mr Hickey that, in this case, this is the just and equitable approach. We do not accept that the Applicant should be confined to a limited share from each relevant Respondent, or should have to wait to see whether a given Respondent is solvent (or how much they can pay) before they move on to the next, even if some kind of top up machinery could be included in the wording of a RCO to accommodate this as Mr Morris suggested. It would obviously mitigate the huge impact on each Respondent, but would be impractical for an applicant. It does not seem consistent with the purpose of this jurisdiction, as noted above. We accept Mr Hickey’s submission that in this case it leaves a grave risk that assets which should be included will be missed. In any event, there are questions about the reliability of the accounts and related documents in relation to the Respondents (which again we regard simply as matters of blurred divisions between company affairs and finances and/or inadequate administration and record keeping). Even if assets are shown in the last filed accounts of a given Respondent and those accounts were accurate, it may now genuinely have none left. Those Respondents we have included appear sufficiently linked for us to consider it just and equitable to expect them to arrange between themselves what contributions should be made by each company, on the basis described above.”*

46. In the Appeal the Appellants challenge the decision of the Tribunal that it was just and equitable to make the RCO. The Appellants say that if, contrary to their primary case, the Tribunal had jurisdiction to order the Specified Respondents to make payment of the same sum on a joint and several basis, the Tribunal were wrong to decide that it was just and equitable to grant any relief under Section 124 against the bulk of the Specified Respondents. The Appellants also say, in the alternative, that if it was just and equitable to grant any relief under Section 124, the Tribunal either could not or should not have made remediation contribution orders against all of the Specified Respondents on a joint and several basis. Instead, and on this hypothesis, the just and equitable course would have been for the Tribunal to consider the position of each Specified Respondent and decide whether that Specified Respondent should, by a separate remediation contribution order, be required to make its own separate and distinct contribution to the total sum payable.

### **The RCO**

47. As I have said, the RCO was made on 24<sup>th</sup> January 2025. I have already identified the 76 respondents (the Specified Respondents) against whom the RCO was made.
48. The RCO is contained in a single document, but it is headed “**REMEDIATION CONTRIBUTION ORDERS**”. The third recital to the RCO is in the following terms:

*“AND UPON the Tribunal being satisfied that it is just and equitable to make remediation contribution orders for the reasons set out in the decision dated 24 January 2025 (the “**Decision**”)”*

49. Paragraphs 1 and 2 of the RCO Order provide as follows:
- “1. These are remediation contribution orders made pursuant to section 124 of the Building Safety Act 2022 (as amended by the Leasehold and Freehold Reform Act 2024) which apply to the Respondents whose company names are set out in the title above who are specified in these Orders (the “**Specified Respondents**”) and each of them jointly and severally in respect of the Building.*
  - 2. The Specified Respondents and each of them jointly and severally shall make the payments identified in these Orders to the Applicant for the purpose of meeting the costs incurred or to be incurred in remedying or otherwise in connection with relevant defects relating to the Building.”*
50. Paragraphs 3-6 of the RCO Order contain the payment provisions, as follows:
- “3. The Specified Respondents shall make payment to the Applicant, by no later than 4pm on **28 February 2025**, in the sum of **£1,975,905** for the purpose of meeting the costs described in paragraphs 173-180 of the Decision.*
  - 4. The Specified Respondents shall make payment to the Applicant, by no later than 4pm on **28 February 2025**, in the sum of **£11,275,352** for the purpose of meeting the costs described in paragraphs 181-189 of the Decision.*
  - 5. The Specified Respondents shall make payment to the Applicant, by no later than 4pm on **28 February 2025**, in the sum of **£10,862.08** for the purpose of meeting the costs described in paragraph 190 of the Decision.*
  - 6. Payment as required by these Orders may be remitted by bank transfer to such account as is specified by the Applicant for the purpose and should make it clear which of the Specified Respondents it is being made by.”*
51. There are then various supplemental provisions which it is not necessary to set out.
52. The key feature of the RCO Order, so far as the Appeal is concerned, is that it requires the Specified Respondents to make the payments specified in paragraphs 3-5 of the RCO Order (“**the Specified Payments**”) on a joint and several basis. As such, the RCO Order is enforceable for the entire amount of the Specified Payments (£13,262,119.08), against any one or more of the Specified Respondents.

### **The grounds of the Appeal**

53. The position in relation to permission to appeal was somewhat complicated. There were applications for permission to appeal against the Decision, made by various of the Appellants, both to the Tribunal and to the Upper Tribunal. Permission to appeal was in part granted and in part refused by the Tribunal and the Upper Tribunal. Matters were however much simplified in this respect by an order of the Deputy Chamber President of the Upper Tribunal (Martin Rodger KC), made on 16<sup>th</sup> June 2025, which gave directions in the Appeal including a direction for the Appellants to serve on Grey a consolidated document setting out the grounds of appeal on which they had permission to reply.
54. Pursuant to this direction the Appellants have produced consolidated grounds of appeal. The consolidated grounds of appeal are as follows.

55. The first ground of appeal (“**Ground 1**”) is that the Tribunal went wrong in making a single remediation contribution order, pursuant to which a large number of respondents, namely the Specified Respondents, were made jointly and severally liable to make the Specified Payments. The case of the Appellants is that Section 124 did not give the Tribunal jurisdiction to make an order of this kind or, in the alternative and if such jurisdiction did exist, it would only have been just and equitable to order each of the Specified Respondents to pay a fixed and separate share of the total sum due by way of the Specified Payments.
56. The second ground of appeal (“**Ground 2**”) is that the Tribunal went wrong in its approach to determining whether it was just and equitable to make the RCO against the various Appellants and, in doing so, wrongly eroded the principle of separate corporate identity far beyond the scope of the specific purposes permitted by the Act, and far beyond the specific limits within which this is permitted by the Act. In particular, it is said that the Tribunal:
- (1) wrongly failed to appreciate and decide that participation in a particular development or receipt (directly or indirectly) of remuneration from that development is a minimum requirement or “*touchstone*” for it being just and equitable to make a remediation contribution order;
  - (2) wrongly imposed an evidential burden on respondents to an application for a remediation contribution order to show why it would not be just and equitable to make such an order against them;
  - (3) wrongly drew adverse inferences against the Specified Respondents based on a supposed failure to discharge that evidential burden.
57. The third ground of appeal (“**Ground 3**”) is that the Tribunal wrongly concluded that a “*building safety risk*” for the purposes of Section 120 is any risk above “*low*” risk, so as to include tolerable risks. The Tribunal should have directed themselves that only an “*intolerable*” risk could be a “*building safety risk*”.
58. It is accepted by the Appellants that Ground 3 can be said to be academic. This is because both the Tribunal and the Upper Tribunal refused permission to appeal against the decision of the Tribunal to include the costs of replacing the Type 2 Wall within the RCO. The question of what constituted a building safety risk, for the purposes of Section 120, would have been relevant to an appeal against this decision of the Tribunal. Nevertheless, the Appellants have permission to appeal on Ground 3, and I am asked by all the parties to address the issue raised by Ground 3, with a view to giving guidance to other tribunals on the question of what constitutes a building safety risk.
59. The fourth ground of appeal (“**Ground 4**”) is that the Tribunal wrongly concluded that it was just and equitable to include within the scope of the RCO the costs of replacing the Type 1 Wall in its entirety. To the extent that the Tribunal did so, it is said that the Tribunal also wrongly included the professional fees in respect of those works.
60. In terms of the outcome sought by the Appellants, if the Appeal is successful on all or any of Grounds 1, 2 and 4, the position is as follows:
- (1) If the Appeal is successful on Ground 1, the Appellants say that the RCO should be set aside. On this hypothesis R1 (Edgewater (Stevenage) Limited), as the developer in respect of the Development, accepts that the RCO should be remade as a remedial contribution order against R1 alone.
  - (2) If the Appeal is successful on Ground 2, the Appellants say that the RCO should be set aside. On this hypothesis R1, as the developer in respect of the Development, and R16 (DFS Three Limited), as a party which accepts that it benefited financially from

the Development, accept that the RCO should be remade as a remedial contribution against R1 and R16 alone.

- (3) If the appeal is successful on Ground 4, the Appellants say that the RCO should be set aside and remade for an amount which excludes the costs of replacing the Type 1 Wall.

61. Before I come to my analysis and determination of the Grounds, it is helpful to set out certain parts of the legal framework relevant to my decision. First, I set out some key provisions of the Act relevant to what I have to decide. Second, I set out some of the principal case law, as it currently exists, in relation to the Act. Third, I explain the role of the Explanatory Notes to the Act in the construction of the Act.
62. In the skeleton arguments filed on behalf of the Appellants for the hearing of the Appeal, the presentation of the arguments was not in identical terms. This is not a criticism. It simply reflected the fact that there are three groups of Appellants, as explained earlier in this decision. In oral submissions counsel for the three groups of Appellants sought, sensibly, to avoid traversing the same ground. I mention this only because I find it convenient, as a general rule and save where making references to specific submissions of counsel, to refer to the arguments in support of the Grounds as the arguments of the Appellants. In doing so, I keep firmly in mind that these arguments were made in respect of particular groups of Appellants and, where necessary, need to be considered as such. I also find it convenient, subject to the same proviso, to adopt the same approach where I need to make reference to the arguments advanced on behalf of the Appellants in the hearing before the Tribunal

## The Act

63. I start with Section 124 itself, which confers upon the FTT the power to make a remediation contribution order. This power is set out in the following terms, in subsections (1) and (2):
- “(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.”*
64. Subsection (3) identifies a body corporate or partnership which may be specified in a remediation contribution order in the following terms:
- “(3) *A body corporate or partnership may be specified as a person required to make payments only if it is—*
- (a) *a landlord under a lease of the relevant building or any part of it,*
- (b) *a person who was such a landlord at the qualifying time,*
- (c) *a developer in relation to the relevant building, or*
- (d) *a person associated with a person within any of paragraphs (a) to (c).”*
65. A remediation contribution order is thus an order which requires “*a specified body corporate or partnership*” to make payments to a specified person, for the purpose of

meeting costs referred to in subsection (2). Subsection (2A) then sets out certain categories of costs which fall within subsection (2):

- “(2A) The following descriptions of costs, among others, fall within subsection (2)—*
- (a) costs incurred or to be incurred in taking relevant steps in relation to a relevant defect in the relevant building;*
  - (b) costs incurred or to be incurred in obtaining an expert report relating to the relevant building;*
  - (c) temporary accommodation costs incurred or to be incurred in connection with a decant from the relevant building (or from part of it) that took place or is to take place—*
    - (i) to avoid an imminent threat to life or of personal injury arising from a relevant defect in the building,*
    - (ii) (in the case of a decant from a dwelling) because works relating to the building created or are expected to create circumstances in which those occupying the dwelling cannot reasonably be expected to live,*  
*or*
    - (iii) for any other reason connected with relevant defects in the building, or works relating to the building, that is prescribed by regulations made by the Secretary of State.”*

66. The forms of order which the FTT may make, by way of a remediation contribution order, are identified in subsection (4), in the following terms:

- “(4) An order may—*
- (a) require the making of payments of a specified amount;*
  - (aa) if it does not require the making of payments of a specified amount, determine that a specified body corporate or partnership is liable for the reasonable costs of specified things done or to be done;*
  - (b) require a payment to be made at a specified time, or to be made on demand following the occurrence of a specified event.”*

67. Subsection (5) then sets out a series of definitions of expressions used in Section 124. For present purposes I should mention, in particular, the definition of “associated”, as that expression is used in subsection (4)(d). The concept of an associated person is defined in Section 121. Section 121 is lengthy, but for present purposes I need only set out subsections (1) to (5), which explain the concept of association in relation to a partnership or body corporate:

- “(1) For the purposes of sections 122 to 124 and Schedule 8, a partnership or body corporate is associated with another person in the circumstances mentioned in subsections (2) to (5).*
- (2) Where a person’s interest in a relevant building was held on trust at the qualifying time, any partnership or body corporate which was a beneficiary of the trust at that time is to be regarded, for the purposes of the provisions mentioned in subsection (1) as they apply in relation to the relevant building, as associated with the person.*
- (3) A partnership is associated with any person who was a partner in the partnership, other than a limited partner, at any time in the period of 5 years ending at the qualifying time (“the relevant period”).*
- (4) A body corporate is associated with any person who was a director of the body corporate at any time in the relevant period.*

- (5) *A body corporate is associated with another body corporate if—*
- (a) *at any time in the relevant period a person was a director of both of them,*
  - or*
  - (b) *at the qualifying time, one of them controlled the other or a third body corporate controlled both of them.”*

## **Case law**

68. There are three recent cases dealing with the Act which contain important guidance on the construction and application of the Act.
69. The first of these cases is the decision of the Supreme Court in *BDW Trading Ltd v URS Corporation Ltd* [2025] UKSC 21 [2025] 2 WLR 1095. The case was concerned with two developments in respect of which BDW Trading Ltd was the developer and URS Corporation Ltd had been appointed to provide structural design services in relation to the developments. BDW commenced proceedings against URS, prior to the Act coming into force, alleging that URS had failed to exercise reasonable skill and care. BDW considered the fire safety defects in the developments to be dangerous and had voluntarily carried out remedial works to address the same. BDW carried out the works notwithstanding its understanding, based on the legal position as it then was, that the claims of home owners against BDW under the Defective Premises Act 1972 would have been time barred.
70. On appeal to the Supreme Court there were four issues for decision. For present purposes however I need only mention the second of these issues, which was whether Section 135 applied and, if so, what was its effect. Section 135(1) introduced a new Section 4B into the Limitation Act 1980 which, in its material part, introduced a new 30 year limitation period for a claim under Section 1 of the Defective Premises Act 1972, in the following terms:
- “Where by virtue of section 1 of the Defective Premises Act 1972 a person became entitled, before the commencement date [the date when Section 135 was brought into force – 28<sup>th</sup> June 2022], to bring an action against any other person, this section applies in relation to the action as if the reference in subsection (1) to 15 years were a reference to 30 years.”*
71. By Section 135(3), this new limitation period was to be treated as having always been in force. The central question before the Supreme Court, in relation to this ground of appeal, was the extent of the retrospective effect of the amendment to the Limitation Act 1980 introduced by Section 135. What was in dispute was whether Section 135 applied so as to produce the effect that the claims of homeowners against BDW under the Defective Premises Act 1972, in respect of the fire safety defects, which had been statute barred at the time when BDW carried out its voluntary repair works, should be treated as not having been statute barred.
72. For the reasons given by Lord Hamblen and Lord Burrows JJSC in their joint judgment, with which the other Justices of the Supreme Court agreed, the Supreme Court decided that Section 135 did have this retrospective effect. Lord Hamblen and Lord Burrows expressed their conclusion in the following terms, at [125]:
- “125 For all these reasons, URS’s appeal on Ground 2 is dismissed. When the meaning of the words used in section 135(3) is considered in the light of their context and the purpose of the statutory provision, they should be interpreted as applying in the circumstances of this case. More specifically, they apply*

*where, as in this case, there is a claim for damages for repair costs in the tort of negligence, or there is a claim for contribution in respect of those repair costs, and it is contended that there is a rule of law that the repair costs are irrecoverable as voluntarily incurred, or that there was no liability for the same damage, because the DPA claim was time-barred. The effect of the retrospective limitation period extends to such claims, which are dependent on the limitation period in section 1 of the DPA but are not actions brought under that section, with the consequence that there was no relevant time bar at the time that the repair costs were incurred. Section 135 does not, however, retrospectively affect any issue at trial as to the reasonableness of BDW's actions in carrying out the remedial works as a matter of legal causation or mitigation."*

73. I am not directly concerned with questions of retrospectivity in the Appeal, but the decision of the Supreme Court in this case, which I will refer to as "**BDW**", is of particular relevance by reason of their Lordships' analysis of the background to and purposes of the Act, at [78]-[92] in their judgment. It is not necessary to quote the entirety of this extract from the joint judgment. I should however set out the following survey of the Act, at [85] and [86]:

"85 *The BSA is both forward and backward-looking. The forward-looking provisions include Part 2 which sets up a new Building Safety Regulator in England to oversee a new, more stringent regime for higher-risk buildings and to drive improvements in building safety and performance standards in all buildings; Part 3 which amends the Building Act 1984, reforming the process for the design and construction of higher-risk buildings, and provides for the registration of building inspectors and building control approvers with a view to improving standards across the industry; and Part 4 which creates a new regulatory regime for the management of occupied higher-risk residential buildings in England, and places duties on an "Accountable Person" (for example, the freeholder) in relation to building safety risks in their building.*

86 *The backward-looking provisions are set out in Part 5, which includes section 135. Part 5 makes a number of changes to the law in order to address the problem of historical building safety defects. In summary, the main changes are:*

- (1) Section 135 which provides for a new 30-year limitation period for accrued claims under section 1 of the DPA.*
- (2) Section 124 which provides persons with a legal or equitable interest (such as leaseholders) in medium and high-rise buildings, the Secretary of State, and other bodies, with a new right to seek remediation contribution orders from the First-tier Tribunal against the building's developer, landlord, or associate. Such an order requires a respondent to contribute to the costs of remedying historical building safety defects if this is considered "just and equitable" (see section 124(1)). Section 124 sits within a broader suite of "leaseholder protections" at sections 116 to 124 of, and Schedule 8 to, the BSA, which provides for a range of new safeguards that ensure owners of qualifying leases in medium and high-rise buildings are protected as far as possible from the costs of remediating historical building safety defects that they played no part in creating.*
- (3) Section 130 which provides the High Court with a power to grant "building liability orders". Section 130(2) and (4) provide that a building liability order will extend a "relevant liability" of a body corporate to*

another “associated” body corporate, so that both bodies are jointly and severally liable for the relevant liability.

- (4) Sections 147 to 151 which introduce various new causes of action to hold the manufacturers and sellers of unsafe construction products to account.”

74. The second of the cases to which I have referred above is the decision of the Court of Appeal in *Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point* [2025] EWCA Civ 856 (“*Adriatic*”). The case came before the Court of Appeal by way of an appeal from my decision, sitting as Chamber President in the Upper Tribunal, on an appeal from the FTT. The case was concerned with the recovery of the costs of remediating fire safety defects in a high-rise building by way of the service charge provisions in the leases of the flats in the building. There were three grounds of appeal before the Court of Appeal:
- (1) The first ground of appeal was whether the costs of an application for dispensation, pursuant to Section 20ZA(1) of the Landlord and Tenant Act 1985, fell within the scope of paragraph 9 of Schedule 8, which provides that no service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect.
  - (2) The second ground of appeal was whether paragraph 9 of Schedule 8 applies in relation to costs which had been incurred before the Act came into force.
  - (3) The third ground of appeal was whether words needed to be read into paragraph 9 of Schedule 8 in order to render it compatible with Article 1 of Protocol 1 to the European Convention on Human Rights.
75. The Court of Appeal were unanimous in deciding that the costs of a dispensation application fell within the scope of paragraph 9 of Schedule 8, and that words did not need to be read into paragraph 9 in order to render it compatible with the European Convention on Human Rights. The Court of Appeal were not agreed on the second ground of appeal. In a dissenting judgment Newey LJ concluded that the provisions of Schedule 8 only applied to costs which had been incurred after 28<sup>th</sup> June 2022, and were not retrospective in their effect. Nugee LJ concluded however that the effect of paragraph 9 was that no service charge was payable from 28<sup>th</sup> June 2022, regardless of whether the relevant service charge had already been incurred, or had already been demanded or had fallen due. Holgate LJ agreed with Nugee LJ. The Court of Appeal thus decided, by a majority, that paragraph 9 was retrospective in its effect, to the extent identified by Nugee LJ. My understanding is that permission to appeal to the Supreme Court has been granted by the Supreme Court in respect of the decision on the retrospective effect of paragraph 9 of Schedule 8.
76. As I have noted in relation to *BDW*, I am not directly concerned with questions of retrospectivity in the Appeal. As with *BDW*, the decision of the Court of Appeal is relevant to what I have to decide by virtue of the analyses of the Act and its purposes, in particular Part 5 of the Act, which are to be found in the judgments of Newey and Nugee LJJ. Although their Lordships were not agreed on the retrospectivity question, this disagreement does not, as it seems to me, affect those parts of their judgments which provide general guidance on the questions which I have to decide in the Appeal.
77. I will come back to *Adriatic*, in the next section of this decision, in relation to the role of the explanatory notes to the Act in the process of construction, and in relation to the correct approach to statutory construction. At this stage I should however make specific reference to the analysis by Nugee LJ of the legislative purpose of the Act, which is to be found in his judgment at [145] to [162]. I should also make specific reference to Nugee LJ’s analysis of

the legislative scheme of what he referred to as “*the remediation provisions*”; meaning Sections 116-124 and Schedule 8. This analysis is to found at [163] to [176].

