Falcon Chambers

"ANATOMY OF AN R.C.O."

SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT v URBAN SPLASH LIMITED & OTHERS (FTT, MAN/OOBN/BSB/2024/0001-0007), 5 NOVEMBER 2026.

1. The First-tier Tribunal described *Urban Splash* as having "*given rise to an unusually complex combination of technical, factual, financial and legal issues*". Their decision runs to 260 pages, 882 paragraphs and contains seven appendices.

2. The application was brought by the Secretary of State to seek repayment from the developer and associates of £51.5million of Building Safety Fund funding for remediation of 7 blocks of flats in Manchester, together with additional sums beyond those so funded, to be paid to the management company responsible for the buildings.

3. For the BSA-fascinated, *Urban Splash* is an enthralling read. First, it is a detailed exposition of the very anatomy of an RCO application. Here, in this decision, is the extensive disclosure needed to show if there are relevant defects, and the extensive disclosure to show whether the remediation decided on and carried out was at reasonable cost, the expert evidence, from fire safety engineers and the quantity surveyors, and on which party the burdens on the expert issues lie. There is detailed analysis of what one might call degrees of association, analysis of what issues are within the definitions in Part 5, which issues belong in the just and equitable analysis, and how it is said that human rights law sits in the RCO jurisdiction. If one wants to know the kinds of litigation twists and turns one meets in an RCO application, reading the *Urban Splash* decision is an education.

4. Second, *Urban Splash* discusses many current legal issues on the interpretation of the RCO provisions in Part 5 of the Building Safety Act 2022 (BSA) which you may have been thinking about and as yet seen no answer. This includes some legal questions about the sums which the FTT can order to be paid, relevant defect and "building safety risk", association and the just and equitable discretion. It is these matters which this article is primarily concerned.

The sums which can the FTT can order to be paid.

5. An RCO is an order that requires payments to be made a specified person. An applicant can specify someone, in the application, to which they have no relation. Thus, the Secretary of State could seek an order for payment of costs to the management company (para 44).

6. The costs set out in section 124(2) as those that can be the subject of an RCO have no limitation, (although section 124(4)(aa) in further describing orders that can be made allows an order for a respondent to be "*liable for the reasonable costs of specified things*"). The reasonableness of expenditure is relevant to the just and equitable discretion (para 66).

7. That a remediation approach was chosen on the basis of expert advice is "*no more than an indicator of reasonableness (albeit a significant indicator)*". An application for an RCO

> "*is not a conventional common law claim for damages in which questions about mitigation of loss and the cheapest remedial solution are likely to come to the fore. … the question was whether the schemes actually adopted fell within the range of responses that a reasonable and competent professional could have selected when addressing the defects and risks identified at the time*" (paras 126 and 127).

That is very like the position familiar to the FTT with reasonableness for service charges. It is also very like the position for repairing covenants, where the repairing party has the choice of method.

8. The burden of proving the costs incurred and of adducing evidence capable of supporting a finding of reasonableness is on the applicant.

> **160.**"…*Once that evidential burden is discharged, it is for the respondents to identify and substantiate any case that particular costs, or categories of cost, were unreasonable*" […] **181.** "…*The ultimate burden of establishing reasonableness nevertheless remains with the applicant*".

9. The just and equitable discretion is broad, and permits an order for part only of the costs sought, even if all of the costs are within the jurisdiction in section 124(2) (para 68). The first step is to work out if the costs are reasonable. Even if they are, it may not be just and equitable to order a respondent to pay them, or all of them (para 180).

Relevant defect and "building safety risk"

10. There has been case law already about the meaning of relevant defect, in particular to whether the risk in the definition of building safety risk has to be at or above a particular level, a point

addressed in the negative (albeit in obiter) in *Edgewater (Stevenage) Ltd v Grey GR Ltd Partnership* [2026] UKUT 18 (LC). In *Urban Splash*, the approach to determining whether is a relevant defect was in issue. The FTT said that

> ***88.*** *"The assessment of whether a feature of a building is a relevant defect requires first the identification of a defect…"*
>
> ***89.*** *[What is a defect] "is a broad concept, which is apt to include any deficiency in a building assessed by current building standards … even if it complied with the then current standards at the time of the building's construction or conversion"*

11. This has long been an issue of contention in RCO cases. It seems to the authors to make sense given the BSA came out of a reset post the Grenfell fire which identified that something had gone wrong with earlier standards.

Association

12. On the issue of association, the parties disputed what must be proved to show that one entity controlled another within the meaning of section 121(8). There was a "narrow" and "broad" construction. As the FTT set out at [420]:

> *can control for the purposes of section 121(8) be exercised by a body corporate through the powers of common individuals, or must the relevant power always be found within a conventional chain of corporate ownership or constitutional rights?*

13. The "narrow" construction was that "*control*" was "*anchored in established corporate law concepts*" and that "*broader influence is insufficient unless it approximates legal control*": ownership and voting rights being key. Thus, on the narrow concept it is the body corporate which must control the other so that even where a "*natural person controls, influences or occupies positions of authority*" in both, that is not enough for section 121 (para 381-382).

