FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

[2024] UKFTT 26 (PC)

FTT Case No: LON/00BB/HYI/2022/0018-22

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

19 January 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

APPLICATIONS UNDER THE BUILDING SAFETY ACT 2022

BUILDING SAFETY – REMEDIATION CONTRIBUTION ORDER – remediation of cladding defects at former Olympic Village – whether just and equitable to make orders against head landlord/developer and well resourced associate – tribunal jurisdiction – costs incurred before commencement of Act – s.124, Building Safety Act 2022

BETWEEN:

TRIATHLON HOMES LLP

Applicant

-and-

STRATFORD VILLAGE DEVELOPMENT PARTNERSHIP (1)
GET LIVING PLC (2)
EAST VILLAGE MANAGEMENT LIMITED (3)

Respondents

Re: Meller House, Chroma Mansions, Seasons House, Patina Mansions and Kaleidscope House, East Village, London E20

Mr Justice Edwin Johnson, Chamber President, Upper Tribunal, Lands Chamber and Martin Rodger KC, Deputy Chamber President Upper Tribunal, Lands Chamber

13-17 November 2023

Alexander Nissen KC, *Richard Millett KC*, *Paul Letman* and *Daniel Benedyk*, instructed by Gowling WLG (UK) LLP for the applicant
Jonathan Selby KC and *Cecily Crampin*, instructed by Mishcon de Reya LLP for the first and second respondents

The following cases are referred to in this decision:

Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point [2023] UKUT 271 (LC)

Daejan Investments Ltd v Benson & Ors [2013] UKSC 14; [2013] 1 WLR 854

L'Office Cherifien des Phosphates Unitramp SA v Yamashita-Shinnihon Steamship Co Ltd (The Boucraa) [1994] 1 A.C. 486

O (a minor), R (on the application of) v Secretary of State for the Home Department [2022] UKSC 3; [2023] AC 255

Omar Parks Ltd v Elkington [1992] 1 WLR 1270 CA

R v Montila [2004] 1 WLR 3141

Secretary Of State For Home Department v Immigration Appeal Tribunal [2001] EWHC Admin 261

Secretary of State for Social Security v. Tunnicliffe [1991] 2 All E.R. 712

The Good Law Project, R(on the application of) v Electoral Commission [2018] EWHC 2414 (Admin)

URS Corporation Limited v BDW Trading Limited [2023] EWCA Civ 772

Waite v Kedai LON/00AY/HYI/2022/5

Index

Introduction

1. During the early hours of 14 June 2017 an electrical fault in a domestic appliance started a fire in the kitchen of Flat 16 on the fourth floor of Grenfell Tower, a 25-storey block of flats on the Lancaster West Estate in North Kensington. The fire escaped to the exterior cladding of the building through which it spread rapidly, enveloping the entire tower in under three hours. Seventy-one people, including a stillborn child, lost their lives on the night of the fire. Another resident died later in hospital.

2. Parliament's legislative response to the Grenfell Tower tragedy was the Building Safety Act 2022 ("the 2022 Act") which was first published in draft on 20 July 2020, received royal assent on 28 April 2022 and came into force in its material parts on 28 June 2022.

3. These proceedings are brought under Part 5 of the 2022 Act. They concern five residential buildings at Stratford in East London, originally developed by the first respondent, Stratford Village Development Partnership ("SVDP"), to provide accommodation for 17,000 athletes and officials participating in the London 2012 Olympic Games. The former athletes' village is now known as East Village and has become a large permanent residential estate providing 2,818 new homes, including 1,379 affordable homes and houses, most of which are contained in 66 blocks of between 8 and 12 storeys.

4. The five buildings concerned in these proceedings are Meller House (Block A), Chroma Mansions (Block B), Seasons House (Block C), Patina Mansions (Block D) and Kaleidoscope House (Block E) (together "the Blocks"). Each Block contains three storey "town houses" or maisonettes and retail units on the lower levels and flats or apartments on the upper levels. All five are in a part of the village referred to during its development as Plot N26.

5. Some of the units in the Blocks are owned through subsidiaries by the second respondent, Get Living plc ("Get Living") and some are owned by the applicant, Triathlon Homes LLP ("Triathlon"). Get Living is a property company which, through subsidiaries, specialises in the private rental market and owns all the private rented housing at East Village. Triathlon is a limited liability partnership established to provide affordable housing at East Village and owns all the social and affordable housing.

6. Triathlon has a long lease of all of the flats and apartments in two of the Blocks (45 units in Block A and 40 in Block B). It has a long lease of only some of the units in the others (three units in Block C out of a total of 43 houses and apartments, five of a total of 41 in Block D and 36 apartments and town houses in Block E).

7. Get Living's holding includes all of the units in Blocks C, D and E which are not leased to Triathlon. It also owns the original developer, SVDP, although it did not at the time the development was being undertaken.

8. The repair and maintenance of the structure and common parts of the East Village is the responsibility of the third respondent, East Village Management Ltd ("EVML"), a company owned jointly by Get Living and Triathlon.

9. Following the Grenfell Tower fire work was undertaken by EVML to identify the materials used in the construction of the East Village and to determine what risks they might present. By December 2017 it had been established that the same highly combustible aluminium composite material (ACM) employed in cladding at Grenfell had been used at plots N02 and N07, but not at Plot N26. Further investigations were commissioned in August 2019 to ascertain whether the non-ACM cladding material used in other buildings at East Village nevertheless presented a risk to the safety of residents as it was not of limited combustibility.

10. The position in relation to the N26 Blocks was not clearly identified until November 2020. Serious fire safety defects were discovered, relating both to the design and the construction of the various non-ACM cladding systems adopted for the external facades. These defects included the presence of combustible insulation and breather membranes in the cladding used on each of the Blocks, inadequate firestopping, the use of combustible timber decking in external balconies, and the absence or defective installation of cavity barriers and firestopping within the external wall systems. In response to these discoveries a waking watch was implemented in all Blocks in November 2020 which remained in place until additional alarm and heat detection systems were installed in flats as temporary measures.

11. A programme of work to remedy the defects at East Village permanently by the removal and replacement of the exterior cladding has been devised and is being implemented by EVML. Remediation commenced at the first of the N26 Blocks on 20 April 2023 and is due to have started at all five by February 2024. The current timetable will see the remediation of the Blocks completed by August 2025.

12. For the time being the remediation work is being funded by grants made available to EVML using public money provided from the Building Safety Fund. The total cost of the work exceeds £24.5 million.

The applications

13. On 19 December 2022 Triathlon made five applications, one for each of the Blocks, to the First-tier Tribunal, Property Chamber ("the FTT") for remediation contribution orders under section 124 of the 2022 Act ('the applications').

14. The orders sought by Triathlon would require SVDP and Get Living to reimburse expenditure of £1.058 million already incurred by Triathlon through services charges paid to EVML in respect of interim fire safety measures and investigative and preparatory works. They would also require them to meet further liabilities of £153,538 in respect of service charges previously demanded by EVML which Triathlon has not yet paid, and of £613,899 in respect of costs and anticipated costs which have not yet been the subject of service charge demands. Of more significance the orders sought would also require SVDP and Get Living to reimburse expenditure of £16.03 million incurred or to be incurred by EVML in remedying the defects, representing Triathlon's share of the total remediation costs.

15. No order for payment is sought by Triathlon against EVML. Rather, as the proposed recipient of payments from others, EVML was joined as a respondent at the suggestion of the FTT, to enable it to participate in the proceedings if it chose to. Until a few days before the hearing of the applications EVML took no active part and it was not represented at the

hearing. (Where we refer to "the respondents" we therefore mean SVDP and Get Living and do not include EVML).

16. At the hearing of the applications Triathlon was represented by Alexander Nissen KC, Richard Millett KC, Paul Letman and Daniel Benedyk. The respondents were represented by Jonathan Selby KC and Cecily Crampin. We also received submissions in writing from Timothy Polli KC on behalf of EVML. We are grateful to them and to all those who assisted in the preparation and presentation of the applications.

The legislation

17. The 2022 Act is in six Parts which, as section 1(1) explains, contain provisions intended to secure the safety of people in or about buildings and to improve the standard of buildings. Part 1 is introductory. Part 2 creates the post of building safety regulator and describes its functions. Part 3 amends the Building Act 1984 to confer powers and duties on the regulator. Part 4 is about higher-risk buildings in England and makes the owners of such buildings accountable for the assessment and management of building safety risks. Part 5 is about leaseholder protections and Part 6 contains general provisions.

18. Part 5 of the 2022 Act, comprising sections 116 to 160, is titled "Other provision about safety, standards etc" and contains complex measures relating to remediation, building standards and redress. The scope of Part 5 is very broad and in addition to the matters with which we are concerned it also encompasses the establishment of building industry schemes to fund remediation at the expense of developers, a new homes ombudsman, and new warranties and construction product liability provisions. We note three groups of sections at this stage.

19. Sections 116 to 125 and Schedule 8 are concerned with the remediation of relevant defects in relevant buildings.

20. Sections 130 to 132 allow the High Court to make building liability orders extending liability to associates of the original developer or landlord liable under the Defective Premises Act 1972 or as a result of a building safety risk.

21. Sections 133 to 135 amend other legislation, including the Limitation Act 1980 and the Landlord and Tenant Act 1985, to accommodate the new leaseholder protections. Section 135 introduces a new section 4B into the Limitation Act 1980 which provides a new limitation period of 30 years for claims under the Defective Premises Act 1972 and section 38 of the Building Act 1984.

22. The group of sections introduced by section 116 provide for the remediation of "relevant defects" in "relevant buildings". A "relevant building" is defined in sections 116 and 117 and includes any self-contained building in England containing at least two dwellings which is at least 11 metres high or contains at least 5 storeys. It is not disputed that each of the five Blocks is a relevant building. Nor is it disputed that the defects discovered in the Blocks are relevant defects. These are defined in section 120(2) as follows:

> "'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."

23. The expression "relevant works" is defined in section 120(3) and includes works relating to the construction or conversion of the building, provided it was completed in the "relevant period", being the period of 30 years ending with the commencement of the section (and therefore beginning on 29 June 1992 and ending on 28 June 2022). A "building safety risk" is defined in section 120(5) as, in relation to a building, a risk to the safety of people in or about the building arising from the spread of fire, or the collapse of the building or any part of it.

24. Remediation, and the cost of remediation, are then dealt with in sections 122 to 125.

25. Section 122 introduces Schedule 8. It is relevant to one of the issues of construction which arises, so we set it out in full, as follows:

> "122**. Remediation costs under qualifying leases etc**
>
> Schedule 8 —
>
> (a) provides that certain service charge amounts relating to relevant defects in a relevant building are not payable, and
>
> (b) makes provision for the recovery of those amounts from persons who are landlords under leases of the building (or any part of it)."

26. Schedule 8 itself is titled "Remediation costs under qualifying leases etc" and most of its provisions apply only to service charges payable under a "qualifying lease". That expression is defined in section 119(2) and refers to a long lease of a single dwelling in a relevant building which was granted before 14 February 2022 and under which the tenant is liable to pay a service charge. The dwelling must also have been the tenant's only or principal home on that date and the tenant must not have owned any other dwelling, or not more than two, apart from their interest under the lease.

27. By virtue of these requirements a single lease comprising more than one dwelling, or held by a company, will not be a qualifying lease. Thus, a body such as Triathlon, which holds headleases comprising a number of flats in each of the Blocks, and which cannot occupy premises as a home, will not be the tenant under a qualifying lease and will not be entitled to most of the leaseholder protections in Schedule 8.

28. One important exception to this exclusion from protection is paragraph 2 of Schedule 8, which is not restricted to qualifying leases but applies "in relation to a lease of any premises in a relevant building". The substance of the protection is provided by paragraph 2(2), as follows:

"(2) No service charge is payable under the lease in respect of a relevant measure relating to a relevant defect if a relevant landlord—

(a) is responsible for the relevant defect, or

(b) is associated with a person responsible for a relevant defect."

29. The expression "a relevant measure" (which is used only in Schedule 8) is defined in paragraph 1:

"relevant measure", in relation to a relevant defect, means a measure taken—

(a) to remedy the relevant defect, or

(b) for the purpose of—

(i) preventing a relevant risk from materialising, or

(ii) reducing the severity of any incident resulting from a relevant risk materialising;

"relevant risk" here means a building safety risk that arises as a result of the relevant defect;"

30. The expression "a relevant landlord" is defined in paragraph 2(4) and means the landlord under the lease at the "qualifying time" or any superior landlord at that time. The "qualifying time" is 14 February 2022 (section 119(2)(d)).

31. In broad terms a person will be taken to be "responsible for" a relevant defect for the purpose of paragraph 2 of Schedule 8 if they were the developer who undertook or commissioned the construction or conversion of the building with a view to granting or disposing of interests in it or were in a joint venture with the developer (paragraph 2(3)). Responsibility, in this sense, is not synonymous with fault; a developer may have done all that could reasonably be expected of it to build a safe building, but will still be "responsible for" relevant defects caused by others.

32. Thus, paragraph 2(2) only applies where the landlord or any superior landlord on 14 February 2022 was also the person responsible for the relevant defect or was associated with that person. If that degree of connection exists between the landlord and the defect the leaseholder under any lease of any premises in a relevant building, including a corporate leaseholder of the whole building, is relieved from liability to pay service charges in respect of measures to remedy the relevant defect or to prevent a building safety risk arising as a result of the defect, or to reduce the severity of any incident resulting from the defect.

33. The remaining leaseholder protections in Schedule 8 apply only to qualifying leases. They protect qualifying leaseholders from liability for the cost of relevant measures where the landlord meets a contribution condition related to net worth, and where the lease was below a certain value on 14 February 2022. They also impose financial limits on service charges payable in respect of a relevant measure in any one year and over a longer period, and provide immunity from service charges in respect of cladding remediation and legal or other professional services.

34. Section 123 gives power to the Secretary of State to make provision by regulations for "remediation orders", by which a relevant landlord of a relevant building may be required by the FTT to remedy specified relevant defects within a specified time. A "relevant landlord" is a landlord with statutory or contractual repairing obligations in respect of the relevant defect (section 123(3)). Remediation orders are in the nature of orders for specific performance of those obligations and, though the orders are made by the FTT, they are enforceable through the County Court (section 123(7)).

35. Section 124, under which these applications are brought, allows for the making of remediation contribution orders, by which developers, landlords, and their associates may be required to contribute towards the costs of remedying relevant defects. It provides as follows:

> "**124 Remediation contribution orders**
>
> (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 relevant defects (or specified relevant defects) relating to the relevant building.
>
> (3) A body corporate or partnership may be specified 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).
>
> (4) An order may -
>
> (a) require the making of payments of a specified amount, or payments of a reasonable amount in respect of the remediation of specified relevant defects (or in respect of specified things done or to be done for the purpose of remedying relevant defects);
>
> (b) require a payment to be made at a specified time, or to be made on demand following the occurrence of a specified event.
>
> (5) In this section -
>
> "associated": see section 121;
>
> "developer", in relation to a relevant building, means a person who undertook or commissioned the construction or conversion of the building (or part of the building) with a view to granting or disposing of interests in the building or parts of it;
>
> "interested person", in relation to a relevant building, means—
>
> (a) the Secretary of State,

(b) the regulator (as defined by section 2),

(c) a local authority (as defined by section 30) for the area in which the relevant building is situated,

(d) a fire and rescue authority (as defined by section 30) for the area in which the relevant building is situated,

(e) a person with a legal or equitable interest in the relevant building or any part of it, or

(f) any other person prescribed by regulations made by the Secretary of State; "partnership" has the meaning given by section 121;

"relevant building": see section 117;

"relevant defect": see section 120;

"specified" means specified in the order.

(6) The Secretary of State may by regulations provide that this section applies, with or without modifications, in relation to a building that would, but for section 117(3), be a relevant building."

36. In summary, section 124 allows an interested person (as defined in section 124(5)) to apply to the FTT for an order requiring a current or former landlord or developer of the building, or someone associated with them, to meet costs incurred or to be incurred in remedying relevant defects. An interested person includes any person with a legal or equitable interest in the relevant building or any part of it and therefore includes the leaseholder of an individual flat, or a leaseholder of the whole building. The landlord or their associate against whom the order is sought must in each case be a company or partnership. If the relevant qualifying conditions are met, the FTT may then make such an order if it considers it "just and equitable" to do so (section 124(1)). The same test is employed in section 125 which provides for contribution orders to be made by the court against associated companies or partnerships in the course of winding up of an insolvent landlord.

37. Triathlon is the proprietor of long leases of all or part of each of the Blocks and is agreed to be an interested party for the purpose of section 124(5)(e).

38. The circumstances in which one company or partnership will be "associated" with another for the purpose of sections 124 and 125 are described in subsections (2) to (5) of section 121. We will come to these when we consider the relationship between Get Living and SVDP. At this stage we note that provision is made for the status of an associate to exist between beneficiaries of a trust and their trustees, between current and former partners and their partnerships, between directors and their companies, and between companies with common directors or controlling interests.

39. Any landlord (or any right to manage company or leaseholder owned management company) which has paid or is liable to pay the costs of a relevant measure which would have been recoverable from leaseholders but for paragraph 2(2) of Schedule 8, has the right to pass those costs on to another person who is a "responsible landlord". That right is conferred by regulation 3 of The Building Safety (Leaseholder Protections) (Information etc) Regulations 2022 ("the LPI Regulations") which allows a landlord which has paid the

costs of a relevant measure to give notice to a responsible landlord making them liable for those costs. The recipient of such a notice may appeal to the FTT, but only on the limited grounds that they are not a responsible landlord or that the sum claimed is more than the cost incurred. There is no right of appeal on the ground that it is not just and equitable for the responsible landlord to have to pay.