78. Both of these analyses need to be read in full, but at this stage I set out the concluding part of Nugee LJ’s analysis of the legislative scheme, at [174] to [176]:

“174. *These are the principal features of the leaseholder protections. But they are supplemented by other provisions in the BSA. As I have already referred to, the inevitable corollary of providing protection for leaseholders was (unless Government was proposing, which it was not, that the taxpayer should pick up all the costs) that costs will be incurred (by whoever is responsible for carrying out the work, whether that be a landlord or a management company) which would otherwise have been recoverable from leaseholders through the service charge provisions in the leases, but will now not be. The BSA therefore contains provisions enabling those costs to be passed on to others. This includes section 124 under which the FTT can make remediation contribution orders where it is just and equitable to do so (see paragraph 21 ii) above), and regulations 3, 4 and 5 of the 2022 Regulations (see paragraphs 23 to 26 above).*

175. *Whoever ends up bearing the costs is given new rights against those ultimately responsible, namely (i) by an extended limitation period under the DPA 1972 (section 135 of the BSA) and (ii) by a new cause of action against those manufacturing or mis-selling cladding products (section 149). In addition the High Court is given power to make associated companies liable for breaches of the DPA 1972 (section 130): see paragraphs 21 iii) to v) above.*

176. *As can be seen this statutory scheme all flows from the decision to intervene in the contractual scheme of obligations by protecting leaseholders from the full extent of their contractual service charge liabilities. Once this decision had been made, it was necessary not only to define who could benefit from the leaseholder protections, but also to make provision for the level of protection they would receive; for who would pick up the costs that were no longer to be met through the service charges; and for what rights the latter would have to make claims over against others, including those ultimately responsible.”*

79. The third case is the decision of the Court of Appeal (with the same constitution as in *Adriatic*) in *Triathlon Homes LLP v Stratford Village Development Partnership, Get Living Plc and East Village Management Ltd* [2025] EWCA Civ 846 (“**Triathlon**”). The case was concerned with applications for remediation contribution orders pursuant to Section 124. The applications were made by Triathlon Homes LLP (“**Triathlon Homes**”), a provider of social housing, which held long leasehold interests in the social housing in five residential blocks in Stratford, London. The five residential blocks were originally constructed as part of the Olympic Village for the 2012 Olympics. Following the Olympics the accommodation in the Olympic Village was converted to provide residential housing, creating a large permanent residential estate known as the East Village, of which the five residential blocks formed part.
80. The management of the East Village was in the hands of East Village Management Ltd (“**EVML**”). In 2020 the five residential blocks were found to have serious fire safety defects in respect of both the design and construction. EVML made a successful application to the BSF for funding to replace the external cladding of the blocks, and work commenced in April 2023. By reason of the restrictions in Schedule 8, the costs of this work could not be recovered from the tenants of the flats in the blocks through their service charges.

81. Triathlon Homes made five applications for a remediation contribution order, with each application being made in respect of a particular block. The first respondent to the applications was the Stratford Village Development Partnership (“SVDP”), which was the original developer of the East Village. The second respondent to the applications was a company called Get Living plc (“Get Living”). Get Living is a property company which, through subsidiaries, specialises in the private rental market. Get Living owned all the private rented accommodation in the East Village, while Triathlon Homes owned all the social and affordable housing. By the time of the applications, Get Living was the owner of SVDP, although it did not own SVDP at the time when the development work was undertaken.
82. By the applications Triathlon Homes sought orders for SVDP and Get Living to reimburse Triathlon Homes for (i) sums already paid by Triathlon Homes, by way of service charges, in respect of costs already incurred, in relation to interim fire safety measures and investigative and preparatory works, (ii) further sums demanded of Triathlon Homes and not yet paid, and (iii) costs and anticipated costs which had not yet been the subject of service charge demands. Triathlon Homes also sought orders for SVDP and Get Living to pay a much larger sum by way of reimbursement to EVML in respect of expenditure by EVML, incurred or to be incurred in remedying the fire safety defects. No order for payment was sought against EVML, but EVML was also joined as a respondent to the applications, at the suggestion of the FTT, but only to enable it to participate in the applications if it wished to do so.
83. The applications were heard by myself and the Deputy Chamber President. We were obliged to sit as the FTT to hear the applications, because the Act confers no first instance jurisdiction upon the Upper Tribunal to hear applications for remediation contribution orders pursuant to Section 124. For the reasons which we set out in a decision dated 19<sup>th</sup> January 2024, we concluded that Triathlon Homes was entitled to the remediation contribution orders which it had sought. The parties were invited to submit agreed orders giving effect to our decision.
84. In response to this invitation we were presented with a single document, which was headed “*Remediation Contribution Orders*”. The document contained what were, in effect, five orders, with one order being made in each of the five applications. In terms of what was actually ordered, the document contained a single set of provisions. Not all of the terms of this documents were agreed. We were invited to determine, on paper, the areas of disagreement, which we did. I shall refer to the order (strictly set of orders) which we made, after resolving the points of disagreement, as “**the Triathlon Order**”.
85. By paragraphs 1-4 of the Triathlon Order we ordered SVDP and Get Living to make payment of various sums to Triathlon Homes and EVML. Each of paragraphs 1-4 of the Triathlon Order ordered payment of the relevant sum or sums to be made by “*SVDP and/or Get Living*”. It follows from our use of the expression “*and/or*”, that we ordered the relevant payments to be made by SVDP and Get Living on a joint and several basis. It should however also be recorded that there was no argument raised, either in the trial or in relation to the dispute over the terms of the Triathlon Order, to the effect that we had no jurisdiction to make a remediation contribution order on a joint and several basis. It was assumed, without the point being raised, that we did have this jurisdiction.
86. Our decision in the case, as the FTT, was the subject of an appeal, which lay to the Upper Tribunal in the first instance. At the joint invitation of the parties the appeal to the Upper Tribunal was subject to an agreed dismissal and grant of permission to appeal, without

engagement with the substance of the argument, thereby creating an effective leapfrog appeal from the decision of the FTT to the Court of Appeal. There were two grounds of appeal. The first ground of appeal was that the FTT had erred in concluding that it was just and equitable to make the remediation contributions orders contained in the Triathlon Order. The second ground of appeal was that the FTT had erred in concluding that a remedial contribution order could be made in respect of costs incurred before the relevant part of the Act came into force.

87. The appeal was heard by the Court of Appeal with the same constitution as in *Adriatic*, and directly after the hearing of the appeal in *Adriatic*. In *Triathlon* the Court of Appeal were unanimous in dismissing the appeal. The leading judgment was given by Nugee LJ. Holgate LJ agreed with the judgment of Nugee LJ. Newey LJ delivered a short concurring judgment in which he briefly explained, in relation to ground 2 of the appeal, his reasons for concluding that Section 124 did allow remediation contribution orders to be made in respect of costs pre-dating the coming into force of Section 124, in contrast to the different conclusion which he had reached, in *Adriatic*, in relation to Schedule 8.
88. In his judgment in *Triathlon* Nugee LJ dealt more shortly with the legislative scheme of the remediation provisions in the Act (Sections 116-124 and Schedule 8), because this was ground which he had already traversed in *Adriatic*. For the purposes of the Appeal what is most relevant is Nugee LJ's analysis of the ten sub-grounds of appeal which were relied upon by the appellants in relation to ground 1 of the appeal. For the reasons set out in his judgment Nugee LJ dismissed all of these sub-grounds of appeal, and thereby dismissed the appeal against the decision of the FTT that it was just and equitable to make the remediation contribution orders against SVDP and Get Living. I will need to come back to *Triathlon* later in this decision, in particular in relation to Ground 2, but at this stage it is not necessary to highlight any particular part of Nugee LJ's judgment.
89. So far as I am aware, there was no argument in the Court of Appeal in *Triathlon* that the FTT had not had any jurisdiction to make the Triathlon Order on a joint and several basis.

### **The Explanatory Notes**

90. Considerable reference was made, in the written and oral submissions in the Appeal, to the Explanatory Notes to the Act, which were published by the Department for Levelling Up, Housing and Communities in July/August 2022 (“**the Explanatory Notes**”). There is an extremely useful analysis of the role to be played by explanatory notes in the process of statutory construction in the judgment of Newey LJ in *Adriatic*, at [65]-[72]. There is also an equally useful explanation of the history of the Explanatory Notes, which is material to the question of what influence they should have in the construction of Section 124 and certain other provisions of the Act.
91. As Newey LJ explained in his judgment, at [29]-[30], what became Sections 116-125 and Schedule 8 were not in the original Building Safety Bill. They were introduced by amendment on 22<sup>nd</sup> March 2022, at the House of Lords report stage:

“29. On 10 January 2022, the Government announced that it had “reset its approach to building safety with a bold new plan to protect leaseholders and make wealthy developers and companies pay to fix the cladding crisis”. Soon afterwards, on 13 January, the Government tabled amendments to the Building Safety Bill. A further and more substantial set of amendments followed on 14 February (when the Bill was at the Committee stage in the House of Lords) and

*some additional amendments were put forward on 22 March (at the House of Lords Report stage). The amendments introduced for the first time what became sections 116-125 of the BSA and schedule 8 to it. (Section 125 has since been repealed by the Leasehold and Freehold Reform Act 2024.)*

30. *The Building Safety Bill received Royal Assent on 28 April 2022 and most of the provisions in Part 5 came into force automatically two months later, on 28 June 2022, by virtue of section 170(3)."*

92. As Newey LJ went on to explain, what I am referring to as the Explanatory Notes, published in July/August 2022 were not in the same form as the original explanatory notes to the Bill. The commentary on Section 116-125 and Schedule 8 came later, in the Explanatory Notes as published in July /August 2022, after the Act had been enacted. As Newey LJ explained, at [34]:

*"34. In paragraph 105 of their judgment in URS, Lords Hamblen and Burrows (with whom Lords Lloyd-Jones, Briggs, Sales and Richards agreed) quoted from the explanatory notes in respect of the BSA. Lords Hamblen and Burrows said in paragraph 105 that they had been "provided with the Explanatory Notes to the Bill and to the BSA which were in materially the same terms" and, in the next paragraph, that the passages they had set out "show that ensuring that those directly responsible for building safety defects are held to account was central to the BSA and various of its provisions, including specifically section 135". It is evident, however, that the Supreme Court was under a misapprehension. The explanatory notes to the BSA were by no means in the same terms as those in respect of the Bill. In fact, the explanatory notes to the Bill did not include any of the paragraphs quoted by Lords Hamblen and Burrows. They featured for the first time in the explanatory notes which the Government published after the BSA had already been enacted."*

93. Newey LJ went on to explain the role to be played by explanatory notes in the process of statutory construction, at [65]-[72]. In terms of the general role played by explanatory notes Newey LJ said this, at [65]:

*"65. In R (O) v Home Secretary [2022] UKSC 3, [2023] AC 255, Lord Hodge explained that the "primary source" from which the meaning of a statute is ascertained is "the words which Parliament has chosen to enact as an expression of the purpose of the legislation" and that "[e]xternal aids to interpretation therefore must play a secondary role": see paragraph 30. He nevertheless acknowledged in paragraph 30 that "Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions"."*

94. Newey LJ went on however to draw the following distinction, at [66]-[67]:

*"66. A distinction is, however, to be drawn between explanatory notes which were available when the legislation was being enacted and those which have come into existence subsequently. A passage from the judgment of Lord Sales (with whom Lords Reed, Leggatt and Stephens agreed) in R (PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC 28, [2023] 1 WLR 2594 ("PACCAR") is relevant in this context. Lord Sales said in paragraph 42:*

*"It is legitimate to refer to Explanatory Notes which accompanied a Bill in its passage through Parliament and which, under current practice, are*

*reproduced for ease of reference when the Act is promulgated; but external aids to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be ascertained .... Reference to the Explanatory Notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen” (emphasis added).*

67. *Where explanatory notes have “accompanied a Bill in its passage through Parliament”, there is sense in regarding them as capable of shedding light on what Parliament intended. Where, on the other hand, explanatory notes in respect of a statute did not exist when it was being passed, there is less reason to see them as a guide to Parliament’s intentions. They may, of course, show what the Department which promoted the Act understands it to mean, and possibly what it wished it to mean, but the materials plainly cannot have informed Parliamentary decision-making.”*

95. Newey LJ also drew, at [69]-[70], the following analogy from what was said by Lloyd Jones J in *Chief Constable of Cumbria v Wright* [2006] EWHC 3574 (Admin) [2007] 1 WLR 1407:

“69. *In Chief Constable of Cumbria v Wright* [2006] EWHC 3574 (Admin), [2007] 1 WLR 1407, Lloyd Jones J, with whom Keene LJ agreed, said in paragraph 17:

*“It is, of course, for the courts and not the executive to interpret legislation. However, in general, official statements by government departments administering an Act, or by any other authority concerned with an Act, may be taken into account as persuasive authority on the legal meaning of its provisions ....In the present case we are concerned with guidance published by the Home Office, which is the government department which had responsibility for the enactment and operation of the legislation in question. In any given case, it may be helpful for a court to refer to the guidance in the interpretation of the legislation. It may be of some persuasive authority. However, to my mind that is the limit of its influence. It does not differ in that regard from a statement by an academic author in a textbook or an article. It does not enjoy any particular legal status. There seems to me to be no satisfactory basis for the submission that it gives rise to a presumption that the views it contains are correct and should be rejected only for good reason.”*

70. *In my view, the position is similar where explanatory notes have been published only after a statute has already been enacted. The notes may be of persuasive authority, but they do not enjoy any particular legal status and can be compared with academic writings.”*

96. Newey LJ also cited with approval, at [71], the following passage from Bennion, Bailey and Norbury on *Statutory Interpretation* (8<sup>th</sup> Edition), in section 24.14:

“71. *Bennion says this in section 24.14 about explanatory notes:*

*“The rationale for using explanatory notes in the way discussed above appears to be that they form part of the background material available to the legislature at the time at which legislation is passed and may therefore help to inform its interpretation in the same way as other pre-enactment materials. It seems to follow that only the explanatory notes published during the Bill’s passage through the legislature can be used in this way. The explanatory notes for the Act itself post-date its enactment and therefore cannot be viewed as part of the context against which it is enacted. Those notes should be given no more weight than other post-enactment expressions of opinion by the government as to the meaning of legislation .... In other words, the weight to be given to them should depend on the cogency of any reasoning contained in them. ... It should be acknowledged that, in practice, it will not always make a difference since changes between different versions of the notes are often relatively minor ....”*

97. In his judgment in *Adriatic* Nugee LJ expressed, at [141], his specific agreement with the analysis and conclusions of Newey LJ at [65]-[72].
98. I note two points, in particular, from Newey LJ’s analysis of the role of the Explanatory Notes in the process of statutory construction. First, the Explanatory Notes can, at best, play only a secondary role in the process of construction. They may cast light on the meaning of a particular statutory provision. Second, there is a distinction to be drawn between explanatory notes which were available when the relevant legislation was being enacted and those which have come into existence subsequently. In the latter case there is less reason to see the explanatory notes as a guide to Parliament’s intention. In the present case this distinction is material because I am concerned with provisions in the Act in respect of which the relevant parts of the Explanatory Notes did not come into existence until the Act had been enacted.

### **Ground 1 (the first argument) – analysis and determination**

99. There are two distinct arguments within Ground 1. The first argument is that the Tribunal had no jurisdiction to make the RCO on a joint and several basis. This raises a point of statutory construction. The second argument is that even if the Tribunal had this jurisdiction, it was not just and equitable to make the RCO against all the Appellants on a joint and several basis. This requires consideration of the just and equitable test in Section 124(1), and thereby overlaps with Ground 2. In these circumstances I find it convenient to consider only the first argument, of statutory construction, in this section of my decision. I will consider the second argument as part of my analysis of Ground 2.
100. Dealing then with the first argument, I should start by setting out the basic principles which govern the exercise of statutory construction.
101. An authoritative summary of these principles can be found in the judgment of Lord Hodge DPSC in *R(O) v Secretary of State for the Home Department* [2022] UKSC 3 [2023] AC 255, at [29]-[31]:

*“29 The courts in conducting statutory interpretation are “seeking the meaning of the words which Parliament used”: Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: “Statutory interpretation is an*

*exercise which requires the court to identify the meaning borne by the words in question in the particular context.” (R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, p 397: “Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.”*

*30 External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.*

*31 Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in Spath Holme [2001] 2 AC 349, 396, in an important passage stated:*

*“The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the “intention of Parliament” is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House . . . Thus, when courts say that such-and-such a meaning “cannot be what Parliament intended”, they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.”*

102. I have already made reference to Nugee LJ’s analysis of the legislative purpose and scheme of the Act, in his judgment in *Adriatic* at [145]-[176]. At [142]-[144] Nugee LJ explained why he found it helpful to approach the question of statutory construction which was before

the Court of Appeal by “*first orientating ourselves by reference to the legislative purpose and scheme of the Act*”:

- “142. *As I have said the exercise we are engaged in is one of statutory construction. The general principles applicable to such an exercise have been authoritatively laid down in a series of cases in the House of Lords and Supreme Court and I think can be considered as well settled.*
143. *A convenient recent summary can be found in the judgment of Lord Sales in PACCAR at paragraphs 40-41. At paragraph 40 he said (by reference to R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349 (“Spath Holme”) at 396 per Lord Nicholls) that the basic task was clear: the Court was required to identify the meaning borne by the words in question in the particular context.*
144. *At paragraph 41 he referred to the numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose, referring to R (Quintavalle) v Secretary of State for Health [2003] 2 AC 687 at paragraph 8 per Lord Bingham (“the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment”) and Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs [2011] UKSC 25, [2011] 1 WLR 1546 at paragraph 10 per Lord Mance (“in matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance”). Lord Sales summarised the position as follows:*
- “The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it.”*
- So I find it helpful to approach the question of construction before us by first orientating ourselves by reference to the legislative purpose and scheme of the BSA.”*

103. I should also quote what Lord Sales JSC said in his judgment in *R (PACCAR Inc and others) v Competition Appeal Tribunal* [2023] UKSC 28 [2023] 1 WLR 2594, at [40] and [41]:

- “40 *The basic task for the court in interpreting a statutory provision is clear. As Lord Nicholls put it in Spath Holme [2001] 2 AC 349, 396, “Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.”*
- 41 *As was pointed out by this court in Rossendale Borough Council v Hurstwood Properties (A) Ltd [2022] AC 690, para 10 (Lord Briggs and Lord Leggatt JJSC), there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. The examples given there are R (Quintavalle) v Secretary of State for Health [2003] 2 AC 687 and Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs [2011] 1 WLR 1546. In the first, Lord Bingham of Cornhill said (para 8):*
- “Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose. So the controversial provisions should be read in*

*the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.”*  
In the second, Lord Mance JSC said (para 10):  
*“In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance . . . In this area as in the area of contractual construction, “the notion of words having a natural meaning” is not always very helpful (Charter Reinsurance Co Ltd v Fagan [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme.”*  
*The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it.”*

104. With these principles in mind, I turn to the question of statutory construction raised by the first argument within Ground 1.
105. At the outset, and following the guidance of Nugee LJ in *Adriatic*, at [144], I find it helpful to approach the question of statutory question by first orientating myself by reference to the legislative purpose and scheme of the Act. I have already made reference to the statements of legislative purpose and scheme of the Act which are to be found in *BDW, Adriatic* and *Triathlon*, but I find it helpful to make reference to the following explanations of the legislative purposes and scheme of the Act, given by Nugee LJ in, respectively, *Adriatic* and *Triathlon*.
106. Following the extract from his judgment in *Adriatic* which I have quoted above, at [142]-[144], Nugee LJ identified the general purpose of the provisions in Part 5 of the Act (Sections 116-160) in the following terms, at [146]-[147]:

- “146. Part 5 (sections 116 to 160), which is headed “Other provisions about safety, standards etc”, contains provisions dealing with a variety of matters. Some of these are also forward-looking. But others, including those with which we are concerned, are intended to address the historic problems associated with existing safety defects in buildings. This was not something included in the review led by Dame Judith, as that had not been tasked with considering how remedial work on existing stock should be carried out or how it should be paid for.*
- 147. The first group of sections in Part 5 (originally sections 116 to 125, although section 125 has now been repealed) are grouped together under the heading “Remediation of certain defects”. As explained in section 116(1), they (together with schedule 8) make provision in connection with remediation of relevant defects in relevant buildings. I will refer to these sections and schedule 8 together as “the remediation provisions”; by section 170(3)(a) of the BSA, they all came into force together two months after the BSA was passed, that is on 28 June 2022.”*

107. Turning to the general purpose of the remediation provisions, at [148] Nugee LJ approved the following identification of the broad purposes, provided by counsel for the appellants in *Adriatic*:

*“148. There was no dispute between the parties as to the general purpose of the remediation provisions. Mr Allison himself identified the broad purposes as fourfold:*

- i) To ensure that historic safety defects were remediated.
- ii) To protect leaseholders.
- iii) To ensure that those responsible for the defects were held liable.
- iv) To restore stability to the lending market.”

