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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BN/BSB/2024/0001-0007**
Property	**:**	**Seven Buildings in Manchester**
Applicant	**:**	**Secretary of State for Housing, Communities and Local Government**
Respondents	**:**	**Urban Splash Limited & others (as listed in Appendix A)**
Type of Application	**:**	**Applications for remediation contribution orders – section 124 of the Building Safety Act 2022**
Tribunal	**:**	**Judge J Holbrook** **Regional Judge N Walsh** **Mr A Gee RIBA**
Hearing dates	**:**	**27 April – 15 May 2026** **8 June – 1 July 2026**
Date of Decision		**5 November 2026**

DECISION

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Re:
Burton Place, Castlefield, Manchester M15 4LR
Chips Building, 1 New Islington, Manchester M4 6BU
Christabel House, Dalton Street, Manchester M40 7EH
Emmeline House, Dalton Street, Manchester M40 7EB
Moho Building, Ellesmere Street, Manchester M15 4FQ
Sylvia House, Dalton Street, Manchester M40 7ED
The Box Works, 4 Worsley Street, Manchester M15 4NU

Kerry Bretherton KC, Alexander Burrell, Hannah Fry and Samuel Moss, instructed by Walker Morris LLP for the applicant
Nicholas Dennys KC, David Sawtell KC and Nyasha Weinberg, instructed by Reynolds Porter Chamberlain LLP for the first to fourth respondents
William Charlesworth, for the fifth respondent and instructed by Reynolds Porter Chamberlain LLP for the sixth and eleventh respondents
Catherine Gibaud KC and Robert Bowker, instructed by Charles Russell Speechlys LLP for the seventh and tenth respondents

The following cases are referred to in this decision:

Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point [2025] EWCA Civ 856
BDW Trading Ltd v URS Corporation Ltd [2025] UKSC 21
CIR v Lithgows Ltd (1960) 39 TC 270
Crest Nicholson Regeneration Ltd v Ardmore Construction Ltd (in administration) & Others [2026] EWHC 789 (TCC)
Edgewater (Stevenage) Limited & Ors v Grey GR Limited Partnership [2026] UKUT 18 (LC)
Farnborough Airport Properties Company v HMRC [2019] EWCA Civ 118
Plough Investments v Manchester City Council [1989] 1 EGLR 244
Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd [2020] EWCA Civ 308
Secretary of State v Canary Riverside Estate Management Limited & Ors LON/00BG/BSA/2024/0005
381 Southwark Park Road RTM Co Ltd v Click St Andrews Ltd (In Liquidation) [2024] EWHC 3569 (TCC) 219 ConLR 29
Triathlon Homes LLP v Stratford Village Development Partnership & Ors [2024] UKFTT 26 (PC); [2025] EWCA Civ 846
Westbrook Dolphin Square Ltd v Friends Life Ltd (No.2) [2014] EWHC 2433 (Ch)
Zielinski and Others v France (1999) 28 EHRR 776

DECISION

A The Tribunal makes the remediation contribution orders which accompany this Decision.

B Those orders relate to each of the seven Buildings in this case and, taken together, require the First, Second, Third, Fourth and Eleventh Respondents to pay sums totalling £46,500,650.

C Those Respondents are jointly and severally liable to make the required payments.

D Nevertheless, no remediation contribution orders are made against the Fifth, Sixth, Seventh or Tenth Respondents: the applications against each of those Respondents are dismissed.

E The applications against the Eighth and Ninth Respondents have been withdrawn.

REASONS

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PART 1 – INTRODUCTION, SUMMARY AND THE PROCEEDINGS

INTRODUCTION

1. The Grenfell Tower fire in June 2017 sent shockwaves through society, Government and the construction and property industry. The responses of Government and industry to that tragedy have been well documented. In its aftermath, serious fire-safety deficiencies were discovered in the design and construction of many other high-rise residential buildings, and steps were taken to secure their remediation.

2. Some buildings have yet to be made safe. The remediation of many others has been completed, invariably at considerable cost and often with the assistance of grant funding from the Government's Building Safety Fund (BSF), established following the Grenfell Tower fire. Unsurprisingly, the question of who should ultimately bear those costs remains a live issue in many instances.

3. This case concerns seven high-rise residential buildings in Manchester (the Buildings), developed by Urban Splash Limited between about 2000 and 2008. Following the Grenfell Tower fire, investigations were undertaken into the safety of those Buildings. As a result, it was alleged that they each contained serious fire-safety defects, although the extent of such defects is disputed. In any event, the alleged defects have now been remediated, at a total cost in excess of £60 million. Approximately £51.5 million of that sum has been paid from the BSF. By the time of the remediation, however, the Buildings were no longer owned by Urban Splash and none of the BSF funding was paid to any of the Respondents.

4. The central question posed by this case can therefore be simply stated: should the remediation costs funded by the taxpayer continue to be borne by the taxpayer, or should liability for all or part of them be transferred to the developer and/or to various entities alleged to be associated with it?

5. That question arises in the context of applications in relation to each of the Buildings, made to the Tribunal under section 124 of the Building Safety Act 2022 (BSA). By those applications, the Secretary of State sought remediation contribution orders (RCOs) against each Respondent to these proceedings.

6. These applications have given rise to an unusually complex combination of technical, factual, financial and legal issues. Their determination has necessarily required a lengthy Decision. To assist the reader before turning to the detailed reasons for our conclusions, we therefore begin by summarising the principal findings we have made and the orders which result from them.

SUMMARY

Outcome

7. The Tribunal has decided that RCOs should be made against five Respondents: Urban Splash Limited (R1), Urban Splash Developments Limited (R2), Urban Splash Group Holdings Limited (R3), Urban Splash Work Limited (R4) and Stubbs Mill LLP (R11). R1 was the developer of each of the seven Buildings. The other four Respondents are associated with it for the purposes of the BSA.

8. We have therefore made RCOs requiring R1, R2, R3, R4 and R11 to pay a total of £46,500,650. Most of that amount is payable to the Secretary of State in respect of remediation expenditure funded through the BSF. £741,594, representing recoverable expenditure incurred by the management company at Moho Building, is payable directly to that company. The liabilities of the five Respondents are joint and several.

9. No RCOs are made against TBI 2000 Limited (R5), TM Freeholds Limited (R6), SURE Residential A Limited (R7) or SURE Residential LLP (R10). The applications against R8 and R9 were withdrawn following a settlement reached before the final hearing.

10. In reaching those conclusions we have considered three broad questions: what relevant defects affected the Buildings and what reasonable remediation costs resulted from them; which Respondents fall within the statutory provisions governing association; and against which Respondents it is just and equitable to make RCOs.

The remediation liabilities

11. We have found that each of the seven Buildings contained relevant defects relating to fire-safety and that the remediation schemes undertaken represented reasonable responses to them. Although their construction differed, the principal defects involved combinations of combustible materials,

ineffective cavity barriers and fire-stopping, and failures of compartmentation capable of permitting fire to spread through or over the Buildings.

12. We find that £60,638,548, inclusive of VAT, was reasonably incurred or is reasonably to be incurred in remedying, or otherwise in connection with, those defects. Of that amount, £51,510,063 represents expenditure funded or to be funded by the BSF. A further £741,594 was reasonably incurred by the management company at Moho Building outside the BSF. The orders we have made are for a lower amount than the expenditure funded by the BSF, principally because of our conclusion concerning the Government's shared responsibility for the circumstances which produced the building-safety crisis.

Why some Respondents are liable and others are not

13. An entity does not become liable merely because it is a developer or is legally associated with one. Section 124 of the BSA requires the Tribunal to decide whether it is just and equitable to make the particular order sought. The developer nevertheless stands at the head of the hierarchy as to who should pay remediation costs, which provides a powerful starting point when applying that test. In the case of an associated entity, the nature and strength of its connections with the developer, the relevant buildings and any wider property-centred enterprise are important considerations in deciding whether it should contribute. The fact that the alternative may be to leave costs with the taxpayer is important but does not by itself make an RCO just and equitable.

14. Applying that test to R1, we consider it appropriate to make RCOs against it. R1 developed all seven Buildings, procured their design and construction, brought them to market and obtained the commercial benefit of doing so. Its connection with the Buildings and the resulting remediation liabilities could scarcely be closer.

15. The Secretary of State argued that Urban Splash had "failed to do the right thing" by not undertaking or funding the remediation itself. We do not find that expression helpful: the issue is not whether a Respondent met some undefined moral standard, but whether its conduct affects the fairness of requiring it to contribute. We accept that Urban Splash provided useful and responsible assistance with the post-Grenfell investigations into the safety of these Buildings. But there is an important distinction between assisting those investigations and accepting financial responsibility for the resulting remediation, which R1 did not do. Its present insolvency and the apparent difficulty of recovering contributions from others involved with the original developments do not outweigh the powerful case for requiring R1, as developer, rather than the taxpayer, to bear the remediation costs.

16. We have also concluded that RCOs should be made against R2, R3 and R4. R2 became the principal vehicle through which Urban Splash continued its property development business following a restructuring in 2013, which took place against the background of financial pressures generated by the 2008 financial crisis. There was substantial continuity of ownership, control, personnel, purpose and business identity. R3 is the ultimate parent company and the point at which ownership and control of the surviving Urban Splash

enterprise reside; the continuing retention of R1 because of the economic benefit of its accumulated tax losses further demonstrates the relationship between the developer and the wider group. R4 performs a different function, principally owning and managing commercial property, but is a longstanding constituent of the same wider property-centred enterprise, operating under common ownership and control. In each case, the connection goes beyond bare statutory association and provides sufficient justification for an RCO.

17. R11 was established after the Buildings had been completed and had no involvement in their construction. However, its members are the five individuals referred to during the hearing as "the Urban Splash 5", who comprised the senior leadership of Urban Splash. Through R11, they undertook another property development, Stubbs Mill, using a separate vehicle which enabled them to obtain tax relief unavailable to the Urban Splash group and to invest personal capital outside the group. Stubbs Mill was acquired from an Urban Splash company and subsequently developed, managed and financed through substantial connections with the wider Urban Splash enterprise. We have also found that the same individuals collectively controlled R11 and R3. Taken together, those circumstances provide sufficient justification for an order against R11.

18. The Respondents also argued that the RCOs sought would infringe their rights under the European Convention on Human Rights, relying particularly upon their retrospective and financial consequences. We were not persuaded. Those matters are capable of being relevant to the just and equitable assessment and have been taken into account. We are satisfied that the orders we have decided to make are compatible with the Respondents' Convention rights.

19. The position of R5 and R6 is materially different. They are private or family investment companies whose activities and assets are distinct from the Urban Splash property-centred enterprise. Neither had any meaningful connection with the Buildings. An order against R6 would also affect the interests of joint-venture investors having no connection with Urban Splash. The RCO regime is directed towards specified companies and partnerships; its purpose is not simply to provide a means of pursuing the private wealth of individuals connected with a developer. The fact that an associated entity holds assets from which an order might be satisfied cannot itself justify imposing liability upon it.

20. R7 and R10 form part of a regulated investment fund investing in completed UK residential property. Although the residential fund enjoyed a close and mutually beneficial commercial relationship with Urban Splash, particularly during its earlier years, its assets are held overwhelmingly for investors who had no involvement in the development of the Buildings. That relationship does not provide sufficient justification for transferring the present liabilities to the fund. R7 is associated with R1 because of a common directorship, but that provides only the statutory gateway: taking account of the nature of the residential fund, the interests of its investors and its lack of any meaningful connection with the Buildings, we do not consider it just and equitable to make an RCO against R7.

21. We have additionally found that R10 is not associated with R1. Tom Bloxham, the founder and Chairman of Urban Splash, was also a founder of the residential fund and played an important role in its creation and development. Urban Splash also supplied most of the residential fund's early investment opportunities. But influence is not control, and the fund retained genuinely independent processes for deciding which investments to make and upon what terms. That finding means that the principal statutory gateway condition relied upon by the Secretary of State is not satisfied. R10 nevertheless falls within the separate landlord gateway in relation to two of the Buildings because it held leases of several flats within them. However, the limited circumstances in which it was a landlord provide no sufficient reason for making an RCO against it under the just and equitable test.

Government responsibility

22. The Respondents also relied upon the Government's role in the building-safety crisis. The Hackitt Review and the Grenfell Tower Inquiry identified serious shortcomings in the regulatory framework, statutory guidance, building control and enforcement, and failures by central Government to respond adequately to known risks. The Government has accepted the findings of the Hackitt Review and the Grenfell Tower Inquiry. We have not attempted to make our own findings about responsibility for the building-safety crisis, which was not an issue for us to decide. Those authoritative reports describe systemic failures involving both Government and the construction industry but provide no basis upon which this Tribunal could quantify their relative responsibility.

23. Those accepted findings do not make it unjust or inequitable to require R1 to contribute. Parliament enacted the BSA against that background and nevertheless placed the developer at the head of the hierarchy as to who should pay remediation costs. Moreover, this is not a case in which R1 can say that it simply built in accordance with the standards of the time and is now being judged by different standards imposed later: we have accepted expert evidence that aspects of the original construction of a number of the Buildings failed to satisfy the Building Regulations or statutory guidance then applicable.

24. Nevertheless, some adjustment is justified in light of the Government failures identified in those reports and accepted by Government. We have therefore reduced by 10% the BSF-funded remediation expenditure which R1 would otherwise be required to pay. Had the Buildings been shown to comply with the regulatory standards applicable when they were developed, we would have attached materially greater weight to this argument.