40. A "responsible landlord" for the purpose of regulation 3 is any landlord or superior landlord on 14 February 2022 which is either responsible for the defect in the sense explained in paragraph 2(3) of Schedule 8 (see paragraph 31 above), or is associated with a person responsible for the defect, or any successor in title of theirs after that date.

41. Similar provisions in paragraph 4 and 5 of the LPI Regulations allow a landlord, RTM company or leaseholder owned management company which is prevented by other leaseholder protections in Schedule 8 from recovering the costs of a relevant measure for which it has paid, to pass those costs on first to any landlord of sufficient means to satisfy a "contribution condition" (requiring group net worth of more than £2m. per group building) and then to any other landlord of the building in proportion to the extent of their interest and obligation to remediate. Once again this entitlement is not subject to appeal on any just and equitable ground.

42. The provisions of section 124 and the LPI Regulations were described by Mr Nissen KC for Triathlon as creating a "hierarchy" or "cascade" of liability with the landlord who was responsible for the relevant defect, or which is associated with a developer which was responsible for it, standing at the top of the list of those liable to meet the costs of remediation. If no such responsible landlord can be found then liability will pass to the next available landlord in the list.

43. These applications do not raise any issues under the LPI Regulations, and are concerned only with section 124. It is apparent, however, that in some circumstances the same costs may either be the subject of an application under section 124 or of a notice under regulations 3, 4 or 5 of the LPI Regulations.

Issues of principle

44. We will deal first with a number of issues of principle concerning the 2022 Act. The same issues are likely to arise in other applications under sections 123 and 124.

Jurisdiction

45. The applications were commenced in the FTT but on 27 February 2023, at the request of Triathlon and without objection from the respondents, they were transferred to the Upper Tribunal pursuant to rule 25 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"). The proceedings were duly listed, and the hearing commenced in the Upper Tribunal.

46. It was, naturally, assumed when the transfer took place that the Upper Tribunal had jurisdiction to hear an application for an order under section 124, 2022 Act. But at the

commencement of the hearing the Tribunal pointed out that section 124(1) states specifically that the FTT may make a remediation contribution order and that the 2022 Act appears to contain no other provision which confers a concurrent jurisdiction on the Upper Tribunal. Those features of the legislation had previously escaped the attention of the parties and of the Judges in both Chambers (including us) who approved the transfer.

47. On the creation of the Property Chamber of the FTT in 2013, property statutes which had conferred jurisdiction on its statutory predecessors (leasehold valuation tribunal, residential property tribunal and rent assessment committees) were amended to reflect the transfer of the functions of those bodies, so far as they related to property in England, to the unified tribunal structure established by the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). The statutes were amended to refer to "the appropriate tribunal" and a standard definition of that expression was adopted which comprised, in relation to England, the FTT or the Upper Tribunal "where determined by or under Tribunal Procedure Rules" (see, for example: section 37(1), Leasehold Reform Act 1967; section 5(1), Mobile Homes Act 1983; section 38, Landlord and Tenant Act 1985; section 21(8), Landlord and Tenant Act 1987). That formulation leaves the selection of the most appropriate forum to Tribunal Procedure Rules and also allows for the transfer of individual cases to the Upper Tribunal under rule 25 of the 2013 Rules when that is thought to be justified by reason of the complexity or value of the subject matter.

48. Whether by inadvertence or design, the reference to "the appropriate tribunal", meaning both the FTT and the Upper Tribunal, has not been adopted by the drafters of the 2022 Act. Sections 123 and 124 allow remediation orders and remediation contribution orders to be made by the FTT alone. Nothing in the 2007 Act or the Tribunal Procedure Rules made under it cures that omission and when we shared our concern about the issue of jurisdiction with the parties, after consideration, they agreed that the Upper Tribunal has no power to make a remediation contribution order (except in its appellate capacity).

49. Although it is regrettable that this matter cannot proceed to a determination in the Upper Tribunal which would be binding on tribunals at FTT level and (with permission) could be the subject of an appeal to the Court of Appeal, the restrictions imposed by the 2022 Act are not fatal as far as these proceedings are concerned. During the hearing we made an order transferring the applications back to the FTT under our general case management powers. By section 4(1)(c), 2007 Act all judges of the Upper Tribunal are also judges of the FTT. We were therefore able to continue to hear the applications in that capacity without interruption or inconvenience to the parties.

Aids to statutory interpretation – Explanatory notes and Ministerial statements

50. In its statement of case Triathlon supported its case on the key issue of whether it would be "just and equitable" for remediation contribution orders to be made against the respondents by asserting that there was a presumption under the 2022 Act that where a responsible landlord or developer, or a sufficiently capitalised associate of theirs, could be identified, "it will ordinarily be regarded as just and equitable to make an RCO requiring them to meet the costs of remediation works".

51. Triathlon relied on the Act itself and in particular on the leaseholder protections in Schedule 8 and the LPI Regulations as sources from which the principles said to underpin the legislation could be discerned. We were also referred to the Explanatory Notes on section 124 prepared by the Parliamentary draftsman and invited to rely on them as confirming the existence of the presumption for which Triathlon contended. We were additionally invited to give weight to ministerial statements made by the Minister of State for Building Safety and Fire, and by the Secretary of State for Levelling Up, Housing and Communities in Parliamentary debates during the progress of the Building Safety Bill.

52. The respondents disputed the existence of any such general principle or presumption and submitted that the language of the Act spoke for itself and that there was no need to put an "interpretative spin on the just and equitable test by reference to non-statutory material".

53. In *O (a minor), R (on the application of) v Secretary of State for the Home Department* [2022] UKSC 3, at [29], Lord Hodge DPSC emphasised that the words which Parliament has chosen to enact as an expression of the purpose of a piece of legislation are the primary source by which the meaning of the legislation is to be ascertained. The role of external aids is secondary, as he explained, at [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."

54. The explanatory notes on the clauses of the Bill relied on by Triathlon are clearly a legitimate but secondary aid to interpretation. Mr Selby KC, for the respondents, agreed that was so, but cautioned that they should not be used for any wider purpose; in particular, they could not properly be used to identify any presumption about how a tribunal should exercise its discretion when determining whether it is just and equitable to make a remediation contribution order in a particular case. We agree.

55. Ministerial statements are a different matter. The circumstances in which it is permissible for a court or tribunal to have regard to ministerial statements about the purpose or meaning of legislation were reitereated by Lord Hodge in *O (a minor),* at [32]:

> "Such references are not a legitimate aid to statutory interpretation unless the three conditions set out by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, 640 are met. The three conditions are (i) that the legislative provision

> must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity; (ii) that the material must be or include one or more statements by a minister or other promoter of the Bill; and (iii) the statement must be clear and unequivocal on the point of interpretation which the court is considering."

56. It was not suggested by Mr Nissen KC in his submissions for Triathlon that the ministerial statements which had been pleaded in its statement of case met the first or third of these conditions. They were general statements which did not address any of the points of interpretation which do arise in this application. We have therefore disregarded them.

The "retrospective" effect of the 2022 Act – the issues

57. The relevant provisions of Part 5 of the 2022 Act were brought into force by section 170(3) on 28th June 2022 without any transitional provisions. The absence of transitional provisions gives rise to questions of principle concerning the extent to which the leaseholder protections in Schedule 8 and the rights of contribution in section 124 are intended to apply to costs incurred before the Act came into force.

58. In these applications the respondents argue that a remediation contribution order cannot be made in respect of costs incurred before the commencement of the 2022 Act on 28 June 2022. If they are right about that they also rely on a more refined argument, namely, that it is insufficient for the costs to have been incurred after 28 June 2022 by the person seeking the contribution order (for example, a leaseholder who paid a service charge) and that they must also have been incurred after that date by the person who remedied the relevant defects (the landlord or management company responsible for carrying out remediation works to the building).

59. If the respondents' main argument is correct the costs for which a contribution order could be sought in this case would be reduced by £1,120,397. The secondary argument relates to a small further sum, amounting to £7,945.

60. The respondents have a third argument, if their others are unsuccessful, which is that the fact costs were incurred before the date of commencement of the 2022 Act is either a sufficient reason, or a contributory reason, why it would not be just and equitable for a remediation contribution order to be made against them in relation to those costs. We will address that argument after we have considered the facts.

61. A number of relevant propositions of law were common ground between the parties. Legislation is said to be retrospective if it alters the legal consequences of things that happened before the legislation came into force. It is common ground that, as a matter of legal policy, changes in the law should not take effect retrospectively. Nevertheless, Parliament clearly has power to enact legislation which has retrospective effect, but it is presumed not to intend to do so unless that intention is clear. How clearly Parliament's intention must appear depends on the degree of unfairness which would result from giving the legislation retrospective effect.

62. In support of these propositions we were referred to *Bennion, Bailey and Norbury, Statutory Interpretation,* 8th ed. (2020) , paragraphs 7.13 and 7.14, and by Mr Nissen KC

to the speech of Lord Mustill in *L'Office Cherifien des Phosphates Unitramp SA v Yamashita-Shinnihon Steamship Co Ltd (The Boucraa)* [1994] 1 A.C. 486. At 524H Lord Mustill expressed reservations about 'the reliability of generalised presumptions and maxims when engaged in the task of finding out what Parliament intended by a particular form of words'. He explained that the basis of the presumption against giving a statute retrospective effect is 'no more than simple fairness' and that the effect of a statute is to be ascertained by analysing it, rather than through any mechanistic presumption. He referred with approval to the following statement by Staughton LJ in *Secretary of State for Social Security v. Tunnicliffe* [1991] 2 All E.R. 712 , 724:

> "In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

Lord Mustill then identified several factors, capable of varying from case to case, which would have to be weighed together when determining whether the consequences of reading the statute with the suggested degree of retrospectivity would be so unfair that the words cannot have been intended to mean what they might appear to say. These included: the value of the rights affected; the extent to which they would be diminished or extinguished by the suggested retrospective operation of the statute; the unfairness of adversely affecting the rights; the clarity of the language used by Parliament; and "the light shed on it by consideration of the circumstances in which the legislation was enacted".

63. The retrospective operation of the 2022 Act has already been the subject of two appellate decisions, neither of which specifically concerns section 124.

64. In *URS Corporation Limited v BDW Trading Limited* [2023] EWCA Civ 772 the Court of Appeal had to consider the effect of section 135(1), 2022 Act, which extends the limitation period for claims under the Defective Premises Act 1972 to 30 years by amending the Limitation Act 1980. Section 135(3) provides that the amendment is "to be treated as always having been in force". It was argued that, notwithstanding section 135(3), the new limitation period could not have been intended to apply to proceedings which had already commenced, thereby "changing the rules of the game" after litigation had begun.

65. Coulson LJ did not agree, and held that section 135 was clearly retrospective in effect (subject to an express exception for claims which had already been finally determined or settled); there was no exception relating to the rights of parties involved in ongoing litigation. The only part of his reasoning to which we need to refer, because it is of general application, is at [161], where he said:

> "The starting point – and, in some ways, the end point – must be the ordinary linguistic meaning of the words used in s.135(3)".

66. The second appeal considering the retrospective effect of the 2022 Act is the Upper Tribunal's recent decision in *Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point* [2023] UKUT 271 (LC), which was handed down during the hearing of these applications. It concerned paragraph 9 of Schedule 8 to the 2022 Act 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". Costs of relevant professional services had been incurred by a landlord before 28 June 2022 and the Tribunal was required to consider whether they could be recovered as a service charge (as part of its consideration of conditions which might be imposed on the making of an order under section 20ZA Landlord and Tenant Act 1985 dispensing with the requirement of consultation before service charges for remedial work could be levied). On behalf of the landlord it was argued that it would be highly unjust to deprive landlords retrospectively of the right to collect service charges for works which they had already carried out by the time the Act came into force. Alternatively, it was argued that paragraph 9 could not apply to service charges which had already been demanded and become payable by 28 June 2022.

67. The Upper Tribunal did not accept the landlord's submissions and based its conclusion on the language of paragraph 9, the effect of which was not limited by reference to when the costs in question had been incurred. It was consistent with the overall scheme of the leaseholder protections that Schedule 8 should be capable of applying to costs incurred before it came into force. As to that scheme, the Tribunal said this, at [157]:

> "The legislative intention which emerges from these provisions, and specifically from Schedule 8, is that certain categories of expenditure, in relation to relevant defects, are no longer recoverable by a service charge, including the costs of Qualifying Services. In terms of the passing on of liabilities for expenditure caught by Schedule 8, there is Section 124 and the ability to apply for remediation contribution orders. Whether an application under Section 124 will produce an equitable distribution of a liability to meet expenditure which is caught by Schedule 8 will depend upon the circumstances of each particular case. What is clear is that Parliament has decided that the specified categories of costs in Schedule 8 are not to be payable by the service charge."

68. There have also been at least three decisions of the First-tier Tribunal in which orders have been sought in respect of costs incurred before the commencement of the 2022 Act. These are discussed in *Adriatic Land 5* but the publication of that decision makes it unnecessary for us to refer to them in detail. The approach taken by the FTT in the *Waterside Apartments* case is inconsistent with the conclusion of the Upper Tribunal in *Adriatic Land 5.*

69. With that introduction we can now address the two issues of construction concerning the availability of remediation contribution orders.

Issue 1: Can a remediation contribution order be made in relation to costs incurred before the commencement of the 2022 Act?

70. Mr Selby KC submitted on behalf of the respondents that a remediation contribution order could not be made under section 124 in relation to costs incurred before the section came into force on 28 June 2022. To interpret the section as enabling an applicant to recover costs which it had been legally liable to pay at the time it paid them would be to give the provision retrospective effect and to assume a jurisdiction to unravel completed transactions. Section 124 does not say clearly that it is intended to apply to costs incurred prior to commencement, and in that respect it was to be contrasted with section 135(4) (the amendment to the Limitation Act which was "to be treated as always having been in force"). The only relevant linguistic clue to the scope of the section was the use of "incurred" in section 124(2), but that was too insubstantial an indicator that the jurisdiction to order contributions is to apply to payments made before the section came into force. Costs incurred after 28 June 2022 but before an application for a remediation contribution order would also be costs "incurred", and plainly could be the subject of an order, so it was not necessary to include costs incurred before commencement in order to explain the drafter's choice of tense.

71. In response, Mr Nissen KC submitted that applying section 124 to costs incurred before it came into force would not involve giving it retrospective effect. The change in the law which conferred power to make remediation contribution orders was entirely prospective, and it was not made retrospective by extending it to costs incurred before the Act commenced. The suggested contrast with section 135(3) was of no assistance as, unlike section 124, section 135 plainly did have retrospective effect in depriving a developer of an accrued defence to a cause of action. In any event, it was within Parliament's power to legislate to require a contribution by one person to costs incurred by another at a time before the enactment of the legislation. That is what Parliament had done when it permitted orders to be made requiring payments "for the purpose of meeting costs incurred" in remedying relevant defects. There was no justification for limiting those words to costs incurred after the commencement of the 2022 Act, and to do so would cut down the application of section 124 and cause it to operate in an arbitrary way. The relevant provisions in Part 5 were backward looking, in the sense that they were all about things which had happened in the past and it would be bizarre to limit the power to require a contribution to remediation costs so that it applied only to costs incurred after commencement. Limiting the scope of section 124 by reference to the date remedial works were done or paid for, rather than applying it generally to the defects which caused the legislation to be enacted, would be absurd. If there was any unfairness in diverting responsibility for the cost of remediation away from leaseholders and towards developers, landlords and their associates, it could be taken into account by the FTT when it determined whether it was "just and equitable" for a particular respondent to be the subject of a contribution order.

72. Mr Nissen KC relied on the Explanatory Notes to the 2022 Act as confirming Parliament's intention that section 124 should apply to costs incurred before commencement, referring to the following passage:

> "1012 As discussed above, freeholders and landlords will have new liabilities to pay for remediation costs under Schedule 8. Remediation contribution orders will allow landlords to seek to recover these costs from the building's developer by applying to the Tribunal for an order against the developer. Similarly, leaseholders would have the ability to apply for an order against the developer; for example, if leaseholder contributions are required under Schedule 8, *or if leaseholders have already paid costs towards remediation before the coming*

into force of the leaseholder protections, they may wish to seek to recover these costs using a remediation contribution order." (Emphasis added)

73. We are in no doubt that section 124 allows remediation contribution orders to be made in respect of costs incurred before 28 June 2022. We begin with the language of section 124(2). A remediation contribution order is an order requiring payments to be made "for the purpose of meeting costs incurred or to be incurred in remedying relevant defects …". The drafter of the section was here specifically addressing the issue of which costs of remedying relevant defects may be the subject of an order. In relation to time, the choice of language is unlimited, extending to costs which have already been incurred and those which are yet to be incurred. The language appears to us to be clear and explicit and the absence of any temporal limitation or transitional provision is telling.

74. The clear effect of the language is confirmed by paragraph 1012 of the Explanatory Notes. One of the circumstances in which it is said leaseholders might wish to seek a remediation contribution order against a developer is where they have already contributed towards the costs of remediation works before the coming into force of the leaseholder protections. The reference to the leaseholder protections is, of course, a reference to Schedule 8. The drafter would have appreciated that section 170(3)(a) provided for sections 116 to 125 and Schedule 8 to come into force on the same day, two months after royal assent. It follows that the note is consistent only with an intention that costs which were paid before the commencement of Schedule 8, and therefore before section 124 was in force, should be capable of being the subject of an order under section 124.