108. Turning to *Triathlon*, Nugee LJ addressed the scheme of the Act in the following terms, in his judgment at [23]:

“23. Before coming to the facts, it is worth standing back from the detail and considering the legislative scheme of these provisions. In my judgment in *Adriatic I* attempted to identify a number of features that can be discerned from the remediation provisions taken as a whole (see paragraphs [164] to [175]). As there set out in more detail, they can be summarised as follows:

- (1) If the person responsible for the defect retains an interest in the building (as at the relevant date, 14 February 2022), they will be likely to have to bear the costs of remedying it (paragraph 2 of schedule 8, and regulation 3 of the 2022 Regulations).
- (2) If the lessee has more than a very small portfolio of properties, they get no further protection (this is the effect of confining the other protections to those with qualifying leases); conversely if the landlord is part of a well-resourced corporate group they meet the “contribution condition” and cannot pass on costs to protected lessees at all (paragraph 3 of schedule 8). In other words those who are more likely to be able to afford to pay are required to do so.
- (3) Next there are certain categories of costs (cladding remediation under paragraph 8 of schedule 8, and legal and other professional costs under paragraph 9 of schedule 8) which protected lessees do not have to contribute towards at all.
- (4) In other cases remediation costs can in principle be passed on to protected lessees, but subject to a cap on their liability (or a complete exemption from liability) depending on the value of their flats (paragraphs 4 to 6 of schedule 8).
- (5) The inevitable corollary of relieving lessees of their contractual service charge liabilities is that (unless Government was proposing, which it was not, that the taxpayer would pick up all the costs) costs will be incurred by whoever is doing the work (whether landlord or management company) that would otherwise have been met by the lessees through their service charges but will now not be. The BSA therefore contains provisions enabling those costs to be passed on to others. This includes section 124 under which the FTT can make RCOs where it is just and equitable to do so, and regulations 3, 4 and 5 of the 2022 Regulations.
- (6) Whoever ends up bearing the costs is given new rights against those ultimately responsible, namely (i) by an extended limitation period under the DPA 1972 (section 135 of the BSA) and (ii) by a new cause of action against those manufacturing or mis-selling cladding products (section 149). In addition the High Court is given power to make associated companies liable for breaches of the DPA 1972 (section 130).”

109. Nugee LJ went on to say this, at [24]:

“24. As I said in *Adriatic*, this statutory scheme all flows from the decision to intervene in the contractual scheme of obligations by protecting leaseholders

*from the full extent of their contractual service charge liabilities. Once this decision had been made, it was necessary not only to define who could benefit from the leaseholder protections, but also to make provision for the level of protection they would receive; for who would pick up the costs that were no longer to be met through the service charges; and for what rights the latter would have to make claims over against others, including those ultimately responsible.”*

110. While all of this guidance as to the statutory purposes behind Part 5 of the Act is important, it seems to me that what was said by Nugee LJ in *Triathlon*, at [23] and [24] is of particular importance in the present context, because *Triathlon* was directly concerned with the jurisdiction under Section 124. Once the decision had been made to intervene in the contractual scheme of obligations by protecting leaseholders from the full extent of their contractual service charge liabilities, it was necessary for Parliament to deal with a number of consequential matters, including the questions of who would pick up the costs that were no longer to be met through the service charges; and what rights the latter would have to make claims over against others, including those ultimately responsible. The jurisdiction in Section 124 is part of this Parliamentary purpose.
111. I come next to the statutory language in Section 124. Subsection (1) identifies the jurisdiction of the FTT to make “*a remediation contribution order*” in relation to “*a relevant building*”. Subsection (2) identifies a remediation contribution order as “*an order requiring a specified body corporate or partnership*” to make payments to a specified person.
112. The Appellants relied upon these singular references to mean that it is only open to the FTT to make a single remediation contribution order against a single specified body corporate or partnership at any one time. As I understood the argument, it is open to the FTT to make a series of orders against different specified persons in respect of the same sum to be paid pursuant to those orders, but what the FTT cannot do is to make an order which imposes joint liability on two or more specified persons for all or any part of that sum. Each specified person can only be made liable to pay a distinct and separate part of the sum.
113. The Appellants’ argument, as I understand it, can be illustrated by an example. A remediation contribution order might be sought against, say, ten specified persons, whom I will refer as A-J, for a total payment of £1million. The FTT might then decide that it was just and equitable to make remediation contribution orders against all ten of A-J, on the basis that it was fair that all of them should be held equally responsible for the costs of remedying the relevant defects. On the Appellants’ argument A-J could not be made jointly and severally liable for the entire sum of £1 million. Instead, the FTT would be required to apportion the payment of the sum between A-J. The FTT would have to determine the split of liability which, assuming that the FTT considered each of A-J to be equally responsible, might result in a series of orders, each of which required each of A-J to pay £100,000. Once each of A-J had paid their allotted sum of £100,000 they would then have no liability to the applicant, under the relevant order, to contribute to the remaining sum of £900,000 or, if a lesser sum, to contribute to whatever remained unpaid, out of the total sum of £1 million, under the relevant set of orders.
114. In support of this argument the Appellants contended that the making of an order under Section 124 is not an order which reflects a pre-existing liability. Rather, it is an order which creates a statutory liability. As such, so it was argued, the FTT can only create a joint liability in a remediation contribution order if the statutory language in Section 124 gives it

the jurisdiction to do so. The Appellants' argument was that the wording of Section 124 does not confer such a jurisdiction upon the FTT.

115. In this context I was referred to the decision of the Court of Appeal in *Sutton v Norwich City Council* [2021] EWCA Civ 20 [2021] 1 WLR 1691. The case was concerned with an appeal to the FTT, by Mr Sutton and a company which he controlled, against notices of financial penalties which had been served on each of them. The notices arose out of the failure of the company to comply with improvement notices served on the company by the local authority, in respect of a residential property owned by the company. The notices served on Mr Sutton were served upon him, as the relevant legislation permitted, in his capacity as a director of the company. One of the issues which the Court of Appeal had to consider was the question of how the financial penalties should have been apportioned, as between Mr Sutton and his company. In his judgment in the Court of Appeal, Newey LJ (with whom Underhill and Moylan LJJ agreed) did not suggest that liability for such a financial penalty, under the relevant legislation, could be joint, or joint and several. There were separate financial penalties in the case of Mr Sutton and the company. There was no joint, or joint and several liability, by reference to which problems of apportionment could be addressed. Ultimately, Newey LJ concluded that the significantly greater financial penalty imposed upon Mr Sutton was justified.
116. In this context I was also referred to the decision of the Supreme Court in *Jepsen v Rakusen* [2023] UKSC 9 [2023] 1 WLR 1028. The case was concerned with an application to the FTT for rent repayment orders by the occupiers of a flat which constituted a house in multiple occupation. A licence had been required for the use of the flat as a house in multiple occupation, but no such licence had been obtained. The application for the rent repayment orders was not made against the applicants' immediate landlord, but was instead made against Mr Rakusen and a Ms Field, who held a superior long leasehold interest in the flat. The Court of Appeal upheld an appeal against the decision of the Upper Tribunal that a rent repayment order could be made against a superior landlord. The appeal to the Supreme against this decision was dismissed. The Supreme Court decided that, on the true construction of Section 40(2) of the Housing and Planning Act 2016, a rent repayment order could only be made against the immediate landlord under the tenancy in respect of which a rent repayment order was sought. The order could not be made against a superior landlord.
117. In their joint judgment (with which Lord Lloyd-Jones, Lord Kitchin and Lord Richards JJSC agreed) Lord Briggs and Lord Burrows JJSC acknowledged the difficulties which this construction of Section 40(2) created, in a situation where the immediate landlord turned out to have insufficient assets to meet the relevant rent repayment order or orders. They were however unpersuaded that this was a justification for adopting a different construction of Section 40(2). As they said, at [43]:

*“43 Having said all that, we accept that the interpretation we take renders RROs less effective than they perhaps could be if they were to be made available against superior landlords. But in our view that development would undermine the clear definition of an RRO, as set out in section 40(2) of the 2016 Act, and would therefore require new legislation. In other words, if this is thought to be a problem any reform would be a matter for Parliament and cannot be achieved through a distorted interpretation of the relevant provisions in the 2016 Act.”*
118. The Appellants drew my attention to the Renters' Rights Act 2025 (due to be brought into force on 1<sup>st</sup> May 2026), which will allow rent repayment orders to be made against superior

landlords. In particular Section 102(7) of the new Act will insert a new Section 46A into the Housing and Planning Act 2016, in the following terms:

- “(1) A rent repayment order made against more than one landlord must provide for the landlords to be jointly and severally liable for the amount due under the order.*
- (2) If a rent repayment order (“the original order”) has been made in respect of rent under a tenancy and another rent repayment order (“the new order”) is made in respect of rent under the same tenancy, the new order may not require payment to be made in respect of any period in respect of which the original order required payment to be made.”*

119. It was submitted that this provision was a Parliamentary response to the difficulty, said to be illustrated by the *Sutton* decision and the *Rakusen* decision, that joint and several liability could not be imposed upon parties subject to statutory liabilities such as financial penalties and rent repayment orders, without specific provision for such liability in the relevant statute.

120. The Appellants also placed at the centre of their argument on statutory construction what was said to be the contrast in language between Section 124 and Section 130. Section 130(1) gives the High Court jurisdiction to make a building liability order if it considers it just and equitable to do so. Indeed, as mentioned earlier in this decision, Grey has commenced proceedings in the High Court (Technology and Construction Court) for a building liability order against R1, R16 and R17. Those proceedings have yet to come to trial.

121. Subsections (2)-(5) of Section 130 identify a building liability order in the following terms:

- “(2) A “building liability order” is an order providing that any relevant liability (or any relevant liability of a specified description) of a body corporate (“the original body”) relating to a specified building is also—*
  - (a) a liability of a specified body corporate, or*
  - (b) a joint and several liability of two or more specified bodies corporate.*
- (3) In this section “relevant liability” means a liability (whether arising before or after commencement) that is incurred—*
  - (a) under the Defective Premises Act 1972 or section 38 of the Building Act 1984,*  
*or*
  - (b) as a result of a building safety risk.*
- (4) A body corporate may be specified only if it is, or has at any time in the relevant period been, associated with the original body.*
- (5) A building liability order—*
  - (a) may be made in respect of a liability of a body corporate that has been dissolved (including where dissolution occurred before commencement);*
  - (b) continues to have effect even if the body corporate is dissolved after the making of the order.”*

122. The Appellants pointed to the specific reference to joint and several liability in subsection (2), and to the reference to “a specified body corporate”. The Appellants argued that this language demonstrated that the person drafting the Act was aware both of the distinction between (i) singular or individual liability and (ii) joint and several liability, and was also aware of the need to make specific provision for joint and several liability in Section 130(2). By contrast, so the Appellants argued, no similar provision was made for joint and several

liability in Section 124. Given that both Sections appear in the same Part of the same Act, and given the presumption that, where the same words are used more than once in an Act they have the same meaning, it was clear from the statutory context that Parliament had not intended to confer jurisdiction upon the FTT to make remediation contribution orders against multiple parties on a joint and several basis. If Parliament had intended to go this far in Section 124, so the argument went, Parliament would have said so, and would have needed to say so.

123. I am not persuaded by the arguments of the Appellants in support of their construction of the scope of the FTT's jurisdiction under Section 124. I say this for the following reasons.

124. The starting point seems to me to be the reference to "*a specified body corporate or partnership*". Although the reference is singular I do not see why, at least on an initial reading and concentrating only upon Section 124 itself, it cannot be read as a plural reference. If statutory support is required for that conclusion, it can be found, subject to a contrary intention appearing, in Section 6 of the Interpretation Act 1978, which provides as follows:

**"6 Gender and number.**

*In any Act, unless the contrary intention appears,—*

*(a) words importing the masculine gender include the feminine;*

*(b) words importing the feminine gender include the masculine;*

*(c) words in the singular include the plural and words in the plural include the singular."*

125. I will come back to the question of whether a contrary intention can be found, either in Section 124 or more widely in the Act. As I have said, as a matter of initial reading, I cannot see why the reference to a specified body corporate or partnership cannot be plural.

126. In this context it needs also to be borne in mind that concentration upon the reference to "*a specified body corporate or partnership*" in Section 124 does not necessarily answer the question of whether the FTT has the power to impose joint and several liability. The reason for this is that, as I understood the Appellants' arguments, it was accepted by the Appellants that, in a case such as a present case, it was open to the FTT to make a series of individual orders against each of the Specified Respondents, as "*a specified body corporate or partnership*". What the FTT could not do, on the Appellants' argument, was to impose joint liability, or joint and several liability on any two or more of the Specified Respondents. Indeed, although I am referring to the orders made by the FTT as "*the RCO*", they are expressed to be orders in the plural, as was the case with the Triathlon Order. It follows that if the reference to "*a specified body corporate or partnership*" in Section 124 has to be read as singular only, this does not prevent the FTT from making a series of individual orders against each one of multiple respondents, in respect of a sum to be paid for the remedying of a particular set of relevant defects. Nor does it prevent the FTT from incorporating a series of individual orders of this kind, in the case of multiple respondents, into a single form of order, as was done in the RCO and in the Triathlon Order. Nor does it necessarily mean that there cannot be joint and several liability between those respondents or some of them, in respect of the sum to be paid.

127. I am also not persuaded that there is the contrast contended for by the Appellants, as between Section 124 and Section 130. Section 130 is concerned with a different jurisdiction to Section 124, and works in a different way. Section 130 is engaged where a body corporate has a relevant liability, of a kind described in Section 130(3). That liability can then be

made transmissible from the original body to a specified body corporate, or it can be made transmissible as the joint and several liability of two or more specified bodies corporate. The transmission of liability takes place pursuant to paragraph (a) or paragraph (b) of subsection (2), depending upon whether a building liability order is sought against one specified body corporate or two or more specified bodies corporate, and provided, in each case, that there is the required association with the original body.

128. While it is the case that Section 130, along with Section 124, is part of the set of remedial provisions in Part 5 of the Act, which are intended to ensure that the cost of remedying defects can be passed on to the parties who should, ultimately, be held responsible for that cost, it will be noted that Section 130 is fairly rigid in its operation. The pre-existing liability which founds the jurisdiction in Section 130 can be made transmissible to an associated party or associated parties. The liability which is transmitted is the same liability to which the original body is subject. The jurisdiction in Section 124 is more flexible and open ended. It is for the FTT to decide what amount should be paid, and by whom, and on what basis.
129. In these circumstances I do not find it surprising that Parliament should spell out in Section 130(2) the joint and several nature of the liability in Section 130(2)(b), when dealing with the transmission of the liability of the original body, but should not have thought it necessary or, for that matter, convenient to spell matters out, to the same degree, in relation to the more flexible jurisdiction in Section 124.
130. I am also wary of being guided in the construction of Section 124 by provisions in separate legislation, which are intended to perform a different function. In my view neither the *Sutton* case nor the *Rakusen* case nor the provisions of the Renters' Rights Act 2025 provide a reliable analogy for the construction of Section 124. This point is illustrated by the terms of Section 40(2) of the Housing Planning Act 2016, which was in issue in *Rakusen* and which provides as follows:

“(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to - (a) repay an amount of rent paid by a tenant, or (b) pay a local housing authority an amount in respect of a relevant award of universal credit paid (to any person) in respect of rent under the tenancy.”
131. As Lord Briggs and Lord Burrows noted, in their joint judgment at [28], if a straightforward interpretation exercise was carried out, it was clear that the reference to the “*landlord under a tenancy*” in Section 40(2) had its “*ordinary and generally understood meaning*”; namely the immediate landlord under that tenancy. This seems to me to be a different interpretation exercise to the interpretation exercise in the present case. Equally, the decision of Parliament to spell out the joint and several nature of the liability for a rent repayment order, if made against more than one party, does not seem to me to justify a general rule that, in the absence of such a provision, joint and several liability is not possible.
132. Beyond the analysis above however, Section 124 has to be construed by reference to the legislative purpose and scheme of the Act, and specifically by reference to the legislative scheme and purpose of the remediation provisions in Part 5 of the Act. In this context the Appellant's construction of Section 124, as precluding the imposition of joint and several liability, seems to me to raise serious problems with the operation of remediation contribution orders.
133. If the Appellants are correct, what the FTT was constrained to do in the present case was to apportion out the Specified Payments (the sums payable pursuant to the RCO) between the

Specified Respondents. Whether the FTT had made a single order or a series of orders, each of the Specified Respondents could only, on the Appellants' case, be ordered to pay a specified part of the Specified Payments, with no overlap between that specified part and the specified parts payable by other Specified Respondents. If the FTT considered all the Specified Respondents to be equally responsible it could not require each of the Specified Respondents to pay the entirety of the Specified Payments. If, by way of example, the FTT had considered it just and equitable that R1 should be liable to pay all of the Specified Payments, and made an order to that effect, the FTT would effectively have shot its bolt, so far as the jurisdiction under Section 124 was concerned. None of the remaining 75 Specified Respondents could be required to pay anything, because R1 had been required to pay the entirety of the Specified Payments. If the FTT had considered it just and equitable that each of the Specified Respondents should be responsible for the entirety of the Specified Payments, the best that the FTT could have done was to order each of the Specified Respondents, either in one order or in a series of orders, to pay a seventy-sixth share of the Specified Payments. This result would not however actually have reflected what the FTT had considered to be just and equitable on this hypothesis. On this hypothesis each of the Specified Respondents would be liable to pay only one seventy-sixth of what the FTT considered to be just and equitable, in terms of what each Specified Respondent should be liable for.

134. It seems bizarre that the jurisdiction of the FTT to make remediation contribution orders should be hamstrung in this way. Beyond this however, there is an additional, and obvious problem which results from the inability of the FTT, on the Appellants' case, to order payment on a joint and several basis. In a case, which will not be uncommon, where a remediation contribution order is sought against more than one respondent and the FTT is persuaded that the remediation contribution order, or orders should be made against multiple respondents, there is an obvious problem with enforcement. If one or more of the respondents turns out to be impecunious, a gap or gaps will appear in the ability of the party or parties, in whose favour the remediation contribution order is made, actually to recover the cost of the relevant remedial work.
135. This problem is illustrated by the present case. The relevant developer in the present case is R1. Unfortunately, it appears that R1 may not be good for the Specified Payments. The Tribunal recorded the position of R1 in the following terms, at Paragraph 350:

*“350. We agree the developer is a key target, at the top of the hierarchy of liability (or waterfall). We are therefore in no doubt that a RCO should be made against R1 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, such as the untrue warranty in the sale contract, failure to deal with those fire safety defects which were identified in 2017/2018 and failure to ensure the sprinkler system was commissioned. However, it appears R1 has little or no remaining assets and may soon be subject to administrative strike off for failure to file documents. In the sale contract, R1 gave an indemnity, but that does not mean that associates must be treated as if they had given indemnities or share any blame with R1.”*

136. In a case such as the present case, where there are multiple respondents in respect of whom the FTT considered it just and equitable that there should be a liability to make a payment, the best that the FTT could achieve, if the Appellants are right, is a separately apportioned liability for each respondent. If one then assumes a situation, which will not be uncommon, where some of the respondents are or may be unable to pay, the applicant party or parties

will be left with something resembling a colander, in terms of their ability to recover the total sum ordered to be paid.

137. Bearing in mind the legislative scheme and purpose of the Act and, in particular, the legislative purpose and scheme of the remediation provisions in Part 5 of the Act, as identified in *BDW*, *Adriatic* and *Triathlon*, the problems created by the Appellants' construction seem to me to be completely at odds with what the remediation provisions in Section 124 were intended to achieve. As Nugee LJ explained in *Adriatic*, at [176], the statutory scheme of the Act flows from the decision to intervene in the contractual scheme of obligations by protecting leaseholders from the full extent of their contractual service charge liabilities. Once that decision had been made it became necessary to address other matters including "*who would pick up the costs that were no longer to be met through the service charges; and for what rights the latter would have to make claims over against others, including those ultimately responsible*". If the FTT does not have the ability to impose joint and several liability but must, as the Appellants contend, apportion out the sum to be paid, with no overlap in liability as between multiple respondents, it seems to me that Section 124 cannot work as it was intended to work. Effectively, the statutory purpose is frustrated.
138. In oral argument Mr Morris, who undertook the principal burden of the oral submissions in support of Ground 1, sought to meet this problem by contending that if the person making the application for a remediation contribution order, that is to say the interested person, was confronted with a shortfall in recovery, the interested person could return to the FTT and ask for a re-arrangement of the apportioned shares of the respondents, in order to assign the shortfall between those able to pay. Mr Morris suggested three possible sources for this jurisdiction to return to the FTT for a variation of the original remediation contribution order. The first source was Section 124(1) itself which, Mr Morris submitted, did not preclude return applications of this kind. The second source was the jurisdiction of the FTT to vary its own orders. I was not given a specific reference in this context, but I assume that the intended reference was to the case management powers of the FTT in Rule 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the FTT Rules**"), and/or to the powers of the FTT to correct, set aside or review its own decisions in Part 6 of the same Rules. The third source was derived from Chitty on Contracts, 35<sup>th</sup> Edition, at 20-025, where the editors explain the principle of law that joint debtors and joint and several debtors have a restitutionary right of contribution among themselves, so that if one has paid more than their share of the debt, they can recover the excess from the other debtors in equal shares, subject to any agreement to the contrary. Mr Morris submitted that the principle was a precedent upon which the FTT could rely, in a situation where an applicant sought an adjustment to a remediation contribution order in order to compensate for a shortfall in recovery resulting from the insolvency of one or more of the respondents to the remediation contribution order.
139. This did not seem to me to be a satisfactory answer to the problem, for at least three reasons.
140. First, and while I do not regard it as necessary to make a final decision in this particular respect, I have serious doubts that Section 124 actually permits repeated applications of this kind. So far as the FTT Rules are concerned, it does not seem to me that the case management powers of the FTT to amend, suspend or set aside its earlier directions, as contained in FTT Rule 6, would permit variation of a remediation contribution order in the circumstances I am considering. So far as the powers of correction, setting aside and review in Part 6 of the FTT Rules are concerned, those powers are closely confined and would not, it seems to me, extend to the variation of a remediation contribution order in the

circumstances under consideration. So far as the principle of contribution between joint debtors is concerned, it does not seem to me to provide an apt precedent in a case where it is the applicant for a remediation contribution order which is returning to the FTT in order to try to secure an adjustment in the sums payable by the respondents. This situation involves adjustment between the applicant and the respondents, not adjustment in a separate dispute between respondents.