25. The 10% reduction does not represent a finding that Government was responsible for 10% of the defects or remediation costs. It is not an apportionment of causative responsibility between Government and Urban Splash. It represents our assessment, in the exercise of the discretion conferred by section 124 of the BSA, of the adjustment to the publicly funded costs necessary to produce a just and equitable result.

26. After that reduction and the other adjustments explained in Part 6 of this Decision, the RCOs require payment of £46,500,650. R1, R2, R3, R4 and R11

are jointly and severally liable for the full amounts. The differences between them were important when deciding whether RCOs should be made, but provided no principled basis for allocating different proportions of the costs. Apportionment would also increase the risk that part of the remediation expenditure would remain unrecovered, particularly given R1's financial position, leaving the resulting shortfall with the Secretary of State and ultimately the taxpayer.

Why the remediation costs were accepted

27. We preferred the Applicant's fire-safety evidence. Although much of the original external wall constructions had been removed or concealed by new replacement building elements before the parties' experts were instructed, contemporary investigations, photographs, design information and professional assessments provided a sufficiently reliable basis for determining the condition of the Buildings before remediation.

28. The question was not whether the schemes adopted were the best or cheapest solutions which might conceivably have been devised, but whether they fell within the range of reasonable professional responses to the defects. We found that they did. R1-4 argued that the availability of public funding had produced unnecessarily extensive and expensive remediation. Burton Place and Moho Building provided the clearest examples. At Burton Place, a scheme initially estimated at about £9 million ultimately resulted in expenditure of almost £23 million, an increase of around 150%. At Moho, initial BSF approval of about £9.9 million ultimately increased to more than £18 million, an increase of around 85%. Those increases plainly required careful scrutiny, but were principally explained by the developing understanding of the Buildings as investigations and opening-up revealed further defects and previously concealed construction. Crucially, however, R1-4 did not prove any coherent, technically viable and materially cheaper alternative capable of addressing the relevant defects to an equivalent standard. That evidential gap was fundamental to the failure of their challenge to the remediation schemes and their costs.

29. Nor did we find that BSF funding had resulted in indiscriminate removal of combustible materials or unnecessary renovation. At Burton Place, what had begun before Grenfell as a comparatively modest proposal concerning deteriorating timber cladding expanded as numerous defects within the external wall construction were identified. At Moho, substantial additional works followed the discovery of inadequately protected voids, missing compartmentation and service penetrations, particularly behind the service risers. The remediation schemes did not proceed on the basis that every combustible component had to be removed: where retention was considered appropriate, existing components were retained. The evidence therefore did not support the contention that public funding had produced "gold-plated" remediation rather than reasonable responses to the defects encountered.

30. The replacement of the distinctive lettering on Chips Building required particular scrutiny. The direct contract variation for the new aluminium lettering was approximately £420,000, although R1-4 contended that its true

cost was materially greater and their evidence suggested that the overall cost attributable to it might have approached £1 million. The lettering was not itself a relevant defect and its reproduction had a principally architectural purpose. The scale of the expenditure therefore gave us considerable pause. Nevertheless, alternatives had been considered and R1-4 did not establish that a materially cheaper solution was available which would satisfy the relevant planning, architectural and fire-performance requirements. We were therefore not satisfied that the expenditure was unreasonable.

31. As to quantum more generally, the principal remediation contracts were competitively procured and expenditure was subjected to professional contract administration, cost-consultant review and BSF scrutiny. Those processes were not conclusive, but provided substantial positive evidence of reasonableness. We preferred the Applicant's quantity-surveying evidential approach. An RCO application is not equivalent to a construction final-account dispute requiring every item of expenditure to be proved through detailed primary documentation. The provisional reductions proposed on behalf of R1-4 generally reflected a desire for further substantiation rather than a positive conclusion that the expenditure was excessive.

32. We did not, however, accept the claim indiscriminately. Most notably, although a waking watch at Moho was likely to have been necessary, the Applicant did not provide sufficient evidence that the amount claimed for it had been reasonably incurred. Those costs have therefore been excluded.

Structure of this Decision

33. The remainder of this Decision explains these conclusions in detail. Part 1 continues with an account of the applications, the parties, the issues, the procedure and the evidence. Part 2 considers the relevant defects affecting the Buildings, the remediation works undertaken and the resulting costs. The detailed Building-specific evidence and findings are set out in Appendices.

34. Part 3 describes the Respondents, their history and their relationships with the wider Urban Splash enterprise. Part 4 determines the disputed questions of association concerning R10 and R11. Part 5 explains the principles governing the "just and equitable" test in section 124 of the BSA and our reasons for making RCOs against R1-4 and R11, but not R5-7 or R10. Finally, Part 6 explains the amounts payable, the joint and several nature of the liabilities and the terms of the RCOs which accompany this Decision.

LIST OF EXPRESSIONS USED IN THIS DECISION

Abbreviation	Meaning
AIF	Alternative investment fund
AIFM	Authorised investment fund manager

Approved Document B	Statutory guidance on how to comply with the fire-safety requirements of the Building Regulations
Applicant / Secretary of State	Secretary of State for Housing, Communities and Local Government (formerly, Secretary of State for Levelling Up, Housing and Communities)
BSA	Building Safety Act 2022
BSF	Building Safety Fund
Buildings	The seven buildings to which these proceedings relate
BWP	Bailey Wilson Construction & Property Consultants Ltd (building surveyors and project managers involved in investigating the Buildings and developing remediation projects)
DFC	Design Fire Consultants Ltd (fire-engineering consultants who investigated the Buildings and advised upon fire-safety risks and remediation options)
The Fund	The SURE Residential Fund (formerly, the Urban Splash Residential Fund)
LLPs	R10 and R11 (limited liability partnerships)
PAS 9980	Code of practice for appraising the fire risk of external wall construction and cladding on existing blocks of flats, published by the BSI
PSC	Persons of Significant Control (for the purposes of the scheme introduced under the Companies Act 2006)
RCO	Remediation contribution order
Scott Schedule	Schedule prepared by the expert fire-safety engineering and quantity-surveying witnesses, summarising disputed issues relating to the Buildings
STAR	STAR Capital Partners LLP (AIFM in relation to the Fund)
SURE	SURE Capital Partners LLP (investment advisor to the Fund)
Thomasons	Thomasons Ltd, (building surveyors and project consultants involved in the investigation, design, management and delivery of remediation works to the Buildings)
Three Towers	Christabel House, Emmeline House & Sylvia House

APPLICATIONS, PARTIES AND ISSUES

35. On 22 March 2024, the Secretary of State made seven applications under section 124 of the BSA. The purpose of the applications was to seek RCOs requiring the payment of reasonable or specified amounts in respect of the remediation of specified relevant defects relating to the Buildings, which are:

    1. Burton Place, 3, 9 & 15 Burton Place, Manchester M15 4LR;

    2. Chips Building, 1 New Islington, Manchester M4 6BU;

    3. Christabel House, Dalton Street, Manchester M40 7EH;

    4. Emmeline House, Dalton Street, Manchester M40 7EB;

    5. Moho Building, Ellesmere Street, Manchester M15 4FQ;

    6. Sylvia House, Dalton Street, Manchester M40 7ED; and

    7. The Box Works, 4 Worsley Street, Manchester M15 4NU.

36. The Respondents to the applications are listed in Appendix A to this Decision. As presented, the applications only sought RCOs against all or any of the First to Fourth Respondents (R1-4). However, on 13 November 2024, the Secretary of State applied to join each of the Fifth to Eleventh Respondents. The Tribunal agreed to join those additional Respondents.

37. Prior to the final hearing, a mediated settlement was agreed between the Secretary of State and the Eighth and Ninth Respondents. The applications in relation to them were therefore withdrawn.

38. Initially, the Applicant sought RCOs for a total sum of £48,170,328 across all seven applications. However, in each case the Applicant purported to reserve the right to amend the amount claimed so that it reflected the full costs of the remedial works incurred by the party with responsibility for remediating each Building. The applications were indeed amended multiple times during the course of the proceedings and, by their conclusion, the total amount sought against all or any of the remaining Respondents was £51,841,956. This sum was broken down as follows:

Burton Place	£22,954,848
Chips Building	£4,705,670
Christabel House	£1,472,075
Emmeline House	£2,027,778
Moho Building	£18,424,141

Sylvia House	£495,390
The Box Works	£1,762,054

39. The overwhelming majority of these amounts related to costs allegedly incurred (or to be incurred) by the BSF in connection with the remediation of the Buildings. However, in relation to Moho Building specifically, they also included sums totalling £931,893, alleged to have been incurred by Moho's management company.

40. Section 124(1)-(3) of the BSA provides:

> *(1) The First-tier Tribunal may, on the application of an interested person, make a remediation contribution order in relation to a relevant building if it considers it just and equitable to do so.*
>
> *(2) "Remediation contribution order", in relation to a relevant building, means an order requiring a specified body corporate or partnership to make payments to a specified person, for the purpose of meeting costs incurred or to be incurred in remedying, or otherwise in connection with, relevant defects (or specified relevant defects) relating to the relevant building.*
>
> …
>
> *(3) A body corporate or partnership may be specified as a person required to make payments only if it is–*
>
> *(a) a landlord under a lease of the relevant building or any part of it,*
> *(b) a person who was such a landlord at the qualifying time,*
> *(c) a developer in relation to the relevant building, or*
> *(d) a person associated with a person within any of paragraphs (a) to (c).*

41. The Secretary of State is an "interested person" who may apply for an RCO[1], and it was common ground that each Building is a "relevant building"[2]. It was also common ground that Urban Splash Limited, the First Respondent (R1), is a "developer"[3] in relation to each Building, and that the Second to Seventh Respondents are "associated"[4] with R1. Beyond these points of agreement, however, consensus was harder to find.

42. R1-4 disputed the nature and extent of the "relevant defects" which were alleged to have affected each of the Buildings. They also challenged the works carried out to remediate such defects, both in terms of the scope of the works undertaken and in terms of the costs incurred. The Tenth and Eleventh Respondents (R10 and R11) each denied that they are associated with R1. Of

[1] See section 124(5) of the BSA.
[2] As defined in section 117.
[3] As defined in section 124(5).
[4] As defined in section 121.

course, the parties also disagreed about whether it would be just and equitable for RCOs to be made against all or any of the Respondents.

43. R1-4 also challenged the inclusion within the Moho claim of the sums said to have been incurred by the management company, rather than by the BSF. They submitted that the Secretary of State had failed to establish any legally effective basis upon which those sums could be recovered on its behalf. During closing submissions, the Applicant sought permission to rely upon a document said to record the management company's authority for the claim to be pursued in this way. We refused that application, principally because the document had been executed at a very late stage in the proceedings and its admission would have deprived R1-4 of the opportunity to cross-examine the relevant witness about its provenance and effect.

44. Nevertheless, we did not regard the absence of that evidence as fatal to this aspect of the claim. Section 124(2) of the BSA expressly provides that an RCO may require payments to be made to "a specified person". It does not require that person to be the applicant. The Secretary of State is an interested person entitled to apply for an RCO, and there is no requirement that all payments required by an order made on her application must be made to the Secretary of State.

45. In relation to Moho, therefore, the appropriate course is to distinguish between the costs incurred through the BSF and those incurred by Moho Management Company Ltd. To the extent that we are satisfied that costs incurred by the management company fall within section 124(2) and that it is just and equitable to require the Respondents to meet them, the RCO will require the relevant payment to be made to the management company itself, rather than to the Secretary of State.

46. As it happens, we have found part of this aspect of the claim, namely the claim relating to waking watch costs, not to have been adequately evidenced[5]. Those costs have therefore been excluded. That conclusion does not rest upon any lack of standing and does not preclude another person with standing from pursuing a separate application in respect of those costs. The remaining sum of £741,594 will be addressed on the basis that it is payable directly to Moho Management Company Ltd.

PROCEDURE AND EVIDENCE

Case management

47. These proceedings required active and intensive case management over a period of more than two years. The applications were originally brought against R1-4, but the Secretary of State subsequently sought the joinder of seven additional respondents. Their joinder gave rise to contested questions concerning the proper scope of the proceedings and the basis upon which liability was said to arise against entities with differing relationships to R1.

[5] See Appendix E, paragraphs E117-E122.

48. A substantial procedural milestone occurred in February 2025, when the Tribunal heard strike-out applications brought by a number of the newly joined Respondents. Those applications invited consideration of novel questions concerning the scope of the RCO regime and the meaning of association under section 121 of the BSA. The Tribunal dismissed the applications following a two-day hearing, concluding that the issues raised could only properly be determined after full disclosure and a hearing at which the relevant evidence could be tested. The strike-out proceedings nevertheless played an important role in refining the issues and shaping the subsequent management of the litigation.

49. A further and substantial part of the case-management exercise concerned disclosure and expert evidence. The volume of disclosure in these proceedings was exceptional, ultimately extending to many tens of thousands, and possibly hundreds of thousands, of documents concerning the remediation projects, BSF funding applications, corporate structures, governance arrangements and financial affairs of the various Respondents. Issues concerning disclosure arose repeatedly during the life of the proceedings and, despite extensive pre-trial directions, continued throughout the final hearing itself. The Tribunal was required to determine disclosure applications, resolve disputes concerning compliance with disclosure orders, address issues arising from late disclosure, and consider questions of privilege and the admissibility of material which emerged even after the hearing had begun.

50. The preparation of the parties' expert evidence was similarly demanding. Detailed directions were required for the preparation of expert reports, joint statements and Scott Schedules, and the pre-trial timetable was revised on a number of occasions as the scale of the exercise became apparent and the evidential picture continued to develop. The case-management process was therefore directed towards reducing a vast quantity of documentary material and a large number of interrelated factual, technical, financial and corporate disputes to a form in which they could be addressed fairly and efficiently in a hearing.