75. In the context of Part 5 as a whole, we do not regard this construction of section 124 as either improbable or unfair. On the contrary, it is consistent with the purpose and structure of Part 5 that the radical protection it extends to leaseholders should not be restricted by precise distinctions of time. Service charges are already subject to extensive statutory intervention, which can certainly include unpicking payments already made. In this instance Parliament has decided that, irrespective of fault, it is fair for those with the broadest shoulders to bear unprecedented financial burdens. To that end the 2022 Act goes far beyond the limited leaseholder protections in section 18 to 30, Landlord and Tenant Act 1985 and provides for wholesale intervention in and beyond normal contractual relationships in order to transfer the potentially ruinous cost of remediation from individual leaseholders to landlords, and to distribute it between landlords and developers and their associates according to criteria which Parliament has decided are necessary and fair. We agree with Triathlon's submission that the Act and the LPI Regulations disclose a hierarchy of liability, with the original developer and its associates at the top. An interpretation of the Act which resulted in some leaseholders bearing the cost of remediation, and some developers, landlords and their associates avoiding responsibility, would not give effect to the obvious purpose of the Act to protect leaseholders to the fullest extent possible. Moreover, such an interpretation would create serious inconsistencies in the operation of the legislation.

76. The inconsistencies we refer to would exist between the functioning of sections 123 and 124 on the one hand and Schedule 8 on the other and would discriminate between individual leaseholders in materially identical circumstances.

77. The effect of paragraph 2 of Schedule 8 is that leaseholders are fully protected against the cost of relevant measures relating to relevant defects if their landlord or a superior landlord was responsible for the defect; paragraph 3 provides the same protection to qualifying leaseholders of many other landlords; paragraph 4 protects the holders of qualifying leases below specified values; paragraph 5 caps the total service charges payable in a period beginning, in some cases, as early as 28 June 2017. But Schedule 8 protects only against the obligation to pay service charges and does not assist leaseholders who have already contributed to the cost of relevant measures before the commencement of the Act. Those leaseholders must rely on section 124 for a remedy; it is a less certain remedy, since it depends on being able to identify some relevant developer, landlord or associate with the capacity to pay and involves consideration of what is just and equitable, but its objective is the same, namely so far as possible to spare leaseholders from the financial burdens imposed by the need for remediation. On the respondents' interpretation of section 124 leaseholders who had already paid for the cost of measures by the date of commencement would have no remedy, no matter how much they may already have paid for those measures. They would be unable to seek a contribution order under section 124 to reimburse their expenditure, and Schedule 8 would not assist them because it is concerned with current and future liabilities, not past payments.

78. It appears to us to be inconceivable that Parliament can have intended that the individual leaseholders of flats in a building which had not yet been remediated by the time the leaseholder protections in Schedule 8 came into force on 22 June 2022 were to enjoy those protections, but that the leaseholders of an identical building on the same estate which had already been remediated at their expense were to be left to bear the full costs themselves and prevented from seeking a contribution order under section 124. Similarly, it cannot have been intended that a leaseholder who paid a service charge demanded to meet the cost of remedial works before 22 June 2022 would be left with no remedy, whereas their neighbour in the same building who had refused or been unable to pay would have full Schedule 8 protection. The sums involved in remediation are too great, and the consequences for individuals too extreme, for such a haphazard pattern of protection to have been Parliament's intention.

79. We therefore think it important to read the Act as a whole, and to give effect to its different provisions as parts of a complicated scheme with a consistent objective. Section 124 and Schedule 8 are different routes towards the same destination: the transmission of responsibility for remediation away from individual leaseholders and towards the original developer and its associates. The Upper Tribunal having decided in *Adriatic Land 5* that the Schedule 8 leaseholder protections apply to costs incurred before the commencement of the Act, in the absence of some clear direction in the language of section 124, consistency requires that it be interpreted in the same way.

Issue 2: By whom must the costs have been incurred?

80. In view of the conclusion we have already reached on the respondents' first retrospectivity argument, its second argument does not arise, and the whole of the costs in respect of which remediation contribution orders are claimed are capable of being included. In case we have reached the wrong conclusion on the first issue, we will briefly consider the second issue.

81. Section 124(2) allows an order to be made requiring payments to be made "to a specified person, for the purpose of meeting costs incurred or to be incurred in remedying relevant defects". It is noticeable that the identity of the "specified person" to whom the payment is to be made is left open, beyond the confirmation in section 124(5) that "specified" means "specified in the order". In particular, it is not necessary that the "specified person" must be the "interested person" who is applying for the order. Thus, for example, in this case Triathlon is applying for orders for payment to be made to EVML.

82. If we had concluded that, to be the subject of a remediation contribution order, costs had to be incurred after 22 June 2022, we would have been minded to find that it was necessary that the costs be incurred after that date by the person who remedied the relevant defect. We would have rejected Triathlon's submission that it was irrelevant that EVML paid the costs before 22 June 2022, and that instead it was sufficient that it, Triathlon, had incurred a cost, by paying a service charge, after the date of commencement. Triathlon was not the person who remedied the defect and any costs it may have incurred were therefore not incurred in remedying the defect.

Issue 3: Can a remediation contribution order be made in respect of costs incurred in preventing risks from materialising or reducing the severity of building safety incidents?

83. The respondents argue that a distinction is drawn in the 2022 Act between costs incurred in remedying relevant defects, on the one hand, and costs of measures taken for the purpose of preventing a building safety risk from materialising or reducing the severity of any incident resulting from a building safety risk which does materialise, on the other. They submit that, on a proper construction of section 124 and Schedule 8, the former costs may be the subject of a remediation contribution order, but the latter may not.

84. In this case an example of costs which the respondents accept can fall within section 124 are the costs of removing combustible cladding from the Blocks and replacing it with non-combustible cladding. Examples of costs which they say fall outside the section are the costs of providing a waking watch and of employing fire evacuation officers to assist residents with limited mobility in the event of a fire, and the costs of installing, servicing and decommissioning additional fire alarms and heat detectors as a temporary measure while remediation works are awaited. The agreed cost of these measures is £1,100,750.

85. In drawing this distinction the respondents contrast section 124 and paragraph 1 of Schedule 8.

86. Section 124(2) defines a remediation contribution order as an order requiring a person to make payments "for the purpose of meeting costs incurred or to be incurred *in remedying relevant defects* (or specified relevant defects) relating to the relevant building". Section 124(4)(a) provides further detail; an order may require the making of payments "*in respect of the remediation of specified relevant defects* (or in respect of specified things done or to be done *for the purpose of remedying relevant defects*)". The respondents stress the words we have italicised as defining the scope of remediation contribution orders.

87. This, so the respondents submit, is to be contrasted with the leaseholder protections in Schedule 8. In different ways paragraphs 2 to 5 of the Schedule limit the recoverability of

service charges "in respect of a relevant measure relating to a relevant defect"; for example, paragraph 2 provides that no service charge is payable "in respect of a relevant measure relating to a relevant defect" if a relevant landlord was responsible for the defect or is an associate of the person responsible.

88. "Relevant measure" is defined in paragraph 1:

> '"Relevant measure" in relation to a relevant defect, means a measure taken-
>
> (a) to remedy the relevant defect, or
>
> (b) for the purpose of -
>
> (i) preventing a relevant risk from materialising, or
> (ii) reducing the severity of any incident resulting from a relevant risk materialising.'

89. The respondents rely on the fact that the definition of "relevant measure" in Schedule 8 distinguishes between what they refer to as type-(a) and type-(b) works. Type-(a) works are works to remedy, or cure, a defect; whereas, in contrast, type-(b) works are works which do not cure the defect, but prevent or limit the risks to which the defect gives rise.

90. Mr Selby KC made four points in support of his submission that a remediation contribution order under section 124 could be made only in respect of type-(a) works and never in respect of type-(b) works.

91. First, in the definition of "relevant measures" type-(a) and type-(b) works were clearly intended to relate to different measures. To treat type-(b) works as a subset of type-(a) works would make sub-paragraph (b) redundant, contrary to the presumption that words in an enactment should be given meaning. Mr Selby KC referred to Bennion, Bailey and Norbury on Statutory Interpretation (8th ed 2020) at paragraph 21.2 in support of that proposition. Sub-paragraph (b) would have been unnecessary if the measures described in it were already included in sub-paragraph (a).

92. Secondly, variants of the expression "remedy the relevant defect" used in Schedule 8 also appear in section 124(2) ("remedying relevant defects") and in section 124(4)(a) ("remediation of specified relevant defects" and "remedying relevant defects"). No material distinction can have been intended in the use of those terms, as remedy, remedying and remediation all connote the same activity. Where the same words are used more than once in a statute they are presumed to have the same meaning (Mr Selby KC referred again to Bennion at paragraph 21.3 in support of this proposition).

93. Thirdly, had the drafter wanted to include type-(b) works in the scope of section 124 they could have made use of the expression "relevant measure" which was employed in Schedule 8. They did not do so, but instead used "remedying" and "remediation".

94. Fourthly, Mr Selby KC argued that little weight should be given to other indicators relied on by the applicants. The title to Schedule 8 refers to "Remediation Costs under Qualifying Leases etc." and it was suggested that all relevant measures (as defined in paragraph 1) are

intended to be treated as acts of "remediation" and therefore as being within the scope of section 124. But the function of headings is "to serve as a brief guide to the material to which it relates and that it may not be entirely accurate" (Bennion at paragraph 16.7), and in any event, the scope of the heading to Schedule 8 was expanded beyond type-(a) remediation work by the addition of "etc". Finally, Mr Selby referred to *R v Montila* [2004] 1 WLR 3141, at [34], in which Lord Hope said of headings and side notes in a statute that:

> "The question then is whether headings and sidenotes, although unamendable, can be considered in construing a provision in an Act of Parliament. Account must, of course, be taken of the fact that these components were included in the Bill not for debate but for ease of reference. This indicates that less weight can be attached to them than to the parts of the Act that are open for consideration and debate in Parliament."

95. For their part Triathlon accepted that jurisdiction under section 124 is limited to the costs of remedying relevant defects, but contended that all of the costs in issue in these applications are costs of remedying relevant defects, including the costs of the waking watch, fire detection equipment and other precautionary measures.

96. Mr Nissen KC submitted that the language of the 2022 Act should be construed with its statutory purpose in mind. That purpose was stated in section 1(1), namely, "to secure the safety of people in or about buildings". The notion of remedying a relevant defect identified in section 124(2), which, as section 124(4) shows, extends to things done for the purpose of remedying defects, should not be narrowly construed.

97. Textually, the word "remedying" bears its normal meaning which, according to the Shorter Oxford English Dictionary, includes: "a means of counteracting or removing something undesirable". The Chambers Dictionary also includes within its definition of remedy something "counteracting or repairing any evil or loss". A remedy or remediation need not remove the cause of the malady, but may simply counteract it, and could be either temporary or permanent. For example, a remedy to protect a building from imminent collapse might involve installing temporary supports. The cost of such works, which could be considerable, would, Mr Nissen submitted, obviously constitute part of the cost of remedying a relevant defect. The statutory language should therefore be read as covering both the repair or replacement of defects, and other steps which counteract the harm or risk caused by the defect question.

98. Mr Nissen KC commended to us the approach taken by the FTT in *Waite v Kedai* [LON/00AY/HYI/2022/ 0005 and 0016] in which the panel had commented that the 2022 Act did not provide detailed guidance about how building safety risks or the scope of remedial works were to be identified, but instead was drafted "in deliberately broad terms, to enable the Tribunal to find the best and most practical, outcomes-focussed solutions to myriad circumstances that will inevitably present themselves in applications such as this." He submitted that there will often be various methods by which relevant defects can be addressed to counteract the risks they present. That is particularly so since the introduction of the building safety standard PAS 9980: 2022 published by the BSI on 31st January 2022. PAS 9980 constitutes a new code of practice for appraising the fire risk of external wall construction and cladding on existing blocks of flats. It offers a more nuanced appraisal of fire risks and enables the justification of alternative remedial solutions short of replacing

all combustible materials, components and systems. A satisfactory remedy for the purpose of these building safety standards may, therefore, include leaving combustible components in place while adopting a pragmatic solution which overcomes the risks posed by their presence. Section 124, like section 123, should be construed to accommodate this reality by including within its ambit the installation of alarms or detection systems or any other risk mitigation measure necessary 'to remedy' the relevant defect and the building safety risk that it poses.

99. As for the interpretative presumptions relied on by the respondents, Mr Nissen KC pointed out that these were not rigid rules and must give way when they were inconsistent with the obvious intention of Parliament. Thus, in *Secretary Of State For Home Department v Immigration Appeal Tribunal* [2001] EWHC Admin 261, Scott Baker J had said, at [35]:

> "There is no absolute rule that one word cannot have two different meanings within the same section or subsection. True, it will only rarely occur but the ultimate question is what did Parliament intend. To determine this it is necessary to look at the Act as a whole."

100. Mr Nissen KC also referred to *R(The Good Law Project) v Electoral Commission* [2018] EWHC 2414 (Admin), in which Leggatt LJ (as he was) said at [33]:

> "The basic principles are that the words of the statute should be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the purposes of the legislation. It is generally reasonable to assume that language has been used consistently by the legislature so that the same phrase when used in different places in a statute will bear the same meaning on each occasion – all the more so where the phrase has been expressly defined."

101. The passages from Bennion to which we were referred also drew our attention to observations by Nourse LJ in *Omar Parks Ltd v Elkington* [1992] 1 WLR 1270 CA at 1273 where he said:

> "It is perfectly true, as was pointed out by Mr Howard on behalf of the plaintiff … that if that is the only function of the words 'on the application of the owner', they could just as well have been omitted. If a long experience of legislative drafting had brought with it a conviction that an Act of Parliament never included words of surplusage, that would no doubt have been a persuasive point. But that is not our experience and I for one do not complain of it. An emphasis of the obvious, unnecessary to a judge who has had the benefit of argument, may yet be welcome to a busy practitioner who has not."

102. We are attracted to Mr Nissen's submissions. Though Mr Selby's rival contentions are also persuasive, we find it difficult to reconcile them with the coherent and consistent functioning of the Act.

103. Beginning with the statutory language, we agree that the word remedy and its variants are readily capable of being applied to measures short of eliminating the existence of a defect altogether. Measures which alleviate symptoms of an illness or reduce the risks of damage

being caused by a building defect can properly be called remedies. A remedy which produces a complete cure is one type of remedy but that is not the only outcome which can result from a remedy. In ordinary usage if it is intended to convey that, as a result of a remedy, some defect or illness had been removed entirely the user might be expected to say so specifically, or to qualify the word to add emphasis, referring perhaps to a complete remedy, or to comprehensive remedial works. An example can be found in paragraph 8(2) of Schedule 8, where the expression "cladding remediation" is defined as "the removal or replacement of any part of a cladding system"; rather than referring simply to "remediation of a cladding system" the drafter chose instead to focus on one specific form of remediation (removal or replacement) in order to avoid doubt about the scope of that particular leaseholder protection.

104. Section 124 is about the cost of "remedying relevant defects". Not all defects are relevant defects. As defined in section 120(2) a relevant defect has two characteristics: it must arise as a result of something done or used (or not done or used) in connection with "relevant works" (including the construction or conversion of the building); and it must be a defect that "causes a building safety risk". A "building safety risk" means a risk to the safety of people in or about the building arising either from fire or from the collapse of the building.

105. Any measure which either eliminates a defect altogether, or reduces it to a point where it no longer presents a risk to the safety of people in the building from fire or building collapse would cause it to cease to be a relevant defect. In that sense the relevant defect would have been remedied. One example referred to in argument was of a balcony constructed of timber, or with timber components. The presence of timber in the balcony structure creates a risk to the safety of people in the building arising from the spread of fire. One way of addressing that risk might be by removing the timber altogether; an alternative approach might be to coat the timber with a fire retardant paint. One method removes the component which gives rise to the defect, while the other leaves it in place but removes or reduces the risk to safety which the defect presents. If both methods have the effect of removing the building safety risk it is very difficult to see why one could aptly be said to have remedied the relevant defect while the other could not.

106. This simple example illustrates the complexity of the subject matter of the 2022 Act as a whole, namely securing the safety of people in or about buildings, and of sections 117 to 125 in particular, being the remediation of relevant defects. That complexity seems to us to require an interpretation of section 124 which focuses on the practical outcome of the things which have been done, or are to be done, rather than any interpretation which tends to narrow the scope of the remediation provisions.

107. We would therefore have no difficulty, whether simply as a matter of ordinary language, or additionally in view of the definition of relevant defect, in concluding that any measure which causes a building defect to cease to be a relevant defect, or which is part of a larger programme of measures for that purpose, is capable of being the subject of a remediation contribution order.

108. Mr Selby KC's argument to the contrary is a linguistic one, turning on the presumption that because the definition of "relevant measure" in Schedule 8 differentiates between measures taken to remedy relevant defects, and other measures, those other measures must be taken

to be excluded wherever the Act refers only to remedying relevant defects. We see the force of that point, but we do not accept that it is determinative.

109. The group of sections with which we are concerned is headed "Remediation of certain defects" and begins with a statement in section 116(1) that "sections 117 to 125 and Schedule 8 make provision in connection with the remediation of relevant defects in relevant buildings". Effect is given to Schedule 8 by section 122, which is headed "Remediation costs under qualifying leases etc" and the same heading is applied to Schedule 8 itself. The impression created by these indicators is that all of the provisions referred to, including those in Schedule 8, are concerned with remediation. That is perhaps not a matter of great weight, but it contributes to the interpretation of the provisions as a whole.