14. The broad construction was that "*practical ability, however derived, to secure that another's affairs follow X's wishes*" is enough. Thus, the focus is "*on real-world power rather than formal rights*" (para 383-384).

15. That second construction raises an issue about the degree of power which would suffice, since the broad construction allowed for control within the meaning of section 121(8) even if there was not exclusive control. As the FTT framed it:

> ***421.*** *Even if a body corporate may exert control through common individuals, what must be shown before it can properly be said that X has the power to secure that the affairs of Y are conducted in accordance with X's wishes?*

16. The Applicant argued for a "broad" construction, and the FTT accepted this. However, the FTT thought the Applicant's submissions on what the degree of power was went too far (para 437).

17. The FTT concluded that the inclusion in section 121(8) of the phrase "*directly or indirectly*" in the description of the power of X to control Y favoured the broad construction. Since a body corporate acted through human agents, control through common powers could suffice (para 432). To show control, one must identify the relevant individual with sufficient power to control both X and in Y (para 434). That may not be sufficient however to show that X controls Y.

18. The degree of power is high. See para 446 and 451:

> *"The phrase 'secure that the affairs of Y are conducted in accordance with X's wishes [in section 121(8)] denotes something stronger than influence, strategic alignment, commercial dependent, shared objectives, overlapping personnel or the ability to persuade." …* ***451.*** [Control isn't merely that] "*X is one of several significant influences affecting Y's decision-making. The statutory concept … requires a practical ability by X to obtain the result is wishes.*"

19. Applying that analysis excluded the tenth respondent from association with the developer. Though, as noted at [713], [778] and elsewhere, association is a gateway condition rather than a freestanding jurisdiction for an RCO, even if it is relevant to both jurisdiction and discretion.

Just and equitable

20. In this application, as in so many, there were numerous respondents by association with the developer. Not all had RCOs made against them even when association was established. The FTT did not conclude that it was just and equitable to make RCOs in all cases. The FTT's approach started with a series of propositions about the just and equitable test (paras 580 to 584). The following three are perhaps the newest type of statements within the case law:

    (1) The discretion must be exercised consistently with the purpose of the statutory scheme. The BSA is concerned with the remediation of historical building-safety defects and the allocation of responsibility for the resulting costs. The association provisions were

intended, at least in part, to prevent liabilities being avoided through the use of corporate structures.

(2) Responsibility for defects, participation in the development, receipt of development profits or other benefits, and the respondent's connection with the relevant building are all capable of being relevant. None is necessarily determinative when considered alone; none is a universal prerequisite to an order, but none is legally irrelevant.

(3) The FTT may take account of the practical and financial consequences of making, or declining to make, an order. Those consequences may include the impact upon the respondence, and where relevant, its investors, creditors and other affected third parties; the position of the applicant or other person who has incurred the remediation costs; and the consequences for leaseholders and the public purse. The weight to be given to those matters is fact-sensitive.

21. Applying these principles, the FTT made RCOs against the developer, and those of its associates which had connection with the developer as the vehicles through which it "*continued its property development business following restructuring*"; there was with those respondents "*substantial continuity of ownership, control, personnel, purpose and business identity*" (para 16). Those respondents with distinct activities and assets from the Urban Splash enterprise, though associated, did not have "*any meaningful connection with the buildings*" (para 19). No RCOs were made against such respondents.

Human Rights

22. Prehearing publicity about *Urban* Splash emphasised the human rights arguments the Respondents sought to make. The decision discusses those issues from paragraph 626. Although there was no challenge to the general validity of section 124 on human rights grounds, it was said that in this case making RCOs would be an unlawful interference with article 6 and article 1 protocol 1 rights. The FTT concluded that that gave no free-standing right to resist an RCO beyond what is already within the section 124 just and equitable test (paragraph 629). The effect on a respondent of the retrospective nature of the liabilities (the respondents' characterisation), the legitimate reliance by associates on their separate legal personality from the developer, and the consequences of making an order were all within the application of the test.

23. Arguably the most interesting aspect of the discussion of the just and equitable discretion was about whether it was just and equitable to make an order for repayment of all of the costs sought. The FTT identified a basis to reduce the amount payable by 10% (para 705) because of the criticisms of the independent findings on the responsibility of Government for the building-safety crisis shown in the Hackitt Review and the Grenfell Tower Tragedy (para 698).

Conclusion

24. If one wants to get under the skin of an RCO application, and a number of component concepts, *Urban Splash* is worth a read. Being the length of a short book, it might be a prime candidate for holiday reading: a building-safety related stocking-filler.

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