The final hearing

51. The final hearing was held at Manchester Civil Justice Centre between April and July 2026. The Tribunal sat for seven weeks in total during that period, and we spent one day inspecting the seven Buildings.

52. The hearing was split into two distinct phases, with a gap of about three weeks between them. Phase 1 focussed on evidence and submissions relating to the remediation of the Buildings. Not all the Respondents were active participants in Phase 1 of the hearing, as the dispute about building remediation issues played out between the Applicant and R1-4 only. However, all parties participated in Phase 2, which concerned disputed issues relevant to "association", and the exercise of the discretion conferred upon the Tribunal by section 124 of the BSA.

53. The Secretary of State was represented at the final hearing by Kerry Bretherton KC, Alexander Burrell, Hannah Fry and Samuel Moss. R1-4 were represented

by Nicholas Dennys KC, David Sawtell KC and Nyasha Weinberg. R5 was represented during Phase 2 by William Charlesworth, who also represented R6 and R11. R7 and R10 were represented during Phase 2 by Catherine Gibaud KC and Robert Bowker. The proceedings gave rise to difficult and wide-ranging issues of fact, expert evidence and statutory interpretation and we are very grateful to counsel, whose written and oral submissions were of considerable assistance in navigating the unusually complex landscape of factual and legal issues presented by this case. We also acknowledge the very significant contribution of the parties' wider legal teams throughout the proceedings.

54. We heard extensive witness evidence during both phases of the hearing. In Phase 1, the Tribunal received factual evidence from some of those involved in the investigation, management and remediation of the Buildings, together with expert evidence from fire-safety engineers and quantity surveyors. In Phase 2, the Tribunal heard evidence concerning the history, structure, governance and financial affairs of the various Respondents. In total, the Tribunal heard evidence from the fifteen witnesses listed in Appendix B to this Decision, whose evidence ranged across building safety, fire engineering, quantity surveying, property management, corporate governance, investment-fund regulation and financial matters. We are grateful to all of the witnesses who gave evidence for the assistance which they provided to the Tribunal. The hearing was fully transcribed throughout and the availability of a contemporaneous transcript was of considerable assistance, both during the hearing itself and in the preparation of this Decision.

55. The case was exceptionally document-heavy. The documentary evidence ultimately extended to tens of thousands of pages and encompassed a very broad range of material, including reports and records relating to the remediation projects, corporate records, financial information, governance documentation, correspondence, expert reports, funding applications and regulatory materials. Given their volume, the documents were not presented as a conventional hearing bundle. Rather, they were hosted on, and presented through, an online TrialView platform. That platform proved indispensable in enabling the parties and the Tribunal to navigate the documentary evidence efficiently, particularly given the frequency with which documents from different parts of the record required to be considered together.

Expert evidence

56. Expert evidence formed a substantial component of Phase 1 of the hearing and featured prominently throughout the parties' written and oral submissions. Many of the principal factual issues arising in relation to the Buildings involved specialist and technically demanding subject matter. They included the design and fire performance of external wall systems, the nature and significance of alleged fire-safety defects, the appropriateness of the remedial works undertaken, and the reasonableness of costs incurred during complex remediation projects. The Applicant and R1-4 therefore relied heavily upon expert evidence, both in relation to fire-safety engineering issues and in relation to quantity surveying matters.

57. In relation to fire-safety engineering, the Tribunal heard evidence from Jamie Davis of PartB Group Ltd on behalf of the Applicant and from Lauren Vice of H + H Fire on behalf of R1-4. At the highest level of generality, these experts were required to address three broad questions. First, whether the Buildings contained relevant defects as defined for the purposes of the BSA. Secondly, whether the works undertaken were an appropriate response to those defects. Thirdly, whether the competing criticisms advanced by the parties concerning the scope of the remediation schemes were well founded. Although there was a greater degree of agreement between the experts than was sometimes apparent from the parties' submissions, important areas of disagreement remained in relation to both the existence of particular defects and the extent of the remedial works which they justified. The Tribunal's conclusions on those matters are addressed in Part 2 of this Decision.

58. The Tribunal also heard quantity-surveying evidence from Steven Lynch of Delta Consulting Group Ltd on behalf of the Applicant and Faye Allen of Rimkus Consulting UK Ltd on behalf of R1-4. Their evidence was directed primarily towards the costs incurred in remediating the Buildings, the extent to which those costs were adequately substantiated, and the reasonableness of the sums claimed. Whilst significant disagreements remained, particularly in relation to variations, loss and expense claims and the level of supporting documentation available for certain elements of expenditure, the experts reached substantial areas of agreement over the course of the proceedings. Those areas of agreement considerably narrowed the issues ultimately requiring determination by the Tribunal. They are addressed in Part 2 also.

59. We are grateful to all four expert witnesses for their assistance with the many technical matters which arose in these proceedings. Ultimately, the Tribunal preferred the evidence of the Applicant’s experts, both in relation to fire-safety engineering and in relation to quantity-surveying matters. We shall explain the reasons for this in due course when we consider the relevant evidence in detail. However, one aspect of the expert evidence warrants specific mention at this stage because it had a significant influence on the way in which the proceedings were ultimately conducted. A central component of R1-4's challenge to the sums claimed by the Applicant was the contention that any relevant defects affecting the Buildings could have been remediated by means of less extensive and less expensive remedial works. In broad terms, that challenge involved identifying alternative remedial schemes said to have been capable of addressing the relevant fire-safety risks whilst avoiding some of the costs incurred in the schemes actually adopted. The issue therefore featured prominently in both the building-safety and quantum aspects of the case.

60. Prior to the final hearing, however, the Tribunal excluded part of the quantity-surveying evidence relied upon by R1-4 in support of that case. R1-4 had advanced costings for alternative remedial schemes which depended upon assumptions about what works would have been technically feasible and sufficient to address the relevant defects. Those assumptions were not supported by the evidence of R1-4’s fire-safety engineering expert. An attempt was instead made to supply the missing technical foundation for the alternative schemes through the report of R1-4’s quantity-surveying expert, so as to provide an evidential basis for the costings she had produced. Having heard

argument on the issue during the pre-trial review hearing on 23 March 2026, the Tribunal concluded that this amounted, in substance, to the late introduction of additional fire-safety engineering evidence through a witness whose expertise lay in a different discipline. The impugned evidence was therefore excluded, and full written reasons for this decision were provided on 31 March. As a consequence, whilst R1-4 remained entitled to contend that the remediation undertaken had gone further than was necessary and to rely on the admissible evidence of their experts, there was no substantial body of admissible expert evidence before the Tribunal positively identifying and supporting fully-developed alternative remedial schemes. That evidential deficiency forms an important part of the context in which the parties' expert evidence ultimately fell to be assessed.

61. On 22 April 2026, shortly before the final hearing commenced, R1-4 applied for permission to appeal against the 'exclusion decision'. They also sought a review of that decision. These matters were addressed on the first day of the hearing. We declined to review the exclusion decision, because we were not satisfied that a proposed ground of appeal was likely to be successful. With the parties' agreement, however, we stayed the permission application itself until 28 days after the date on which this Decision is sent to the parties.

PART 2 – REMEDIATION OF THE BUILDINGS

62. In this Part, we identify the costs which are capable of forming the subject of an RCO in relation to each Building. We begin by explaining the nature of that enquiry under section 124 of the BSA. We then consider, in turn, the meaning and existence of relevant defects, the appropriateness of the remediation works undertaken and the reasonableness of the resulting costs. The issues common to the Buildings, and our overarching conclusions upon them, are addressed in the sections which follow. The detailed evidence and our findings concerning each Building are set out separately in Appendices C to G, which form an integral part of our consideration of those issues. We conclude this Part by identifying the amounts which we find were reasonably incurred, or are reasonably to be incurred, in remedying, or otherwise in connection with, the relevant defects affecting each Building.

JURISDICTION UNDER SECTION 124 – NATURE OF AN RCO

63. Two overarching points of principle are immediately apparent from the provisions of section 124(1) and (2) of the BSA[6]: first, the power conferred on the FTT to make an RCO is a discretionary one; and, second, where it does decide to exercise that power, the order made by the FTT must be for the purpose identified in section 124(2): that is, "for the purpose of meeting costs incurred or to be incurred in remedying, or otherwise in connection with, relevant defects … relating to the relevant building".

64. Whilst the question whether the FTT should exercise its discretion to make RCOs was largely deferred until Phase 2 of the hearing, the focus of Phase 1 was on the "purpose" issue: in other words, on identifying the costs (if any) which

[6] The provisions are set out at paragraph 40 above.

could *potentially* be the subject of an RCO in relation to each Building should the Tribunal be persuaded that it is just and equitable to make one.

65. Ascertaining the amount of those costs required the Tribunal to determine a number of disputed issues (and, as we will explain in due course, a larger number of disputed sub-issues too). The principal issues were:

- What relevant defects (if any) existed in respect of each Building?
- What was the remediation response (i.e., what has actually been done to remediate any relevant defects, and what costs were/are to be incurred in remedying, or otherwise in connection with, those defects)?
- Were those costs reasonably incurred?

66. Regarding the third of these issues, section 124(2) does not expressly provide that the costs incurred or to be incurred in remedying relevant defects must have been reasonably incurred. We do not read such a requirement into that subsection. The reasonableness of the expenditure is instead relevant to the exercise of the discretion under section 124(1). In deciding whether it is just and equitable to require a respondent to contribute towards costs incurred in remedying relevant defects, and if so in what amount, it will ordinarily be necessary to consider whether those costs were reasonably incurred.

67. For convenience, and because the issue is common to the claims against the various Respondents, we determine that question in this Part of the Decision before considering in Part 5 the other matters relevant to the just and equitable assessment.

68. It is also worth noting at this stage that we consider the discretion conferred on the FTT by section 124 to be broad. Thus, having quantified the costs which fall within the description in section 124(2), the Tribunal is not faced with a stark choice between either making an RCO for the entirety of that amount, or of making no RCO at all: the Tribunal also has power to make an RCO for a specified lesser amount, or for a proportion of those costs, if it determines it to be just and equitable to do so.

RELEVANT DEFECTS

Positions of the parties in outline

69. The Applicant's position throughout these proceedings was that the defects identified by professional advisers in relation to each Building following the Grenfell Tower fire encompassed a range of interrelated failures: the presence of combustible insulation (such as Kingspan K15 and EPS polystyrene), combustible cladding panels (including Trespa HPL, Prodema panels, timber cladding, and zinc cladding with combustible backing), combustible sheathing boards (OSB), combustible structural insulated panels (SIPS), missing or ineffective cavity barriers (notably defective Envirograf products), failures to maintain fire resistance at junctions between external walls and compartment

walls or floors, and combustible membranes and support frameworks. The Applicant contended that these defects, individually and in combination, represent non-compliance with the functional requirements of the Building Regulations — specifically Requirements B3(3) (compartmentation), B3(4) (concealed spaces/cavity barriers), and B4(1) (fire spread over external walls) — and that the combination of combustible materials with absent or ineffective cavity barriers provided a medium for fire spread that constituted a building safety risk requiring remediation.

70. R1-4 disputed the existence and extent of the alleged relevant defects. They also disputed the test for determining relevant defects under the BSA.

71. R1-4's pleaded case can be described as one of comprehensive non-admission as far as the existence of relevant defects is concerned: they explicitly did not admit that any of the Buildings contained relevant defects. They contended that the evidence provided by the Applicant had been "wholly inadequate," arising from the Applicant's own failure to capture appropriate data about the state of each Building before and during remediation, as well as the significant lapse of time since construction. They specifically criticised the Applicant for not carrying out sufficient or proper physical investigations into the state of the Buildings, noting there is "very little evidence indeed as to whether or not these were original construction defects, or if instead there has been subsequent deterioration". R1-4 maintained that only "very limited information has been provided as to the presence of alleged defects in any of the Seven Buildings" and that the evidence produced "falls far short of what is required".

72. This stance was maintained (initially at least) following instruction by the parties of fire-safety engineering experts for the purposes of these proceedings. In a joint statement prepared by the fire-safety engineering experts in February 2025, R1-4's appointed expert, Lauren Vice, adopted a consistent position challenging the existence of relevant defects across all seven Buildings on five principal grounds: 1) that the wrong benchmark for assessing relevant defects had been applied; 2) that combustible materials alone do not create a relevant defect; 3) that the available evidence was insufficient; 4) that pre-remediation reports undermined the case for remediation; and 5) that building geometry and holistic risk had not been considered.

73. Ms Vice's position shifted somewhat during cross-examination, when she made admissions that at least some features of each Building constituted relevant defects. She made extensive admissions in respect of the Three Towers, for example, including acceptance that the combination of K15 insulation and HPL cladding presented a building safety risk, and that defective or missing cavity barriers required remediation. In relation to Chips, Ms Vice accepted that K15 insulation and Trespa cladding formed a dangerous combination and required remediation. The lack of effective cavity barriers compounded the situation and the replacement of the cladding system was a reasonable response. In relation to The Box Works, Ms Vice accepted that the XPS/polyfoam insulation used in the building's construction was combustible; did not comply with guidance in Approved Document B; and would not satisfy the relevant fire-testing requirements.

74. Nevertheless, Ms Vice consistently sought to qualify some such admissions by arguing that: the existence of a defect did not automatically establish a sufficiently serious building safety risk; the degree of risk had to be assessed in context; some remediation schemes went beyond what was required to address the risk; and there had been a policy of removing all combustible materials rather than addressing only those defects that materially increased risk. Her position was therefore not that there were no relevant defects. Rather, it was that defects existed, but the significance of some of them was overstated and some remediation works were unnecessary.