110. Schedule 8 is concerned with the treatment of remediation costs for the purpose of service charges. It begins with a series of definitions which are stated to be applicable "in this Schedule"; that is a slight indicator that the drafter was focussed on the specific subject matter of the Schedule and not on the wider operation of the Act as a whole.

111. Paragraph 1(1) defines "service charge" by reference to section 18 of the Landlord and Tenant Act 1985, which itself defines the expression as an amount payable by a tenant which is payable, directly or indirectly "for services, repairs, maintenance, improvements or insurance or the landlord's costs of management". The language used to describe service charges in leases is often exhaustive or tautologous for fear of implying some unintended exclusion. In that context it would be understandable, when it comes to those parts of the 2022 Act concerned with service charges, if the drafter was less concerned with economy of expression than with the avoidance of doubt.

112. The definition of "relevant measure" is expressed in wide terms, in particular by the use of "measure" rather than some narrower word, such as work, or service, to describe the activity in question. Nor is there any definition of what a defect is, which similarly leaves open the range of acts, omissions or changes capable of being covered by the provisions.

113. Relevant measures are all measures in relation to a relevant defect and are described in three parts: measures taken to remedy a relevant defect; measures for the purpose of preventing a relevant risk from materialising; and measures for the purpose of reducing the severity of any incident resulting from a relevant risk materialising. As a relevant risk is a building safety risk that arises as a result of a relevant defect, all three types of measures are, in principle, capable of being taken in response to the same defect.

114. The three-fold description of relevant measures does not appear to us to create sealed compartments with precise lines of demarcation. Each measure is described by reference to the purpose for which it is taken - to remedy, to prevent, to reduce - rather than by reference to a particular activity. The definition could be visualised as a Venn diagram of overlapping descriptors by which the same activity might easily fall within more than one classification. The removal of a combustible cladding panel would remedy a building defect, but at the same time it would prevent the risk associated with its presence from materialising. If an escape route is designed without adequate compartmentation, so that smoke is allowed to enter a corridor or staircase in the event of fire, the building would be said to suffer from a defect; the installation of appropriate fire doors would both remedy the

defect and reduce the severity of any incident arising as a result of the defect (by delaying the entry of smoke into the corridor for long enough to enable residents to escape).

115. A further example of the difficulties created by treating the three-fold description of relevant measures as divided into sealed compartments is provided by the recently introduced building safety standard PAS 9980: 2022. As we have explained above, PAS 9980: 2022 offers a more nuanced assessment of fire risks and enables the justification of alternative remedial solutions short of replacing all combustible materials, components and systems, in contrast to so-called full or ADB remediation; that is to say remedial works required by current Building Regulations and Approved Document B. The demarcation required by the respondents' argument could, it seems to us, leave PAS works at risk of falling outside the scope of Section 124. By way of example, in the case of a relevant defect such as the presence of combustible materials in a building PAS works could constitute an approved method of dealing with the relevant defect falling short of actual replacement of the relevant combustible materials. It would be an odd, and undesirable result if such works were excluded from the scope of Section 124 because, while qualifying as an approved method of dealing with the relevant defect, they fell short of being the most extensive and, no doubt, most expensive method of dealing with the relevant defect.

116. We therefore part company with Mr Selby's argument at its first stage. We do not accept that each component of the definition of "relevant measure" is intended to describe a different activity with no room for crossover or duplication. The presumption against redundancy is not sufficiently strong to compel that conclusion and is outweighed by other considerations. Nor do we think Parliament is likely to have intended the scope of remediation contribution orders to depend on fine distinctions between measures taken to remedy a defect or to prevent a relevant risk from materialising.

117. It is also relevant to consider the effect the respondents' interpretation would have on the achievement of the purposes of the 2022 Act. In the context of issue 1 we have previously described as untenable an interpretation of section 124 and Schedule 8 which would discriminate between individual leaseholders on the basis of when and if they had already contributed to the cost of responding to building safety defects. The respondents' argument for the purpose of issue 3 also has that consequence in that it treats leaseholders who have paid differently from those who have not yet paid, notwithstanding that they may live next door to one another and have received identical service charge bills for the same measures. Mr Selby KC did not suggest any reason why Parliament should have intended leaseholders to enjoy different degrees of protection by reference to whether they had already contributed to costs incurred in preventing relevant risks from materialising (in respect of which section 124 would not be available to them), or had not yet done so (hence enjoying the protections afforded by Schedule 8). To read the Act in such a way that section 124 and paragraph 8 discriminate between different leaseholders in materially comparable situations seems unlikely to reflect Parliament's intention.

118. The respondents' construction would also result in other improbable consequences.

119. A remediation order under section 123 is an order requiring a landlord to "remedy specified relevant defects". Amongst the interested persons who may apply for such an order are the building safety regulator, a local authority and a fire and rescue authority, as well as any person with a legal or equitable interest in the building. It would be a surprising limitation

of the scope of remediation orders if they could not be used, for example, to require the installation of additional fire alarms or the application of fire retardant coating to timber building components, if those were measures that the relevant fire authority considered appropriate and sufficient to remedy a relevant defect.

120. Section 125 enables the court, on the application of an insolvency practitioner acting in relation to the winding up of a company, to order an associate of the company to meet costs incurred or to be incurred in remedying any relevant defect which the insolvent company was liable to remedy. That power would also be restricted by the respondents' interpretation.

121. Finally, regulation 3(1) of the LPI Regulations gives a landlord which has paid for or is liable to pay for the cost of relevant measures, and which is prevented from recovering those costs from leaseholders by paragraph 2 of Schedule 8, the right to recover them instead from the responsible landlord (i.e. the developer or its associate). That right would be available where the landlord for the time being which is required to take the relevant measures holds its interest from a superior landlord which was the developer or an associate of the developer, thereby engaging the paragraph 2 leaseholder protection. The regulation 3 right extends to recovery of the costs of any relevant measure, but it is available only to a landlord. A leaseholder who has paid the costs of relevant measures cannot rely on regulation 3, but must fall back on section 124 which allows the leaseholder to make his or her own application against the responsible landlord. Yet on the respondents' interpretation of section 124, if the relevant measures were type-(b) measures, the leaseholder would be unable to do so. It would be a paradox, to say the least, if a responsible landlord could escape liability for the cost of type-(b) measures which had been paid for by an individual leaseholder but not for type-(b) measures paid for by an intermediate landlord.

122. For these reasons our conclusion on the third legal issue is that a remediation contribution order can be made in respect of costs incurred in preventing risks from materialising or in reducing the severity of building safety incidents.

Issue 4: Association with a limited partnership

123. A fourth legal issue featured in the parties' statement of case. That was whether, for the purpose of section 121 (associated persons), a company which is associated with each of the corporate partners in a limited partnership is also associated with the partnership itself. At the hearing before us the respondents, who first raised the issue, argued for a negative answer to the question while Triathlon argued for the opposite conclusion.

124. The one matter on which the parties were agreed was that the answer to the question does not matter in this case. It is acknowledged that Get Living is an associate of the freeholder and of each of the landlords in the relevant chain of title. That is sufficient to enable it to be specified in a remediation contribution order (assuming the other jurisdictional requirements are met) as a body corporate required to make a contribution to remediation costs. The question whether Get Living is also an associate of SVDP, which was the developer and is a limited partnership, therefore makes no difference to the Tribunal's jurisdiction. Nor is it argued on behalf of Get Living that the capacity in which it may be specified as an associate

makes any difference (in this case) to the Tribunal's determination whether it is just and equitable that an order should be made against it.

125. In those circumstances, without intending any disrespect to Mr Selby KC and Ms Crampin, on the one side, and Mr Millett KC, on the other side, we do not propose to determine this issue. We are influenced by the fact that this is a decision of the FTT which will already be lengthy even without consideration of another complicated point of interpretation which may be determinative in another case. For the avoidance of doubt, we would not have felt inhibited in considering the issue by a concession made at a very early stage on behalf of Get Living that it was an associate of the developer, which was subsequently withdrawn.

126. Having, as far as we need to, addressed the issues of interpretation of section 124 which arise in the applications, we can now turn to the main issue, which is whether it is just and equitable for the Tribunal to make a remediation contribution order against the respondents. We will begin by saying a little more about the parties to the applications.

The parties

127. Triathlon, the applicant, is a limited liability partnership of three housing providers, Southern Space Ltd, East Place Ltd and First Base 4 Stratford LLP; we understand the first two named to be subsidiaries of much larger registered social housing providers, Southern Housing Group Ltd and London and Quadrant Housing Trust respectively. First Base is a property development and investment company which was part of the consortium selected by the Olympic Delivery Authority ("the ODA") in March 2007 as its private sector development and funding partner for the development of the East Village. Triathlon therefore describes itself as a joint venture between the private and public sectors.

128. Triathlon came into existence with the intention of purchasing the affordable housing at East Village with funds provided by the Housing Corporation and commercial lenders when the buildings became available after the 2012 Games; it would then let and manage the homes under a variety of tenures prescribed by the relevant section 106 agreements. It has therefore been involved in the East Village project since its inception.

129. Kath King is Triathlon's Managing Director. Elliot Lipton is Managing Director and a major shareholder of First Base; he is also a director of Triathlon. Ms King and Mr Lipton gave evidence on behalf of Triathlon.

130. SVDP, the first respondent, is the beneficial owner of the freehold of Plot N26 at East Village and was the developer, within the meaning of s124(5), of each of the five Blocks. It is a limited partnership comprising one general partner, Stratford Village Development (GP) Ltd, and two limited partners, Stratford Village Development L1P Ltd and Stratford Village Development L2P Ltd. It was originally in public ownership, having been set up and owned by the ODA in 2009 for the sole purpose of funding and developing East Village for legacy use after its occupation by the 2012 competitors.

131. Evidence was given by Ralph Luck OBE about the establishment of SVDP and its sale on 6 August 2014 (pursuant to a Framework Agreement entered into in 2011) to realise the capital value of East Village for the ODA. From 2006 to 2013 Mr Luck was the ODA's

Property Director and the person responsible for negotiating the Framework Agreement with the purchaser, QDD Ltd (through its SPV, QDD Athletes Village UK Ltd).

132. It is agreed that SVDP was the developer of East Village within the meaning of section 124(5). It did not carry out the development by itself but entrusted the management of the project to Lend Lease Development Ltd which in turn commissioned Galliford Try Construction Ltd as its design and build contractor in respect of Plot N26.

133. Get Living, the second respondent, was incorporated in August 2018 and did not exist until long after the construction of East Village had been completed. It is a successful property investment group, which also includes SVDP and each of its partner entities. Get Living is also the parent of two dormant subsidiaries which now hold the freehold of Plot N26 as trustees for SVDP. Amongst those who gave evidence on behalf of Get Living were Stafford Lancaster, the Chief Investment Officer of Delancey Real Estate Asset Management Ltd ("DREAM") and Daniel Greenslade, Chief Financial Officer of Get Living PLC.

134. EVML, the third respondent, is the estate management company for each Block and in that capacity is a party to leases held by Triathlon of premises forming part of each Block. It is also Triathlon's immediate landlord, following the grant of an intermediate lease in November 2016 of the whole of the previously developed plots at East Village. As estate management company EVML has day to day management of the Blocks, and has commissioned the remediation works now underway at Plot N26 pursuant to a major works contract with Errigal Facades Ltd ('Errigal') in the sum of £19,956,315.

135. EVML was incorporated, under its former name of Stratford Village Management Company Limited, on 28th May 2009. By a members agreement dated 19th June 2009 ("the Members Agreement") SVDP and Triathlon set out the terms and conditions on which they had agreed to establish EVML. The Members' Agreement also set out certain undertakings entered into by the parties in respect of the management and business of EVML. In relation to the question of whether it is just and equitable to make the orders sought on the applications the respondents placed considerable reliance on the Members Agreement and, in particular, clause 7 therein. We will return to the Members Agreement when we come to consider the just and equitable question.

136. Triathlon and Get Living are both members of EVML and appoint directors to its board. Triathlon has 39% of the voting rights (approximately) and it has appointed Ms King and Mr Lipton to be directors. Get Living has 58% of the voting rights and has appointed two corporate directors, one of which has appointed Mr Greenslade as its representative. Additionally, SVDP is a "Founder Member", entitled to appoint a director who has only one vote, and it has appointed Mr Lancaster. The quorum for board meetings cannot be reached unless at least one of the Triathlon directors, one of the Get Living directors and the SVDP director are present.

137. We heard a considerable amount of evidence about difficulties which the EVML board had in managing the situation in which they found themselves. EVML was contractually responsible for the remediation of the cladding defects in the Blocks, including taking decisions about the form that remediation would take and how it would be funded. From the commencement of the 2022 Act (and before that when its provisions became known)

the interests of its two major shareholders diverged, SVDP being the developer against whom both EVML and Triathlon had rights under the Act. It is hardly surprising that this made taking some decisions at board level a slow and difficult process which caused frustration both to the directors and to EVML's senior management. We put on record at this stage that, whatever may have been implied in pleadings and witness statements, it was not part of either side's case that the EVML directors appointed by the other had not acted in good faith.

138. Until very late in the day, the divergent interests of its shareholders made it impossible for EVML to participate in these proceedings. It was not originally made a party by Triathlon and when the FTT directed that it should be joined it did not file a response. It was at almost the very last minute that the board agreed that only Ms King and Mr Lipton should make decisions in connection with the proceedings, and authorised them to take advice on behalf of EVML and to adopt a position. This they duly did, and as a result EVML notified the Tribunal through Mr Polli KC that it supports the making of the orders sought by Triathlon against SVDP and Get Living.

Respondents' corporate structure and ownership

139. Some importance is attributed by the respondents to the history of ownership of SVDP and Get Living, so we record here the position agreed between the parties.

140. Mr Luck explained that SVDP had been incorporated by the ODA in 2009 for the sole purpose of funding and developing the Olympic Village. It remained wholly owned by the ODA until 6 August 2014, which was after the completion of all stages of the development including what was referred to as "retrofitting" to convert the athletes accommodation into self contained flats by the installation of kitchens and removal of some partitions.

141. The disposal by the ODA of the entire shareholding in SVDP on 6 August 2014 was pursuant to a Sale and Purchase Agreement entered into on 9 August 2011 between the ODA as seller and QDD Athletes Village UK Ltd ("QDDAV") as buyer. Other parties to the Agreement include Qatari Diar Real Estate Investment Company ("QD") (Qatari Diar being the sovereign wealth fund of Qatar) as guarantor of the obligations of the buyer.

142. At the time of the Sale and Purchase Agreement QDDAV, which acquired SVDP, was a wholly owned subsidiary of QDD Ltd, which in turn was owned by QDD Holdco Ltd. QDD Holdco was owned in equal shares by QD, through a Jersey subsidiary, and a BVI registered investment fund, DV4 Ltd, again through a subsidiary. DV4 Ltd was advised by DREAM.

143. In April 2016 an additional jointly owned subsidiary, East Village London LLP, was interposed in the structure above QD Holdco without changing the ultimate equal beneficial ownership but the following month one third of the shares in East Village London LLP were sold to a Dutch pension investment company ("Stichting"). Thereafter from May 2016 the ultimate beneficial ownership of East Village was held equally by Qatari, BVI and Dutch investors.

144. A further change in the ultimate beneficial ownership occurred in October 2018, when DV4 entered into a joint venture with a Canadian real estate investment group to create Delancey Oxford Residential SLP ("DOOR") which then acquired DV4's interest in East Village.

145. Until this point Get Living had not featured as part of this corporate structure, but on 7 November 2018 it replaced East Village London LLP as the parent of SVDP. At the same time QD's interest was diluted from 33% to 22%, with DOOR and Stichting each owning 39%.

146. Since 2018 QD has disposed of its interest in the investment to an Australian pension fund and a number of other investment and pension funds have invested in DOOR, reducing DV4's share to a little over 4%.

147. Two salient points emerge from this history. First, at all times during the construction of the Blocks, the developer, SVDP, was a subsidiary of the ODA and ultimately owned by the British taxpayer; this was the basis of a submission by Mr Selby KC that "the SVDP of today is not the SVDP that designed and constructed Plot N26". Secondly, the original Qatari and BVI investors who purchased SVDP from the ODA in August 2014 have subsequently reduced their participation very substantially or exited altogether.

Ownership of the Blocks

148. East Village was always intended to include both affordable housing and market housing. From the start it was an important design principle that units occupied under different tenures were not to be identifiable by their appearance nor concentrated in separate buildings but were to be distributed throughout the Village. That principle underpins tenure and management arrangements which see a social housing landlord, Triathlon, and a private rental landlord, Get Living, each owning leases in the same buildings and jointly controlling EVML which manages and maintains the whole Village.

149. The chain of property ownership can be described quite simply.

150. The freehold interest in East Village is held jointly by Stratford Village Property Holdings 1 Ltd and Stratford Village Property Holdings 2 Ltd (together "SVPH 1/2"), subsidiaries of SVDP for whom they hold their interest on trust.

151. EVML holds part of East Village, including Plot N26, under a headlease for a term of 1000 years at a pepper corn rent which was granted in 2016 subject to pre-existing leases of the individual Blocks which we mention next.

152. Triathlon's interests in the Blocks are under seven separate 999 year leases granted pursuant to agreements for lease dated 22 October 2009, for terms expiring in 3013. Four of the leases relate to individual blocks and demise all of the social and shared ownership units in that block (in Blocks A and B the leases are of 40 or more apartments,while in Blocks C and D the demises comprise only a small number of townhouses on the lower floors). There are three separate leases of units in Block E, two demising apartments and one townhouses.