141. This leaves Section 124(1) as the possible source for such a jurisdiction. The jurisdiction in Section 124(1) is set out in flexible terms, and I can see that the FTT could, in an appropriate case, include a variety of provisions catering for eventualities such as the possible insolvency of a party. The RCO itself contains a liberty to apply for variation of certain provisions of the RCO, relating to the use of the sums to be paid; see paragraph 7 of the RCO. This however is a reflection of the broad powers given to the FTT when making a remediation contribution order, in the particular circumstances of a particular case. A provision granting the parties liberty to apply for a variation of the relevant order may be included in the order, in order to deal with particular problems of implementation of that order. I am however doubtful that Section 124(1) was intended to confer upon the FTT a general jurisdiction to entertain repeated applications to the FTT, of the kind contemplated by the Appellants' argument.
142. Second, and if it is assumed that the FTT does have the power to revisit its own decision, in a situation of the kind which I am envisaging, the exercise of the power would, in my view, be seriously problematic. In such a situation one can easily see that the paying respondents would have grounds for objecting to their shares being adjusted as a result of the default of a co-respondent. Even if such an application was possible under Section 124, the paying respondents would no doubt argue, with at least some force, that it was not just and equitable to adjust their shares in order to accommodate the default of another respondent. They would no doubt say that their shares had already been settled by the FTT, and that it either was not permissible, or at least not fair to allow the interested person what would no doubt be characterised as a second bite at the cherry.
143. Third, and even if the problems outlined in my previous paragraph are assumed not to exist, it seems to me contrary to the scheme and purpose of the remediation provisions that an interested person, invoking the jurisdiction in Section 124, should have to face the prospect of repeated visits to the FTT, in order to try to secure full recovery of the sum ordered to be paid.
144. In this context it is also important to keep in mind that, if the FTT has the ability to impose joint and several liability, it is not obliged to do so. In a particular case the FTT might think it just and equitable that a particular, and only a particular respondent should have to pay a particular part of the costs of remedying the relevant defects. On that hypothesis, if that respondent turned out to be unable to pay the relevant sum, one can see that there would no particular unfairness in the interested person (the applicant for the remediation contribution order) being left out of pocket in that respect. The situation would result from the failure of the interested person to persuade the FTT that it was just and equitable to make an order for payment of the relevant part of the costs by anyone other than the defaulting party. This situation stands in stark contrast to a situation where the FTT considered that it was just and equitable to make all the respondents jointly and severally liable for payment of the entire sum due but found itself constrained, on the Appellants' construction of Section 124, to parcel out the liability on an apportioned basis between the respondents. On that hypothesis the FTT would have been frustrated in achieving what it considered to be the just and

equitable result, and the interested person would be left out of pocket, unfairly, if particular respondents defaulted on their apportioned liabilities.

145. In his oral submissions in reply Mr Morris suggested that the FTT, in addition to having the ability to entertain a further application by an applicant confronted by a gap in recovery resulting from the insolvency of a respondent, could take into account the risk of the insolvency of a party at the stage of making the remediation contribution order or orders. As I understood this suggestion, it would mean that the FTT could, in deciding who should pay what share of the liability, take into account the risk of a particular respondent becoming insolvent.
146. This suggestion did not seem to me to provide any sensible solution to the problems which I have identified above. Given the breadth of the just and equitable jurisdiction conferred on the FTT by Section 124(1), I can see that the Tribunal might well take into account the risk of a respondent or respondents becoming insolvent in deciding which respondents should be subject to a remediation contribution order. This however is most likely to occur in a scenario, such as the present case, where the respondent in the position of the developer is at risk of becoming insolvent. In those circumstances, there is good reason for the FTT to consider whether it is just and equitable to make a remediation contribution order against other respondents, in order to avoid the risk of a shortfall in recovery. It would however, in such a situation, be perverse for the developer respondent to escape a remediation contribution order on the basis of the risk of its becoming insolvent. Such a situation can be avoided by imposing liability on a joint and several basis, with the result that, while no respondent can rely on its own insolvency or likely insolvency to escape an order, recovery can be made against the solvent respondents if the developer respondent, or for that matter any other respondent does turn out to be insolvent. If a remediation contribution order cannot be made on a joint and several basis, the perverse result which I have just identified cannot be avoided by the suggestion put forward by Mr Morris.
147. In theory, there is another route by which the problems, which I have identified as arising from the inability of the FTT to impose joint and several liability, might be avoided. The jurisdiction under Section 124(1) is, as I have noted, a flexible one. In theory, and if the imposition of joint and several liability is not available, the FTT could craft an order which provided for one respondent to assume the liability of another respondent, if the latter respondent failed to pay its share of the total liability. The position would obviously become significantly more complicated, in the case of a remediation contribution order against multiple respondents, but in theory the FTT could try to create a sort of waterfall of liabilities within the remediation contribution order, to compensate for its inability to impose joint and several liability.
148. I cannot see however that this is a satisfactory answer to the problems which exist if the FTT has no jurisdiction to impose joint and several liability. The difficulties with constructing an order of the kind contemplated in my previous paragraph, in any but a simple case, are obvious. Construction of such an order might be possible in a case with a simple and obvious hierarchy of respondents, but most cases involving multiple respondents will not fit into this category. The position is likely to be a good deal more complex, and is also likely to raise time-consuming and intractable issues of which respondent or respondents should have a contingent liability imposed upon them, and in respect of the liability or liabilities, if left unsatisfied, of which respondent or respondents. Such an order would also be of no assistance in a case, such as the present case, where the FTT considered it just and equitable that all of the relevant respondents should shoulder the entirety of the relevant liability. It will be appreciated that the question of whether the Tribunal were right to take

this view in the present case is beside the point for present purposes. Whether the Tribunal were right to take this view in the present case is for Ground 2. The relevant point is that in a case where the FTT took a view of this kind, it would not be able to impose joint and several liability. At best, the FTT would have to try construct an order with contingent liabilities. Even if such an order could be constructed, it could not and would not replicate or reflect the answer which the FTT had, on this hypothesis, decided should be given to the just and equitable question.

149. All of the above considerations seem to me to point strongly in favour of a construction of Section 124 which permits the imposition of joint and several liability upon multiple respondents, in a case where the FTT considers that it is just and equitable to take this course. A construction of Section 124 which means that the FTT does not have this ability seems to me to be in direct conflict with the scheme and purpose of Section 124.
150. The Appellants sought to counter arguments based on the legislative purpose and scheme of Section 124 by arguing that the construction of Section 124 favoured by the Tribunal produces an injustice of its own.
151. The Appellants argued that, if joint and several liability was imposed on respondents to a remediation contribution order, there was no means by which those respondents could, as between themselves, adjust their joint and several liabilities. If one respondent ended up paying the entire sum due, that respondent would have no means, by proceedings in the FTT, of recovering a contribution towards this payment from their co-respondents. The contribution provisions in the Civil Liability (Contribution) Act 1978 (“the 1978 Act”) would not apply, and the FTT would have no jurisdiction of its own to order contribution, as between the respondents. In oral submissions Mr Morris drew my attention to the history behind the statutory rights of contribution between those liable in respect of the same damage, which are now to be found in the 1978 Act. This history is set out in the speech of Lord Bingham in *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14 [2002] 1 WLR 1397. As Mr Morris explained, historically, claims for contribution between joint tortfeasors liable for the same injury could not be made at common law. This problem was originally addressed by the Law Reform (Married Women and Tortfeasors) Act 1935, from which the relevant provisions in the 1978 Act derive. The jurisdiction in the 1978 Act is however a statutory jurisdiction, which applies to courts. The essential point made by Mr Morris was that the jurisdiction of the FTT is statutory. As such, and in the absence of the FTT having any powers equivalent to those of a court to entertain a claim for contribution under the 1978 Act, the FTT would have no jurisdiction to entertain a claim by one respondent to a remediation contribution order for a contribution from a co-respondent or co-respondents. This would produce an injustice if multiple respondents could be required to pay a sum on a joint and several basis pursuant to a remediation contribution order. If one respondent ended up having to shoulder the burden of the entire payment, it would have no means of making application to the FTT for a fair contribution to be made by its co-respondents.
152. The Appellants argued that this problem had been glossed over by the FTT in the Decision at Paragraph 380, where the FTT dealt with the question of contribution between the Specified Respondents in the following terms, in the final part of the Paragraph:

*“380. Further, we accept the submission from Mr Hickey that, in this case, this is the just and equitable approach. We do not accept that the Applicant should be confined to a limited share from each relevant Respondent, or should have to wait to see whether a given Respondent is solvent (or how much they can pay)”*

*before they move on to the next, even if some kind of top up machinery could be included in the wording of a RCO to accommodate this as Mr Morris suggested. It would obviously mitigate the huge impact on each Respondent, but would be impractical for an applicant. It does not seem consistent with the purpose of this jurisdiction, as noted above. We accept Mr Hickey's submission that in this case it leaves a grave risk that assets which should be included will be missed. In any event, there are questions about the reliability of the accounts and related documents in relation to the Respondents (which again we regard simply as matters of blurred divisions between company affairs and finances and/or inadequate administration and record keeping). Even if assets are shown in the last filed accounts of a given Respondent and those accounts were accurate, it may now genuinely have none left. Those Respondents we have included appear sufficiently linked for us to consider it just and equitable to expect them to arrange between themselves what contributions should be made by each company, on the basis described above."*

153. It seems to me that there are two points which are important in this context.
154. First, and as demonstrated by the findings made by the Tribunal in the Decision, the Tribunal found that R1, as the developer in respect of the Development, was part of a wider corporate structure through which the individuals who controlled this structure conducted their business. This wider corporate structure included the remainder of the Specified Respondents. In the light of their findings in this respect, the Tribunal concluded not only that it was just and equitable to make the RCO against all of the Specified Respondents on a joint and several basis, but also that it was just and equitable, given the linkage between the Specified Respondents, to expect them to arrange between themselves what contributions should be made by each Specified Respondent. On the evidence in this case therefore, the Tribunal concluded that it was fair to leave the Specified Respondents to sort out contributions themselves. It follows that, on the findings made by the Tribunal on the evidence in this case, the problem identified by Mr Morris does not arise. Whether there were any errors in the way the Tribunal exercised its discretion on the just and equitable question is a matter to which I will have to return when I come to Ground 2.
155. This first point is particular to this case. It does not address the point of principle made by Mr Morris, which is that the FTT has no jurisdiction to determine contributions, as between respondents who are ordered to make payment pursuant to a remediation contribution order on a joint and several basis. This brings me to my second point.
156. In dealing with this particular submission of the Appellants Mr Hickey, in his oral submissions, did not pull his punches. As I understood Mr Hickey's submissions, he did not dispute that the FTT has no jurisdiction to entertain contribution proceedings between respondents, where those respondents are liable on a joint and several basis, of the sort which a court could entertain under the 1978 Act. I understood him to accept that the 1978 Act had no application. Mr Hickey's short point was that Parliament, in enacting Section 124, had simply not concerned itself with solving the problem of respondents seeking contributions between themselves. As the same submission was explained in Grey's skeleton argument for this hearing, the 1978 Act is fault-based and is concerned with the position between parties liable for the same damage. Section 124 is not fault-based, but is a new and entirely different form of statutory direct liability, the purpose of which is to facilitate payments for remediation. Section 124 is not concerned with arguments between associated persons as to who should pay in respect of a joint and several liability.

157. It was not clear to me, on the submissions of the parties, whether it was being said by the Appellants that there were no means, either in the FTT or in court, whereby respondents could seek contributions, as between themselves, in respect of a joint and several liability pursuant to a remediation contribution order. As I have said, I understood it to be common ground that the FTT had no jurisdiction to deal with a contribution claim of this sort. The question of whether such contribution proceedings could be brought in court, on the basis of a restitutionary right, was not properly explored in the submissions.
158. Whether or not any such claim in contribution could be pursued by court proceedings is not a matter which I am in a position to decide, and I do not do so. In my view it is not necessary to explore this particular point because the position seems to me to be as characterised by Mr Hickey. Section 124 creates a new form of statutory liability, in respect of which Parliament has not concerned itself with the question of rights of contribution as between respondents to a remediation contribution order.
159. Whether this creates an injustice, in a situation where the FTT opts for a remediation contribution order on a joint and several basis, seems to me to be at least open to debate. I say this for three reasons. First, the question of contribution between respondents who are liable on a joint and several basis is most likely to arise where the FTT is persuaded that associated parties should be brought into the liability, through the gateway of paragraph (d) of Section 124(3). In such a case there will, by definition, be the required element of association between the respondents, which might in turn be expected to result in a situation where it is reasonable to leave the respondents to sort out contributions between themselves. Second, the problem identified by Mr Morris arises where the FTT decides to make a remediation contribution order on a joint and several basis. Before making such an order the FTT will need to be satisfied, as the Tribunal were in the present case, that it is just and equitable to impose joint and several liability upon the respondents. If the FTT is satisfied that it is appropriate to impose joint responsibility, that is likely to be because there is a degree of linkage between the respondents which renders it reasonable to leave the respondents to sort out contribution themselves. Third, and as Mr Hickey pointed out, where an applicant seeks a remediation contribution order against multiple respondents on a joint and several basis, it is open to the respondents or any of them to argue, when the just and equitable question comes to be considered, that such an order should not be made because it is likely to create unfairness and/or problems, as between the respondents, in terms of who is likely to end up having to pay what share of the joint and several liability. Given the breadth of the just and equitable discretion in Section 124(1), the FTT would clearly be entitled to take arguments of this kind into account, in its consideration of the just and equitable question.
160. In summary, I am not persuaded that the absence of specific provisions for adjustment of contributions, as between multiple respondents to a remediation contribution order, provides any real support for the argument that the FTT has no power under Section 124 to impose joint and several liability.
161. I was also pressed with the argument, by the Appellants, that Section 124 constitutes expropriatory legislation, which should be construed, so far as possible, in a manner which leaves property rights intact. I was referred to the judgment of Newey LJ in *Adriatic*, at [60]-[64], where the presumption against interference with property rights is explained. This part of Newey LJ's judgment was not affected by his dissent on the issue of retrospectivity in *Adriatic*. In particular, at [64], Newey LJ made reference to the judgment of Lord Sumption JSC in *S Franes Ltd v Cavendish Hotel (London) Ltd* [2018] UKSC 62 [2019] AC 249 at [16], where Lord Sumption stated that "*as a statutory interference with*

*the landlord's proprietary rights, the protection conferred by the Act [Part II of the Landlord and Tenant Act 1954] should be carried no further than the statutory language and purpose require.*". The principle is not in doubt, but it is a general principle of construction, which must be considered in the overall context of the particular question of statutory construction where it is said to be engaged. I do not think that the construction of Section 124 which I prefer infringes this principle. Nor do I think that the principle is sufficient to override all the other reasons which, in my judgment, point strongly to the FTT having the power, when making a remediation contribution order, to impose joint and several liability.

162. I indicated earlier that I would come back the question of whether a contrary intention can be found in Section 124 or elsewhere in the Act, for the purposes of Section 6 of the Interpretation Act 1978, which means that the singular reference to "*a specified body corporate or partnership*" in Section 124(2) cannot be read as including the plural. I have deferred this question because the question of whether a contrary intention can be found in the relevant statute depends heavily upon the particular statutory context, and falls to be answered by considering the relevant statute as a whole; see Bennion at 19.3 and see the judgment of the Privy Council, delivered by Lord Morris, in *Blue Metal Industries Ltd v Dilley* [1970] AC 827, at 846D-847A and 848C-E. In these circumstances it seemed to me that this question was best left until I had considered the scheme and purpose of the relevant legislation as a whole, which I have now done.
163. What was said by Lord Morris in *Blue Metal Industries* in this context seems to me to be instructive in the present case. The issue with which the Privy Council was concerned in that case was the construction of Section 185 of the Companies Act 1961 (N.S.W.). Section 185 provided for the compulsory transfer of shares where there was a scheme or contract involving the transfer of shares or any class of shares in a company to another company or corporation, which had been accepted by the holders of not less than nine-tenths in value of the shares affected. The essential question in the appeal to the Privy Council was whether Section 185 applied only to a scheme or contract involving the transfer of shares in a single company to a single transferee company, or whether it could extend to a scheme or contract involving the transfer of shares in a company to two or more transferee companies. This, in turn, engaged the question of whether the statutory equivalent (in the relevant legislation of New South Wales) of Section 6(c) of the Interpretation Act 1978 applied to Section 185. The Privy Council decided that the singular references to the transferor company and transferee company in Section 185 could not, bearing in mind the purpose and policy behind the legislation, be read as references to plural companies. Lord Morris put the matter this way, at 848C-E:

*"If regard is being had to the substance and tenor of the provisions in section 185 (1) their Lordships think that there is great force in the submission that whereas there are many policy considerations making it appropriate that if an offer which a company has made has proved acceptable to nine-tenths or more of those to whom the offer was addressed the company should be given powers of acquisition, there may not be equal policy considerations making it appropriate to give the powers to a group of companies acting jointly. It would seem unlikely that the legislature would solely depend upon the provisions of the Interpretation Act if there was an intention to legislate with such important consequences as to give powers of compulsory acquisition not to a single acquiring company but to a group of companies. The Interpretation Act is a drafting convenience. It is not to be expected that it would be used so as to change the character of legislation. Acquisition of shares by two or more companies is not merely the plural of acquisition by one. It is quite a different kind of*

*acquisition with different consequences. It would presuppose a different legislative policy.”*

164. It seems to me that there is an instructive contrast to be drawn between the reasoning of Lord Morris in *Blue Metal Industries* and the present case. In the present case I cannot see that a reading of Section 124 as permitting the imposition of joint and several liability changes “*the character*” of Section 124 in any way. To the contrary, it seems to me that this reading of Section 124 works with the grain of the legislation in Part 5 of the Act.
165. In my view, and based on my analysis of the provisions of the Act which have been drawn to my attention in the context of this construction issue, a contrary intention of the kind referred to in Section 6(c) of the Interpretation Act 1980 is not to be found in the Act, in relation to Section 124. While Section 6(c) is described as a drafting convenience, it seems to me that it is one which applies in the present case; if and to the extent that it is required in order to read Section 124 as permitting the imposition of joint and several liability. I therefore conclude that the presumption in Section 6(c) is available, when reading Section 124(2), so that the singular reference to “*a specified body corporate or partnership*” can be read as including the plural.
166. Before I come to my conclusion on the first argument in Ground 1, I should mention, for the sake of completeness, that there was some reference to the Triathlon Order in Grey’s arguments. The Triathlon Order did impose joint and several liability upon the respondents in that case. There is no suggestion in the judgments in the Court of Appeal in *Triathlon* that we, as the FTT, had not been entitled to make an order in this form. In my view it would be wrong to attach much importance to the form of the Triathlon Order, in weighing the arguments in the present case. As I have explained, the short point is that the question of whether the FTT had the power to make an order in a joint and several form was simply not raised in *Triathlon*, either in the FTT or, so far as I am aware, in the argument in the Court of Appeal. In these circumstances I do not think that it is right to treat *Triathlon* as any authority in support of Grey’s case on Ground 1. Nor is any such support required, given the outcome of my analysis of Ground 1.
167. Drawing together all of the analysis in this section of my decision, and for the reasons which I have set out, I reach the following conclusions. In my view the correct construction of Section 124, bearing in mind the language of Section 124 and the place of Section 124 within the legislative scheme and purpose of the remediation provisions in Part 5 of the Act, is that the FTT does have the power to order payment to be made by two or more respondents on a joint and several basis. I therefore conclude, in relation to the first argument within Ground 1, that the FTT does have the power to make a remediation contribution order against multiple respondents on a joint and several basis.
168. It follows that Ground 1 fails, so far as the first argument within Ground 1 is concerned.

### **Ground 2 and Ground 1 (the second argument) – analysis and determination**

169. I find it convenient to take Ground 2 first, and then to consider the second argument within Ground 1.
170. In relation to Ground 2 the Appellants’ arguments assumed, contrary to their first argument within Ground 1 but in accordance with what I have now decided in relation to Ground 1, that the Tribunal did have jurisdiction to make the RCO in the form in which they did; that is to say by ordering the Specified Respondents to make the Specified Payments on a joint

and several basis. The question raised by Ground 2 therefore becomes whether the Tribunal were right to find that it was just and equitable to make the RCO against all of the Specified Respondents.