75. This is not to say that R1-4 ultimately accepted the entirety of the Applicant's position on relevant defects – that was plainly far from being so. Ms Vice did not accept, for example, that individual timber elements in Moho (such as timber cladding, timber louvres or balcony decking) were themselves relevant defects. Similarly, in relation to Burton Place, she did not accept that timber cladding itself was necessarily a relevant defect. R1-4's case was not that the Buildings (or any of them) were free from relevant defects, however. Rather, whilst it was admitted that various relevant defects did exist, and that some of them plainly required remediation, the real dispute concerned the seriousness of the associated building safety risks and the scope of the remediation response reasonably required.

76. It is also apparent that a significant amount of the disagreement between the parties as to the extent of the relevant defects across the seven Buildings stemmed from their adoption of fundamentally different notions of what constitutes a "relevant defect" to begin with. It is therefore necessary to address that definitional issue directly before any further consideration of the evidential position.

Meaning of "relevant defect" and "building safety risk"

77. Section 120(2) of the BSA defines what is meant by a "relevant defect":

> *"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.*

78. Section 120(3) makes it clear that "relevant works" include works relating to the construction or conversion[7] of the building, if the construction or conversion was completed in the relevant period (being the period of 30 years ending on 28 June 2022[8]).

79. The expression "building safety risk" is defined in section 120(5):

[7] "Conversion" means the conversion of the building for use (wholly or partly) for residential purposes (see section 120(5) of the BSA).
[8] 28 June 2022 is the date on which section 120 came into force.

"building safety risk", in relation to a building, means a risk to the safety of people in or about the building arising from–
(a) the spread of fire, or
(b) the collapse of the building or any part of it

80. The parties advanced fundamentally different positions as to the meaning of this expression. The Applicant contended that a building safety risk exists whenever there is any risk to the safety of people in or about a building arising from the spread of fire. Reliance was placed upon the observations of the Upper Tribunal (Lands Chamber) in *Edgewater (Stevenage) Limited & Ors v Grey GR Limited Partnership*[9] and the First-tier Tribunal in *Secretary of State v Canary Riverside Estate Management Limited & Ors*[10], which were said to establish that the statutory language is unqualified and ungraded. On that approach, the Tribunal is not concerned, at the stage of identifying a relevant defect, with evaluating whether a risk is tolerable, intolerable, serious or insignificant. The sole question is whether the feature in issue gives rise to a risk of fire spread. If it does, there is a building safety risk and, consequently, a potential relevant defect. Questions of seriousness, proportionality and the appropriate remedial response arise only at a later stage of the analysis.

81. The Applicant further argued that the concept of a building safety risk is distinct from professional judgments concerning the tolerability of risk under PAS 9980. It submitted that the statutory test is not concerned with whether a fire engineer might regard a risk as "medium tolerable", "medium intolerable" or otherwise. Such classifications may inform decisions about remediation but do not determine whether a building safety risk exists for the purposes of the BSA.

82. R1-4 contended for a more qualified approach. They submitted that Parliament cannot have intended every theoretical or trivial possibility of fire spread to constitute a building safety risk. In their submission, the statutory concept requires an appreciable or material level of risk and should be informed by established fire-engineering principles, including consideration of the likelihood and consequences of fire spread, the presence of mitigating features, evacuation strategies and the overall tolerability of the risk. R1-4 relied upon the proposition that fire-safety assessment is inherently evaluative and that reasonable fire engineers may legitimately reach different conclusions as to the significance of a particular feature. They argued that the Tribunal should not treat every departure from current guidance, nor every combustible material, as giving rise to a building safety risk. Rather, the assessment should focus on whether the feature creates a meaningful risk to life and safety when viewed in the context of the building as a whole. Moreover, concepts such as tolerability and proportionality cannot be divorced from the identification of risk itself: the post-Grenfell tendency to regard any potential route for fire spread as sufficient justification for extensive remediation risks conflating the existence of risk with decisions about how that risk should be managed. R1-4's case was that a building safety risk requires more than the mere identification of a theoretical possibility of fire spread and that the Tribunal should assess the practical significance of the alleged risk before concluding that a relevant defect exists.

[9] [2026] UKUT 18 (LC).
[10] LON/00BG/BSA/2024/0005.

83. Accordingly, whilst the Applicant's case was that the statutory threshold is satisfied by the existence of any risk arising from the spread of fire, R1-4 argued that the BSA requires a more substantive assessment directed to the materiality, significance and tolerability of the risk in question.

84. The parties also differed as to the analytical route by which a tribunal should determine whether a relevant defect exists for the purposes of section 120 of the BSA. The Applicant submitted that the concept of a "defect" cannot be divorced from the statutory definition of a "building safety risk". Reliance was placed upon the reasoning in *Canary Riverside* and *Edgewater (Stevenage)*, where it was said that the preferable approach is not first to identify a defect and then ask whether it creates a building safety risk. Rather, the focus should be upon the matters complained of and whether they cause a building safety risk. If something done, omitted, used or not used in connection with the relevant works causes a building safety risk, that matter is thereby defective and constitutes a relevant defect. On this approach, there is no separate threshold inquiry into whether a feature is a defect independently of the question of risk. The Applicant further argued that the statutory concept of defect is broader than non-compliance with Building Regulations. It relied upon observations in *Edgewater (Stevenage)* that Parliament did not define a defect by reference to regulatory non-compliance and that it would be surprising if the legislation were limited to failures to comply with pre-Grenfell regulatory standards. Consequently, whilst departure from Building Regulations or Approved Document B may provide evidence of a defect, compliance with those requirements is not conclusive, nor is non-compliance a necessary precondition. The correct question is whether the feature in issue causes a building safety risk.

85. The Applicant's case therefore proceeded on the basis that a building may contain a relevant defect notwithstanding that it complied with the regulatory standards prevailing when it was constructed, provided that the relevant feature gives rise to a risk to the safety of people arising from the spread of fire. Equally, the fact that a feature was once regarded as acceptable industry practice would not prevent it from constituting a defect if it creates such a risk.

86. R1-4 contended for a different and more conventional analysis. Their case was that it is first necessary to identify a defect before considering whether that defect gives rise to a building safety risk. In substance, they argued that the legislation contemplates two distinct concepts – the existence of a defect and the consequences of that defect – and that the Tribunal should not collapse those stages into a single enquiry. R1-4 also placed significant weight upon the regulatory context in which the buildings were designed and constructed. They contended that a feature should not readily be characterised as defective where it complied with the Building Regulations, Approved Document B, or accepted fire-engineering practice applicable at the time of construction. In their submission, later changes in professional understanding, guidance, or risk appetite do not retrospectively convert a previously acceptable design feature into a defect. They further argued that a defect should not be equated with the mere existence of combustible materials or with every departure from modern guidance, but that the concept of defect imports some objective deficiency in

the design, construction or performance of the building, and that the assessment requires consideration of the building as a whole, including the extent to which the feature actually compromises fire performance. A feature that presents only a theoretical or tolerable level of risk, particularly when viewed in the context of the building's overall fire strategy, was said not necessarily to constitute a defect at all.

87. Accordingly, the Applicant's position was that the Tribunal should focus directly upon whether the matters complained of create a building safety risk, because a matter that causes such a risk is inherently defective. R1-4's position was that a prior and distinct inquiry is required into whether there is, in fact, a defect, informed by the regulatory standards, professional practice and fire-engineering knowledge applicable at the time the building was constructed.

88. In our view, the assessment of whether any particular feature of a building constitutes a relevant defect does first require the identification of a "defect": that much seems apparent from the plain wording of section 120. To determine whether that defect is a "relevant defect", however, it is then necessary to go on to consider (a) whether it arises as a result of anything done/not done, or used/not used, in connection with relevant works; and (b) if so, whether it causes a building safety risk.

89. Nevertheless, "defect" is a broad concept, which is apt to include any deficiency in a building assessed by reference to current building standards. A feature which does not comply with the current Building Regulations or Approved Document B, for example, may fairly be described as defective, even if it complied with the then current standards at the time of the building's construction or conversion (and to this extent we accept the Applicant's submissions). We do not accept R1-4's contention that the question whether a feature constitutes a defect for this purpose necessitates any consideration of the risk it poses; and in particular, of the "tolerability" of any such risk.

90. Nor do we accept R1-4's contention that the degree, or tolerability, of risk posed by a defect is relevant to the question of whether it causes a building safety risk. The defect in question must plainly cause a risk to the safety of people in or about the building arising from the spread of fire or building collapse. However, the argument that the degree of risk is relevant to the definition is very hard to maintain in the face of previous authority, including *Canary Riverside*, and *Edgewater (Stevenage)*, in particular, in which Edwin Johnson J came to the following conclusion at [253]:

> "In my view the reference to "a risk" in Section 120(5) means what it says. It refers to any risk, subject to the point that the relevant risk will only qualify as a building safety risk if it satisfies all the other conditions, which I have identified above, for the risk to qualify as a building safety risk. The reference to "a risk" does not refer to any particular level of risk and is not gradated. It refers to any risk."

91. R1-4 submitted that this conclusion was wrong and that neither *Edgewater (Stevenage)* nor *Canary Riverside* should be followed in this regard. Whilst *Canary Riverside*, as a decision of the FTT, is not binding authority, *Edgewater*

(Stevenage) clearly is binding. Although R1-4 identified, correctly, that the above comments of the President of the Lands Chamber were *obiter dicta*, and that this aspect of the appeal was acknowledged to be "academic" and "not fully argued", the President also noted that all parties had asked him to address the issue "with a view to giving guidance to other tribunals on the question of what constitutes a building safety risk". His conclusion was clearly offered with a view to providing such guidance, and is thus highly persuasive. In any event, and in our respectful opinion, the President's conclusion was entirely correct.

92. It was submitted on behalf of R1-4 that this broad interpretation of "building safety risk" opens the door to unnecessary and disproportionate remediation being funded at the expense of the Respondents. We disagree: as R1-4 themselves acknowledged, *Edgewater (Stevenage)* also confirms that the level of risk remains relevant at the next stage — namely, what remediation is actually required in response to a relevant defect. Edwin Johnson J stated at [247] that:

> "the level of risk posed by the relevant building safety risk will, or at least may be a relevant factor in the decision of the FTT as to what works are required."

93. The *Canary Riverside* decision reached a similar conclusion, holding that a tribunal may decide it is "not just and equitable to make such an order in respect of costs incurred in remedying a relevant defect where it considers those costs were unnecessarily incurred".

Fire-safety engineering expert evidence – methodological approach to identifying relevant defects

94. The Tribunal had the benefit of extensive expert evidence in the field of fire-safety engineering, both in the form of expert reports concerning the Buildings, prepared for the purpose of these proceedings, and also by way of oral evidence given by the experts. As already mentioned, the fire-safety expert appointed by the Applicant was Jamie Davis of PartB Group[11], and the fire-safety expert appointed by R1-4 was Lauren Vice of H + H Fire.

95. Both experts had prepared their reports on the basis of desk-based reviews focusing on the remediation histories of the Buildings. This is perhaps unsurprising given that, with the exception of the ongoing works to Chips, all remediation works were substantially complete before the experts were instructed in these proceedings. Mr Davis told us that he had not visited any of the Buildings himself until the day before he started to give his oral evidence. So, neither expert had carried out their own intrusive or non-intrusive investigations, although Ms Vice had visited the Buildings on two occasions during 2025 (albeit at times when the remediation works were already substantially complete). In formulating their opinions, the experts were therefore dependent on the documentary record, which included:

[11] Al Brown had originally been appointed as the Applicant's fire-safety expert and, together with Ms Vice, he was one of the authors of the February 2025 Joint Statement mentioned earlier. However, it was Mr Davis who subsequently authored detailed reports relating to the Buildings on behalf of the Applicant.

- Historic design information and construction information relating to the Buildings, including drawings, specifications, planning and Building Regulations material;

- Investigatory reports prepared by others, including façade investigation surveys undertaken by Bailey Wilson Construction & Property Consultants (BWP); fire risk assessments; reports and design notes prepared by Design Fire Consultants (DFC); and information concerning existing materials and external wall assemblies;

- BSF application material, associated reports and correspondence; and

- Product literature, and regulatory and technical guidance spanning the original construction periods, the remediation period and present-day standards.

96. The resulting reports of the two fire-safety experts reveal marked differences, not only in the extent to which they were willing to rely on the available documentary evidence, but also between their methodological approaches to identifying relevant defects. At a high level, these differences were less about the identification of particular physical features of the Buildings and more about the analytical framework they used to decide whether those features amounted to "relevant defects".

97. Mr Davis exhibited a comparatively high level of confidence in the documentary record. Even though he had not personally inspected the Buildings before completing his reports, he regarded the available investigation reports and project documentation, when supplemented with his experience and technical understanding of materials, systems and fire engineering, as providing a sufficiently reliable basis for identifying relevant defects and assessing risk. Mr Davis largely accepted the investigatory material as capable of supporting conclusions about the existence and significance of defects.

98. Mr Davis therefore approached the exercise in relation to each Building by reviewing the documentary material to identify physical defects, deficiencies and non-compliances within the external wall systems and then asking whether those matters created pathways by which fire could spread and thereby cause a building safety risk. He examined the alleged defects, the evidence for them, their compliance with the functional requirements of the Building Regulations and Approved Document B, and the hazards flowing from those defects. Nevertheless, Mr Davis stated that compliance with contemporaneous building standards was not used as the sole benchmark. Instead, he also focussed on the actual fire-safety consequences of the design and construction choices, including combustible materials, cavities, cavity barriers and compartmentation measures to conclude that there was sufficient evidence of defects and deficiencies in the external walls and that those defects were causative of risk conditions meeting the statutory concept of a building safety risk. In methodological terms, therefore, Mr Davis proceeded broadly by identifying a defect, deficiency or non-compliance; assessing the fire-spread mechanism created by it; and assessing whether it created a building safety risk

(in which case it constituted a relevant defect). Mr Davis's methodology placed substantial weight on defects in cavity barriers, fire-stopping, combustible components, compartmentation interfaces and departures from expected construction standards. If those defects created fire-spread pathways, he tended to regard them as relevant defects.