153. Each lease is of the interior of the apartments or townhouses only and does not include any of the common parts or the structure or exterior of the relevant building. Each requires Triathlon to pay a service charge to EVML, in its capacity as estate management company, in return for the provision of services which include the repair and maintenance of the structure and exterior.

154. Triathlon has granted shared ownership leases and assured tenancies of the 129 individual units let to it in the Blocks.

155. Parts of Blocks C, D and E which are neither common parts nor demised to Triathlon are the subject of 999 year leases to QDD EV N26 Ltd. The 77 flats and houses comprised in these leases are the subject of sub-leases to a Get Living subsidiary, Get Living EV 26 Ltd. Each lease requires the payment of a service charge to EVML in return for the usual services.

156. Get Living has let these individual units on "private" assured shorthold tenancies at market rents.

The factual background to the dispute

157. We were provided with a detailed account from a number of witnesses of the involvement of the various parties in the development of East Village and subsequent events. Very little was controversial.

The development agreements

158. The right to host the Games had been awarded to London in July 2005 and the ODA came into existence in March 2006. By May 2009 it had been decided that the project would be fully funded by the UK government.

159. The development of Plot N26 took place pursuant to a Framework Agreement concluded in June 2009 which comprised both an agreement for the construction of the affordable housing units at East Village, and for the grant of leases of the completed units. The parties to that agreement were SVDP as Developer (with the ODA as the guarantor of its development obligations), SVPH 1/2 as the Landlord, and Triathlon as the Tenant.

160. The Framework Agreement provided for the development of each Plot by separate Development Agreements between SVDP and Triathlon covering both the initial delivery of the athletes' village and the post-Games retrofitting works. On completion of retrofitting in a particular block the Triathlon lease of the affordable housing element would then be granted by SVPH 1/2.

The parties' involvement in the design and construction of East Village

161. A bidding process for the market housing was conducted by the ODA between September 2010 and August 2011. It offered the opportunity to acquire the East Village, with completion due no earlier than 31 March 2014 following the Games and after the

retrofitting. The whole of the Village was to be disposed of, including 2,818 homes, but subject to Triathlon's interest in the 1,379 affordable homes. The successful bidder would be free to sell or let on the open market the 1,439 homes in which Triathlon did not have an interest and would also acquire six as yet undeveloped plots capable of accommodating a further 2,100 to 2,500 homes.

162. The joint venture between Qatari Diar and DV4 emerged as the successful bidder in that process in which they were represented by Mr Lancaster and his colleagues at DREAM.

163. The ODA was flexible about the way in which its interest should be disposed of. It was prepared to sell the land itself together with the completed buildings, or alternatively to sell SVDP, the beneficial owner of the land. In the event, all interested parties expressed a wish to acquire SVDP itself. The benefits of proceeding in that way would, of course, carry with them any current or future liabilities which SVDP might have, but those risks were to be mitigated by indemnities given by the ODA and by warranties from the consultants and contractors engaged on behalf of SVDP to carry out the development.

164. On 9 August 2011, QDD exchanged contracts with the ODA for the purchase of the shares in SVDP. It did so through its English subsidiary, QDDAV, specially incorporated for that purpose.

165. We heard a certain amount of evidence about the parties' involvement in the design of East Village. Most of this was concerned with the extent to which prospective purchasers of SVDP, including QDD, had access to detailed information before the Sale and Purchase Agreement was exchanged on 9 August 2011, in particular about the design and specification of the external cladding of the Blocks. Evidence was also directed towards the extent to which QDD, and DREAM as its representative, were in a position to influence design decisions after that.

166. DREAM, as Mr Lancaster explained, is a property consultancy founded by Mr Jamie Ritblat and is part of the Delancey group in which Mr Ritblat and his family have substantial interests. By virtue of his position in DREAM Mr Lancaster managed the East Village project on behalf of the investors in QDD from the exchange of the SVDP Sale and Purchase Agreement. In that capacity he attended meetings of the board of EVML (then comprising representatives of Triathlon and the ODA) as an observer although, as he put it, the intensity of the project required all hands on deck, and he was not a passive observer but actively involved where he could be. This was particularly so after the Games, later in 2012 and in 2013 during the period of the retrofitting works

167. The design and build contract for Plot N26 had been entered into between Lend Lease and Galliford Try in December 2009. The athletes accommodation was opened in March 2012 and its construction was already at an advanced stage when QDD became the ODA's preferred bidder and was given access to the contract and to other details of the construction project to enable it to undertake its own due diligence. We accept Mr Lancaster's evidence that, from that time until completion of the purchase of SVDP in August 2014, risks associated with cladding were not brought to his attention. Nor is there any reason to believe that any serious concerns had been expressed about cladding risks by any of the consultants involved on behalf of QDD who had access to the project documents and opportunities to

visit the site. As far as can be established the contract itself did not specify what materials were to be used, and while it was possible for QDD's cladding advisers to inspect the site under conditions of high security, the delivery of the athletes village on time was critical to the whole of the Olympic project and involved a massive effort which none of the ultimate purchasers had the right or opportunity to interrupt.

168. We are satisfied that, in relation to the design of the cladding, QDD had no detailed information about the materials being used and became involved too late to influence the critical choices made by the contractors. None of the evidence we heard causes us to think that QDD and its investors were anything other than appropriately careful in protecting its own interests. They were protected against development and construction risks by the form of the agreement, which would not be completed until the retrofitting works had been certified by an independent certifier as practically complete. They had no reason to doubt the competence of those involved in the development and they were to have the protection of warranties, including from the contractors, from the consultants advising SVDP and from the ODA itself. They made their own assessment of the risks involved in the project, those which were apparent and those which were not, and agreed a price which took all of those risks into account. Having done so Mr Lancaster considered that QDD's acquisition of SVDP was "a good deal".

169. As for Triathlon, it had been party to its own development agreement with SVDP since October 2009, before work began. It had some input into the design of the facades but, as Mr Lipton explained, its concern was to ensure that the private rental and social housing units were not distinguishable by their appearance. It was not consulted on the materials to be employed by the contractor.

170. Between August 2011 and certification of practical completion of the athletes' accommodation QDDAV had quality control monitoring rights under the Sale and Purchase Agreement but in practice these were limited by the advanced stage the development had reached. It was entitled to be kept informed through monthly progress meetings and its comments and representations were to be taken into consideration. SVDP was not required to give effect to any requests QDDAV might make for additions or modifications to the specification of works if those could delay completion of the Village in time for the Games. QDDAV did not have a role in the certification of practical completion, which was the responsibility of an independent certifier. In this respect it was in a similar position to Triathlon. Mr Lipton described Triathlon's status in relation to construction matters as "hands off", with final sign off being left to the independent certifier, and we think that description applied equally to QDDAV before the Games.

171. In September 2012, after the Games were over, the retrofitting of the athletes accommodation began. This further phase of work was to the interior of the buildings only and did not change the facades. QDDAV had the same monitoring rights as it had enjoyed during the main construction phase but in practice there was a greater prospect of its views making a difference. Its involvement became much more "hands on" and it appointed its own head of quality assurance in June 2012. Mr Lancaster informed Mr Lipton of that appointment in an email which he signed off with the quip: "There are, needless to say, many skeletons!!". Mr Lipton appeared to imply in his written evidence that this was an indication of early knowledge on QDDAV's part of problems relevant to cladding, but he did not seek to maintain that position from the witness box. He acknowledged that with a

project of this size, completed in phases to a hard deadline, construction issues would inevitably be picked up as part of the retrofitting works. There is nothing to suggest that he was surprised or alarmed by Mr Lancaster's remark and he took no steps to follow it up. We do not regard it as a portent of the problems which subsequently became apparent.

172. Mr Lipton himself made a note at a monthly progress meeting he attended in September 2012 of a query raised by Alison Poole, QDDAV's head of quality assurance, about the quality of insulation installed in a building in a different part of East Village (not Plot N26). Ms Poole was not called to give evidence and, once again, when Mr Lipton was asked about this in his oral evidence he made it clear that he was not trying to insinuate that QDDAV had knowledge of defects in Plot N26 before it completed its acquisition of SVDP in August 2014. On the basis of the evidence we have heard we are satisfied that there was no reason for QDDAV not to proceed at that time on the assumption that the Blocks had been constructed competently and in accordance with current building standards and were safe.

The involvement of Get Living

173. Get Living PLC did not exist as a corporate entity until August 2018. It was established as a real estate investment trust, or REIT, to take advantage of tax concessions intended to encourage investment in real estate. It acquired the shares in the QDD holding company which, through subsidiaries, owns SVDP on 7 November 2018.

174. Get Living's involvement therefore commenced after the Grenfell Tower fire and, as will be seen, after concern was first expressed about the cladding used on the Blocks. Whether that chronology is of any significance in these proceedings is a different matter, since the insertion of an additional level in the corporate hierarchy to secure tax benefits did not change either the ultimate ownership or day to day management of the estate. That continuity is apparent from Get Living press releases and publications including its 2020 accounts and 2022 annual reports, both of which claim involvement with East Village going back to 2013. The "Get Living" brand was applied by QDDAV to the private rental units at East Village from mid-2013.

The identification of defects in the Blocks

175. The Grenfell Tower fire in June 2017 precipitated a review by EVML of the cladding materials utilised at East Village. The initial investigation took the form of desk top studies and concentrated on identifying the presence of the ACM cladding which had been implicated as a primary cause of the rapid spread of the fire at Grenfell. The buildings at East Village were, for the most part, clad in masonry, including brick and pre-cast concrete, but ACM material was soon found to have been used in limited locations on eight buildings in Plots N02 and N07 but not in Plot N26. The design and implementation of a remedial scheme to remove this ACM cladding was EVML's first priority and removal was completed by January 2021, but it soon appreciated that there were more widespread problems. The earliest issue to be suspected at Plot N26 related to compartmentation which was reported to the board as being under investigation in May 2018.

176. The pace of activity at East Village picked up in response to Advice Note 14 published by the Ministry of Housing, Communities and Local Government in December 2018. This

required owners of taller residential buildings (those over 18m) to undertake a more intensive investigation of external wall safety going beyond ACM cladding to identify the use of any materials which were not of limited combustibility.

177. Publication of Advice Note 14 precipitated mortgage lenders to insist on confirmation that the latest guidance had been implemented before they would lend on the security of flats in taller buildings. At East Village this effectively prevented Triathlon's shared-ownership leaseholders from selling their homes or increasing their share. We received evidence from three shared-ownership leaseholders directly affected by these developments, Ms Shelley Vallance, Mr Brian Tapson and Mr Sam Williams, and their experiences are, we are sure, typical of many of those at East Village who own their homes on this form of tenure. Triathlon leases around 400 of its 1379 units at East Village on shared ownership terms and the East Village leaseholders' action group had 200 members by March 2021.

178. Get Living does not offer any equivalent form of long leasehold tenure, with its units being let only on assured tenancies. As will be seen, this difference in operating model contributed to tensions between Triathlon and Get Living.

179. EVML initially appointed Savills' building consultancy team to coordinate the necessary investigations and to advise it on compliance with Advice Note 14. In August 2019 it commissioned localised exploratory surveys of all 66 buildings at East Village which began the following month and were completed by May 2021. While these surveys were going on a new in-house cladding team was appointed to oversee the work of consultants as it became clear from these initial investigations that significant fire related safety defects were present in buildings across East Village, including the five Blocks with which these proceedings are concerned.

180. In October 2020 two of the Blocks, Kaleidoscope House and Chroma House, were given a red risk rating by EVML's fire engineers who recommended that the current "stay-put" evacuation strategy be re-assessed and warned that it was likely no longer to be appropriate. This advice led directly to the introduction of waking-watch patrols in November and a revision of the evacuation strategy which now required residents to leave their homes immediately on hearing a fire alarm. The waking-watch patrols continued until 23 March 2021 when a new fire detection and alarm system was installed in all of the Blocks which enabled confirmation to be given by EVML's consultants that the Blocks were safe for residential occupation.

181. A detailed description of the defects discovered at East Village is unnecessary, as it is an agreed fact that the costs which are the subject of these applications were all incurred in remedying "relevant defects" and (subject to legal arguments) may all therefore be the subject of remediation contribution orders under section 124. It is not disputed that there are defects in each of the Blocks both as regards design and construction.

182. Four different external wall systems feature in the Blocks, some of which employ terracotta panels, and others a blockwork design with insulated cavities. Design defects have been found in each system, including the use of combustible breather membrane and insulation behind rainscreen panelling, a failure to specify any firestopping or cavity closers in some areas, and the use of combustible timber decking and timber battens in balconies.

183. Construction defects have also been identified in the external wall systems and balconies in each Block, including: gaps between cavity barriers and external façade materials and between horizontal and vertical cavity barriers; missing, distorted, damaged and poorly installed cavity barriers and horizontal fire barriers; fire barriers installed directly on the surface of combustible insulation rather than on the non-combustible substrate behind the insulation; and the use of unidentified insulation in aluminium spandrel panels.

184. It was also agreed that there are defects in other buildings at East Village, the details of which are not relevant to these applications. The parties agree that these defects will also be the subject of remediation and 33 applications have been made to the Building Safety Fund by EVML in relation to the necessary work. We were not provided with evidence or asked to make findings about other buildings but, as far as Triathlon is concerned, the need for work across East Village is an important part of the context in which we are asked to make our decision. Triathlon intends that these applications should set a precedent for the remainder of East Village.

The position of the ODA

185. In 2009 the ODA guaranteed the obligations of SVDP under the Development Agreements between SVDP and Triathlon covering both the initial delivery of the athletes' village and the post-Games retrofitting works. The guarantee was subject to conditions and required Triathlon to mitigate any loss it sustained.

186. In 2014 the ODA was dissolved, and all its rights and liabilities became vested in the Department for Culture, Media and Sport ("DCMS").

187. The Sale and Purchase Agreement of 9 August 2011 also included guarantees of SVDP's liabilities in favour of QDDAV on a similar basis. QDDAV no longer has the benefit of those guarantees because in January 2020 it entered into a settlement agreement with DCMS by which they were released as part of a package which included the settlement of claims by DCMS against QDD parties arising out of the Sale and Purchase Agreement, an earlier 2014 settlement agreement and a related overage agreement. The final settlement provided for payment of a sum of money by QDD to DCMS which, we assume, must have taken account of the value of QDDAV's rights under the ODA guarantee.

188. The settlement was concluded after the Grenfell fire and after it was known that East Village suffered from serious cladding problems including the presence of ACM cladding in some buildings, but before the extent of those problems had been identified and the full cost of remediation determined.

The Building Safety Fund

189. It is convenient at this stage to refer to the Building Safety Fund ("the Fund"), one of three central government schemes to provide assistance to building owners to meet the cost of permanent remedial work to address fire risks associated with cladding on high-rise residential buildings. It is distinct from the Waking Watch Relief Fund which funded measures to reduce dependence on expensive waking-watch patrols and from which EVML

received £361,219 (inc.VAT) towards the cost of installing the new fire detection and alarm system throughout Plot N26.

190. The Fund was announced in the March 2020 budget and opened for registrations on 1 June 2020; an initial deadline was extended from 31 December 2020 to 30 June 2021 and a second round of applications opened in July 2022. We were referred to a Guidance document published in July 2020 by the Department for Levelling Up, Housing and Communities which explained that the Fund would meet the cost of addressing relevant fire safety risks "where building owners (or other entities legally responsible for making buildings safe) are unwilling or unable to afford to do so". Amongst the objects of the Fund identified in the Guidance were that fire safety risks associated with cladding should be addressed quickly and proportionately, and that "cost recovery from those responsible for the installation of cladding is maximised".

191. Applications were made to the Fund by EVML at Triathlon's request in respect of 41 buildings at East Village in which Triathlon has units, including the five Blocks. At that stage the applications were precautionary as the existence of defects in each of the buildings had not yet been confirmed.

192. In London the Fund is administered by the Greater London Authority ("the GLA"). On 22 October 2021 the GLA approved the buildings at Plot N26 as eligible for funding.

193. Assistance from the Fund is of two types: "pre-tender support" to meet the initial costs of fire risk appraisals and other preparatory works; and "full cost funding", to meet the cost of eligible remedial work to remove and replace unsafe cladding systems. Full cost funding is available only after a building owner or other eligible applicant has signed a grant funding agreement which includes provision for the applicant to take all reasonable steps to recover from those responsible for the cost of addressing the fire safety risks caused by the cladding.

Remediation options and disagreement at board level

194. At different times in EVML's consideration of the advice it has received about how the Blocks may be rendered safe, differences of approach have existed between Triathlon and the respondents about the most appropriate remedial scheme. Those differences have been resolved and their continuing relevance may only be as an illustration of the potential for delays in EVML's internal decision making to be caused by disagreements between its members. With their different tenure mixes and uneven distribution of units the interests of Triathlon and the respondents have never been fully aligned but, for the most part, the board of EVML, on which they had equal representation but the respondents had the greater voting share, appeared to work cooperatively until the complexities of applying to the Fund began to open fault lines.

195. The design programme for remedial works in Plot N26 was referred to as Tranche 1. Two remedial schemes (each with a variant, producing four options in all) were presented to the EVML board on 31 March 2021. Only the most comprehensive of the four options was fully compliant with current building regulations and, for that reason, only that option was eligible for funding from the Fund.