171. Although this particular point did not receive much attention in the skeleton arguments for the hearing of the Appeal, I start by reminding myself that the Tribunal, in determining that it was just and equitable to make the RCO, were exercising a discretion conferred upon them by Section 124(1). Mr Warwick and Mr Hughes undertook the principal burden of the oral submissions in support of Ground 2. In their oral submissions both accepted, quite correctly on the hypothesis that the Tribunal had jurisdiction to make the RCO on a joint and several basis, that the Tribunal were exercising “*a broad discretionary power*” (the expression used by Mr Hughes). As such, both Mr Warwick and Mr Hughes accepted that it was not open to me to interfere with the Decision simply on the basis that I might disagree with the determination of the Tribunal that it was just and equitable to make the RCO. I could only interfere if the Tribunal had gone wrong in the exercise of their discretion in such a way as to vitiate the exercise of that discretion.
172. The Appellants’ case is that this is what occurred in the Decision. For ease of reference, I repeat the three principal arguments which are relied upon in support of Ground 2:
  - (1) The Tribunal wrongly failed to appreciate and decide that participation in a particular development or receipt (directly or indirectly) of remuneration from that development is a minimum requirement or “*touchstone*” for it being just and equitable to make a remediation contribution order.
  - (2) The Tribunal wrongly imposed an evidential burden on respondents to an application for a remediation contribution order to show why it would not be just and equitable to make such an order against them.
  - (3) The Tribunal wrongly drew adverse inferences against the Specified Respondents based on a supposed failure to discharge that evidential burden.
173. At the conclusion of his oral submissions in support of Ground 2 Mr Hughes helpfully summarised the ways in which he submitted that the Tribunal had gone wrong in the exercise of their discretion. This summary, which I found helpful, was as follows:
  - (1) The Tribunal wrongly conflated Section 121 and Section 124. Section 121 defines who can be an associated person within paragraph (d) of Section 124(3). In the remainder of this decision I will refer to the paragraphs of Section 124(3) as “**Paragraph (a)**” and so on. A person falling within Paragraph (d) qualifies as a specified body corporate or partnership, within the terms of Section 124(2), against whom a remediation contribution order may be made. A person cannot however be made the subject of a remediation contribution order simply because that person is an associated person falling within Paragraph (d). Before a remediation contribution order can be made against such a person, there is a separate and additional exercise which the FTT must undertake; namely the determination of whether it is just and equitable to make a remediation contribution order against the relevant associated person. In the present case, so Mr Hughes submitted, the Tribunal were, in effect, invited to elide the investigation of associate status with the just and equitable enquiry. Grey was wrong to make that invitation and, in any event, the Tribunal were wrong to accept the invitation.
  - (2) The Tribunal were wrong in making no attempt to recognise the very different status and position of the various Specified Respondents. Some of the Specified Respondents, so it was submitted, had no connection whatsoever to the Building, and no connection was pleaded, no connection alleged, no connection proved, and no connection demonstrated in the Decision. In other cases there was a connection and,

in the case of R1, an obvious connection. It was however wrong for the Tribunal to lump all the Specified Respondents together, given the substantial differences, in terms of status and position, as between the Specified Respondents. Nor were the Tribunal entitled to justify this approach on the basis that there was a paucity of evidence.

- (3) The Tribunal were wrong to accept the invitation, again from Grey, to embark upon an all or nothing approach to questions of liability and responsibility under Section 124. This all or nothing approach was wrong, and resulted in the Tribunal effectively reversing the burden of proof, by accepting the submission of Grey that there was some initial prima facie position which Grey could permissibly put forward, which then required the Specified Respondents to explain their positions. There was nothing in the Act or at common law which required or justified such an approach, and the Tribunal were wrong to adopt this approach.
174. In relation to the consideration of the position of each of the Specified Respondents Mr Hughes also submitted that there had to be a clear nexus, a rational nexus between the relevant body corporate and the imposition of a remediation contribution order to deal with relevant defects. The question of whether such a rational nexus existed was not investigated, still less answered by the Tribunal in relation to any of the Specified Respondents.
175. In considering the Appellants' case in support of Ground 2 the starting point is to identify those elements of the task required of the FTT, when considering an application for a remediation contribution order, which are relevant to the Appellants' case.
176. I agree with the Appellants that, in considering an application for a remediation contribution order, there are two separate exercises required of the FTT.
177. The first exercise is to determine whether the gateway conditions for the making of a remediation contribution order are satisfied. Grey summarised the nature of this exercise in the following terms, in its skeleton argument for the hearing of the Appeal:
- (1) The FTT must determine whether the application is made in relation to a relevant building.
  - (2) The FTT must, as the case may be, determine whether the respondent or respondents are persons falling within one of Paragraphs (a) to (c); that is to say a landlord of the specified kind or a developer in relation to the relevant building.
  - (3) The FTT must, as the case may be, determine whether the respondent or respondents are associated, within the terms of Paragraph (d), with persons falling within Paragraphs (a) to (c).
  - (4) The FTT must determine whether the costs in respect of which the remediation contribution order is sought were or will be incurred for the purposes of meeting the costs of remedying relevant defects relating to the relevant building.
178. I did not understand this summary of the gateway conditions to be disputed by the Appellants. I also did not understand it to be in dispute that the burden is on the applicant (the interested person) to satisfy the FTT that these gateway conditions are met, so that the FTT has jurisdiction to make a remediation contribution order.
179. The second exercise is for the FTT to consider whether it is just and equitable to make the remediation contribution order against the relevant respondents. It seems to me that this is a separate exercise, or determination on the part of the FTT. I accept the Appellants' argument that it is not sufficient for the applicant simply to satisfy the FTT that the gateway conditions have been met. There has to be something more before the FTT can be satisfied

that it is just and equitable to make the remediation contribution order against each of the relevant respondents.

180. In his oral submissions in reply Mr Warwick invited me to provide some guidance, whatever the outcome of the Appeal, as to how the FTT should approach the just and equitable question. The invitation was extended in good faith, but I do not think that it is one to which I can or should accede. I do not think that it is either possible or sensible to seek to catalogue the factors upon which the FTT may rely in determining, in any particular case, whether it is just and equitable to make the order sought against any particular respondent. I say this essentially for two reasons. First, the breadth of the discretion conferred upon the FTT, namely whether the FTT "*considers it just and equitable*" to make the order sought, is very wide. The factors which may be taken into account in any particular case are not limited by the terms of Section 124(1) and are not, in my view, capable of exhaustive classification. Second, and if I was to attempt this task, it seems to me that I would be at risk of committing the basic error of attempting to re-write Section 124(1). In Section 124(1) Parliament has chosen not to list or limit the factors which can be taken into account in the exercise of the just and equitable discretion. In these circumstances it is not appropriate for me to attempt to do so.
181. So far as the just and equitable question is concerned, it seems to me to follow from my analysis above that the initial burden is on the applicant to put forward a case as to why it is just and equitable to make a remediation contribution order against the relevant respondent or respondents. One can, I think, test the matter this way. If one assumes a case where an applicant attended before the FTT, and confined itself to proving that the gateway conditions were satisfied, without putting forward any case as to why it was just and equitable to make a remediation contribution order, and without putting forward any evidence on the basis of which the FTT could consider the question of whether it was just and equitable to make the order, I find it difficult to see how the FTT could make the order. There would be no material upon which the FTT could conduct the second exercise of considering the just and equitable question.
182. It is however important, in my view, not to overstate this initial burden. It seems to me that it is no more than an initial burden on the applicant to put forward its case as to why it is said to be just and equitable for the remediation contribution order to be made. The example given in my previous paragraph may be thought to be somewhat unrealistic. It is highly unlikely that an application for a remediation contribution order would come before the FTT, with the applicant having proved the gateway conditions but otherwise electing to sit on its hands, and with the respondent also electing to sit on its hands. In reality, of course, in any such application the FTT is likely to require, as in the present case, statements of case from the parties, with the applicant going first. From a practical point of view therefore, the applicant will have the initial burden of putting forward its case on why it is just and equitable for the remediation contribution order to be made. This burden is however only an initial burden. The discretion of the FTT is a broad one. Once the applicant has stated its case, it is for the respondent or respondents to put their case in response. So far as evidence is concerned, I do not accept that the evidential burden is necessarily on the applicant. It is for the applicant to prove those matters upon which it relies in support of its case that it is just and equitable to make the order. It is for the respondent or respondents to prove those matters on which they rely in support of their case that it is not just and equitable to make the order.
183. This completes my brief analysis of the task required of the FTT, when considering an application for a remediation contribution order. With this analysis in place, I proceed to

the question of whether the FTT, in the Decision, went wrong in any of the ways alleged by the Appellants in support of Ground 2.

184. In my view the FTT did not go wrong, in the Decision, in any of the ways alleged by the Appellants. To the contrary, it seems to me that the Appellants' case proceeds on the basis of a misconception of the reasons given by the Tribunal for their decision that it was just and equitable to make the RCO. I say this for the following reasons.
185. The starting point is that this is not a case where Grey failed to put forward a case that it was just and equitable for remediation contribution orders, in the form of the RCO, to be made. This is demonstrated by Grey's Amended Statement of Case, which pleaded its case against all 96 of the Original Respondents. The structure of this Amended Statement of Case is as follows:
- (1) Paragraphs 3-7 identified the parties. R1 was identified as a developer, within the meaning of Paragraph (c). R2-R96 were identified as associated bodies corporate, within the meaning of Paragraph (d).
  - (2) Paragraphs 8-14 identified the Building as a relevant building, within the meaning of Section 117(2).
  - (3) Paragraphs 15-18 identified the relevant defects which were said to exist in relation to the Building.
  - (4) Paragraphs 19-25 set out the costs said to have been incurred or to be incurred in remedying the relevant defects.
  - (5) Paragraph 26 made reference to the RO Application.
  - (6) Paragraphs 27-30 set out Grey's case as to why it was just and equitable for remediation contribution orders to be made.
  - (7) Paragraphs 31-34 set out the alleged failures of the Original Respondents to engage in appropriate pre-action conduct.
  - (8) Paragraphs 35-36 identified the remediation contribution orders which were sought.
186. The obvious, but important point is that the Amended Statement of Case (i) set out Grey's case that the gateway conditions were satisfied, so that the Tribunal had jurisdiction to entertain the RCO Application, and then (ii) separately set out Grey's case as to why it was just and equitable for the remediation contribution orders to be made. At least therefore so far as the pleaded case was concerned, the two distinct exercises required of the Tribunal in considering the RCO Application were observed and addressed.
187. Turning specifically to Grey's case on the just and equitable question, I need to set out paragraph 27 and the bulk of paragraph 28 of the Amended Statement of Case, where Grey put its case in the following terms (the underlining is my own):

*“27. It in the circumstances, the Applicant avers that it would be just and equitable for the Respondents to be subject to a Remediation Contribution Order on the following basis:*

*27.1 Remediation Contribution Orders are a new legal remedy that requires developers to pay for the cost of remediation<sup>3</sup> [the footnote refers to paragraph 1011 of the Explanatory Notes].*

*27.2 Edgewater [R1] acted as the developer in respect of the Conversion Works [the Development] that were carried out and made a substantial profit as a result of the subsequent sales of the leasehold interests in the Building.*

- 27.3 *However, those Conversion Works were not compliant with the applicable Building Regulations and good and normal building practices at the time. This is clearly evidenced by the enclosed Reports.*
- 27.4 *As a result, there are significant building safety risks to the leaseholders in relation to the spread of fire. Accordingly, the Conversion Works have caused a number of relevant defects to arise as defined under the Act.*
- 27.5 *On this basis, Edgewater is responsible for the Conversion Works that caused the relevant defects at the Building, and has gained a substantial profit from the same. It should therefore be required to meet the costs of the remedial works.*
28. *Edgewater has previously indicated in the Remediation Order Proceedings that it does not have the funds to meet the costs of remediation. Edgewater's approach fails to consider the scope and purpose of the Remediation Contribution Order.*
- 28.1 *The Explanatory Notes to the Act note at paragraph 977 that "section 124 also gives the First-tier Tribunal the ability to require developer and their associated companies to make payments. It is also common practice for developers to use special purpose vehicles which are wound up after the completion of the development. The associated persons provision similarly allows the assets of the wider group structure to be accessed".*
- 28.2 *It further states at paragraph 1013 that "remediation contribution orders can also be made against persons associated with the developer; this will include, for example parent companies where developments have been run through special purpose vehicles which are thinly capitalised or have since been wound up".*
- 28.3 *Whilst Edgewater itself has limited assets as indicated by its last set of accounts filed at Companies House, it is part of a wider corporate structure which includes the Associated Parties [R2-R96].*

188. As can be seen, the case against R1 was put on the basis that R1 was the developer in respect of the Conversion Works, was thereby responsible for the relevant defects in relation to the Building, and had gained a substantial profit from the Conversion Works. Turning to R2-R96, the case was put on the basis that while R1 had only limited assets, it was part of a wider corporate structure which included the Associated Parties; namely R2-R96.
189. Although the relevant parts of the Explanatory Notes are, for the reasons which I have explained, of limited assistance in construing Section 124, there is no doubt that the obvious purpose of the associated person provisions in Paragraph (d) was to address the problem of special purpose vehicles being used as developers which were either thinly capitalised or were wound up once the relevant development project had been completed. In such cases Section 124, by the associated persons provisions in Paragraph (d), "*allows the assets of the wider group structure to be accessed*". Such associated persons include parent companies where developments have been run through special purpose vehicles which are thinly capitalised or have since been wound up.
190. *Triathlon* was a good example of such a case. The party in the position of the developer was SVDP, which depended upon its parent company, Get Living, for financial support. Get Living was the wealthy parent company. In our decision in *Triathlon*, sitting as the FTT, we set out the factors which we considered to be important in determining whether it was just and equitable to make a remediation contribution order. The first related to SVDP,

and to our identification of SVDP as the responsible developer. We then turned to the position of Get Living. At [266] we said this:

*“266 If, as we are provisionally minded, it is 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 depends for financial support. As we have explained, section 124 permits applications for remediation contribution orders to be made against developers and those associated with developers. 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. It seems to us that the situation of SVDP, with its relatively precarious financial position and its dependence for financial support upon Get Living, its wealthy parent, constitutes precisely the sort of circumstances at which these association provisions are targeted. We say this notwithstanding that we have declined to decide whether Get Living is associated with SVDP, as a limited partnership, for the purposes of section 121. It is common ground that Get Living is caught by the association provisions in section 124, by virtue of its association with the freeholder and each of the landlords in the relevant chain of title. Get Living is also the ultimate parent company of the corporate partners which comprise the limited partnership. In relation to the question of what is just and equitable, and in the context of the point we make in this paragraph, technical questions as to precisely how Get Living is caught by the association provisions in section 124 seem to us to be of little weight.”*

191. *Triathlon* may, with the benefit of hindsight, be said to have been an easy case. There was a thinly capitalised developer, and a wealthy parent company. It may be said that this was a classic case for the making of a remediation contribution order against both parties.
192. For present purposes however, the relevant point is this. In its pleaded case Grey sought to bring itself within the same category of cases to which *Triathlon* belonged. Grey was unable to point to a single parent company. Grey was also unable to identify a simple corporate structure to which R1 belonged. Instead, Grey’s case was that the wider corporate structure, of which R1 was part, included R2-R96.
193. There may be said to have been an element of risk in this strategy. Mr Warwick drew my attention to the transcript of the hearing before the Tribunal and, specifically, to what was submitted by Mr Hickey, at the conclusion of his submissions to the Tribunal, in explaining the basis on which Grey sought orders against R2-R96:

*“It is just and equitable to make a joint and several order against these respondents because there would be, in this situation, in these circumstances, no other fair and equitable way of addressing each of these 96 respondents. There is no other mechanism that really helps you to allocate between the respondents what that should be. It allows them to work out between themselves how to fill the pot, and it won't work injustice on them because they collectively can put their heads together to find the money wherever it may be found.”*

194. A short while earlier in his submissions Mr Hickey put the following analogy to the Tribunal:

*“My intention was the wisdom of a mother in dealing with children who will not own up to something is to say “I don’t care how you deal with it between yourselves, you are going to have to work it out between yourselves”. That is why I say that this order, on a joint and several basis against a number of respondents who are all associated, should be able to work out between themselves -- because they know where the money is and have the ability to arrange it so that they can pay -- should pay.”*

195. I agree with the Appellants that the case put by Grey to the Tribunal may be described as an all or nothing case. Grey’s case was that it is not feasible to try to allocate responsibility between R2-R96. The appropriate “*mechanism*” was to hold all of R2-R96 jointly responsible. I say that there may have been an element of risk in this strategy because, as I understand the way Grey’s case was put to the Tribunal, Grey had no fallback case which sought to allocate responsibility between R2-R96, on an individual basis, if its primary case on responsibility failed.

196. This then brings me to the Decision itself. I have already summarised the terms of the Decision, earlier in this decision. For present purposes, I can go straight to the essential reasoning of the Tribunal on the just and equitable question, at Paragraphs 349-381.

197. The Tribunal commenced by considering the position of R1. They were in no doubt that R1 should be held responsible for the relevant defects, as the party in the position of the developer; see Paragraph 350 in particular. As I understand the Appellants’ case, this particular part of the reasoning is not challenged. I assume that this is why it is conceded by R1, if the RCO is set aside on Ground 1 or Ground 2, that the RCO can be remade as a remediation contribution order against R1.

198. The Tribunal then turned to the question of whether it was just and equitable to make a remediation contribution order against R2-R96. It is the reasoning of the Tribunal on this question which is challenged by the Appellants. I will address the grounds of the Appellants’ challenge in turn, starting with Mr Hughes’ helpful summary of the grounds of challenge.

199. The Appellants say that the Tribunal wrongly conflated Sections 121 and 124, and treated the fact of association as sufficient to justify the making of a remediation contribution order. It seems to me that this misrepresents the reasoning of the Tribunal. It is quite clear, from the reasoning in Paragraphs 349-381, that the Tribunal were addressing themselves to the just and equitable question. It is equally clear that the Tribunal were not treating the fact of association, within the meaning of Paragraph (d), as sufficient to justify a decision that it was just and equitable to make the orders sought. This is clear from the entirety of the reasoning of the Tribunal, but by way of example I refer to Paragraph 357, where the Tribunal said this:

*“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. Ultimately, these cases will be very fact-sensitive and this is a matter for our discretion.”*

200. At Paragraph 359 the Tribunal again made it quite clear that the fact of association was not sufficient in itself to justify a remediation contribution order:

*“359. We recognise that, as Mr Warwick argued, the association provisions in section 121 could include very remote associates. He gave examples, such as a director of the lessee-owned freeholder of the building they live in who is also a director of completely different bodies. However, this is not a case where the wide association provisions have caught many completely unrelated companies who are operated by others and merely happened to have the wrong director at the wrong time.”*

201. What the Tribunal did find, on the evidence before them, was that almost all of R2-R96 could be regarded as part of a wider corporate or group structure. The relevant finding of the Tribunal is to be found in Paragraph 360, and should be quoted in full (the underlining is added):

*“360. For the following reasons, we consider that whether (loosely, as in the explanatory notes to the Act) called a group, or wider corporate structure, or something else, almost all of the remaining Respondents have links in addition to association by common directorship during the specified period which are sufficient to call for an explanation and/or evidence of countervailing factors. It does not follow that a RCO should be made against every such Respondent. However, since the parties have pleaded and given their evidence by reference to 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.”*

202. The Tribunal then proceeded to set out the factors which indicated this wider corporate structure, which existed on the basis of links “*in addition to association by common directorship*”. These factors all involved findings made by the Tribunal on the evidence which was before them at the hearing. It is clear, not least from the length of the hearing before the Tribunal, that this evidence, both oral and documentary, was voluminous.

203. The conclusion of the Tribunal, on the basis of these factors, was set out in Paragraph 373:

*“373. In view of the general and specific linking factors noted above, and the additional specific reasons noted in Schedule 1 below, we consider it just and equitable to make, and have decided to make, a RCO in the joint and several terms described below against the Respondents marked “Yes” in the last column of Schedule 1 below. In relation to these companies, the linking factors outweigh the factors against making an order.”*

204. It is to be noted that not all of the Original Respondents were found to be part of the wider corporate structure which the Tribunal found to exist, and of which R1 was found to be part. A few of the Original Respondents escaped the net, for the reasons given in Schedule 1.