99. In contrast, Ms Vice adopted a much more sceptical stance to the documentary evidence, repeatedly questioning its sufficiency to demonstrate that observed conditions were systemic across an entire Building, or that particular features constituted relevant defects. She noted, for example, that conclusions were often based on limited intrusive investigations, supported by inadequate photographic evidence. Ms Vice also adopted a very different stance in methodological terms: her report started from the proposition that, to identify a relevant defect, a distinction needs to be made between the mere presence of combustible materials or technical departures from guidance, and genuine safety risks that justify remediation. She placed particular reliance on professional judgment and "holistic assessment of risk", as well as building-specific factors such as escape strategy, compartmentation, suppression systems and whether occupants could still evacuate safely. The recurrent theme of Ms Vice's report was that combustible materials do not automatically constitute relevant defects and that the critical question is whether the alleged condition creates fire spread that would prejudice means of escape and life safety. Her report did not acknowledge the existence of relevant defects in any of the Buildings.

100. Put shortly, Mr Davis's methodology was predominantly defect-centred, whereas Ms Vice's methodology was predominantly risk-centred and outcome-focussed. Mr Davis treated defects and deficiencies as the starting point of the analysis; Ms Vice treated actual safety risk as the starting point and was reluctant to concede the existence of a relevant defect unless a material life-safety consequence could be demonstrated. However, the evidential disagreement between the experts was not merely about fire engineering: it was also about what factual conclusions can properly be drawn from a necessarily incomplete historic record and from intrusive investigations carried out on only limited parts of large buildings.

Challenge and submissions

101. In cross-examination, Mr Davis accepted that his report was, in substance, a desktop study founded on existing investigations, photographs, drawings and reports prepared by others. His view was that such an approach was largely unavoidable given the state of the Buildings and the historical nature of the matters being investigated. In several areas Mr Davis accepted that he was relying on investigation reports, DFC reports, material produced by Thomasons (building surveyors engaged by the building management companies) and other historic records. In some instances, he accepted that particular observations reproduced in his report were effectively repetitions of findings made by others rather than matters he had independently verified. For example, when pressed on cavity barrier findings and other construction details, he acknowledged that he was relying on the investigation reports available to him.

102. On behalf of R1-4, Mr Dennys KC suggested that the evidence base was inadequate to support the opinions Mr Davis had formed, by suggesting that (across several Buildings) the available reports were based on limited inspection openings and locations, with limited photographic evidence in support of conclusions about widespread defects which could not safely be drawn from sparse sampling. However, Mr Davis defended his approach by reference to his experience of investigating buildings. He accepted that, in an ideal forensic investigation, more opening-up and more sampling locations would normally be desirable. However, he maintained that where defects are found, it is uncommon for those defects to be wholly isolated and unrepresentative. He therefore regarded it as professionally legitimate to draw broader conclusions from the available evidence. Mr Davis's position was broadly that further physical investigation was largely impossible because the original construction had already been removed or concealed by remediation; reliance on historic reports, photographs, drawings and investigation records was therefore unavoidable; expert fire engineers routinely have to form opinions from such material; the available evidence revealed enough about the existing constructions and fire-spread mechanisms to permit reliable conclusions; and where limitations existed, they did not prevent him from forming an expert opinion on building safety risk and relevant defects. The overall thrust of Mr Davis's position, therefore, was not that the evidence base was perfect, but that it was sufficient.

103. Mr Dennys KC submitted that conclusions about extensive or building-wide defects could not safely be inferred from the limited evidence available, and so the Applicant had failed to discharge the burden of proving the existence of relevant defects. He submitted that the experts on both sides had been placed in difficulty by incomplete and evolving disclosure, but that this was particularly important in the case of Mr Davis because he was offering retrospective opinions about Buildings that had already been remediated. Accordingly, his conclusions depended heavily upon documentary reconstructions of the original condition rather than direct observation. Expert opinion should be treated with caution where it relied on third-party reports, and a distinction should be drawn between evidence of what a particular report said, and proof that the underlying condition existed throughout the Building.

104. The Applicant's challenge to the methodology adopted by Ms Vice was, in many ways, a mirror image of these submissions: where Mr Davis had been criticised for being too willing to draw conclusions from the available documentary record, Ms Vice was criticised for being unwilling to draw conclusions from it and for setting the threshold for proving a relevant defect too high. On behalf of the Applicant, Ms Bretherton KC repeatedly suggested that Ms Vice had adopted an excessively sceptical and restrictive methodology which prevented her from recognising relevant defects, even where there was substantial documentary evidence that they existed. In particular, Ms Vice was challenged on her assertions that she could not safely accept findings recorded in historic reports unless she could independently verify them. A clear example arose in relation to Moho and the BWP investigations prior to remediation. Ms Vice was taken to intrusive survey reports recording absent cavity barriers and compartmentation defects; subsequent reports recording multiple inspections;

and DFC reports drawing conclusions from those investigations. Ms Vice responded that she had not seen all the underlying inspection records; she could not be sure inspections had been carried out in the correct locations; and she could not guarantee the conclusions drawn by others. Even when confronted with a report expressly stating that multiple intrusive surveys had been undertaken, she maintained reservations about relying on the statement without seeing the underlying material herself. The challenge to Ms Vice's stance was, in effect: if reputable investigators had repeatedly recorded defects, and no positive evidence contradicts them, why was that not sufficient to support a conclusion?

105. The overall thrust of Ms Bretherton KC's submissions on these points was that Mr Davis had done what an expert is supposed to do – evaluate incomplete material and reach conclusions – whereas Ms Vice had too often responded to the same material by declining to reach conclusions at all.

Alleged defects – common themes and general conclusions

106. We consider relevant defects at a building-specific level in Appendices C to G. However, standing back from the detail, it is apparent that the Applicant alleged three principal categories of defect across all of the Buildings:

- The incorporation of combustible materials within the external wall systems;
- The absence, inadequacy or defective installation of cavity barriers and fire-stopping; and
- Defective compartmentation and detailing, creating routes for vertical and horizontal fire spread.

107. All of these were alleged to constitute relevant defects on the basis that they resulted in an increased risk of the spread of fire through or over the external walls and between compartments.

108. The widespread use of combustible materials within the façade systems of the Buildings was a central theme in Mr Davis's report and, indeed, in the Applicant's case as to the existence of relevant defects. Across all the Buildings, Mr Davis identified various forms of combustible insulation, including EPS, PIR, Kingspan K15 and other foam-based insulation products. It was contended that these materials were unsuitable for use in high-rise external wall systems and did not satisfy the limited-combustibility requirements applicable under the relevant building control regime. The extensive use of combustible cladding and façade materials was alleged, including timber cladding; HPL products (such as Trespa and Prodema); combustible sheathing boards, OSB and plywood products; timber battens and other combustible sub-structures, all of which were said to contribute significant fuel loads and create a mechanism for rapid fire spread over the external envelope of the Building.

109. A second recurring theme of the Applicant's case was the alleged absence or inadequacy of cavity barriers, with defects including missing horizontal and/or vertical cavity barriers; missing or defective barriers around openings; incorrect products being used in locations for which they were not intended; poor installation, inadequate fixing or discontinuity of cavity barriers. Mr Davis treated these failures as particularly significant because they undermined the compartmentation strategy of the Buildings and permitted concealed fire spread within façade cavities. Closely related were allegations of defective fire-stopping at interfaces between the façade and the structure, including slab edges, columns, service penetrations, window surrounds and other junctions.

110. Thirdly, wider failings in compartmentation were alleged, which were said to allow fire to bypass intended fire-resisting elements and to spread between compartments. These included failures to maintain effective compartmentation at the junctions between compartment walls or floors and the external wall construction; inadequate treatment of service penetrations; and defects associated with modular, pod or SIPS construction.

111. Certain of these defect types were alleged to be more prominent in particular Buildings:

- The Three Towers – Systemic issues involving combustible insulation, combustible façade materials and inadequate cavity barriers were alleged.

- Chips – The focus was said to be on combustible HPL cladding, Kingspan K15 insulation and cavity barrier deficiencies.

- The Box Works – The Applicant identified zinc-clad wall systems incorporating combustible OSB sheathing and insulation, together with deficiencies in cavity barrier provision and compartmentation.

- Moho – The allegations centred on EPS insulation within the rendered wall system, timber façade elements, cavity barrier failures and wider compartmentation deficiencies.

- Burton Place – The Applicant pointed to the interaction of timber cladding, combustible insulation, SIPs construction and inadequate cavity barrier provisions.

112. Finally, a further recurrent theme was that opening-up the external wall systems revealed additional defects requiring remediation. These included corrosion or deterioration of structural elements; the uncovering of previously concealed voids apparently lacking appropriate cavity barriers or fire-stopping; defective fire protection to structural members; and the need to remove and replace windows, doors, trims and other components to facilitate remediation and achieve compliance. The Applicant contended that such works were consequential upon the primary façade defects and that the associated costs were incurred "in connection with" relevant defects for the purposes of section 124(2) of the BSA. We return to that issue below.

113. Prior to the hearing, the parties' experts had developed a detailed (and lengthy) Scott Schedule to capture their respective positions on relevant defects and remediation on a building-by-building basis. This proved to be a useful tool, both for reference purposes during the hearing and also to facilitate some narrowing of the issues in dispute. As we have already noted, by the conclusion of the hearing, R1-4 had conceded the existence of many of the alleged relevant defects, notwithstanding their more restrictive definition of that concept. Significant issues remained unresolved in this regard, however, as discussed in Appendices C to G. Nevertheless, the primary focus of R1-4's case had shifted to an attack on the reasonableness of the remediation response.

114. On a general level, and viewed through the lens of the correct legal test for identifying building safety risks, it seems readily apparent that, if the defects alleged by the Applicant are established on the facts, they constitute relevant defects: the defects arose from things done/not done, or used/not used in connection with relevant works, and they plainly caused building safety risks. R1-4 were wrong, in our view, to factor into this stage of the enquiry a test as to tolerability of risk.

115. We are satisfied that the principal defects relied upon by the Applicant, and identified in the building-specific findings in Appendices C to G, have been established as matters of fact. This is because we are also satisfied that Mr Davis's methodology was appropriate in the circumstances and, in particular, that it was reasonable for him to rely on the findings about the existence of defects set out in existing reports prepared by others, including fire engineering reports, façade investigation reports and façade engineering assessments. Those materials – prepared principally by BWP, DFC and Thomasons, as well as specialist façade engineers – were provided by appropriately qualified professionals for the purpose of informing decisions about remediation of the Buildings. They were also scrutinised as part of the BSF funding application process. As such, their findings may reasonably be relied upon in the absence of evidence casting doubt upon them. R1-4 did not produce such evidence and thus Ms Vice's approach of declining to accept the findings in such reports unless they were capable of independent verification was, in our view, unreasonable. Such reports clearly did have their limitations, of course, and we have taken this into account. For example, Mr Davis accepted that the underlying investigations did not involve opening-up every part of every Building. However, he explained that this is inherent in the nature of the exercise. Large residential buildings cannot realistically be stripped back in their entirety merely to establish whether defects exist. Instead, investigators examine representative locations and use professional judgment to assess what those findings reveal about the wider construction. His position was therefore not that the investigations were exhaustive, but that they were sufficient (considered alongside design information, photographs, technical reports and other contemporaneous records) to permit reliable conclusions. We accept Mr Davis's evidence about this, and we also accept his view that, where intrusive inspection reveals construction defects, those defects are often not unique to the precise location opened up: discovery of a defect at a number of locations may reasonably support an inference that the same approach was employed elsewhere.

116. It is also apparent that, having identified building defects, Mr Davis applied the correct legal test to assess whether they caused building safety risks and thus constituted relevant defects. Given that Mr Davis's conclusions were evidence-based and informed by his own fire-safety engineering expertise, standing up well to challenge on cross-examination, we therefore found them to be reliable.

117. We found Ms Vice's evidence to be more problematic – not least because it proceeded from a flawed notion of what constitutes a building safety risk. The fact that Ms Vice regarded the critical issue as whether fire spread would prejudice occupants' means of escape also made her formulation of building safety risk difficult to apply in practice. In relation to particular alleged defects, it was not always clear whether she considered that the defect had not been proved, that it existed but did not create a building safety risk, that it created a building safety risk which could be adequately managed by a different remedial strategy, or merely that the available evidence was insufficient to enable a conclusion to be reached. As submitted on behalf of the Applicant, this lack of distinction reduced the clarity and usefulness of Ms Vice's assessment of whether the alleged defects gave rise to building safety risks. More broadly, because significant parts of Ms Vice's analysis proceeded from a conception of relevant defects and building safety risks which we have found to be legally incorrect, and because she was frequently unwilling to draw conclusions from contemporaneous material unless it was capable of a level of independent verification which we consider unrealistic in the circumstances, we approached her conclusions with caution. It is important to distinguish between the question whether a relevant defect existed and the question whether the remediation response to that defect was reasonable. We consider that the tendency of Ms Vice's evidence to conflate those distinct enquiries materially reduced the assistance it was able to provide on a number of the disputed issues.