196. One might have expected that eligibility for assistance from the Fund would recommend the comprehensive remediation option to all concerned, and eventually it did. But until November 2022 UK domestic regulations introduced to replace EU state aid rules imposed a cap on the support available from the Fund for Get Living as SVDP's parent (a limit of £342,000 was referred to by Mr Martin Ellis, Get Living's Head of Project Management in his evidence). Triathlon was not subject to such a limit and it expected that the Fund would cover all its eligible costs. As a result, Get Living was keen to investigate cheaper remedial solutions while Triathlon wanted to press ahead with approval of the comprehensive option.

197. There is no suggestion that Get Living's preference was for an inadequate scheme and we accept Mr Lancaster's evidence that his priority, and that of Get Living, was the safety of residents of East Village. We were told by Mr Ellis that, initially at least, the advice available to EVML was that the removal and replacement of the cladding would be disproportionate and unnecessary and that a scheme compliant with the then current requirements of PAS 9980 would be satisfactory. But two factors made any variant of a PAS 9980 scheme unacceptable to Triathlon; first, it would not satisfy the mortgage lenders on whom its shared ownership leaseholders were dependent; and secondly, it would not be eligible for support from the Fund which covered only comprehensive remediation schemes.

198. These circumstances produced what Mr Ellis referred to in his evidence as a "hiatus" in the commissioning of remedial work which continued between March and June 2022. For a time Get Living pushed for different approaches to be adopted for different buildings, and detailed work was done on costings, but Triathlon remained consistent in its opposition to any scheme less than complete remediation. By 16 June Get Living had agreed to comprehensive remediation of all of the blocks, including those in which it held the great majority of the units. A number of considerations contributed to the achievement of this consensus. The additional cost of adopting different solutions for different blocks was found to be significant. We were told by Mr Ellis and Mr Greenslade that ultimately the advice received by EVML about the adequacy of a PAS 9980 approach changed. There was also a change to the relevant state aid rule which allowed Get Living to benefit equally from the Fund. The sequence and relative significance of each of these changes was not closely explored in the evidence, but it is apparent that all parties were of one mind on the form of remediation by the middle of 2022 and tender packages for a comprehensive scheme were issued for all of the Blocks on 5 August.

199. The commencement of the 2022 Act on 28 April 2022 added a further level of complication to the relationship between Triathlon and Get Living and led to additional tension within the board of EVML. Whereas it had originally been assumed that the cost of remediation would be met through service charges payable as a matter of contractual obligation by Triathlon and Get Living's relevant subsidiary (rather than by their assured tenants), the 2022 Act appeared to prohibit any reliance on service charges. At the same time SVDP as developer and Get Living as its parent were exposed to the risk of applications such as these for remediation contribution orders.

200. Inevitably the divergence of interests created by the 2022 Act played out at board level within EVML as the parties sought to adjust their previous thinking and to understand the complicated new statutory provisions. Between May and December 2022 the Triathlon nominated directors pressed for the costs which they would have had to meet through service charges to be met by SVDP instead. Mr Lancaster and Get Living's nominees

preferred to look to the Fund in the short term and to a claim against the original contractors in the longer term. They were encouraged in that approach when on 28 September the Fund agreed in principle to fund the majority of the works at East Village.

201. On 14 December 2022 (precipitated by Triathlon's letters before action) Get Living confirmed to EVML that it would meet its share of the cost of remediation of all of the Blocks unconditionally, and that it would cover Triathlon's share of the work to Seasons House and Patina Mansions, where most of the units were Get Living's, provided EVML continued its applications to the Fund. It was unwilling to fund Triathlon's share of the works to the remaining Blocks as this was the subject of the Fund's in principle commitment which, in Get Living's eyes, made any further commitment by it unnecessary.

202. It was not established in the evidence that the commencement of remediation work was delayed to any significant extent by the disagreements at board level. The cladding project team continued to work on a number of design solutions and on procurement up to the stage a building contractor could be appointed. Planning permission for remediation was granted in May 2022 and was not held up during the hiatus. The board had decided not to proceed with its original preferred contractor for reasons unconnected to the design of the remedial scheme and a second tender exercise had to be pursued in the summer of 2022 as a result. The contract with Errigal was eventually entered into on 22 December 2022 (we will refer to the works covered by that contract as the "Major Works").

203. It is possible that the same stage might have been achieved a few weeks or months earlier if only one option had been pursued from the start of the year, or if the 2022 Act had not added to the uncertainty, but we are not in a position to determine that that was the case and by their closing submissions neither party suggested that any delay which had occurred was relevant to the main issue we have to determine.

204. Mr Lancaster suggested that the Triathlon appointed directors of EVML, Ms King and Mr Lipton, engaged in a "filibuster approach", raising objections to progress at every opportunity during 2022. We do not think that is a fair characterisation and it was one of a large number of criticisms which the parties made of each other in their written evidence which was not maintained orally or in submissions. Nor did Get Living's EVML directors adopt an intransigent approach or delay EVML's ability to enter into a remediation contract any more than Triathlon's. Nevertheless, we have no doubt that the difference in approach to remediation schemes and the divergence of interests created by the 2022 Act caused disharmony on the board of EVML and considerable tension even before the commencement of these applications. Perhaps inevitably, these proceedings and the trading of allegations by the directors against each other, have further soured relationships.

The progress of the works and funding

205. So far, the commencement and progression of these applications since 20 December 2022 has not interfered with the Major Works contracted for with Errigal only a few days later. Site set up and preparatory works started in January 2023 and scaffolding was erected on the first of the Blocks, Patina Mansions, in April, with an anticipated completion date for that building of August 2024. The work to other Blocks has also commenced in the programmed sequence and, assuming no serious delays, full remediation of Plot N26 is

expected to be complete by August 2025. All applications for payment by the contractor have been paid as and when they have fallen due.

206. In August 2022 the GLA, as administrator of the Fund, approved pre-tender support totalling £2,212,880, which was paid over after EVML entered into a short form grant funding agreement on 19 October. Confirmation was received on 6 February 2023 that the Fund would cover the cost of the Major Works and a second, more detailed grant funding agreement was executed between EVML, the Secretary of State and the GLA on 1 June 2023. The agreement provides for funding in four instalments up to a maximum of £24,569,544. The first instalment of £7,370,863, 30% of the approved maximum, was received by EVML in June. We were informed that a second instalment in the order of £10m had been approved during the hearing of these applications and was due to be received by the end of November.

207. In the parties' pre-application exchanges and in their subsequent statements of case (which closed in May) Triathlon emphasised that the receipt of support from the Fund was not guaranteed and explained that its purpose in making the applications was to ensure the security and continuity of funding for the Major Works. In his written evidence prepared on 5 July Mr Lipton suggested that, even at that stage, "it remains entirely possible that BSF funding may fail". We are satisfied that those concerns have been overtaken by events.

208. In his closing submissions Mr Nissen KC, who led for Triathlon on this aspect of the applications, identified a number of contingencies and uncertainties which, he submitted, made it impossible to be sure how much money would be contributed by the Fund. The security and continuity of funding therefore remained a concern to Triathlon. It is convenient to consider that concern at this stage.

209. Mr Nissen KC began by pointing out that the Fund would not cover Triathlon's "additional costs" (see paragraphs 218-225 below). We agree that those substantial additional costs will not be covered by the Fund, but equally there is no reason why their recoupment should affect the funding of the Major Works.

210. Two specific concerns were identified. The first was that the GLA or DLUHC might decide that EVML was failing in its duty under the funding agreement to use all reasonable endeavours to pursue reasonable remedies available to it in respect of the unsafe cladding; that was said to create a risk that funding might be stopped or premature repayment insisted on. We discount that suggestion. While it is true that since a pre-action protocol letter of claim was sent on 8 September 2022 no further progress has yet been made by EVML in pursuing claims against Galliford Try, or others from whom it has warranties, it has now associated itself with these applications against SVDP which, if successful, will provide a much swifter and more convenient route to reimbursement of the Fund. There was no evidence of any pressure from the Fund's administrators for EVML to be more proactive, nor of any relevant policy they may have adopted at this relatively early stage in the operation of the Fund. In the absence of evidence, the suggestion that the funding already agreed might be interrupted on this ground appears to us to be fanciful.

211. The second concern was a discrepancy between the maximum support available under the current grant funding agreement and the total cost of the Major Works. This discrepancy

or underfunding, which appears to have been overlooked in the application process, relates to professional fees and work to balconies and totals £1.7m. Evidence about the discrepancy was given by Ms King and by Mr David O'Flaherty, EVML's employee with responsibility for the funding application and overseeing the Major Works. Mr O'Flaherty acknowledged that the shortfall existed, and had been identified and discussed at a progress meeting attended by representatives of both parties on 17 October. He explained that it had also since been discussed by him with the GLA and would be the subject of a supplemental application for funding. Such applications are permitted under the rules of the Fund and the GLA has power to authorise payments of up to 20% of the original maximum, without referring it to DLUHC. Mr O'Flaherty had previous experience of making such an application and anticipated that it would take a further 12 weeks to obtain GLA approval. Nevertheless, he had been advised by the GLA not to submit the proposed application before the second tranche of funding was released to EVML in November since it might delay the release of that money.

212. Mr Nissen KC criticised Mr O'Flaherty's failure to include details of the funding shortfall in his witness statement, prepared on 13 October, and suggested that his evidence about access to additional sums should be treated with suspicion. We do not agree. Both parties have been aware of the shortfall and we think it likely that Mr O'Flaherty included in his witness statement those matters which he was asked by the respondents to include and no more. He was precise and accurate in his evidence, which was particularly helpful in understanding the procedures for obtaining funding from the Fund. He felt a sense of frustration at being caught in the middle of the dispute over who should ultimately be responsible for the cost of the remedial works. This came through in some of his answers in cross examination, but it did not detract from his credibility or from his evident expertise. We were satisfied that Mr O'Flaherty was honest in his evidence. He was not alarmed by the prospect of having to make an application for additional funding and, while he acknowledged that success was not guaranteed, it was plain that he did not expect the application to be refused.

213. Taking account of contract variations which had already been agreed and other professional fees Mr Nissen KC put the shortfall at £2.5m. He also pointed out, and Mr O'Flaherty agreed, that the original project budget had included an 8% contingency to meet the potential cost of overruns and variations; that contingency had been removed by the Fund. The omission of this cushion made Mr O'Flaherty nervous. When this was added back in the potential shortfall grew to £4.74m.

214. It remains to be seen what approach the Fund will take to applications for additional funding for matters originally left out of account, or for variations and costs overruns. Nevertheless, it has agreed in principle to fund full remediation of each of the Blocks. We do not assume that the Fund will provide a blank cheque but it can hardly be unaware that, for perfectly good reasons, the incorporation of a sum for contingencies is routine in large building contracts. We assume that the Fund's aversion to funding a contingency up front reflects a wish to maintain close control of expenditure, and we would be surprised if it was prepared to risk the successful completion of a remediation project, to which it has already contributed almost £20m, by refusing to meet costs which were properly incurred and shown to be necessary.

215. One of the main foundations of the respondents' case has been that the remedial works are now funded and underway and that the making of a remediation contribution order is therefore unnecessary. We will consider the second part of that proposition later in this decision, but at this stage we accept that the premise has substantially been made out. With the support of the Fund there is no good reason to believe that the remedial works will founder for lack of money, whatever we decide.

Triathlon's share of the Major Works costs and its additional costs

216. The respondents acknowledge that none of the costs of the Major Works are recoverable as service charges from Triathlon.

217. The cost to Triathlon of the Major Works and associated professional fees, if apportioned in the way they would be if they were recoverable through the service charge, is forecast to be £16,031,244. That sum may change and the final cost will not be known until the completion of the Errigal building contract. Triathlon has not paid anything towards these costs, but it seeks a remediation contribution order requiring the respondents to pay its share to EVML.

218. Certain other costs have been incurred by Triathlon as a result of the discovery of the relevant defects and these have been referred to as its "additional costs" to distinguish them from the cost of the Major Works.

219. The additional costs are Triathlon's share of costs incurred in respect of measures other than the execution of the Major Works themselves and to which Triathlon has either already paid or received service charge demands which it has not yet paid. Examples include the costs of the waking watch, of employing fire evacuation staff to assist residents with restricted mobility, of contractors and professionals involved in the original fire risk assessments and investigations to identify the defects, and of installing the new temporary fire detection and alarm system and so on.

220. The quantum of these additional costs is agreed. To the extent that it has already paid these sums to EVML, Triathlon seeks remediation contribution orders in its favour requiring SVDP and Get Living to reimburse its expenditure. To the extent that the additional costs have been demanded as service charges by EVML but not paid, Triathlon seeks orders that they be paid by the respondents to EVML. The additional costs give rise to the issues of principle which we have already determined. As a result of our conclusions on the scope of section 124 the additional costs do not require detailed consideration, but we record here what has been agreed about their quantum.

221. The total sum incurred by Triathlon and paid before the commencement of the 2022 Act on 28 June 2022 is agreed to be £1,120,397 (plus a few pence which we omit at this stage). We assume that, by their use of the word "incurred" the parties mean that these sums became due contractually under Triathlon's leases of each block before 28 June 2022 (or were paid voluntarily before that date).

222. Triathlon also claims reimbursement of two further sums which were incurred and paid by it on or after 28 June 2022. The first relates to certain staff and professional costs incurred

by EVML before the commencement of the 2022 Act on that date, totalling £7,945. The second is a sum of £30,015 in respect of the fees of EVML's solicitors incurred by it and paid after 28 June 2022.

223. The expenditure in respect of which Triathlon has received service charge demands which it has not paid was all incurred by EVML on or after the date of commencement of the 2022 Act and totals £153,538.

224. Post-commencement costs which have not been the subject of service charge demands (either because they have not yet been incurred or for some other reason which is not apparent from the agreed schedule), but for which Triathlon seeks a remediation contribution order in favour of EVML, total £613,899 (of which £571,481 is the cost of fire evacuation officers, and £42,418 is the anticipated cost of servicing and later decommissioning the temporary fire detection and alarm system).

225. It is possible that some of the additional costs will be credited back to Triathlon by EVML. That possibility does not give rise to any issue at this stage, but if we do make a remediation contribution order it would be appropriate for it to deal with the consequences of any such credit.

The financial position of the respondents

226. Triathlon seeks remediation contribution orders against SVDP and against Get Living, its parent, because it believes SVDP would be unable to comply with such orders from its own resources. We were therefore presented with evidence about the financial position of both respondents.

227. That evidence was given by Mr Greenslade, the Chief Financial Officer of Get Living. He explained that SVDP is the beneficial owner of the freehold of East Village, which includes a number of prospective development sites, and in the year to 31 December 2021 it had a net asset value of £12.44m. He was taken by Mr Millett KC to the partnership's annual accounts for that year which showed that it made a loss of £2.7m. Its net asset position was underpinned by fixed assets, in the form of illiquid real estate, which Mr Greenslade agreed would take time to sell if that ever became necessary. Its current asset position was negative, with net liabilities of £57.6m, which included £112m owed to other group undertakings and repayable on demand. Mr Greenslade readily agreed that, as recorded in the accounts, it was only possible for SVDP to prepare its accounts on a going concern basis because of the continued financial support of Get Living and in reliance of confirmation provided by Get Living that it would not withdraw that support for a period of at least one year. He demurred at Mr Millett KC's description of SVDP as balance sheet insolvent but agreed that it would be without Get Living's support.

228. There has never been any doubt that Get Living itself has substantial means, sufficient to satisfy any contribution order the Tribunal might make, but their true extent was downplayed by the respondents. Mr Greenslade had focused in his written evidence on challenging a suggestion made by Triathlon in its statement of case that Get Living had benefitted from a substantial increase in the value of its property portfolio in a specific period of 33 months ending in December 2021. He put that proposition in context by

explaining that much of the increase in the value of the portfolio was due to acquisitions and improvements, both at significant cost. Focussing on the same narrow window identified by Triathlon Mr Greenslade suggested that the value of Get Living's investment property at East Village had declined by £12.2m. while its entire portfolio had increased in value by only £4.6m.

229. The impression of Get Living's financial position given by Mr Greenslade was incomplete, as became apparent during cross examination. The period to which he had been responding covered the Covid-19 pandemic, which he agreed had had a depressing effect on the valuation of the Get Living group's assets. Performance since the pandemic had more than reversed the previous short term decline. The accounts for 2022, which had been filed before Mr Greenslade prepared his witness statement, showed that the value of the group's investment property had increased by £293m. and totalled more than £2.6b.. The group's CEO, Mr De Blaby, had been able to announce a doubling of its net profits in 2023.

230. We are satisfied that Mr Greenslade was honest, if defensive, in the answers he gave in cross examination, but he gave ground only reluctantly. Our overall impression of his evidence was that he had allowed himself to be drawn into a partisan role, rather than confining himself to those matters of fact to which he was able to speak. The position by the end of his evidence was clear: SVDP would be unable to comply with a remediation contribution order in any significant sum without the support of Get Living; Get Living, on the other hand, would be more than able to meet any obligation which might be imposed on it in these proceedings.

The evidence of the shared-ownership leaseholders

231. We have already referred to the fact that we received evidence from three of Triathlon's shared-ownership leaseholders. That evidence was not disputed by the respondents so it was unnecessary for the leaseholders to give it in person. It goes without saying that we accept what they told us but we take this opportunity to summarise their evidence which illustrates the different ways in which the cladding crisis has affected private individuals. We do so because the exceptional measures contained in the 2022 Act were intended to provide relief for individual leaseholders and we consider it important that they should not be lost sight of.