205. It is also important to note that I am, in my review of the essential reasoning of the Tribunal, disregarding the careful and conscientious consideration by the Tribunal, prior to the section of the Decision on which I am concentrating, of the evidence and arguments of the parties at the hearing.
206. In my judgment it is quite clear, from the Decision as a whole and, in particular, from a review of the essential reasoning of the Tribunal at Paragraphs 349-381, that the Tribunal did not conflate or elide Sections 121 and 124. The Tribunal made it quite clear, in their reasoning, that they were addressing the just and equitable question, and were addressing that question separately to the question of whether the gateway conditions were satisfied. The Tribunal made this clear at numerous points in their reasoning, but if an example of this is required, it can be found in Paragraph 360, where the Tribunal referred, in terms, to links *“in addition to association by common directorship.”*
207. The essential problem confronting the Appellants, in relation to Ground 2, is that the Tribunal found, on the evidence before them, that the bulk of the Original Respondents were all members of the wider corporate structure of which R1 formed part, and through which the individuals who controlled the wider corporate structure conducted their business. There was no individual parent company, such as Get Living in *Triathlon*, but there was the wider corporate structure.
208. I am in no position, sitting in an appellate capacity, to interfere with this overall finding by the Tribunal or to interfere with any of the other findings of the Tribunal in this context. They were findings made by the Tribunal on the basis of the evidence which they heard and read. In any event, it is clear that the relevant findings were solidly based. In this context, and by way of example only, I should quote the findings of the Tribunal in Paragraph 369:
- “369. Fourth, the Respondents are likely to be linked by financial or other dealings and their records are opaque and/or do not appear reliable (although again we see this as a matter of poor and disorganised practice, not dishonesty). Mr Hickey argued that the disclosed documents and Companies House records showed a complex and interconnected web of relationships and interdependencies. The relationships are obviously complex and part of the community connections which may be based on trust and which we may not fully understand, not least because little has been explained about them. In any event, as was suggested, it appears many of the relevant Respondents were not actually run as carefully separated SPVs but as part of a fluid, disorganised and blurred network or structure, controlled by Jack Frankel and/or Jacob Dreyfuss. This (or they, or those working for them) probably had a tendency to take from whichever company had money when it was needed by another (as a loan or otherwise) and at least sometimes repaid it, at least in part.”*
209. In the light of findings of this kind, I have difficulty in understanding how it can be said that the Tribunal elided the investigation of associate status with the just and equitable enquiry. The Tribunal found that R1 formed part of a wider corporate structure which included the bulk of the Original Respondents. If there had been a single wealthy parent company within that wider corporate structure, the position might have been equivalent to the position in *Triathlon*, and it might have been just and equitable to single out the wealthy parent company. That was not however how the relevant individuals identified in Paragraph 369 ran their business. The business was run through the wider corporate structure which the Tribunal found to have existed, as *“a fluid, disorganised and blurred network or structure”*.

In those circumstances the Tribunal decided that it was just and equitable to hold all of the Specified Respondents jointly responsible. There was no elision of the gateway conditions and the just and equitable question.

210. My analysis of the reasoning of the Tribunal above also seems to me to supply the answer to the Appellants' argument that the Tribunal were wrong in making no attempt to recognise what is alleged to have been the very different status and position of the various Specified Respondents. The Tribunal explained, in their reasoning, why they were not persuaded that it was appropriate to differentiate between the Specified Respondents. On the evidence the Tribunal concluded that it was just and equitable to impose joint responsibility on all those Original Respondents who, on their findings, were part of the wider corporate structure of which R1 formed part. As the Tribunal said, at Paragraph 381, they accepted the submission of Mr Hickey "*that in this case the fair approach is an "all or nothing" one.*" (my underlining). The decision of the Tribunal to impose joint responsibility was a decision which they made on the evidence before them. I cannot see that this decision was wrong, given the evidence before the Tribunal. Still less can I see any basis on which I would be entitled to interfere with that decision.
211. The position is the same in relation to the Appellant's argument that the Tribunal were wrong to adopt an all or nothing approach. Once it is accepted, as it is for the purposes of Ground 2 and indeed as I have now decided, that the Tribunal were entitled to make remediation contribution orders on a joint and several basis, it was open to the Tribunal to decide that joint responsibility should be imposed upon the Specified Respondents, without differentiation. As I have said, I cannot see that the Tribunal went wrong in this decision, still less that I am entitled to interfere with this decision.
212. It is said that a result of the Tribunal adopting the all or nothing approach was that the Tribunal reversed the burden of proof. It seems to me that there is a confusion in this part of the Appellants' argument. As I have explained, it seems to me that the initial burden was on Grey to state its case. Grey did so, in the Amended Statement of Case. That case included the pleaded contention that R1 was part of a wider corporate structure which included R2-R96. This was said by Grey to render it just and equitable that joint responsibility be imposed on the Original Respondents. It was then for Grey to prove, on the evidence before the Tribunal, that the factual basis for this case was made out. Grey was successful in that endeavour, as it is clear from the findings made by the Tribunal on the evidence. There was no reversal of the burden of proof in this respect. This is clear from the reasoning in the Decision. I note in particular what was said by the Tribunal at Paragraph 357, which I have already quoted but which I repeat for ease of reference:
- "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."*
213. I have difficulty in seeing how this statement can be squared with the argument that the Tribunal reversed the burden of proof.
214. In reality this part of the Appellants' argument seems to me to be a disguised complaint that the Tribunal took an unfavourable view of the evidence adduced by the Original Respondents. It is clear that the Tribunal were not impressed by the evidence of the Original Respondents, and took the view that, in a number of respects, it was incomplete and unsatisfactory. This, in turn, was clearly a factor in the Tribunal's findings. In particular, this was clearly a factor in the Tribunal's finding, at Paragraph 369, that many of the

Original Respondents “*were not actually run as carefully separated SPVs but as part of a fluid, disorganised and blurred network or structure controlled by Jack Frankel and/or Jacob Dreyfus*”. In making this and their other relevant findings the Tribunal were not reversing the burden of proof. In making these findings the Tribunal were entitled, indeed bound to have regard to the entirety of the evidence, including the evidence adduced by the Original Respondents. If there were problems with the evidence on the Original Respondents’ side the Tribunal were quite entitled to take those problems into account in weighing the evidence and making their findings. An exercise of this kind is a basic, and standard task of any fact finding court or tribunal, and should not be interfered with by an appellate court or tribunal without very good reason. There is no such good reason in the present case.

215. Turning to Mr Hughes’ submission that there has to be a clear or rational nexus between the relevant body corporate and the imposition of a remediation contribution order to deal with relevant defects, it seems to me that there are two problems with this submission.
216. First, I do not think that it is right to say that there is a requirement for a clear or rational nexus. This is not what Section 124(1) says. Provided that the gateway conditions are satisfied, the question for the FTT is whether it considers it just and equitable to make a remediation contribution order. While this is a separate exercise to the question of whether the gateway conditions are satisfied, the question of what is just and equitable is left at large. It is for the FTT to decide what is just and equitable, on the facts of the particular case before the FTT. As the Tribunal correctly noted, at Paragraph 357, decisions on what is just and equitable are very fact-sensitive.
217. Second and if, contrary to my view, there was a requirement for a clear or rational nexus, it seems to me that it can be found in the reasoning of the Tribunal. The Tribunal considered it just and equitable, on the evidence, that the Specified Respondents, as members of the same wider corporate structure should jointly shoulder the burden of remedying the relevant defects. A primary purpose of the jurisdiction in Section 124 is to ensure that 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. On the evidence in the present case the Tribunal decided that it was appropriate to treat all of the Specified Respondents in the wider corporate structure (here meaning the Specified Respondents with the exception of R1) as the effective equivalent of the wealthy parent company or other wealthy entity caught by the association provisions. Given this effective equivalence and if, contrary to my view, a nexus of the kind contended for by the Appellants was required before it could be considered just and equitable to make a remediation contribution order, such a nexus could be found and was found by the Tribunal in the present case.
218. Turning to the arguments in support of Ground 2 which are set out in the consolidated grounds of appeal, I can take them more briefly. They are largely dealt with by the analysis above.
219. The Appellants argue first that participation in a particular development or receipt (directly or indirectly) of remuneration from that development is a minimum requirement or touchstone for it being just and equitable to make a remediation contribution order. As with the argument that a nexus must be shown, it seems to me that this argument does not respect the wording of Section 124(1). As I have already noted, the question of what is just and equitable is left at large. It is for the FTT to decide what is just and equitable, on the facts

of the particular case before the FTT. There is no requirement for direct participation or receipt of profits.

220. Beyond this, the Appellants' argument finds no support in the case law. In *Triathlon*, Get Living had not participated in the relevant development. Get Living was inserted into the corporate structure after the development, when it acquired the assets and liabilities of the East Village. Nor had it received, directly, the profits of the relevant development. At most, it had derived a benefit from the increase in the value of its investment in the East Village, although this was a matter to which we did not give any great weight; see the FTT decision in *Triathlon* at [255]. As *Triathlon* demonstrates, and as I have already noted, the obvious purpose behind the association provisions in Paragraph (d) is to ensure that a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the costs of remedying the relevant defects by hiding behind the separate personality of the development company. There is no additional requirement for participation in the relevant development or for the direct or indirect receipt of profits from the development, although these matters are clearly matters which can be taken into account in considering what is just and equitable.
221. There is also this further point. As with the Appellants' nexus argument, if one assumes that the Appellants are correct to say that there is a minimum requirement or touchstone which applies to the just and equitable question, it seems to me that this requirement was satisfied, on the findings of the Tribunal, in the present case. The Tribunal found that the Specified Respondents were all included within the wider corporate structure through which the individuals in control of the structure conducted their business, which business included the carrying out of the Development and the receipt of the profits from the Development. As such, all of the Specified Respondents can be seen both as having participated in the Development and as having received the profits therefrom. They were all, on the findings of the Tribunal, part of the same business.
222. In his oral submissions in reply Mr Hughes made forceful submissions to the effect that it was wrong to draw an analogy between the position of the parties in *Triathlon* and the position of the parties in the present case. He submitted that the Specified Respondents (here not including R1) could not be seen as the parent of R1 or as in any equivalent position to Get Living. The problem confronting Mr Hughes in this respect was however that, in seeking to make good this submission, he was obliged to make submissions on the evidence which was before the Tribunal and to contend that, on the basis of that evidence, the analogy with *Triathlon* did not hold up. I am however in no position to make any findings of my own on the evidence before the Tribunal. The relevant findings have been made by the Tribunal. It is clear from those findings, with which I am not entitled to interfere, that the analogy with *Triathlon* does hold up. On the Tribunal's findings the Specified Respondents (not including R1) were in an equivalent position to Get Living.
223. The Appellants' second argument is that the Tribunal wrongly imposed an evidential burden on the Original Respondents to show why it would not be just and equitable to make an order against them. For the reasons which I have already set out, I do not think that the Tribunal did commit any error of this kind. As I have explained, in making their findings the Tribunal were entitled, indeed bound to have regard to the entirety of the evidence, including the evidence adduced by the Original Respondents. If there were problems with the evidence on the Original Respondents' side, the Tribunal were quite entitled to take those problems into account in weighing the evidence and making their findings. The point bears repeating that an exercise of this kind is a basic, and standard task of any fact finding

court or tribunal. Such an exercise should not be interfered with by an appellate court or tribunal without very good reason. There is no such good reason in the present case.

224. The Appellants' third argument is that the Tribunal wrongly drew adverse inferences against the Specified Respondents based on a supposed failure to discharge the evidential burden wrongly placed upon them by the Tribunal. For the reasons which I have set out, the Tribunal did not commit any error in relation to the burden of proof. It is true that the Tribunal did draw adverse inferences against the Specified Respondents, based on the unsatisfactory nature of their evidence. Without repeating my earlier analysis, the Tribunal were, for the reasons which I have given, quite entitled to draw adverse inferences from the unsatisfactory nature of this evidence.
225. Drawing together all of the above analysis, I conclude that the Tribunal made no error in its approach to determining whether it was just and equitable to make the RCO against the Specified Respondents. The Tribunal directed themselves correctly in the exercise of their just and equitable discretion and, in my judgment, their exercise of that discretion cannot be faulted.
226. I consider that it is worth adding this point to my analysis. The essential problem confronting the Appellants, in relation to Ground 2, is that the findings of the Tribunal, on the evidence before them, justified the imposition of joint or collective responsibility on the Specified Respondents. As I have commented, Grey took what may be described as a risk in advancing its case on what I understand to have been an all or nothing basis; that is to say without a fallback case which dealt with the Specified Respondents on a non-collective basis. On the findings of the Tribunal on the evidence, the risk paid off. In another case, on different evidence, the Tribunal might have concluded that it was not just and equitable to impose joint responsibility on a large number of respondents. This however simply goes to bear out the wisdom of the Tribunal's observation that consideration of the just and equitable question is a very fact sensitive exercise.
227. Mr Hughes argued that the decision of the Tribunal that it was just and equitable to make the RCO raised the spectre of an investor putting £100,000 or £200,000 into a multi-million pound venture, and then finding itself jointly and severally liable for the full amount of a multi-million pound remediation contribution order. I do not agree that the Decision raises any such spectre. If and to the extent that any of the Specified Respondents are in this position in the present case, that is the result of the findings made by the Tribunal, on the evidence in the present case, as to the wide corporate structure which was found to exist and as to the way in which the individuals who controlled that structure conducted their business through the structure. It was these findings which underlay the decision of the Tribunal to impose joint responsibility. As I have said, in another case involving multiple respondents, and on different evidence, the result might be different.
228. This leaves the second argument within Ground 1 to deal with. The second argument within Ground 1 is that if, again contrary to the Appellants' argument but in accordance with what I have decided in relation to Ground 1, the Tribunal had jurisdiction to impose joint and several liability upon the Specified Respondents, it would have been just and equitable to order each of the Specified Respondents to pay a fixed share of the total sum due by way of the Specified Payments.
229. On the basis of my analysis of Ground 2 it seems to me that this argument must also fail. The Tribunal decided that it was just and equitable to impose joint responsibility upon the Specified Respondents. The Tribunal set out their reasons for this decision in very clear

terms in Paragraphs 349-381. Those reasons were based on the findings made by the Tribunal on the evidence. For the reasons which I have given, the Tribunal did not go wrong in the exercise of their discretion. In these circumstances it seems to me that there is no basis on which it can be said that the Tribunal should, in the exercise of their discretion, have opted for an order or orders requiring each of the Specified Respondents to pay a fixed share of the total sum due by way of the Specified Payments. Indeed, such an exercise of discretion would have been inconsistent with the findings of the Tribunal on the evidence.

230. On the basis of the analyses set out above, my overall conclusions are (i) that Ground 2 fails, and (ii) that the second argument within Ground 1 also fails.

### **Ground 3 - analysis and determination**

231. The argument in Ground 3 is that the Tribunal wrongly concluded that “*a building safety risk*” for the purposes of Section 120 is any risk above low risk, so as to include tolerable risks. The Tribunal should have directed themselves that only an “*intolerable*” risk could be a “*building safety risk*”.

232. As I have explained, and as the Appellants have acknowledged, Ground 3 can be said to be academic because permission to appeal was refused in respect of the decision of the Tribunal to include the costs of replacing the Type 2 Wall within the RCO. The question of what constituted a building safety risk, for the purposes of Section 120, would have been relevant to an appeal against this decision of the Tribunal.

233. In oral submissions, and on the Appellants’ side, Mr Morris made brief reference to Ground 3. He indicated that, given the academic nature of Ground 3, he proposed to rest on the written submissions in support of Ground 3 set out in the skeleton argument of the TS Appellants, and not to expand upon those submissions in the oral argument. I took the opportunity, in this exchange, to inform all counsel that I was reluctant to decide Ground 3, as an abstract ground of appeal. I also made it clear that I had made no decision as to whether I should decide Ground 3, and that it was open to any of the parties to seek to persuade me to overcome my reluctance to go into Ground 3. Mr Morris, after taking instructions, indicated that he did not wish to seek to persuade me out of my reluctance. For the Respondent however Ms Gillies indicated that she did wish to address me on Ground 3 and did wish to persuade me to give some guidance on the question of construction raised by Ground 3.

234. In these circumstances, and in addition to the written submissions on Ground 3 in the skeleton arguments of the TS Appellants and Grey, I had the benefit of some well-organised and helpful oral submissions from Ms Gillies. On the basis of these submissions I was persuaded that I should venture into Ground 3 and state, as briefly as possible, my views on the issue of construction raised by Ground 3.

235. The Tribunal recorded the argument of Mr Morris in the following terms, at Paragraph 71:

*“71. Second, Mr Morris argued that whether something causes a “building safety risk” for the purposes of section 120(5) depends on whether the risk is tolerable, having regard to the other features and characteristics of the building. The fire safety experts had opined that, when assessing the risks associated with fire safety of external walls under PAS9980, a “medium” fire risk that is considered to be “tolerable” would not be a building safety risk. Mr Morris argued for this narrow interpretation, particularly in view of the*

*interference (by Schedule 8 to the Act) with private/property law rights in preventing or limiting recovery of service charges relating to relevant defects.”*

236. The Tribunal did not accept this argument. Their construction of the expression “*building safety risk*” was in the following terms, at Paragraph 72:

*“72. We think the better view is that any risk above “low” risk (understood as the ordinary unavoidable fire risks in residential buildings and/or in relation to PAS9980 as an assessment that fire spread would be within normal expectations) may be a building safety risk. Section 120(5) describes a risk to the safety of people arising from the spread of fire or collapse, not a risk reaching an intolerable or any other particular threshold. We do not think “collapse” indicates the risk must be of catastrophic fire spread, as was suggested. It need only be a risk to the safety of people arising from the spread of fire in a tall residential building.”*

237. A building safety risk is defined in Section 120(5) to mean, in relation to a building and for the purposes of Section 120:

*“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;”*

238. It is important to note that the “*risk*” referred to in this definition does not sit on its own. 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.

239. This point can be taken further. For the purposes of Section 120 the definition of building safety risk is required because it forms part of the definition of a relevant defect, in Section 120(2). A relevant defect is defined, for the purposes of Sections 122-124 and Schedule 8, in the following terms in Section 120(2):

*“(2) “Relevant defect”, in relation to a building, means a defect as regards the building that—*  
(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.”*

240. It follows that, for the purposes of the specified parts of the Act, a building safety risk cannot exist unless there is a defect in relation to the relevant building which has caused that building safety risk. Equally, for the purposes of the jurisdictions in Sections 123 and 124, the building must be a relevant building, as defined in Section 117.

241. In these circumstances it is difficult to see a justification for imposing any kind of external gradation or limit on the level of risk which is capable of qualifying the reference to “*a risk*” in the definition of building safety risk. I say this for two reasons. First, there is no such qualifying wording in Section 120(5). There is no qualifying adjective such as “*significant*”, or “*intolerable*”, or, for that matter, “*low*”. The reference is simply to “*a risk*”, which is naturally read as meaning any risk. Second, if “*a risk*” is read as meaning any risk, this does not have the consequence that the definition of building safety risk is

unrestrained. The risk will only be a building safety risk if it satisfies the various conditions which I have just set out. The risk must exist in relation to a building, as 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 part of it. The risk must have been caused by a relevant defect and, so far as the jurisdiction in Section 124 is concerned, the defect must exist in relation to a relevant building. These conditions impose considerable restraints upon what can qualify as a building safety risk.

242. In her oral submissions Ms Gillies explained the wider role which a building safety risk plays in the Act. She drew my attention to the definition of building safety risk which applies for the purposes of Part 4 of the Act. Part 4 of the Act is forward looking, and contains provisions concerning the management of building safety risks. The actual definition is to be found in Section 62. The definition in Section 62 is not in the same terms as in Section 120(5), and includes risks to the safety of people in or about a building arising from “*any other prescribed matter*”, for which purpose the Secretary of State is empowered to make regulations. Another example of a definition of building safety risk, different to that in Section 120(3), can be found in Section 130(6). In relation to the power to make regulations under Section 62 there are supplementary provisions in Sections 63 and 64. The definition of building safety risk in Section 62 is carried over into Section 4. Section 4 is located within part of Part 2 of the Act, which is also forward looking and deals with the building safety regulator. The building safety regulator is defined by Section 2(1) to mean the Health and Safety Executive.
243. References to building safety risk can also be found in Section 87 and Section 101 in Part 4. Section 87 imposes mandatory reporting requirements and creates an offence where an accountable person for an occupied higher-risk building fails, without reasonable excuse, to give prescribed information in prescribed circumstances to the regulator by the prescribed time and in the prescribed way. Section 101 creates an offence in relation to a contravention of a relevant requirement by an accountable person which “*places one or more people in or about the building at critical risk*”. A critical risk is defined to mean “*a significant risk of death or serious injury arising from a building safety risk*”.
244. On the same theme Regulation 6 of Higher-Risk Buildings (Management of Safety Risks etc) (England) Regulations 2023/907 contains provisions in relation to the mandatory reporting requirements in Section 87. These provisions include a definition of the expression “*safety occurrence*”. A safety occurrence means “*an incident or situation relating to the structural integrity of, or spread of fire in, a higher-risk building that meets the risk condition*”. The risk condition is met in relation to a part of a building “*if the use of that part of the building without the incident or situation being remedied would be likely to present a risk of a significant number of deaths, or serious injury to a significant number of people*”.
245. The above provisions demonstrate that Parliament has, at various points in the legislation, defined a risk as a particular level of risk; such as a critical risk in Section 101, and a risk of a significant number of deaths, or serious injury to a significant number of people, in Regulation 6. In addition to this, Parliament has also defined the expression “*building safety risk*” in different terms in different sections of the Act. All this, in turn, strongly suggests that Parliament did not intend that the reference to “*a risk*” in Section 120(5) was intended to mean a particular level of risk.
246. Further support of this conclusion can be found elsewhere in the machinery of the Act. Ms Gillies drew my attention to Section 83(1), which requires an accountable person for an

occupied higher-risk building to assess the building safety risks as regards the part of the building for which they are responsible. As she pointed out, the assessment obligations are at risk of not working as they were intended to work, if it is open to a landlord to treat a “tolerable” risk as not constituting a building safety risk. It is easy to see the sorts of arguments and problems which could arise over what constitute tolerable and intolerable risks. Beyond this, problems would also be likely to arise in relation to the restrictions on service charge recovery in Schedule 8, if a landlord argued that a particular item of work was not caught by the restrictions because it was dealing with a tolerable risk, and thus not a building safety risk. Again, these considerations point against the reference to a risk in Section 120(5) being intended to mean a particular level of risk.