REMEDIATION WORKS

The remediation schemes

118. The various schemes of works carried out to the Buildings were directed towards removing combustible materials from the external wall systems, restoring compartmentation, and constructing replacement façades which complied with contemporary fire-safety requirements. These were comprehensive façade-replacement schemes rather than limited repair works.

119. We discuss the remediation works on a building-by-building basis in Appendices C to G. However, the remediation projects shared some common features which it is helpful to identify in general terms to gain a broad overview of what remediation of the Buildings involved.

120. The dominant feature of the remediation schemes – and the principal means by which the Buildings were brought into conformity with current fire-safety standards – was the removal of existing external wall systems and their replacement with non-combustible alternatives. This commonly involved the removal of combustible cladding systems, including timber and HPL rainscreen products; removal of combustible insulation, sheathing boards, battens and supports; and the installation of replacement wall build-ups using A1 or A2

rated materials, typically incorporating mineral wool insulation and non-combustible cladding systems.

121. A second major workstream involved the restoration of the intended compartmentation strategy of the Buildings by the creation or reinstatement of fire compartmentation within the façade systems. This included installation of new horizontal and vertical cavity barriers and provision of cavity barriers around windows, doors and other openings, and fire-stopping measures.

122. A further recurring theme concerned works to ancillary façade elements which were themselves combustible or which obstructed remediation of other relevant defects. Such works included the removal and replacement of timber decking, timber balcony screens, timber louvres and similar architectural features, as well as modifications to soffits, trims and façade details associated with combustible materials.

123. Another common feature was the removal and replacement of windows, doors and associated façade components. These items frequently became affected by the process of dismantling and reconstructing the external wall systems. A further feature of the projects was that opening-up works often revealed previously concealed conditions, including voids, compartmentation deficiencies, corrosion, structural issues and service-related matters, which then required consideration during the delivery of the works.

Scope of R1-4's challenge to the works undertaken

124. There was no dispute as to what works had actually been undertaken. Rather, the dispute concerned whether the adopted schemes represented a reasonable response to the relevant defects and associated building safety risks, and the extent to which R1-4 were entitled to challenge that question after the event. R1-4 sought to portray the schemes as products of an exceptionally cautious funding and regulatory environment which led to extensive, expensive and insufficiently interrogated remediation. The Applicant, on the other hand, sought to portray them as professionally designed responses to serious life-safety concerns, developed through multiple layers of expert scrutiny, and falling comfortably within the range of reasonable choices available at the time.

125. A preliminary issue concerned the extent to which the Respondents were entitled to dispute the reasonableness of the remediation response. Whilst the Applicant did not contend that the Respondents were entirely precluded from challenging the remediation schemes, it was argued that the scope of any such challenge should be substantially constrained. Ms Bretherton KC asserted that the Respondents had "failed to do the right thing" by not remediating the Buildings themselves (or by not funding the remediation). She argued, in effect, that a consequence of that alleged failure was that others had been forced to make the necessary decisions about remediation and that the Respondents should therefore face a more restricted ability to criticise those decisions retrospectively. Indeed, the Applicant advanced the following argument in its statement of case:

> "[W]here sums were incurred on the basis of expert advice, such sums will always be reasonably incurred unless that advice was negligent. Further, where it is taxpayer sums incurred, as a result of funding granted by the government, there is to be a presumption that such sums will always be reasonably incurred unless there are circumstances where particular work was so unreasonable that the hierarchy of responsibility in which the taxpayer is at the bottom is to be displaced. Such cases will be extremely rare when works have been carried out, and are likely to be limited to circumstances of bad faith or fraud, as to find otherwise would be inviting the Tribunal to assess the reasonableness of Government policy in funding works, which would equate to a form of judicial review which is not appropriate for this Tribunal to carry out and or which would extend beyond its jurisdiction."

126. We consider this to be overstating the position in three respects. First, whilst we agree that the appropriate test is whether the remediation response was reasonable in the circumstances, the fact that the response adopted was chosen on the basis of expert advice is no more than an indicator of reasonableness (albeit a significant indicator). Secondly, we do not consider there to be a presumption of reasonableness merely because the works in question are funded by the public purse. If a given remediation response was unreasonable, then it was unreasonable irrespective of who funded it. Thirdly, in assessing whether grant-funded works were reasonable, a tribunal is not assessing the reasonableness of underlying Government funding policy: it is simply assessing whether a particular scheme of works represented a reasonable response to a particular building safety situation.

127. Nevertheless, an application for an RCO is not a conventional common law claim for damages in which questions about mitigation of loss and the cheapest remedial solution are likely to come to the fore. We accept the thrust of the Applicant's argument which, in essence, was that the Tribunal was not being asked to identify the best, cheapest or optimal remediation scheme. Rather, the question was whether the schemes actually adopted fell within the range of responses that a reasonable and competent professional could have selected when addressing the defects and risks identified at the time. There is an onus upon an applicant for an RCO to evidence reasonableness but, by analogy with the position relating to leasehold service charges expounded in *Plough Investments v Manchester City Council*[12], the existence of a cheaper alternative will not render the adopted scheme unreasonable: where more than one reasonable course is available, the decision-maker is not obliged to choose the least expensive option merely because another party may later be required to bear the cost.

128. The Applicant contended that it had discharged the initial burden of proving that all the remediation schemes fell within the range of reasonable responses to the relevant defects which existed in the Buildings. We agree: this flows from the fact that the schemes were designed and delivered following extensive contemporaneous professional input and scrutiny. In addition, Mr Davis gave expert evidence that the remediation schemes were appropriate: his starting point was that each scheme was targeted at the identified relevant defects and represented a logical and coherent response to those defects which, in his

[12] [1989] 1 EGLR 244.

opinion, presented risks justifying substantial interventions of the kind adopted.

129. It was therefore for the Respondents to identify evidence capable of displacing the Applicant's *prima facie* case that the remedial schemes were reasonable. R1-4 sought to do this by highlighting that the remediation schemes were developed during a period of heightened regulatory concern following the Grenfell Tower fire and were heavily influenced by the requirements of Government guidance and the BSF. They contended that this led to an approach which favoured wholesale removal of combustible materials and comprehensive façade replacement schemes, rather than a proportionate assessment of the risks presented by each Building. This was said to be apparent from a consideration of the Buildings' remediation history: it was asserted that, before BSF funding was an issue, more proportionate and less expensive risk-focussed remediation schemes were advanced, but that when it came to BSF funding, this risk-based analysis was abandoned in favour of conformity with funding guidance. This adherence to the BSF guidance was said to have promoted over-remediation and unnecessary works.

130. R1-4 argued that the mere presence of combustible materials did not necessarily justify extensive remediation and that insufficient attention had been paid to the nature and severity of the actual risks said to arise. In their submission, a proper risk-based assessment could have led to less extensive interventions in a number of cases. They relied upon alternatives such as localised remediation, encapsulation, retention of existing materials with appropriate management measures, and the introduction of additional fire-safety measures including sprinklers. Their case was that potentially effective alternatives were either rejected without adequate analysis or not meaningfully explored at all.

131. A further strand of R1-4's challenge concerned the scope of the works which were ultimately undertaken. They submitted that a substantial proportion of those works related not to the remediation of relevant defects, but to consequential works, replacement of components which had reached the end of their useful life, improvements to existing buildings, or other items which amounted to betterment. They argued that once substantial façade replacement projects were underway, the distinction between remediation and wider refurbishment became blurred, resulting in expenditure which could not properly be attributed to the relevant defects relied upon by the Applicant.

Alleged over-remediation

132. We have already made reference to the Building Regulations and also to Approved Document B. However, to understand fully the context in which R1-4 alleged over-remediation of the Buildings, it is necessary to set out more background detail. It is also necessary to explain the evolving regime of building-safety assessment following the Grenfell Tower fire.

133. The Building Regulations – made pursuant to the Building Act 1984 – have been through various iterations. The version applicable when the Buildings were remediated was the Building Regulations 2010. However, the version in

force when six of the Buildings were constructed/converted was the Building Regulations 2000. The Box Works was built pursuant to the Building Regulations 1991. All of them require building work to be carried out with proper materials and in a workmanlike way[13], and in compliance with the applicable requirements in Schedule 1[14]. These are functional outcomes which must be achieved where building work is carried out, and include Part B in respect of fire. However, these requirements do not require anything to be done except for the purpose of securing reasonable standards of health and safety for persons in or about buildings[15].

134. For present purposes, the relevant requirements in Part B of Schedule 1 are those at B3(3), B3(4) and B4(1):

> *Internal fire spread (structure)*
>
> *B3.*
> *...*
> *(3) To inhibit the spread of fire within the building, it shall be sub-divided with fire-resisting construction to an extent appropriate to the size and intended use of the building.*
>
> *(4) The building shall be designed and constructed so that the unseen spread of fire and smoke within concealed spaces in its structure and fabric is inhibited.*
>
> *External fire spread*
> *B4. –*
>
> *(1) The external walls of the building shall adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building.*

135. The Building Regulations 2010 have been amended[16], so that (subject to certain exceptions) regulation 7(2) now provides:

> *building work shall be carried out so that materials which become part of an external wall, or specified attachment, of a relevant building are of European Classification A2-s1, d0 or A1 (classified in accordance with the reaction to fire classification)*

136. The Building Regulations are supported by 'Approved Documents'. These are promulgated pursuant to section 6 of the Building Act 1984, which confirms that they are provided for the purpose of providing practical guidance with respect to the requirements of any provision of building regulations. The Approved Documents are intended to provide guidance for some of the more common building situations. However, it is acknowledged that there may well

[13] Regulation 7.
[14] Regulation 4.
[15] Regulation 8.
[16] See Building (Amendment) Regulations 2018 and Building (Amendment) (England) Regulations 2022.

be alternative ways of achieving compliance with the requirements in Schedule 1, and that adopting such alternatives is permissible. Approved Document B deals with fire-safety.

137. Following the Grenfell Tower fire, the Government issued a series of advice notes for building managers, which were replaced on 20 January 2020 by the Consolidated Advice Note (CAN[17]). The most relevant advice note for present purposes was Advice Note 14[18] on external wall systems not incorporating ACM, which recommended seeking professional advice and considering remediation but which stated that "the clearest way to ensure safety is to remove unsafe materials". It was nevertheless soon acknowledged that such measures may not be necessary if a building met the functional requirements of the Building Regulations[19].

138. The CAN was withdrawn in January 2022 and replaced by PAS 9980, which expressly criticised the practice of judging existing buildings against strict compliance with current ADB guidance, describing it as "clearly inappropriate" since those standards concern new buildings. PAS 9980 instead mandated a structured risk assessment (FRAEW) to determine whether external wall components needed replacement or whether shortcomings such as absent cavity barriers could be addressed.

139. Annex A to the BSF guidance[20] set out eligibility criteria for grant funding which, according to R1-4, took a fundamentally different approach from the CAN and PAS 9980. The guidance mandated the removal of all combustible material as a condition of funding eligibility:

- Any cladding of Class C-s1,d0 or worse should not be present on a high-rise residential building;
- Where any combustible insulation was present, replacement was a fund requirement; and
- Any combustible sheathing boards within the affected area had to be replaced.

140. R1-4 submitted that this BSF guidance influenced the choice of remedial schemes for each of the Buildings and that the decision to fund the removal of all combustible materials, whether or not this went beyond what was necessary to make any risk to life tolerable, meant that the resulting costs sit outside the scope of what should be recoverable by means of an RCO. In essence, R1-4 challenged the reasonableness of the BSF's funding criteria for allegedly promoting over-remediation by abandoning the risk-based approach endorsed by the CAN and later PAS 9980, and instead imposing a blanket requirement

[17] Advice for Building Owners of Multi-Storey, Multi-Occupied Residential Buildings (January 2020).
[18] December 2018.
[19] See Advice for Building Owners of Multi-Storey, Multi-Occupied Residential Buildings, Supplementary Note (November 2020).
[20] Building Safety Fund for the remediation of non-ACM Cladding Systems: Annex A – Technical information (May 2020).

to remove all combustible material, regardless of whether it posed a building safety risk.

Grant-funding and alleged over-remediation

141. In support of their contention that the BSF grant-funding criteria had both facilitated and encouraged significant over-remediation of the Buildings, R1-4 referred us to a National Audit Office report[21] which identified that, on a general level, the Government had been funding unnecessary works. The report noted that, by January 2022, "MHCLG was concerned that an overly cautious approach to building safety meant that too many buildings were being declared as unsafe and undergoing "unnecessary and costly remediation work"."[22] and that tight application deadlines, designed to achieve rapid remediation progress, had also incentivised bad procurement practices and weakened taxpayer protection.[23] By August 2024, MHCLG had spent £2.3 billion on building remediation. R1-4's case was that this exemplified an approach to grant-funding which failed to consider the question of risk and appropriateness but instead took a rigid approach that required (and funded) unnecessary remediation works.

142. It is not for this Tribunal to make findings in general terms about the consequences of Government policy in relation to BSF funding. Our enquiry is instead limited to a consideration of whether the available evidence demonstrates that any of the particular works undertaken to remediate the Buildings were unnecessary or unreasonable. R1-4's case was that the evidence did indeed demonstrate this, and the remediation of The Box Works was given as a particular example: Mr Dennys KC submitted that the whole exterior of this Building was ultimately remediated notwithstanding that the evidence only demonstrated issues in particular locations.