232. Ms Vallance is the leaseholder of a flat in Kaleidoscope House which she acquired from Triathlon in 2014 on an 80% equity sharing arrangement after saving for many years. It had been her intention to sell her flat before she and her partner had their first child in 2022, but that was made impossible by the discovery of cladding defects in her building. She found the introduction of the waking watch in November 2020 and the uncertainty over who would pay for it or for the remedial works acutely stressful. Her relief that the 2022 Act protects her from liability has been tempered by the prolonged remedial works and she fears that when she is eventually able to sell her flat the market throughout East Village will be saturated with similar property.

233. Mr Tapson works in the hospitality industry and he too purchased a shared ownerhip lease of his two-bedroom apartment in Kaleidoscope House in 2014. He began with a 35% share, which he was subsequently able to increase first to 50% then to 80%. In January 2020 he

had received a favourable indication from his mortgage lender of support to increase to 100% conditional on a favourable EWS1 (the shorthand for a clean bill of health given to external walling systems on high-rise buildings). No such favourable report was possible for Kaleidoscope House and Mr Tapson has been unable to staircase to full ownership of his flat. He expressed his frustration that income of £12,000 which could have paid down an increased mortgage was being diverted into the payment of rent instead.

234. Finally, Mr Williams is a shared-ownership leaseholder of a flat at Meander House in East Village (not one of the Blocks) and is the Chair of the Olympic Park Homes Action Group. He described how, in that capacity, he has spent countless hours since 2018 trying to obtain information and fighting to make homes across East Village safe. He has witnessed the severe mental strain on East Village leaseholders, many of whom have been unable to take up new jobs, start families or move on in their lives as a result of the cladding crisis. His impression was that SVDP and Get Living were indifferent to the position leaseholders found themselves in and he said that the frustration and anger he felt at the lack of clarity and the time it has taken for remediation to commence was shared by many leaseholder members of the Action Group. He and his wife initially acquired a 30% share of their flat in 2014 and were quickly able to staircase to 100% by 2016. Their intended sale and the purchase of a family home fell through in 2019 when it was made conditional on a statement confirming that the cladding on the building met the standards in Advice Note 14. They have subsequently been unable to sell or remortgage and feel trapped by their circumstances; having recently let their flat a tax charge on rental income has now been added to their other irrecoverable losses.

235. All three leaseholders who gave evidence fully supported the applications by Triathlon.

Is it just and equitable to make remediation contribution orders?

236. It is agreed that the qualifying conditions for making remediation contribution orders against both respondents are met. It is also agreed that the fact that relevant defects exist in a relevant building and that the respondents are within the classes of persons who may be specified in an order, is not enough. Whether we should make orders, and if so against which of the respondents and in what terms, is to be determined by considering additionally whether it is just and equitable to do so (section 124(1)).

237. Section 124 gives no guidance on how the FTT is to decide whether it is "just and equitable" in any particular case to make an order. Beyond stating the obvious, that the power is discretionary and should therefore be exercised having regard to the purpose of the 2022 Act and all relevant factors, it is not possible to identify a particular approach which should be taken. But the FTT is well used to exercising its discretion by reference to what is just and equitable in other contexts, notably with regard to costs protection under section 20C, Landlord and Tenant Act 1985 and paragraph 5A(2) of Schedule 11, Commonhold and Leasehold Reform Act.

238. A similar discretion, though expressed by reference to what is reasonable rather than what is just and equitable, is conferred on the FTT by section 20ZA(1), Commonhold and Leasehold Reform Act 2002, when dispensing with the requirement of consultation on expensive service charge items. In *Daejan Investments Ltd v Benson & Ors* [2013] UKSC

14 Lord Neuberger acknowledged the value of identifying the proper approach to the exercise of the dispensing jurisdiction, to promote consistency in decision making and enable parties to receive clear and reliable advice, but at the same time recognised the absence of specific guidance in the section itself:

> "However, the very fact that section 20ZA(1) is expressed as it is means that it would be inappropriate to interpret it as imposing any fetter on the LVT's exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself, and any other relevant admissible material. Further, the circumstances in which a section 20ZA(1) application is made could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules."

239. As for "other relevant admissible material", we were referred by Mr Nissen KC to the explanatory notes to the 2022 Act which refer, at paragraph 1019 to the FTT's discretion under section 124, as follows:

> 'Subsection (1) provides that the Tribunal can only make a remediation contribution order if it considers it just and equitable to do so. This is intended to ensure fairness in proceedings while giving the Tribunal a wide decision making remit which it is expected will allow it to take all appropriate factors into account when determining whether an order should be made, including the wider public interest in securing the safety of buildings, as well as the rights and interests of the individual against whom an order might be made.'

240. The parties adopted different approaches to the central question of whether it is just and equitable to make orders against SVDP and Get Living. Triathlon cast a very wide net and invited us to have regard to the whole of the evidence as relevant factors in our determination. The respondents suggested we should narrow the focus of our consideration and to exclude most of the matters relied on by Triathlon as irrelevant or neutral.

241. The principal factor emphasised by Triathlon in support of it being just and equitable to make an order against SVDP was the fact that it was the developer of each of the Blocks, and was therefore ultimately responsible for the presence of the relevant defects.

242. To this they added a number of other factors: the role of the respondents' group of companies as bidders, purchasers and owners of SVDP and the freeholders SVPH-1 and SVPH-2, and in particular the role of QDD and DV4 in the development since 2011, and SVDP itself from the outset in 2009; the circumstances surrounding the acquisition of SVDP from the ODA by QDDAV in August 2011, including the extent of any due diligence and acceptance of risk regarding the specification and construction of Blocks; the involvement of the respondents' group of companies in relation to the retrofitting works in the period after the Games and prior to completion of the acquisition, including what were said to be Get Living's expressions of concern regarding quality assurance and its reliance, instead, on the contractual rights it has against third-parties; the terms of the Sale & Purchase Agreement and the availability of indemnities and third-party rights to SVDP and Get Living in respect of defects in the Blocks, as well as the subsequent 2020 settlement between Get Living and DCMS; Triathlon's motivation in pursuing the applications, namely the

safety of its tenants and occupiers and the obligations it was under as a provider of affordable housing to take action; that none of the sums claimed are recoverable by way of service charges under the Triathlon leases or any of its occupational leases by virtue of the leaseholder protections afforded by Schedule 8.

243. It was said by Triathlon to be just and equitable to make an order against Get Living for the same reasons and additionally: to guarantee funding for the Major Works and to ensure they are completed without interruption, delay or disruption; because of SVDP's reliance on Get Living for financial support; Get Living's ownership of SVPH-1 and SVPH-2, the owners of the freehold, and their reliance on Get Living for financial support; the substantial financial benefits to the Get Living group as a result of the acquisition of SVDP and the Blocks.

244. The respondents' approach was less elaborate. Mr Selby KC submitted in opening that it is necessary to distinguish the relevant from the irrelevant, and that whether it is just and equitable to make an order must be considered having regard to the purpose of sections 117 to 125. We agree with both of those points. Mr Selby submitted that that purpose was to make provision for and in connection with the remediation of defects. It was therefore necessary to consider why the orders were being sought and what they would achieve as far as the remediation of the Blocks was concerned. There was no presumption that an order should be made and if, as in this case, the Tribunal could see that the necessary remedial works were underway and their funding was secure, it would not be just and equitable to make an order. Instead, Triathlon should be left to its contractual and common law remedies against the contractors and consultants involved in the design and construction of the Blocks, with liability being apportioned by the Court on normal principles.

245. A number of matters covered by the parties in their statement of case and in the evidence seem to us to be of little or no significance when considering whether it is just and equitable to make an order in this case.

246. We do not think it is relevant to the exercise of our discretion to draw conclusions about Triathlon's motivation in bringing these applications. Triathlon directors who gave evidence stressed the importance to them of ensuring the safety of the leaseholders and complying with Triathlon's responsibility to the Homes and Community Agency to maintain standards of building safety. The respondents suggested that the real motivation was to ensure that Triathlon was not called on to meet any of the cost of remediation itself. It was not suggested that that was an improper motive, nor could it have been, and no doubt it is part of Triathlon's thinking. In the absence of any submission that Triathlon was acting out of malice towards the respondents or some other motivation which might be said to taint its case, we do not need to make any findings about why it seeks these orders. Parliament has made them available and Triathlon is entitled to take advantage of them.

247. One aspect of Triathlon's thinking stressed by Ms King was its desire to obtain clarity about where, under the 2022 Act, liability for the cost of remediating the whole of East Village would lie. This was connected with its wish to address the concerns of leaseholders in other buildings, as well as in these Blocks, who had been unable to sell or remortgage their homes and to provide them with some assurance about the future. Although we recognise the state of terrible uncertainty into which leaseholders throughout East Village have been plunged by the discovery of building defects, and sympathise with the position they continue to find

themselves in, the focus of our consideration must be on the buildings which are included in these applications. We have no doubt that, whatever we decide, our decision will assist the parties in avoiding proceedings in relation to other buildings but we do not think that any precedent effect is relevant when asking whether it is just and equitable to make an order.

248. Nor do we give any weight to the fact that EVML has not made its own application for a remediation contribution order, or that other parties could have been the subject of different applications. EVML's ability in practice to receive advice and make decisions about its rights under the 2022 Act has, until recently, been complicated by the composition of its board and the conflicts of interest which have now been addressed. It has made its position in support of Triathlon clear, and we take that into account. Otherwise, section 124 is deliberately flexible in allowing any interested person to seek an order requiring any developer, landlord or their associate to make a contribution to any person who may be specified in the order. The respondents pointed out that, in addition to EVML, Get Living itself, and the freeholders, were "interested persons" and could have brought their own applications, and that the same persons, plus Triathlon, could have been made respondents to applications. That may well be so, but it is not relevant to the determination of these applications.

249. It also seems to us to be of little significance that Triathlon has applied for orders only in respect of its share of the costs of remediation, and has not sought orders to compel Get Living or one of its subsidiaries to pay the share which, but for Schedule 8, EVML would be entitled to collect. That peculiarity might have been relevant if there was a risk that payments which the respondents were ordered to make would be rendered futile because EVML would be unable to fund an effective programme of works without additional funds, but that is not this case. Not only does EVML have access to the Building Safety Fund, but Get Living has the means to pay its share when required. It will be for EVML to decide whether to seek an order against Get Living and the limited scope of the orders sought by Triathlon is not a reason for us to refuse to make them.

250. In the section above headed *The parties' involvement in the design and construction of East Village* we have already reached conclusions about the degree to which, in practice, Triathlon and the respondents were aware of the condition of the buildings, or able to influence their design and construction. Neither side had a voice in selecting materials nor in certifying that the Blocks had been completed in accordance with the building contracts. Mr Millett KC devoted considerable attention to the role of DREAM as advisors to QDDAV, and to the continuity and scope of its involvement. While Mr Lancaster and his colleagues no doubt had an important part to play, it does not seem to us to matter for whom they acted.

251. We give no weight to the changing identity of the ultimate beneficial owners of SVDP and Get Living. Mr Selby KC submitted that the SVDP of today is not the SVDP that designed and built the Blocks. That SVDP was owned by the ODA; today's SVDP is owned by QDDAV and its various investors. He argued that since the Act ignores the distinctions between corporate entities in its search for pockets close enough to the original developer and deep enough to pay for remediation, it was also relevant to take account of the changes which have occurred in beneficial ownership. We do not agree, and we consider that it is

unnecessary to go higher up the corporate chain than Get Living when considering what is just and equitable in this case.

252. Mr Selby is right that the Act erodes and elides corporate identity and deprives it of some of its main advantages, but it does so for specific purposes and within specific limits. It does not require or permit the normal consequences of incorporation to be ignored for different purposes. When QDD opted to acquire SVDP it could instead have taken a transfer of the land and buildings, leaving the liabilities of the developer behind, but it chose not to do so for its own reasons, knowing that it was acquiring not only the assets of the partnership but also its liabilities, including latent and consequential liabilities. The same is true of each of the investors who has subsequently bought in to the corporate structure above SVDP. Each willingly assumed the risks associated with their investment. In our judgment it is not open to any of them to ask that the timing and circumstances in which they made their investment in those assets be taken into account in determining whether it is just and equitable for the companies in which they invested to be the subject of contribution orders.

253. The same applies to the fact that Get Living was inserted in the corporate structure only as late as 2018; when it acquired East Village it acquired both its assets and its liabilities. Additionally, as Mr Millett KC put it, Get Living is the latest holding parent in a group which has been involved as owner of East Village since 2014 and as prospective purchaser since 2011.

254. As for the fact that SVDP was originally in public ownership, through the ODA, that is also irrelevant for the same reasons. In any event, QDDAV had rights against the ODA which it has released for valuable consideration.

255. The increase in value of Get Living's investment in East Village is not a matter to which we give great weight, although to the extent that it is relevant at all it is obviously a point in favour of making an order. It is common ground that Get Living has the resources to enable it to comply with any order the Tribunal may make, but even if there had been doubt about that we think it would be an unusual case in which the source or extent of a respondent's assets or liabilities would carry much weight when deciding whether it is just and equitable to order it to bear the cost of remediation.

256. SVDP have third-party rights against the contractors and consultants responsible for the condition of the Blocks. They also have access to the resources to enforce those rights. The fact that SVDP will be in a position to seek reimbursement of any contributions it is required to make (including any finded by Get Living) does seem to us to be relevant to the justice and equity of making contribution orders against them. But responsibility for the purpose of the 2022 Act is not synonymous with fault, and the ability or inability of a respondent which is treated as responsible for the purposes of the Act to pass on liability to some other party who may be responsible under the general law does not seem to us to be a matter to which much weight should be given.

257. In terms of rights against third parties the respondents also sought to rely on the network of agreements, including the Framework Agreement and the Members Agreement which were entered into in connection with the development and sale (by sale of the corporate ownership

structure) of what became the East Village. As we understood the respondents' case in this context, there were two related strands of argument.

258. First, it was said that Triathlon had its own remedies against other parties, including SVDP and Galliford Try, arising in contract (so far as it was a party to or had rights under this network of agreements) and/or under the Defective Premises Act 1972. It was open to Triathlon to pursue claims in respect of the remediation costs against these other parties. Pursuit of these claims, so Mr Selby KC submitted, would be likely to result in a situation where the respective legal responsibilities of the relevant parties for the relevant defects and the cost of their remediation would have to be fought out between the parties, by way of contribution claims under the Civil Liability (Contribution) Act 1978. In respect of those contribution claims, the court would have to decide the amount of the respective contributions by reference to what was just and equitable; see section 2(1) of the 1978 Act. This would produce a fairer result between all relevant and responsible parties than the applications, while using the same just and equitable test as in section 124(1).

259. Second, and more specifically the respondents relied upon the same network of agreements in support of the argument that it was not just and equitable to allow Triathlon to use the applications to cut through or bypass the contractual arrangements between the parties which were put in place in relation to the development and sale of the East Village. In this context the respondents laid particular stress on the Members Agreement and, in particular, clause 7, which is in the following terms:

> "No Members shall be obliged to provide any loan, capital, finance, guarantee, security or indemnity in respect of any indebtedness or obligation of the Company [EVML]."

260. The argument was that EVML was set up on the express contractual basis that its operations would be funded through service charges, and not through contributions from its members (SVDP and Triathlon). In circumstances where the remedial works were funded and underway, it was just and equitable to let the parties (to quote Mr Selby KC's opening submission on this point) "follow the route on which they had contracted back in the day"; that is to say prior to the 2022 Act. We understood this to mean that it was not just and equitable to allow Triathlon, by the applications, effectively to bypass the parties' contractual arrangements and, in particular, the agreement that EVML's operations should be not be funded by its members.

261. We do not accept either of these strands of argument. The essential answer to both strands seems to us to be the same. The ability to make a claim for a remediation contribution order under section 124 is a new and independent remedy, which is essentially non-fault based. The remedy has been created by Parliament as an alternative to other fault-based claims which a party may be entitled to make in relation to relevant defects. It seems clear to us that Parliament did not intend that the availability of other claims or potential claims should either disqualify an applicant from making a claim for a remediation contribution order or delay the making of that claim. It also seems clear to us that Parliament intended that an application for a remediation contribution order should provide a route to securing funding for remediation works without the applicant having to become involved in, or to wait upon the outcome of other claims arising out of the relevant defects, which might involve complex, multi-handed, expensive and lengthy litigation. By the same token, and

concentrating on the question of what is just and equitable, we can see nothing unfair in making remediation contribution orders on the applications, without requiring Triathlon to hazard the pursuit of other claims which it may have.

262. The same reasoning applies to the argument that Triathlon should follow the contractual route constituted by the network of agreements relating to the sale and development of East Village and, in particular, to the argument that Triathlon should respect the agreement constituted by clause 7 of the Members Agreement. The 2022 Act, and its creation of the independent remedy of a remediation contribution order postdates all of this. The same applies to the new legislative restrictions which now operate on EVML's ability to fund the remedial works by the service charge. Parties cannot contract out of this new statutory regime. In all these circumstances we see nothing unfair in Triathlon taking advantage of the ability which it has been given to act independently of the network of contractual provisions relied upon by the respondents, or in our making remediation contribution orders on the applications.

263. We bear in mind the evidence of the three shared-ownership leaseholders which we have reviewed above. It seems to us that evidence of this kind could be expected to be of paramount importance, in relation to the just and equitable test, in any case where the required remedial works were being held up by the absence of or a delay in funding. In the present case the situation is different. The respondents' case is that the works are now funded and underway. We have found that case substantially to be made out. In these circumstances, and only for this reason, the important evidence given by the three leaseholders does not carry the same weight, in relation to the question of what is just and equitable, as we would expect it to carry in another case.