247. I also bear in mind a further point which was touched upon by the Tribunal in Paragraph 75. In relation to the jurisdictions in Section 123 and Section 124, it seems to me that the level of risk engaged, where a building safety risk exists, is not excluded from the consideration of the FTT. If the FTT decides that a remediation order or a remediation contribution order should be made, the question of what work is required to remedy the relevant defect will then arise. I can see that the level of risk posed by the relevant building safety risk will, or at least may be a relevant factor in the decision of the FTT as to what works are required. In this sense therefore the level of the building safety risk is not excluded from consideration. This seems to me however to be a further reason why it is wrong to seek to impose an initial filter, based on the level of risk, on what risk can qualify as a building safety risk.
248. In their skeleton argument for the hearing of the Appeal, the TS Appellants argued that a threshold on the level of risk which can qualify as a building safety risk, which the TS Appellants set at the level of a risk which is intolerable, can be implied into Section 124. I was referred to both Bennion and case law on the principles which apply, in terms of implying something into the meaning of statutory wording. In my view, the application of these principles does not permit a qualifying adjective to be added to the reference to “a risk” in Section 120(5). Doing so seems to me, for all the reasons which I have set out above, to cross the line between the legitimate implication of meaning into the statutory wording, and rewriting the statutory wording.
249. The TS Appellants also rely upon the Explanatory Notes, at paragraphs 957 and 958, which are in the following terms:

*“957 The leaseholder protections deal only with historical building safety defects; they are backward-looking only. They are a one-off intervention designed to deal with the current serious problems with historical building safety defects in medium- and high-rise buildings. The protections afforded only apply to defects created in the 30-year period prior to commencement of the provision, so in practice between mid-1992 and mid-2022. A 30-year period has been chosen as evidence shows that this period captures all buildings affected by the relevant safety issues. It aligns with changes this Act makes to the limitation period under section 1 of the Defective Premises Act 1972 (to which see section 135) and the relevant limitation period under the new cause of action relating to cladding products (sections 150 and 151). The Government has also agreed with major residential property developers that they will remediate buildings they had a role in developing or refurbishing in the past 30 years.*

*958 Subsections (2) and (5) define what is meant by a “relevant defect” and set out that for a defect to be a relevant defect, it must give rise to a building safety*

*risk. A “building safety risk” is one that puts people’s safety at risk due to either the risk of the spread of fire or structural collapse of a building.”*

250. For the reasons which I have already set out, the assistance which the Explanatory Notes can provide, in construing Section 120(5), is very limited. Independent of this point, I would not be persuaded in any event that the terms in which the Explanatory Notes are expressed justify reading words into Section 120(5) which are simply not there.
251. Finally, the TS Appellants make further reference to the principle that Section 124 constitutes expropriatory legislation, of which Section 120(5) forms part and which should be construed, so far as possible, in a manner which leaves property rights intact. The principle is not in doubt, but in my view it cannot be relied upon to read words into Section 120(5) which, as I have said, are simply not there.
252. I also add this point, before concluding my analysis. Returning to the present case, I can understand why the fire safety experts, as recorded in Paragraph 71, sought to derive assistance from PAS9980 in looking for guidance as to what constituted a building safety risk. PAS9980 is however a code of practice. It is not, in itself, a guide to the meaning of a building safety risk in Section 120(5).
253. Drawing together all of the above analysis, I reach the following conclusions:
- (1) In my view the reference to “*a risk*” in Section 120(5) means what it says. It refers to any risk, subject to the point that the relevant risk will only qualify as a building safety risk if it satisfies all the other conditions, which I have identified above, for the risk to qualify as a building safety risk. The reference to “*a risk*” does not refer to any particular level of risk and is not gradated. It refers to any risk.
  - (2) It follows that I do not accept the argument of the TS Appellants that the reference to a risk in Section 120(5) is confined to a risk which can be described as “*intolerable*”.
254. It also follows, from the conclusions which I have reached, that I find myself in respectful disagreement with the Tribunal in relation to the view which they expressed in the first sentence of Paragraph 72. The Tribunal considered that the reference to “*a risk*” meant any risk above a low risk. While I can understand why the Tribunal took this view, and while I consider that the Tribunal were correct to reject the argument that a risk meant an intolerable risk, it follows from my reasoning above that it was not appropriate to impose the threshold condition of anything above a low risk. If a risk is a low risk, it is still capable of qualifying as a risk, for the purposes of Section 120(5), but whether it will be a building safety risk will depend upon whether it can satisfy the other conditions for the existence of a building safety risk. Equally, if the relevant risk is a low risk, but qualifies as a building safety risk, one would expect that factor to play some part in the question of what remedial action is required.
255. I therefore conclude that Ground 3 fails. It follows from my reasoning that I also conclude that the Tribunal were wrong in their own conclusion on the meaning of the expression “*a risk*” in Section 120(5).

#### **Ground 4 – analysis and determination**

256. By Ground 4 the Appellants challenge the decision of the Tribunal that it was just and equitable to include within the scope of the RCO the costs of replacing the Type 1 Wall in its entirety, including professional fees in respect of those works.

257. This requires a little more explanation. The actual work which was done to the Type 1 Wall involved the removal of the combustible foam insulation which had been injected into the Type 1 Wall. As explained by Mr Morris, what this meant in practice was that the Type 1 Wall was replaced in its entirety. In order to remove the combustible foam insulation, the outer concrete leaf of the wall was removed and a steel framed walling system was put back in its place. I will refer to the works to the Type 1 Wall which were carried out, and which involved the removal of the combustible foam insulation, as **“the Removal Works”**.
258. It is recorded in Paragraph 143 that the experts were agreed that, from *“a purely technical perspective”* these remedial works were not proportionate. There was an alternative and, I assume, simpler and cheaper solution which involved leaving the combustible insulation in place, but putting in place effective fire stopping by installing cavity barriers which sealed the gap where the top of the insulation was exposed; see Paragraph 146. The combustible insulation would thereby have been sealed off and made safe. I will refer to these alternative works, which the Appellants say should have been carried out, as **“the Sealing Works”**.
259. The conclusion of the Tribunal in this respect which is challenged can be found in Paragraph 166, which I have set out earlier in this decision, but which I repeat for ease of reference (I have underlined the key part of this conclusion):

*“166. Ultimately, as Mr Hickey and Miss Gillies pointed out, the residents of Vista Tower had been living in unsafe conditions since they took up occupation and then throughout the earlier attempts to check/reduce the scope of the remedial works and costs (for example, changing from the CAN to PAS, considering in 2020 and 2021 whether new frames could/should be spliced into the window frames at junctions with compartment walls rather than replacing all of the frames, and seeking to avoid decanting). It seems each investigation of a different part of the building had thrown up unexpected variations, challenges or new uncertainties. The Secretary of State had selected Vista Tower to use as an example to require that remedial works be carried out for this type of high risk building without further delay, to minimise the continuing risk to residents. At this stage and in the circumstances of this case, we consider that it was reasonable to press on with the remedial works based on the CHPK report.”*

260. In his oral submissions Mr Morris submitted that this conclusion, as set out at the end of Paragraph 166, was based on a number of findings of fact *“along the way”* which were unsupported by the evidence or contradicted by the evidence and, as such, were findings which it was not open to the FTT to make.
261. The starting point, in relation to Ground 4, is therefore, as Mr Morris correctly acknowledged, that the conclusion of the Tribunal which is challenged was a conclusion on the evidence; that is to say a conclusion on the facts, based upon findings of fact made by the Tribunal. It is also important to record, in this context, that the hearing of the Appeal has been conducted by way of a review of the Decision. The hearing of the Appeal was not the rehearing of the RCO Application.
262. On reading the skeleton arguments for the hearing of the Appeal I noted that the parties had not made express reference to certain authorities which set out important principles in relation to appeals against findings of fact. In these circumstances I notified the parties, in advance of the hearing, of three authorities on which I invited short submissions. The three authorities in question were *Georgiou v Customs and Excise Commissioners* [1996] STC

463, at 476, *Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ 5, at [114]-[116], and *Ingenious Games LLP v HMRC* [2019] UKUT 0226 (TCC), at [53]-[64].

263. The warning, and guidance given by Lewison LJ in the *Fage* case to appellate courts, in relation to interfering with findings of fact made by trial judges, are very well-known, but bear repeating. It seems to me that they should have equal application on an appeal, to an upper tribunal, against findings of facts made by a tribunal. The entirety of what was said by Lewison LJ at [114]-[116] is important, but I will confine myself to quoting [114]:

“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

- 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.”

264. As a general rule, and subject to some exceptions, Section 11 of the Tribunals, Courts and Enforcement Act 2007 confines the right of appeal from a first-tier tribunal to an upper tribunal, as set out in that Section, to an appeal on a point of law. This means that, where Section 11 applies, there cannot be an appeal on a pure question of fact which is decided by the first-tier tribunal. However, a tribunal may arrive at a finding of fact in a way which discloses an error of law, as was explained by the Upper Tribunal Tax and Chancery Chamber (Falk J, as she then was, and Judge Tim Herrington) in *Ingenious Games LLP v The Commissioners for Her Majesty’s Revenue and Customs* [2019] UKUT 0226 (TCC), at [54]:

“However, a tribunal may arrive at a finding of fact in a way which discloses an error of law. That is clear from *Edwards v Bairstow* [1956] AC 14 in which Viscount Simonds referred to making a finding, without any evidence or upon a view of the facts which could not be supported, as involving an error of law: see at page 29. In the same case, Lord Radcliffe, at page 36, regarded cases where there was no evidence to support a finding or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding, as cases involving errors of

*law. The LLPs rely on this reasoning for their challenges to the FTT's findings of fact set out in their grounds of appeal. As Lord Diplock observed in his speech in Council for Civil Service Unions v Minister for the Civil Service [1985] AC 374, at 410F - 411A, a better term for this ground for challenging a decision might be "irrationality".*"

265. In this context it is necessary to have in mind the nature of a challenge of this kind, as explained by Evans LJ in *Georgiou*, at 476:

*"It is right, in my judgment, to strike two cautionary notes at this stage. There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. That is well seen in arbitration cases and in many others. It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be misused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled."*

266. In the same part of his judgment Evans LJ also gave the following invaluable guidance on steps an appellant must go through, in order to make the case that the tribunal made a finding of fact which it was not entitled to make, and thereby made an error of law:

*"...for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. "What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court."*

267. In response to these authorities Mr Morris produced a most helpful Note in support of his case on Ground 4, which identified the three findings of fact made by the Tribunal which are the subject of the challenge in Ground 4, and explained why the Tribunal were not entitled to make those findings. In a well-organised and equally helpful set of oral submissions Mr Morris took me through the grounds of challenge, and elaborated on why, in his submission, the Tribunal had not been entitled to make these findings of fact.

268. Before leaving the authorities, it is also useful to make reference to what was said by Briggs J (as he then was) in *Megtian Limited (in Administration) v HMRC* [2010] STC 840, at [11], on the nature of the question the appellate tribunal must ask itself, in determining whether a finding on the evidence has engaged an error of law:

*"There are numerous authoritative statements of the precise meaning of the concept that a finding of fact involves an error of law when it is based upon non-existent or inadequate evidence. They were very recently summarised by*

*Christopher Clarke J in Red 12 Trading Ltd v HMRC [2009] EWHC 2563 (Ch) at paragraphs 113-120. The question is not whether the finding was right or wrong, whether it was against the weight of the evidence, or whether the appeal court would itself have come to a different view. An error of law may be disclosed by a finding based upon no evidence at all, a finding which, on the evidence, is not capable of being rationally or reasonably justified, a finding which is contradicted by all the evidence, or an inference which is not capable of being reasonably drawn from the findings of primary fact.”*

269. It seems to me that the guidance given in *Ingenious Games*, *Georgiou* and *Megtian* on what constitutes an error of law is equally relevant in the present case. The same goes for the guidance given by Evans LJ in *Georgiou* on the correct approach to an appeal against a finding of fact which is said to constitute an error of law. I did not understand this to be disputed by the Appellants. Indeed, the Appellants put their case on Ground 4 on the basis that the Tribunal had, in their relevant findings of fact, committed errors of law.
270. Before coming to the three findings of fact which are the subject of challenge, it is necessary to make reference to certain documents which formed part of the evidence before the Tribunal.
271. On 6<sup>th</sup> December 2022 CHPK produced a report described as “*Modelling Scenarios Based on PAS9980 Technical Note*” (“**the Modelling Report**”). By way of reminder, CHPK was a fire engineering company which was instructed to carry out an investigation and assessment of external works required, by reference to the then recently published code of practice for appraising the fire risk of external wall construction/cladding on blocks of flats. The new code of practice in question was the BSI published building safety standard PAS9980, which I am referring to as PAS9980, which replaced the CAN (the previously published Consolidated Advice Note).
272. For the purposes of Ground 4 the key part of the Modelling Report is to be found in paragraphs 1.2-1.4, which stated as follows:
- “1.2. CHPK Fire Engineering (CHPKFE) has been commissioned by Grey GR Limited Partnership (Grey, the client) to carry out scenario modelling assessments of the external wall for the Vista Tower, Southgate, Stevenage, SGI IAR (the building).*
- 1.3. CHPKFE have carried out these assessments based on the information provided in the FE01225/05 FRAEW report for Vista Tower on the 13th of October 2022 and six scenarios where some of the materials in Wall Type 1 and 2 are assumed to be altered to non-combustible materials.*
- 1.4. This technical note will consider the following six scenarios from applying the PAS9980 perspective that will be explored to understand each scenario risk rating.”*
273. The different scenarios were then set out in paragraph 1.4. For present purposes the relevant scenario is Scenario 4 (“**Scenario 4**”), which is the following terms:

*“**Scenario 4** – The wall build-up of Wall Type 1 in Figure 4 in this Technical Note is considered to remain unchanged but the window-sill should provide full fire stopping to encapsulate the combustible insulation PIR. Fire risk assessment according to PAS990 methodology shows that the risk of external fire for this scenario spread is **LOW**.”*

274. As I understand the position Scenario 4 constituted, or envisaged a scheme of works to seal off the combustible foam insulation, which I am referring to as the Sealing Works. Scenario 4 was then explained in in the following terms, later in the Modelling Report:

*“Scenario 4 – The wall build-up of Wall Type 1 in Figure 10 of the FE01225/05 FRAEW report is considered to remain unchanged but the window-sill should provide full fire stopping to encapsulate the combustible insulation in the wall build-up. Figure 4 shows the sketch of Wall Type 1 in detail. Effective cavity barriers/fire stoppings are considered to be in place for Wall Types 1 and 2 according to the current version of Approved Document B. If Effective fire stops or cavity closers (in case of the presence of a cavity), this configuration can be considered as a double leaf masonry since both outer and inner leaves have 75mm or higher thickness. The risk of external fire spread in a double leaf wall is normally low if there are cavity closers around the opening and the façade edges.”*

275. On 9<sup>th</sup> December 2022 Mr Kevin Allen of TFT sent an email to various persons, including a number of persons at the Railpen Group. The Railpen Group, it will be recalled, acquired the Building, by Grey, as part of a portfolio of ground rent investments. This email (“**the Email**”) first identified that the Modelling Report had been received, and discussed at the “*weekly TFT/Railpen call this morning*”. Mr Allen stated that “*the scenario modelling has provided positive findings and has reached early conclusions, which is good news.*”. The Email then summarised the modelling carried out by CHPK. The purpose of the scenario modelling was described in the following terms, at the end of the summary:

*“• The purpose of the scenario modelling was to further refine the outline scope of works at Vista to help focus the ongoing design process. The modelling indicates that the works can be undertaken from outside the building, more substantial works within the flats should be avoidable and therefore decanting of residents should also be avoidable. It must be noted though that some screening will still need to be provided within the flats, to provide protection when the glazing systems are removed.”*

276. The Email concluded by setting out “*Key Next steps*”. This included a statement that “*the PAS FRAEW for Vista must be updated to reflect the findings of the scenario modelling and be finalised*”. In the same section of the Email it was stated that “*the outline scope (as identified in the scenario modelling) must be fed into and verified as part of the stage 4 design process. As per the draft project programme, the contractor is due to enter into the PCSA for the stage 4 design after the PAS has been finalised and submitted to DLUHC.*”.

277. There was some dispute between Mr Hickey and Mr Morris, in the course of Mr Morris’ oral submissions, as to whether TFT were engaged to advise Grey on the scope of the remedial works and, in particular, on the scope of the works to be carried out to the Type 1 Wall. Mr Morris described TFT as project managers and professional advisers on the remediation works. Mr Hickey was anxious to point out, as he asserted, that TFT had not been engaged to advise on the scope of the remedial scheme. I am not sure that this dispute particularly matters, in the context of Ground 4. The Tribunal helpfully attached a second schedule to the Decision, which listed the principal parties in the case. In that Schedule 2 TFT were described as project managers for Grey. I proceed on the basis that this was a correct description of their role, in relation to the remedial works, and on the basis that the Email was written in that capacity, as an email reporting on the content of the Modelling Report to their client, Grey, and giving advice to Grey on the suggested way forward. It is also worth pointing out the Email was not, as I read it, giving any direct advice on the scope

of the remedial works. Rather, the Email was advising that the advice from CHPK be updated, to reflect the content of the Modelling Report.

278. The reference to “FRAEW” in the Email stood for “Fire Risk Appraisal External Walls and Attachments”. The reference to “PAS FRAEW” was, as I understand the position, a reference to previous fire risk appraisal reports provided by CHPK. On 19<sup>th</sup> January 2023 CHPK produced a further FRAEW report (“**the January 2023 FRAEW Report**”).
279. The January 2023 FRAEW Report is lengthy, but for present purposes I need only quote section 9, which set out the recommendations of CHPK, in terms of remedial works:

*“The below remedial works are recommended:*

- Remove the opaque panels and combustible insulation in Wall Type 2 and replace them with non-combustible materials in line with the current version of ADB.*
- Remove the PIR insulation in Wall Types 1-C and 1-E and replace them with non-combustible materials in line with the current version of ADB.*
- Install vertical cavity barriers at the vertical compartmentations according to the current version of ADB.*
- Install cavity barriers around the window openings according to the current version of ADB.*
- Install effective firestops around the vent ducts and openings according to the current version of ADB.*

*The open-sided car park should be closed until the external walls highlighted here are fully remediated to avoid potential fire spread from the car park to the external walls.*

*Periodic Fire Risk Assessments should be carried out and the finding of this FRAEW should be considered.*

*If any changes in the fire safety of the building are done, this report should be reviewed immediately.”*

280. As I understand the position, and so far as the Type 1 Wall was concerned, the remedial works recommended by the January 2023 FRAEW Report were the Removal Works.
281. The first finding of fact challenged by the Appellants is in Paragraph 155. I quote the whole paragraph for context, but the challenged finding is underlined:

*“155. The modelling exercises gave different configurations from that shown in most of wall type 1 (with the cavity completely full in scenario 4 and an empty cavity in scenarios 5 and 6; scenarios 1-3 describe different types of wall type 2). The exercises, particularly scenario 4, had been criticised by other fire engineers (Design Engine in January 2023, as noted below). In any event, these modelling exercises were carried out to inform the PAS9980 assessment, which apparently took them into account but decided on a more cautious approach. ADI had for the previously planned remediation scheme produced drawings showing differing wall types, but a variety had been described in the CHPK PAS9980 report and many earlier reports. ADI themselves fell away when it emerged they did not have the requisite insurance cover for work of this high-risk type. The reference in the PAS9980 report to a “shared inner leaf” did not call for the report to be challenged either, because it should be read in context. Mr Ferguson confirmed that in his view the inner leaf of most of the wall was shared - the concrete and foam insulation below and the UPVC/insulation above could reasonably be described as a shared inner leaf.”*

282. The reference to “*the PAS9980 assessment*” was a reference to the January 2023 FRAEW Report. The essential submission made by Mr Morris was that there is nothing in the January 2023 FRAEW Report which demonstrates or suggests that the modelling scenarios set out in the Modelling Report had been taken into account. Section 4 of the January 2023 FRAEW Report set out “*Provided Documents and References*”. The Modelling Report is not mentioned amongst these documents. There are no other references to the modelling scenarios in the January 2023 FRAEW Report, and no evidence of the modelling scenarios having been taken into account. In this context I was referred to the written and oral evidence of Mr Pemberton of TFT, who gave evidence for Grey at the hearing before the Tribunal. The point which was made by Mr Morris was that Mr Pemberton was unable himself to say that the January 2023 FRAEW Report had taken the modelling scenarios into account. Given the position on the evidence, so Mr Morris submitted, the finding of the Tribunal in Paragraph 155, as underlined above (“**the First Finding**”), was a finding which the Tribunal could not, on the evidence, have made.