143. Additionally, in relation to Moho, R1-4 relied on the scale of post-approval cost increases as indicating that the scope of the scheme expanded significantly after funding approval. Mr Dennys KC noted that the original eligible costs were just under £10 million but that subsequent approved variations added more than £5 million. The argument was that some works proceeded because Government funding could be obtained rather than because the works were necessary to address a genuine fire-safety risk. Again relying on The Box Works, Mr Dennys KC highlighted that no comparable remediation had been undertaken internally to areas of cladding of similar composition to that found upon the external walls. It was submitted that this suggested those responsible were insufficiently concerned about the relevant risk to justify interior works, whilst exterior works were nevertheless carried out because funding was available.

144. The building-specific evidence did not support R1-4's contention that the availability of BSF funding had caused the projects to expand beyond what was reasonably required. We discuss that evidence in the relevant Appendices to this Decision. At The Box Works, the existence of combustible insulation and

[21] "Dangerous Cladding: the government's remediation portfolio" NAO (4 November 2024).
[22] At paragraph 1.11.
[23] Paragraph 3.5.

timber-based components, together with the uncertainty surrounding concealed cavity barriers, made the remediation of the zinc-clad wall system as a whole a coherent and proportionate response, notwithstanding DFC's earlier assessment that only some configurations required intervention. At Moho, the substantial increase in scope followed the discovery, during opening-up, of inadequately protected voids, missing compartmentation and service penetrations behind the risers. The contemporaneous evidence showed that less intrusive solutions were actively considered but that no tested and practicable means was found of installing the necessary floor-level barriers while retaining the risers and services in place. At Burton Place, similarly, the project expanded as successive investigations revealed that the defects extended beyond the deteriorating timber cladding to the combustible supporting construction, ineffective cavity barriers, integrated windows and doors, balcony elements and the previously concealed Talbot Mill interface. Those developments reflected an improving understanding of the Buildings and their construction, rather than the abandonment of a risk-based approach in favour of works undertaken merely because public funding was available.

145. The remaining schemes point in the same direction. At the Three Towers, the retention and encapsulation of the SIPs demonstrated that the project did not proceed upon a blanket assumption that every combustible component had to be removed. At Chips, even the replacement lettering, which was not itself a relevant defect and required particular scrutiny because of its unusual cost and principally aesthetic purpose, was not shown to fall outside the range of reasonable responses: alternatives had been considered, but R1-4 produced no developed solution shown to satisfy the relevant architectural, planning and fire-performance requirements at materially lower cost. More generally, R1-4's criticisms required careful scrutiny of both the scope and proportionality of the schemes ultimately adopted. We consider separately below their contentions that particular items constituted consequential works, maintenance or betterment. However, for the reasons explained in Appendices C - G, those criticisms do not establish that any of the remediation schemes fell outside the range of reasonable professional responses or that an identified alternative scheme would have addressed the relevant defects to an equivalent standard.

146. Mr Davis did not accept that the introduction of PAS 9980 to replace the CAN would have caused fire engineers to change their approach to external wall assessment and, whilst he acknowledged that the change in guidance may have reduced remediation in some cases, he did not believe it would have done so in respect of the Buildings. Nevertheless, a theme repeatedly put to Mr Davis in cross-examination was that contemporaneous reports often identified more limited remediation options, whereas the schemes ultimately taken forward and funded through the BSF involved wholesale replacement works. While Mr Davis often accepted limitations in the contemporaneous documentation, he generally resisted the conclusion that the schemes were therefore excessive. He consistently maintained that combustible materials in these Buildings presented a genuine fire-safety concern justifying their removal and replacement. He also maintained that, once a wall system had been opened up and combustible elements removed, the requirements of regulation 7(2) of the Building Regulations meant that historic materials often could not simply be reinstated. Mr Davis's evidence was that, although less expensive approaches

to remediation may theoretically have existed, wholesale replacement remained within the range of reasonable fire-engineering responses to the risks presented by the Buildings.

147. We do not accept R1-4's broader contention that the remediation projects demonstrate a shift from risk-based remediation towards the wholesale removal of combustible materials merely because public funding was available. The building-specific evidence points in the opposite direction. The scope of the schemes evolved principally because intrusive investigations and opening-up works revealed defects, deficiencies and fire-spread mechanisms which had not previously been fully understood. Nor did the projects proceed on the basis that every combustible material required removal irrespective of context. In several instances, the adopted response was directed to the interaction between combustible materials, ineffective cavity barriers, inadequate firebreaks, compartmentation failures and concealed voids. Equally, where retention of existing elements was considered viable, that course was adopted. The evolution of the schemes is therefore better explained by an improving understanding of the Buildings and the defects affecting them than by any abandonment of professional risk assessment in favour of a funding-led approach.

148. We also bear in mind that the proposed schemes, and subsequent variations to them, were subjected to repeated scrutiny by project professionals, contract administrators, cost consultants and the BSF approval process. Whilst such scrutiny is not conclusive proof of reasonableness, it provides significant positive evidence that the works and associated expenditure were carefully examined as the projects developed. Most importantly, although R1-4 identified a number of instances in which different decisions might have been made, they did not establish the existence of any coherent, technically viable and materially cheaper alternative remediation scheme capable of addressing the relevant defects to an equivalent standard. Those criticisms therefore justify scrutiny of the schemes adopted, but they do not demonstrate that the works ultimately undertaken fell outside the range of reasonable professional responses.

149. Ultimately, R1-4's case that the Buildings were over-remediated came up against two insurmountable hurdles. The first was Ms Vice's significant concession in oral evidence that the remediation schemes adopted across the seven Buildings generally fell within the range of opinions that a competent fire engineer could reasonably hold, even where they were more extensive than the approach she herself might have favoured. In relation to Box Works, for example, she accepted that competent fire engineers could reasonably recommend complete removal of combustible panels and insulation, even though she considered that a more limited intervention might have been available. Ms Vice also accepted that she was generally not suggesting that the views reached by Mr Davis or by the contemporaneous fire engineers were views that no reasonable fire-safety expert could reach. Asked whether Mr Davis's opinions fell within the normal range of expert opinion, she answered that "his opinions probably fit within the range" and agreed that they were "within the realms of the reasonable".

150. The principal qualification to those concessions was that Ms Vice considered that, in a number of instances, she had not seen sufficient evidence to justify the particular remediation solution adopted (and we have already considered the reasonableness of this stance). Her disagreements were therefore directed predominantly at the adequacy of the evidential basis for certain decisions, rather than at the proposition that the resulting remediation schemes lay outside the bounds of reasonable professional judgment. Indeed, when asked whether her disagreements stemmed primarily from concerns about the sufficiency of the evidence available to her, she answered that this was "probably true".

151. The second major hurdle was the fact that, to demonstrate that a given remediation scheme went beyond what was reasonable to remediate a Building, R1-4 would have had to show what the lesser/less expensive reasonable scheme would have comprised, and that it would have been a feasible, viable and sufficient alternative to the scheme actually adopted. As has already been explained, there was no admissible evidence which performed this function.

Consequential works and maintenance

152. R1-4 also contended that, as the remediation projects developed, insufficient distinction was maintained between the remediation of relevant defects and the carrying out of consequential works, general maintenance and wider refurbishment. It was submitted that some projects came to encompass windows, doors, balconies, risers, parapets, structural repairs, weatherproofing works and other items which were not themselves relevant defects and which, in some instances, also addressed pre-existing deterioration or maintenance liabilities.

153. We accept that careful scrutiny is required where a remediation project extends beyond the direct treatment of the relevant defects themselves. However, the evidence in relation to the Buildings did not establish that the projects lost sight of that distinction. Rather, it demonstrated that substantial elements of the disputed works were either necessary to remedy the relevant defects effectively or followed as a practical consequence of adopting a reasonable remediation strategy. Thus, at Burton Place, replacement of windows and doors followed from the need to dismantle and reconstruct the external wall system; at Moho, the riser, glazing and associated service works arose from the need to address concealed voids and compartmentation deficiencies; at Chips, various additional works became necessary once the façade had been opened up; and at the Three Towers and The Box Works, a number of further works were required in order to integrate replacement external wall systems with the retained structure and to address conditions revealed during construction. In many instances, these works were not themselves remediating relevant defects. Nevertheless, they were done because the remediation works could not realistically have been undertaken, completed or integrated with the existing Buildings without them.

154. The costs of those works did not fall outside section 124(2) merely because the works did not themselves constitute the direct remediation of a relevant defect. The statutory language encompasses costs incurred "otherwise in connection

with" relevant defects. In our view, that expression is sufficiently broad to include necessary enabling, consequential and integration works undertaken so that the relevant defects could be accessed, removed and effectively remediated, and so that lawful and functional replacement constructions could be provided. The consequential works identified in the Appendices were undertaken for those purposes and therefore had the necessary connection with the relevant defects.

155. We recognise that some components affected by those works had already deteriorated and that expenditure upon them might, in due course, have become necessary in any event. That does not alter the fact that the works were undertaken because the remediation of relevant defects required the removal, replacement, repair or adaptation of those components. Any incidental maintenance benefit resulting from that work does not break the statutory connection between the works and the relevant defects.

Betterment

156. Separately, R1-4 submitted that, even where expenditure was incurred in remedying or in connection with relevant defects, an allowance should be made where the works left the Buildings in a materially improved condition. They relied upon authorities concerning the assessment of damages, particularly *Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd*[24], as support for the proposition that a party ought not to recover the full cost of replacement where the result is that it receives something materially better than what existed before. They argued that several of the Buildings were already suffering from deterioration, ageing components and maintenance liabilities before the remediation projects commenced; that replacement systems frequently offered superior performance, durability and longevity; and that the completed Buildings were, in some respects, superior to their pre-remediation condition. In relation to Burton Place, for example, emphasis was placed on the deteriorating condition of the timber façade before remediation and upon the fact that the completed building was plainly very different from that which existed previously. Similar points were made in relation to aspects of the Moho project and the replacement of the Chips lettering. R1-4 therefore submitted that an allowance should be made to reflect the fact that the remediation projects had, in part, funded improvements, renewal and replacement of elements that would in due course have required expenditure irrespective of any relevant defect.

157. The Applicant responded that the betterment authorities relied upon by R1-4 arise principally in the context of contractual and insurance claims concerned with the proper measure of damages and do not map straightforwardly onto the statutory scheme established by section 124 of the BSA. Reliance was placed upon the fact that an RCO is not a claim for damages but a statutory mechanism concerned with costs incurred in remedying, or otherwise in connection with, relevant defects. The Applicant further submitted that the argument was unsupported by evidence. Neither quantity-surveying expert had undertaken a betterment exercise; no expert identified any appropriate deduction; no

[24] [2020] EWCA Civ 308.

alternative remediation scheme had been proved; and no evidence quantified any financial benefit allegedly obtained by reason of the works. The Applicant accepted that replacement of defective building elements with new compliant systems may incidentally confer advantages which older systems do not possess, but submitted that such consequences are inherent in many remediation projects and do not, without more, demonstrate recoverable betterment.

158. We do not consider it necessary, for the purposes of this Decision, to determine the extent to which principles developed in the law of damages concerning betterment apply to the RCO regime. The fact that expenditure was incurred in connection with relevant defects does not necessarily answer every potential question about betterment, but nor does the incidental improvement of a building establish that the expenditure falls outside section 124(2). Even assuming that such principles are capable of informing the Tribunal's assessment, the evidential foundation for the present argument is absent. We accept that certain works conferred incidental benefits. We also accept that some building elements had deteriorated, that replacement systems frequently performed better than those installed originally, and that the Buildings emerged from remediation in an improved condition in a number of respects. However, those propositions do not of themselves establish that any identifiable part of the expenditure was incurred in order to secure those benefits. Nor should it be overlooked that any such benefits accrued principally to the Buildings and to those with interests in them, rather than to the Secretary of State. The substantial costs under consideration were incurred because relevant defects required remediation and because lawful, functional and compliant replacement solutions then had to be provided. In many instances, those responsible for the remediation had little practical alternative but to replace defective or non-compliant materials with modern systems capable of satisfying contemporary fire-safety requirements, planning constraints and other applicable standards. The advantages relied upon by R1-4 were therefore often an unavoidable consequence of providing a compliant replacement, rather than the objective of the expenditure itself.

159. More fundamentally, R1-4 did not identify, quantify or value any alleged betterment capable of supporting a deduction. No expert evidence was adduced to identify any pecuniary benefit, avoided expenditure or separately chosen improvement for which an allowance should be made. Nor was any evidential basis established upon which the Tribunal could calculate or estimate an appropriate allowance. In essence, the Tribunal was invited to do the best it could with the evidence and arrive at a broad figure or percentage reflecting alleged betterment. We do not consider that to be a satisfactory basis upon which to make a deduction of potentially significant sums. The position is therefore analogous to that described in *Sartex*, where the Court of Appeal emphasised the need for a proper evidential foundation before any deduction for betterment can be made. Whatever incidental advantages may have arisen from the remediation projects, we are not satisfied that the evidence permits the identification of any discrete sum properly attributable to betterment. We therefore reject this aspect of R1-4's case.

REMEDIATION COSTS

Quantum evidence and disputes in context

160. A finding that the remediation scheme adopted for a Building fell within the range of reasonable responses to the relevant defects affecting that Building does not automatically lead to a conclusion that the associated costs were reasonably incurred. It remains necessary to consider whether those costs were reasonable in amount. The Applicant bears the burden of proving the costs incurred and of adducing evidence capable of supporting a finding of reasonableness. Once that evidential burden has been discharged, however, it is for the Respondents to identify and substantiate any case that particular costs, or categories of cost, were unreasonable.