264. Thus, a number of the points relied on by one or other of the parties as significant appear to us merely to provide the context for our decision or to be matters which do not carry much weight. We can now deal with the factors which seem to us to be more important in determining whether it is just and equitable to make an order.

265. The first is that SVDP was the developer of East Village. The policy of the 2022 Act is that primary responsibility for the cost of remediation should fall on the original developer, and that others who have a liability to contribute may pass on the costs they incur to the developer. That policy is most apparent from the LPI Regulations which give every landlord who has contributed to the cost of relevant measures the right of recoupment from the responsible landlord (meaning the person who was, or was in a joint venture with, the developer or who undertook or commissioned work relating to the defect – regulation 3(2) and (8), LPI Regulations and paragraph 2(3) of Schedule 8, 2022 Act). SVDP (or to be strictly accurate, SVPH-1 and SVPH-2 which hold the freehold on trust for SVDP) is the responsible landlord in this case and it, and its associates, would therefore be under an obligation to pay costs of remediation which had been met by other landlords if they were served with notices under regulation 3. That is not the route to recovery which is being pursued in these applications, and section 124 requires us additionally to be satisfied that it is just and equitable to make an order against SVDP, but the availability of an alternative, and unanswerable, route to recovery against its trustees is a strong indicator that it is likely to be just and equitable for SVDP to be ordered to pay.

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.

267. Against the above is the respondents' point that the purpose of section 124 is to ensure that remediation work is carried out without delay, and that where the Tribunal can be confident that the works have already been commissioned and are fully funded and on target, "funded and underway" as the respondents put it, there is no reason to make an order.

268. Under the heading *The progress of the works and funding* (paragraphs 205-215 above) we have already come to the conclusion that the funding currently being provided by the Building Safety Fund is unlikely to be withdrawn and that the respondents are entitled to say that the completion of the Major Works would not be put at risk were we to refuse a remediation contribution order at this stage. Nevertheless, if no additional support from the Fund is secured there will be a shortfall because the sum originally requested was lower than it should have been and, probably, because of variations and overruns. There is therefore a risk that there will be a shortfall and that it might be almost £5m. but we think that risk is a very modest one. If it does eventuate, because the Building Safety Fund refuses to advance additional support, the parties would have to provide funding from their own resources to avoid work coming to a premature halt. We assume that in those circumstances Get Living would fund the work to the Blocks in which it holds the majority of the units; we can make no such assumption about the Blocks in which most of the units belong to Triathlon, but at the very least Triathlon would be able to pursue a further application against Get Living under section 124 which the FTT would be likely to deal with promptly. We therefore attribute little weight to the risk that the Major Works will not be completed if we do not make an order, but give some weight to the possibility that there might be uncertainty for a time if the Building Safety Fund refuses further help, and that there might even have to be further tribunal proceedings to resolve that uncertainty. That would be undesirable.

269. If the funding of the Major Works is subject to only a small shadow of doubt, and if they will properly remedy the defects (as we are sure they will) what reason is there for making an order at this stage? Why not leave the work to be funded by the Building Safety Fund

and allow EVML to pursue its contractual remedies against the contractors who built East Village, with SVDP then picking up any shortfall? In short, why shouldn't the costs of remediation be borne for the time being by the public? This question was referred to by the parties as the "public purse point".

270. Mr Selby KC recognised the attraction of the proposition that the public should not have to pay for work when there was a well resourced commercial entity which could be made liable under the Act. But although he asked us to resist that way of looking at these applications, he did not suggest that protecting the public purse by securing the earliest possible reimbursement of remediation costs was irrelevant; on the contrary he submitted that it was the only basis on which a remediation contribution order could be justified in this case. Nevertheless, he found it difficult to identify a clear and convincing reason why it would be just and equitable to allow the best part of £20m. to remain in Get Living's bank account, earning interest or being put to account for its benefit, rather than being returned to the Building Safety Fund where it could be used to remediate other buildings.

271. The first point Mr Selby KC made was that the application would have been stronger if it had been made by the Secretary of State or the GLA, and was weakened by the fact that Triathlon's only real interest was in protecting itself from having to pay for remediation, rather than protecting the public purse. That was clear from the form of the order it sought, covering only its share of the costs of remediation. We have already said that we do not think the motivation of an applicant will usually be of much significance and nor do we think it matters much who the applicant is. Any eligible applicant coming within section 124(5) will have an interest in the building or an interest or responsibility for building safety and we do not see why the basis of their eligibility should be significant.

272. Mr Selby KC's second point was that (at least as far as future service charges are concerned) the individual leaseholders are already protected by Schedule 8 of the Act and that the effect of an order would simply be to replace one source of funding with another. The purpose of section 124 was already being achieved and the better course would be to preserve the status quo and allow claims to be brought against the original contractors. That does not seem to us to be a reason not to make an order against the parties whom the 2022 Act holds responsible. Whether in the short or medium term the costs of remediation are met from the Fund or from Get Living's resources is a question of real financial consequence for whichever has to pay.

273. Next Mr Selby KC referred to the fact that funds had been secured from the Building Safety Fund after the commencement of the Act and confirmed and disbursed after these applications had been commenced. There was no evidence to suggest that the Fund expected Get Living to forward fund the work or that its continuing support was dependent on the outcome of these applications. Mr Selby went further and suggested that the Grant Funding Agreement prohibited EVML from pursuing claims against Get Living, as an associate of a leaseholder (an optimistic interpretation of the Agreement where Get Living is also an associate of the developer). The Fund was also meeting the remediation costs of 33 other buildings at East Village. Those points seem to us at best to be neutral, but did serve also to highlight the scale of the public resources being committed to remediation. The public interest in securing reimbursement of those funds as quickly as possible seems to us to point strongly in favour of making an order.

274. Mr Selby KC also suggested, in effect, that it was appropriate for public money to be used in the remediation of all of the buildings at East Village because it had been a public project from which the public, through the ODA, had benefitted by receipt of the proceeds of the Sale and Purchase Agreement (which were said to exceed £557m.). Moreover, the public had been prepared to assist Triathlon's purchase of its interest in East Village. As there was every intention that EVML would bring claims against Galliford Try, the main contractor, the funding of the costs of remediation incurred by the public through the Fund would eventually be reimbursed. We appreciate that that is the intention, but there is no knowing how long it will take for a claim to come to trial (liability has already been disputed by Galliford Try) and no guarantee of how much will be recovered. The question is who should fund the work in the meantime.

275. Finally, Mr Selby KC suggested that these applications were a distraction for EVML's board from the task of getting on with the remediation work, and that they were corrosive of relationships between the directors appointed by each side. We can see that latter point is likely to be the case but nothing in the evidence persuaded us that the applications have caused a delay in the progress of the works. But we do not agree that sending a message to those responsible for remediation of other buildings that they should prioritise completion of the necessary works and avoid litigation should be a relevant consideration in deciding whether it is just and equitable to make orders in this case.

276. None of these points seem to us to provide a good reason why the respondents should not now be the subject of a remediation contribution order, or a justification as to why the works should be funded at public expense.

277. In the final analysis, and this is no criticism of Mr Selby KC's submissions, we do not find it surprising that he had difficulty in identifying a clear and convincing reason why it would be just and equitable to allow Get Living to retain the best part of £20m, rather than this sum going to the Building Safety Fund. We say this because Mr Selby KC's attempts to justify this result cut across two of the principal objectives which section 124 was plainly intended to achieve.

278. First, section 124 contains a list of persons against whom a remediation contribution order may be made. Section 124, combined with the LPI Regulations, creates a hierarchy or cascade of liability in relation to a relevant defect. The taxpayer does not appear in section 124 or in this hierarchy, save in so far as a taxpayer funded entity may constitute a body corporate or partnership within the terms of section 124(3) or a landlord within the terms of the LPI Regulations. Given this position, it is difficult to see how it could ever be just and equitable for a party falling within the terms of section 124(3) and well able to fund the relevant remediation works to be able to claim that the works should instead be funded by the public purse. We do not see that this point loses any of its essential force in circumstances where it is said that the public purse will eventually be reimbursed from the fruits of successful litigation against third parties. Even if we were persuaded that the Building Safety Fund could be confident of this result on the facts of the present case, and we are not in a position to be so confident, we do not see why the public purse should act as interim funder and underwriter of the risk of failure, while claims against third parties wend their way to a conclusion. We agree with a point made by Mr Nissen KC in opening, which is that public funding is a matter of last resort, and should not be seen as a primary source

of funding where other parties, within the scope of section 124, are available as sources of funding.

279. Second, as we have already noted, it was plainly the intention of Parliament that an application for a remediation contribution order should provide a route to securing funding for remediation works without the applicant having to become involved in, or to wait upon the outcome of other claims arising out of the relevant defects, which might involve complex, multi-handed, expensive and lengthy litigation. If the Building Safety Fund was left to fund the works while the claims against Galliford Try are resolved, the respondents would effectively achieve the very thing which, as it seems to us, section 124 is intended to avoid.

280. Finally, there is the respondents' argument that it is not just and equitable for remediation contribution orders to be made against them in respect of costs incurred before the date of commencement of the 2022 Act on 28 June 2022. We have decided, as a matter of the statutory language, that a remediation contribution order can be made in relation to costs incurred before that date. It does not necessarily follow that it is just and equitable to order the payment of such costs, as part of the remediation contribution orders sought by Triathlon.

281. The difficulty which confronts the respondents in this context is this. We have decided that the 2022 Act does permit remediation contribution orders to be made in respect of costs incurred prior to 28 June 2022. It follows that if it is otherwise just and equitable to make a remediation contribution order, the order does not cease to be just and equitable simply because it is made in respect of costs incurred prior to 28 June 2022. The legislation permits this result. Something more is required.

282. Although it is difficult to think of an example of such circumstances, we do not rule out the possibility that, on the facts of a particular case, there might be a factor or factors which rendered it unjust and inequitable to make a remediation contribution order in respect of costs incurred prior to 28 June 2022. In the present case however there is no such factor.

283. The respondents say that Triathlon could have pursued other claims for the recovery of the relevant sums. We have already dealt with this point in our general analysis above. This point seems to us to have no more merit in relation to costs incurred prior to 28 June 2022 than it has in relation to costs incurred subsequently. We repeat, section 124 provides a route to securing funding for remediation works without the applicant having to become involved in, or to wait upon the outcome of other claims arising out of the relevant defects. We see nothing unjust or inequitable in Triathlon exercising its right to apply for remediation contribution orders, without first pursuing other claims which it may have arising out of the relevant defects. Even if it is assumed, and we are not in a position to make any such assumption, that the other claims said by the respondents to be available to Triathlon would be viable claims, worth pursuing, we do not regard this as a factor carrying any material weight in our decision on whether it is just and equitable to make the remediation contribution orders. Nor can we see why our reasoning should be any different, as between costs incurred before 28 June 2022 and costs incurred after 28 June 2022.

284. The respondents also sought to rely on the allegation that the relevant costs were incurred by EVML with the agreement of the Triathlon directors of EVML and pursuant to the Members Agreement, which formed part of the network of agreements entered into in relation to the development and sale of what became the East Village. The respondents allege that the costs were incurred by EVML on the basis that they would be recovered by the service charge.

285. It seems to us that there are two points here. The first point is the question of whether the contractual obligations in the Members Agreement or for that matter in any of the other agreements relating to the sale and development of the East Village to which Triathlon was a party, and pursuant to which Triathlon may have claims, should carry weight in the application of the just and equitable test. We do not think that they should carry weight, for the reasons which we have already given. It seems to us that these reasons hold good, whether one is considering costs incurred before or after 28 June 2022.

286. The second point is the question of whether, on the facts of this case, it can be said that the relevant costs were incurred by EVML on the basis that they would and would only ever be recoverable by the service charge. There are obvious difficulties with this second point. The evidence in this case was not directed to a question of this kind, and we do not consider that we are able, on the evidence, to make such a finding, leaving aside the question of what kind of finding we should be making. What assumptions were made by EVML? Were these agreed and, if so, with whom? Even if however we were able to make a finding of this kind, we do not think that this would render it unjust and inequitable to make a remediation contribution order in relation to costs incurred prior to 28 June 2022. In this context we repeat the relevant parts of our earlier analysis. We have decided that the 2022 Act permits the making of a remediation contribution order in respect of such costs. Nor is it possible to contract out of section 124. Beyond this, the world in which the costs of dealing with relevant defects fell to be recovered through service charges has been changed, fundamentally, by the 2022 Act. The purposes of section 124 would seriously be undermined if the respondent to an application could argue that it was unfair to render it liable to make a remediation contribution in respect of costs incurred prior to 28 June 2022, simply because the relevant costs were incurred at a time when it was assumed by all, whether expressly or impliedly, that the relevant costs were only recoverable by the service charge.

287. In principle, we can see that there might be a case where a person against whom a remediation contribution order was sought, in respect of costs incurred prior to 28 June 2022, could say that they had acted to their irretrievable prejudice, in the belief that they could safely expend the relevant funds as service charges validly demanded and received. In such a case there might be traction for an argument that it was not just and equitable to require that person to fund the relevant costs itself, pursuant to a remediation contribution order.

288. There is however no evidence of anything of this kind in the present case. Indeed, in this context as in others, it is important to keep in mind that a remediation contribution order is not sought against EVML in respect of any costs. The remediation contribution orders are sought against the respondents. It is not therefore EVML which is being required itself to fund expenditure which it cannot now recover by the service charge. Indeed, now that a way forward has been found, at board level, for EVML to take action in relation to the

applications, EVML has expressed its support for the applications. This is a factor which, it seems to us, should carry weight in our decision on whether it is just and equitable to make the remediation contribution orders, both generally and in respect of costs incurred prior to 28 June 2022.

289. The respondents also argued that Triathlon did not intimate that it might seek to reclaim the relevant payments from SVDP or Get Living, when it made them. To the extent that this was the case, and we do not consider it necessary to make specific findings in this respect, this is likely to be the position in many cases where a remediation contribution order is sought in respect of costs incurred prior to 28 June 2022. Unless there is more, and there is not more in the present case, we cannot see that this is a good reason for deciding that it is not just and equitable to make remediation contribution orders in relation to costs incurred prior to 28 June 2022.

290. We therefore conclude that the fact that some of the costs, payment of which is sought by the applications, were incurred prior to 28 June 2022 does not constitute a sufficient reason or a contributory reason to conclude that it would not be just and equitable to make remediation contribution orders in respect of those costs.

291. Drawing together all of the above analysis, including our analysis of the facts of this case, and taking into account all the relevant circumstances of this case, we conclude that it is just and equitable to make the remediation contribution orders sought by Triathlon.

Conclusion

292. For the reasons set out in this decision we conclude that Triathlon is entitled to the remediation contribution orders sought by the applications. Subject to working out the precise terms of these orders, we will make orders pursuant to Section 124 for the respondents to make payment of (i) the total sum of £16,031,244.53 to EVML, being the forecast cost of the Major Works and professional fees, apportioned between the Blocks in the proportions set out in paragraph 15.2 of Triathlon's written opening submissions, and (ii) the further total sum to EVML of £767,438.79 being costs of other remedial measures (including the forecast cost of servicing and decommissioning temporary fire alarms), and (iii) the total sum of £1,158,358.18, by way of the additional costs, to Triathlon.

293. We invite the parties to agree the terms of the orders giving effect to our decision, and to submit to us the agreed drafts of these orders, for our approval. They should endeavour to agree such provisions (if any) as may be necessary to deal with future contingencies, including the possibility of credit being given by EVML to Triathlon in respect of the additional payments or funds being recovered by EVML from Galliford Try or others. They may also wish to deal with any problem of matching the payments to be made pursuant to the orders with the funds which have been provided or were to have been provided by the Building Safety Fund.

294. In the course of argument it was suggested by Mr Selby KC that the Tribunal has no jurisdiction to make a remediation contribution order requiring repayment by the recipient of the contribution in the event of it successfully pursuing claims against third parties. We reject that suggestion. Where statute confers a discretion on a tribunal, as section 124 does,

unless precluded by clear words, the tribunal is likely to have been intended to have an incidental power to impose appropriate terms as a condition of exercising that discretion. A familiar example is the power to dispense with statutory consultation on major works conferred by section 20ZA(1), Landlord and Tenant Act 1985, which Lord Neuberger PSC interpreted in *Daejan v Benson* [2013] UKSC 14, at [54]-[58], as giving the tribunal power to impose conditions, including conditions relating to the costs of the proceedings. The Tribunal therefore has ample jurisdiction, as a condition of making a remediation contribution order, to impose such terms as are required to make the contribution just and equitable.

295. If and to the extent that there is disagreement between the parties as to the terms of the orders, we will decide the points of disagreement on written submissions, unless we consider that a further hearing is necessary.

Mr Justice Edwin Johnson
Chamber President,
Upper Tribunal, Lands Chamber

Martin Rodger KC
Deputy Chamber President,
Upper Tribunal, Lands Chamber

19 January 2024

Right of appeal

Any party has a right of appeal to the Upper Tribunal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application to the First-tier Tribunal for permission to appeal to the Upper Tribunal must be sent or delivered to the First-tier Tribunal so that it is received within 28 days after the date on which this decision is sent to the parties; at the same time a copy of the application should be filed electronically with the Upper Tribunal (which will continue to manage the applications) using the Upper Tribunal reference. 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 Upper Tribunal for permission.