283. The second finding of fact challenged by the Appellants is in Paragraph 158. Again, I quote the whole Paragraph for context, but the challenged finding or, it may be said, findings are underlined:

*“158. It appears the only fire engineering advice the Applicant had seen criticising the CHPK reports criticised them for not being cautious enough. Design Engine (as fire engineer for ADI) had reviewed the CHPK reports in January 2023 [E/5.2/115]. They queried scenario 4 from the modelling exercise, indicating that to provide a fire barrier the cavity in wall type 1 would need to be over fixed with a stainless steel plate or the “PIR” insulation would need to be partially removed and replaced with a compressed, rated mineral wool fire barrier. They warned that the condition of the concrete façade panels may have corroded or become unstable over time and advised consideration of the structure of the existing concrete panels and inner leaf blockwork. In relation to wall type 2, they also warned that correct installation and design of vertical compartment walls may require breaking the ribbon windows at compartment wall positions. They also criticised various assumptions which they said were made in the CHPK report and were “optimistic”.”*

284. The reference to the first engineering advice seen by Grey is a reference to a report from Design Engine Limited (“**Design Engine**”) dated 23<sup>rd</sup> January 2023, Design Engine produced this report (“**the Design Engine Report**”) for its client, ADI Building and Refurbishment Limited, the previously proposed external remedial works contractor. In the executive summary to the Design Engine Report it was stated that Design Engine had reviewed the PAS assessments as provided by CHPK for the Building. The executive summary then set out the observations of Design Engine, having reviewed “*the DCH/PK report*”. For present purposes I need only quote the observations in paragraphs 1 and 3:

- “1 The removal of combustible materials to Wall Types 1C & 2 do not change the previously raised concerns of Design Engine report DES-XX-DR-Y-R-0001 RevP02*
- a. Technical Note FE01225/00 Scenario 4 Page 7 states that this wall build up is acceptable if the window cill provides as effective fire barrier. This may be achieved by;*
    - i. Over fixing the cavity with stainless steel plate*

ii. *Partial removal of the PIR insulation and the fitting of a compressed, rated mineral wool fire barrier such as Siderise RV120/120”*

- “3 *The effects on the structure and retained inner leaf blockwork and external concrete façade panels to remove combustible materials needs careful consideration – this review must also include a review of the condition of the façade panels as these may have corroded/become unstable over time.*
- a. *This is not covered by the Technical Note but there may be a scenario where inner leaf blockwork has to be broken out to provide an effective party wall as stated in 2.a)iii)”*

285. Mr Morris submitted that the Tribunal had simply misread the Design Engine Report. So far as Scenario 4 was concerned, he submitted, the Design Engine Report did not criticise Scenario 4, but simply explained how it could be achieved. The concerns about the effect on the structure of the removal of the combustible materials did not arise in relation to Scenario 4, which involved leaving the combustible materials in place. As such, the relevant findings in Paragraph 158 (“**the Second Finding**”) were findings which were inconsistent with the evidence and, as such, were not open to the Tribunal to make.

286. The third finding of fact challenged by the Appellants is in Paragraph 162. Again, I quote the whole Paragraph for context, but the challenged finding is underlined:

*“162. It is obvious that the remedial works team were all proceeding on the basis that the foam insulation had to be removed, as advised by the PAS9980 report. In view of the significant time pressure that existed, we are not persuaded that it was unreasonable to fail to press pause and attempt to go back to the drawing board to ask CHPK whether a way could be found to leave the combustible insulation in place. Lancer Scott were required to produce their design for the remedial works in September 2023, the end of their pre-contract services period. The directions given in the RO proceedings required the Applicant to produce their full proposed specification of the remedial works at the same time. As expected, they did so using the design produced by Lancer Scott. Again, this appears largely to have been driven by the requirements of the BSF and the Secretary of State, who promptly agreed the specification of remedial works which had been produced by Lancer Scott and grant funding for those works.”*

287. The submission of Mr Morris was a simple one. He submitted that there was simply no evidence before the Tribunal, on the basis of which they could find that there was any causal link between the existence of time pressure and the decision of Grey, if it was a decision, to implement the Removal Works. If, in the alternative, the Tribunal simply considered that the time pressure justified proceeding with the Removal Works, without finding a causal link, on the basis of the January 2023 FRAEW Report, this finding was equally not open to the Tribunal on the evidence, in the light of the advice in relation to Scenario 4 contained in the Modelling Report and the Email. I will refer to the finding in Paragraph 162 as “**the Third Finding**”. My use of this expression is intended to encompass both of the alternative constructions placed upon the Third Finding by Mr Morris,

288. The overall result, in the submission of Mr Morris, was that the conclusion of the Tribunal, in Paragraph 166, namely that it was reasonable to press on with the Removal Works, based on the January 2023 FRAEW Report (i) was unsupported in the evidence, (ii) was unexplained, and (iii) ran contrary to the agreement of the experts, which reflected the

Modelling Report, that the Removal Works were disproportionate. As such, the conclusion could not stand.

289. It seems to me that there are a number of difficulties with this case. The starting point is that it was accepted by Mr Morris, quite correctly in my view, that the Tribunal asked themselves the correct question at Paragraph 144. The Tribunal first noted the agreement between the experts at Paragraph 143:

*“143. The agreement between the experts, that from a purely technical perspective the remedial works for wall type 1 were not proportionate, has very significant weight. However, they acknowledged that the scope of the remedial works may have been affected by other factors. Do these justify what was done?”*

290. The Tribunal then proceeded, at Paragraph 144, to pose the question which they had to answer, on the evidence before them (the actual question is underlined):

*“144. As noted above, from 2020 the Applicant had engaged experts and procured proposals for a remediation scheme based on the CAN, which would have required removal of all combustible material. In 2022 they switched to a new approach based on the (then new) PAS9980, because this might reduce the scope of work and/or enable them to secure BSF funding for all works advised. The PAS9980 report from CHPK advised that the presence of the combustible insulation in wall type 1 was a “high” risk and it needed to be removed. In these proceedings, the experts agreed that advice was too cautious (or “conservative”, as they put it). But was it reasonable to rely on it as the basis for the design of the remedial works and not to revisit it later to attempt to reduce the scope of the works?”*

291. 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. The Removal Works had been recommended by its own expert adviser. In their skeleton argument for the hearing of the Appeal Grey’s counsel drew my attention to a number of authorities which establish the principle that a claimant is generally entitled to recover the cost of work carried out pursuant to expert evidence, unless the defendant shows that the advice was negligent.

292. This was the conclusion reached by the Tribunal, at [154]:

*“154. Particularly in 2022 and 2023, when the PAS9980 standard was new, it does not seem unreasonable for CHPK to have taken a cautious approach. In any event, it was reasonable for the Applicant to rely on the advice in their report without attempting to conduct their own analysis of the reasoning in it. Ms Leigh accepted that CHPK were reputable advisers and a sensible choice, as were the other professional advisors the Applicant had appointed.”*

293. The Appellants argue that the decision of Grey to proceed with the Removal Works was unexplained on the evidence. There was however a finding of fact made by the Tribunal, at Paragraph 154, that Grey did rely on the expert advice in the January 2023 FRAEW Report. Further findings of reliance on this expert advice can be found in Paragraphs 162

and 166. Given that the Tribunal read and heard all the evidence, while I am, at best, island hopping in the same sea of evidence, I can see no basis on which I can or should interfere with these findings of reliance. By the same token, and although Mr Morris was not prepared to concede this in his oral submissions, it is equally clear from the findings of the Tribunal, so far as this is not a matter of simple common sense, that Grey did make a decision to proceed with the Removal Works. Grey's proceeding with the Removal Works was clearly not either inadvertent or the result of some mistake on the part of Grey.

294. I can also see nothing wrong with the conclusion of the Tribunal that it was not for Grey to conduct its own analysis of the reasoning of CHPK in their recommendations in the January 2023 FRAEW Report. As Ms Leigh, the fire safety expert instructed by the TS Appellants is recorded in Paragraph 154 as having accepted, CHPK was a reputable adviser and a sensible choice, along with the other professionals instructed by Grey. If one assumes that there was the inconsistency between the Modelling Report and the January 2023 FRAEW Report asserted by the Appellants, I cannot see that it was the responsibility of Grey to identify this inconsistency and interrogate CHPK on the inconsistency. I cannot see that Grey was obliged to query its own professional advice.
295. It is however important not to overlook that the professional advice given by CHPK was not the only reason for Grey's decision to proceed with the Removal Works. The Tribunal found that Grey was under significant time pressure, for a number of reasons, by the time it received the January 2023 FRAEW Report; see in particular the findings to this effect in Paragraphs 156, 162, 163 and 166. In his oral submissions Mr Morris conceded that he was not in a position to dispute the finding of the Tribunal that there was significant time pressure. His argument, as I have explained, was that there was no evidence of a causal link between the existence of this time pressure and the decision of Grey to proceed with the Removal Works.
296. This argument engages the challenge of the Appellants to the Third Finding. The problem here however is that the Tribunal clearly were satisfied that time pressure was a significant factor which justified the decision of Grey to proceed with the Removal Works. Not only that, but it is apparent from the findings made by the Tribunal in relation to the existence of significant time pressure that there was ample material upon which the Tribunal could conclude that this significant time pressure was a factor in Grey's decision to proceed with the Removal Works. To take just one example, if one looks at the final conclusion of the Tribunal, at Paragraph 166, there is reference to the selection of the Building, by the Secretary of State, *"to use as an example to require that remedial works be carried out for this type of high risk building without further delay, to minimise the continuing risk to residents."* This was part of the evidence which went to support the Tribunal's finding of significant time pressure. The Tribunal were however also quite clear, in their findings, that this significant time pressure was not something to which Grey was oblivious, but was instead something of which Grey was acutely aware, to which Grey was subject, and which was both a cause and justification for Grey's decision to proceed with the Removal Works.
297. It follows, in my view, that the challenge to the Third Finding fails. As I read the Decision the Tribunal did find, and were quite entitled to find a causal link between the significant time pressure which existed, and the decision of Grey proceed with the Removal Works.
298. The above analysis also assumes that there were no reasons for the decision of Grey to proceed with the Removal Works other than the advice in the January 2023 FRAEW Report and the significant time pressure which existed. This assumption is itself wrong. If one reads Paragraphs 143-166, it is clear that the Tribunal also identified other factors which, in

their view, justified the decision to proceed with the Removal Works. By way of example only, in Paragraph 153 the Tribunal found that, at least before the remedial works began, no one working for Grey “*could reasonably be expected to have known how much of the Building was covered by which wall type or what other configurations of the observed wall types, or other wall types or defects, might be found when the full remedial works were carried out.*”.

299. This finding is not addressed in Ground 4. It was however another reason found by the Tribunal as to why it was reasonable for Grey to proceed with the Removal Works. It is also a demonstration of a problem which so often arises in relation to an appeal against findings of fact. The argument in support of the appeal seeks to chart a particular course through the evidence, picking out findings of fact which can be challenged. The challenged findings of fact are however only part of a much wider set of evidential findings made by the fact finding tribunal. The finding in Paragraph 153 to which I have just made reference is a good example of this problem.

300. This point can be taken further. Concentration on the reasoning of the Tribunal at Paragraphs 143-166 disregards the findings made by the Tribunal in their careful and thorough analysis of the evidence in relation to the Type 1 Wall, at Paragraphs 113-133. An important example of the problems which this concentration can create is to be found at Paragraph 126, where the Tribunal recorded the following matters:

*“126. However, the experts agreed that the scope of the remedial works may have been affected by other considerations, such as requests by building control or other statutory bodies, a lack of sufficient information about the as-built construction and pressure from stakeholders to adopt cautious or rapid resolutions, but the relevance of such matters was for the tribunal. They all agreed that, if removal of the combustible foam insulation in wall type 1 was required to remedy the building safety risk, the scope of the remedial works was reasonable.”*

301. The important point here is the agreement between the experts that the scope of the remedial works may have been affected by other considerations, which are then listed by the Tribunal. In support of Ground 4, the Appellants say that the Tribunal should not have departed from the agreement of the experts that, from a purely technical perspective, the Removal Works were not proportionate. That agreement between the experts, as recorded in Paragraph 143, must be read subject to Paragraph 126, where it is recorded that the experts themselves agreed that other factors, which were agreed to have existed, (i) might have been in play, and (ii) were for the Tribunal to consider.

302. The points which I have just made are relevant to the challenge to the First and Second Findings. Thus far in my analysis I have not addressed the Appellants’ challenge to the First and Second Findings. The reason for this is that I do not accept that either finding is material, in the sense of being necessary to the conclusion reached by the Tribunal at Paragraph 166.

303. Taking first the Second Finding, if one assumes that the Tribunal should have read the Design Engine Report as containing no query or criticism of Scenario 4, I cannot see that the notional correction of this misreading comes anywhere near subverting the remainder of the reasoning in Paragraphs 143-166. If the Design Engine Report should have been read as offering no support to the recommendation to proceed with the Removal Works, I cannot see what difference this would have made. Putting the matter more simply, if one notionally

removes Paragraph 158 from the Decision, there remains ample evidence, on the findings of the Tribunal, to support the reasoning of the Tribunal.

304. The same applies to the First Finding. If one assumes that there was an inconsistency between the Modelling Report and the January 2023 FRAEW Report, so far as Scenario 4 was concerned, I cannot see what difference this makes to the reasoning of the Tribunal. On this hypothesis the Tribunal should have found this inconsistency existed. If they Tribunal had made this finding, I cannot see what difference this would have made either to the Tribunal's finding that it was reasonable for Grey to rely on the advice in the January 2023 FRAEW Report, or to the Tribunal's findings that there were various other factors, most notably the significant time pressure which existed, which justified Grey's decision to proceed with the Removal Works.
305. I am not however persuaded that either the First Finding or the Second Finding were actually wrong. I say this for the following reasons.
306. Starting again with the Second Finding, at Paragraph 158 the Tribunal described the Design Engine Report as querying Scenario 4 from the Modelling Report. The Tribunal then went on to quote from paragraphs 1 and 3 in the executive summary section of the Design Engine Report. I have quoted those paragraphs in the executive summary above. I am a long way from satisfied that the Tribunal were actually wrong in their characterisation of the relevant sections of the Design Engine Report. If I had heard and read all the evidence which was before the Tribunal, I do not doubt that I would have a better understanding of what Design Engine were saying, in relation to Scenario 4 in the Design Engine Report, and that I would be in a better position to judge whether the Tribunal did go wrong in their characterisation of the Design Engine Report. As that is not my position, I am not persuaded that the Tribunal did go wrong, as alleged by the Appellants, in the Second Finding.
307. Turning to the First Finding I reach the same conclusion. The finding of the Tribunal, at Paragraph 155, was that the January 2023 FRAEW Report "*apparently*" took the modelling exercises in the Modelling Report into account, but decided on a more cautious approach. This is certainly what one would have expected to happen. CHPK produced the Modelling Report. CHPK also produced the January 2023 FRAEW Report, following the advice in the Email that the previous advice from CHPK needed to be updated and finalised in the light of the Modelling Report. As Mr Hickey pointed out in his oral submissions, the Modelling Report was recorded as having been checked by Dr Harem Hussein, Associate Director of CHPK. The January 2003 FRAEW Report was authored by Dr Hussein. It seems somewhat implausible that Dr Hussein forgot about Scenario 4 when he wrote the January 2003 FRAEW Report and recommended proceeding with the Removal Works. This is however my own speculation. To repeat the equivalent point which I have made in relation to the Second Finding, if I had heard and read all the evidence which was before the Tribunal, I do not doubt that I would have a better understanding of the January 2023 FRAEW Report, and that I would be in a better position to make a finding on whether Scenario 4 was taken into account in the advice in that report. That is not my position. The Tribunal were in that position, They clearly took account of the fact that Scenario 4 was not mentioned in terms in the January 2023 FRAEW Report, because they were only able to find that the report "*apparently*" took the modelling exercises into account. I am not persuaded that the Tribunal did go wrong, in making that cautiously expressed finding.
308. In relation to the First Finding there is one other point which I should make, for the sake of completeness. I have already explained why the First Finding, even if it was wrong, was not material to the conclusion reached by the Tribunal. In this context the First Finding

might conceivably have been relevant, if it had been said that the advice in the January 2023 FRAEW Report was negligent, with the consequence that Grey was not entitled to rely on that advice. There are however two answers to this point. First, and as I have noted, there were other factors, as found by the Tribunal, on which Grey was entitled to rely in deciding to proceed with the Removal Works, whether or not it was entitled to rely on the advice in the January 2023 FRAEW Report. Second, the Appellants did not advance Ground 4 on the basis that the advice in this report was actually negligent. The Tribunal made no such finding, and I am certainly not in a position to make any such finding.

309. A further and final point which I should make in this context is that the Appellants' argument assumes that the state of evidence was such that the position, in terms of the remedial works to the Type 1 Wall was a perfectly simple one in January 2023. The argument assumes that Grey was faced with a straight choice between the Removal Works and the Sealing Works, with no uncertainties or complications. As is apparent, from even a cursory reading of Paragraphs 113-133, where the evidence was subject to a careful review by the Tribunal, and Paragraphs 143-166, which contain the relevant reasoning of the Tribunal, the position was nowhere near as simple as this. In their written and oral submissions Grey's counsel made their own foray into the evidence which was before the Tribunal, with a view to demonstrating that the agreement between the experts, as recorded in Paragraph 143, was only part of the picture, and that there was plenty of other evidence to justify the decision to proceed with the Removal Works. The conclusions which I drew from these submissions, by way of reinforcement of the points which I have already made above, were (i) that the evidential picture was actually far more complicated than the Appellants suggest, and (ii) that I am in no position to interfere with the findings made by the Tribunal in this context.
310. In summary, and notwithstanding what was agreed between the experts, as recorded in Paragraph 143, it is clear that there were a number of factors in the evidence on which the Tribunal were entitled to rely and did rely, in concluding that it was reasonable for Grey, on the basis of the advice in the January 2023 FRAEW Report, to proceed with the Removal Works. This is not a case where the Tribunal's findings are either unexplained or unsupported by any evidence. To the contrary, the Tribunal's findings are both explained and grounded in the evidence which was before the Tribunal.
311. Drawing together all of the above analysis, I conclude that Ground 4 fails.

### **The outcome of the Appeal**

312. For the reasons set out in this decision, the Appeal is dismissed.

### **Postscript in relation to Ground 2 and the second argument within Ground 1**

313. In the hope that this will be of some assistance, both to the FTT and to parties involved in applications for remediation contribution orders pursuant to Section 124, I add the following two short points, by way of postscript to my decision on Ground 2 and on the second argument within Ground 1.
314. My first point is directed to the situation of parties who are brought into applications for remediation contribution orders as respondents, on the basis that they are caught by the association provisions in Paragraph (d) and Section 121. In circumstances where the applicant's case is that it is just and equitable to make a remediation contribution order on a joint and several basis against such respondents, it is important that the respondents explain

clearly to the FTT the nature and extent of their relationship. This is not a point based upon burdens of proof or rules of evidence. It is simply good practice, which assists the FTT in making the decision on whether it is just and equitable to make the remediation contribution order against multiple respondents and, if so, on whether it is just and equitable to make the remediation contribution order on a joint and several basis. In the present case the Specified Respondents failed to do this. The difficulties with their evidence, as recorded by the Tribunal in the Decision, were plainly a factor in the decision of the Tribunal, which cannot be faulted, that it was just and equitable to make the RCO against the Specified Respondents on a joint and several basis.

315. My second point brings out one aspect of the exercise required of the FTT, in deciding whether it is just and equitable to make a remediation contribution order against multiple respondents and, if so, on what basis. Although, for the reasons which I have explained, I have declined Mr Warwick's invitation to provide general guidance as to how the FTT should approach the just and equitable question, I venture to spell out this point, although it is one which the Tribunal had well in mind in the present case and which, I am sure, the FTT will have well in mind in other cases.
316. Where there are multiple respondents to an application for a remediation contribution order, joint and several liability is not the starting point in every case where the FTT is persuaded to make the order against multiple respondents. The FTT is required to consider carefully, in relation to each respondent, what constitutes the appropriate just and equitable outcome. The appropriate just and equitable outcome may not be joint and several liability. It may be an apportioned liability. It may, as in the present case, be no liability at all in the case of particular respondents. It may be something else. In the present case the Tribunal carried out this exercise and, for the reasons which I have explained, their conclusion that the imposition of joint and several liability on the Specified Respondents was the just and equitable outcome cannot be faulted. In another case and on different evidence, as I have explained earlier in this decision, the outcome of this exercise might produce a different conclusion.

Mr Justice Edwin Johnson  
The Chamber President

27<sup>th</sup> January 2026

### **Right of appeal**

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.