161. The parties relied upon expert quantity-surveying evidence from Mr Steven Lynch of Delta Consulting Group Ltd (for the Applicant) and Ms Faye Allen of Rimkus Consulting UK Ltd (for R1-4). Both addressed the costs associated with the remediation schemes across the Buildings, including the treatment of BSF funding, variations, consequential expenditure and the extent to which the sums claimed represented costs incurred as a result of relevant defects. Their evidence comprised detailed reports, participation in the preparation of the Scott Schedule, and extensive oral evidence.

162. Although the quantum issues occupied a substantial part of Phase 1 of the hearing, a notable feature of the evidence was the extent of *agreement* between the experts. Both accepted that substantial remediation works had been undertaken. Both accepted that very significant expenditure had been incurred. The Scott Schedule demonstrates broad agreement regarding the principal contract sums and many of the direct remediation costs. At the outset of his oral evidence, Mr Lynch explained that the experts had agreed the total costs incurred in remediating the Buildings at £57,956,000[25]. That figure included some £42,032,000 of contract costs, £5,363,000 of post-contract variations, £1,196,000 of loss and expense, and £9,365,000 of professional fees. However, it excluded a further amount of £2,682,359 which the experts agreed was still to be incurred in completing the remediation works to Chips Building.

163. The experts also agreed that the principal contracts had been procured through appropriate competitive tendering exercises and that those contract costs were therefore reasonable[26]. Mr Lynch's evidence was that, notwithstanding some limited differences in relation to professional fees, the experts remained generally aligned on that issue. Their principal disagreements concerned post-contract variations and loss and expense claims. In broad terms, he considered that the experts were approximately £4.8 million apart in their assessment of the reasonableness of the overall costs incurred.

[25] This figure exceeds the aggregate amounts claimed by the Applicant in these proceedings, recognising that the remediation of some of the Buildings was funded, at least in part, otherwise than by the BSF.

[26] Consensus about competitive tendering had initially excluded Moho. However, the final iteration of the Scott Schedule reflected the experts' agreement that the Moho contract costs were reasonable.

164. The significance of that agreement should not be overstated, as the amounts in dispute nevertheless remained substantial. However, the principal disputes were concentrated within a comparatively limited number of areas, namely variations and additional works, prolongation and loss and expense claims, certain professional and indirect costs, consequential expenditure, allegations of betterment or maintenance, contentions that alternative remedial schemes could have achieved equivalent outcomes at lower cost and questions concerning the sufficiency of the evidence supporting particular costs. At the heart of those disputes lay competing views as to the evidential threshold required before a cost could properly be accepted as reasonable and the significance to be attached to the various procurement, contract-administration and funding-approval processes through which the costs had passed.

Contrasting methodological approaches

165. The most significant divergence between the quantity-surveying experts was methodological.

166. Mr Lynch adopted what may fairly be described as a process-led approach. His analysis was informed not only by the costs themselves but also by the processes through which those costs had been generated, scrutinised and approved. He attached substantial significance to competitive procurement exercises, the involvement of contract administrators and cost consultants, the role played by, for example, Thomasons and by Cushman & Wakefield (a firm of surveyors who acted as cost consultants, providing independent advice to Homes England and the BSF), and the scrutiny applied through the BSF approval process.

167. That is not to say that Mr Lynch regarded those processes as a substitute for independent expert judgment. His reports and oral evidence demonstrate that he undertook his own review of the costs and supporting material. He examined contract documentation, procurement records, cost reports, grant-funding material and project documentation. He reviewed payment evidence, analysed contract-sum breakdowns and variation accounts, and undertook structured sampling of invoices and expenditure records. The significance which he attached to procurement and funding approval processes was therefore not that they relieved him of the need to form an independent opinion, but that they formed part of the evidential matrix from which that opinion was derived.

168. Ms Allen adopted a different approach. Her focus was directed towards primary substantiation. Wherever possible, she sought to trace costs through contracts, invoices, payment records, cost build-ups, calculations and other source material. Where such material was unavailable, she was generally unwilling to express a concluded opinion. In many instances she described her assessments as provisional. The Scott Schedule demonstrates that, where she considered substantiation inadequate, she commonly allowed only part of the claimed amount or made no allowance at all. She was particularly reluctant to endorse prolongation and loss and expense claims in the absence of detailed supporting evidence.

169. Most of the numerical differences between the experts flowed naturally from that methodological divide. Mr Lynch's approach tended to lead him to accept

costs where he was satisfied that they had been subjected to appropriate procurement, professional review and BSF scrutiny. Ms Allen's approach tended to lead her either to reduce or reject costs where she considered the underlying evidence insufficient, notwithstanding the existence of procurement records, contract-administration review or funding approval. As a result, the dispute was often not whether a particular cost had been incurred, but whether sufficient evidence existed to justify acceptance of the full amount claimed.

170. Those contrasting approaches remained largely unchanged throughout the oral evidence. Mr Lynch consistently maintained that the layers of professional and regulatory scrutiny to which the projects had been subjected provided a substantial evidential basis for concluding that costs were reasonable. Ms Allen consistently maintained that approval by third parties, including project consultants and BSF assessors, could not itself substitute for independent verification of the underlying expenditure. In essence, Mr Lynch regarded prior scrutiny as a significant indicator of reasonableness; Ms Allen regarded it as no more than part of the background against which reasonableness still required to be demonstrated.

171. Ascertaining which of these contrasting methodological approaches should be preferred requires us to consider: first, the nature and purpose of the processes which led to the funding of the remediation schemes; second, the context in which those processes now come under scrutiny; and third, whether R1-4, through Ms Allen, were provided with the information about quantum which they asked to see, or reasonably required.

Remediation costs and funding processes – relevance of prior scrutiny

172. The foundation of Mr Lynch's reasoning was that the remediation schemes had already been subjected to an unusually extensive sequence of procurement, review and approval processes before the resulting costs were ever presented to the Tribunal.

173. The process began with the identification of relevant defects and the development of remediation proposals by specialist consultants. Those proposals were then subjected to competitive procurement exercises designed to secure market-tested prices. Both experts accepted that the principal remediation contracts had generally been appropriately procured and that the original contract sums represented reasonable market rates.

174. Once projects were underway, costs became subject to further review by the professional teams responsible for administering them. Mr Lynch attached particular significance to the role played by Thomasons in reviewing, assessing and negotiating contractor claims, variations and payment applications. His evidence was that those items were not simply accepted at face value but passed through a process of professional cost management before progressing further.

175. Thereafter, where BSF funding was sought, further scrutiny was applied through the funding process itself. Mr Lynch repeatedly referred to the role of

Cushman & Wakefield[27], in reviewing costs and funding requests. His evidence was that costs were examined, queried and assessed and that funding requests were sometimes reduced before approval was granted. For that reason, he regarded BSF approval as more than a purely administrative decision. In his view, it constituted evidence that the relevant costs had passed through another layer of independent professional review.

176. R1-4 did not dispute that those processes existed (although they did question whether they were robustly applied). Their criticism was directed instead at the weight which Mr Lynch attached to them and the inferences which he drew from them. Ms Allen's position was that scrutiny by Thomasons, Cushman & Wakefield or the BSF could not, without more, justify acceptance of the underlying costs. The essence of her evidence was that she had not been provided with the detailed material necessary to understand precisely how those reviewers had reached their conclusions. Whilst she accepted that scrutiny had occurred, she maintained that she could not independently evaluate the reliability of another professional's assessment without access to the supporting material on which it was based.

177. The parties were therefore not genuinely in dispute about the existence of the BSF process. The dispute concerned its significance. Mr Lynch viewed the combination of competitive procurement, professional project oversight, contract administration, cost consultancy and BSF scrutiny as a powerful indication that the costs had already been carefully tested and could properly be regarded as reasonable. R1-4 viewed those same matters as historical background which could not relieve either an expert witness or the Tribunal from examining whether the costs had been sufficiently substantiated and were properly recoverable.

The proper approach to assessing reasonableness

178. In criticising the Applicant's disclosure of material concerning the remediation schemes and their associated costs, R1-4 made comparisons with the approach which might be expected in the context of a construction dispute in the Technology & Construction Court: a dispute between parties to a construction contract as to the amounts payable under that contract would typically require detailed evidence, not only as to the claimant's entitlement to be paid, but also as to the amounts payable on an item-by-item basis. In effect, R1-4 sought (by virtue of Ms Allen's methodology) to apply the same approach to the present enquiry – only accepting the reasonableness of costs over and above initial contract costs if and to the extent that the Applicant produced positive evidence that they were reasonable.

179. The present proceedings do not concern a construction dispute, of course: the FTT has no jurisdiction in such disputes anyway and, in relation to applications

[27] Cushman & Wakefield were the independent cost consultants appointed by the Government to assess, benchmark, and recommend eligible costs for cladding remediation works under the BSF. They provided advisory recommendations on funding eligibility and amounts, but the formal approval of funding rested with the BSF itself. Their reports — including Full Cost Consultation reports, Cost Benchmark Commentaries, Final Account reports, and variation assessments — formed a key part of the documentary record in these proceedings.

made under the BSA, the jurisdictions of the FTT and TCC are mutually exclusive. The fact that these proceedings do not arise from a construction contract (or contracts) becomes all the more obvious when it is recognised that none of the parties to these proceedings was a party to any of the contracts for remediation of the Buildings.

180. The focus of the Tribunal's present enquiry is different. To begin with, a consideration of the reasonableness of the remediation costs in the context of an RCO application is an entirely separate question from that of how much (if any) of those costs any respondent should be ordered to pay. The answer to those questions will turn on the application of the 'just and equitable' test in due course. The reason for considering the reasonableness of the costs as, in effect, a free-standing preliminary issue, is that it paves the way for a more straightforward analysis of the other factors which are relevant to the application of that test.

181. The fact that an RCO application is materially different from a claim based on contract is also relevant to the nature of the present enquiry as to quantum, however. Again, the fact that this is so may be illustrated by a consideration of who may apply for an RCO. Although not a party to the relevant construction contracts, the Applicant in these proceedings is, of course, the Secretary of State with responsibility for the BSF, who may therefore be expected to have access (at least indirectly) to much of the remediation project documentation. But in other cases, RCO applicants are likely to be far less well-placed in relation to such matters – individual leaseholders, for example, who would be unlikely to have the access, or the resources, to substantiate the costs of a large remediation project at a granular level. That is not to say that any applicant for an RCO should be absolved from the need to show that the costs claimed have been reasonably incurred but, where there is evidence in general terms capable of establishing a *prima facie* case that the costs of the scheme were reasonable, it is necessary for the respondent to identify any particular costs or categories of cost which it challenges and the evidence relied upon to displace that case. The ultimate burden of establishing reasonableness nevertheless remains with the applicant.

182. This brings us back to the contrasting methodological approaches adopted by the quantity-surveying experts in this case. Mr Lynch did not approach the task of assessing the reasonableness of remediation costs as though he – or the Tribunal – was being asked to evaluate a contractor's invoice in isolation. Rather, he regarded the costs as the product of successive layers of professional and regulatory scrutiny which, taken together, provided significant assurance as to both necessity and value. We consider that this was an approach which was justifiable in the circumstances. The significance Mr Lynch attached to that prior scrutiny was therefore not that it relieved him of the need to exercise independent judgment, but rather that it formed part of the evidential matrix from which he drew his own conclusions. His position was that the costs had not merely been incurred; they had been tested through competitive procurement, reviewed by professional advisers, subjected to ongoing cost management, supported by invoice and payment records, and scrutinised during the BSF approval process. Having considered those materials himself, he regarded the existence and outcome of those review mechanisms as powerful

corroborative evidence supporting the reasonableness of the expenditure claimed. We agree – neither the parties nor the Tribunal should ignore the judgments already made by those involved in the delivery and funding of the schemes: where experienced professionals operating independently of the litigation process have reviewed and approved expenditure, that fact itself constitutes evidence supporting a conclusion that the expenditure was reasonable. In the absence of evidence casting doubt on the reliability of such judgments, they clearly constitute sufficient evidence from which a finding of reasonableness naturally flows, and particularly so when endorsed by a review of the kind to which Mr Lynch subjected the remediation costs.

183. R1-4 submitted that Mr Lynch's approach ultimately demonstrated no more than an absence of evidence that the costs were unreasonable. They argued that, whilst the various procurement, contract-administration and funding-approval processes might explain why costs had been incurred and approved, they did not provide positive evidence that the resulting expenditure was reasonable. We do not accept that characterisation. Mr Lynch did not simply rely upon the fact that no concerns had been raised. Rather, he relied upon evidence that the costs had been generated through competitive procurement, subjected to professional review, scrutinised by cost consultants and examined as part of the BSF approval process. Those matters constituted positive evidence supporting a conclusion that the costs were reasonable. The issue between the parties is therefore not whether reasonableness should be inferred from silence, but whether proper weight should be afforded to the evidence arising from those review processes. For the reasons already given, we consider that considerable weight should be attached to them.

184. It follows from our acceptance that Mr Lynch was justified in placing substantial weight upon the fact that the remediation costs had survived successive stages of examination by procurement exercises, contract administrators, cost consultants and BSF assessors that we reject R1-4's key criticism of his methodology: that he had been wrong to treat the existence of approval processes as a substitute for an independent examination of the underlying evidence. A central feature of that criticism was that the BSF regime was not instituted to determine the questions which arise in these proceedings. R1-4 accepted that the BSF considered funding applications and approved expenditure for grant purposes. However, they submitted that approval within that regime did not establish that every funded item represented a reasonable response to a relevant defect, nor that every variation, prolongation claim or consequential cost would satisfy the statutory test falling to be applied by the Tribunal. In their submission, the fact that a public body elected to fund expenditure did not demonstrate that all of that expenditure was properly recoverable from the Respondents.

185. A number of points can be made in response to this criticism. First, it would be wrong to characterise Mr Lynch's approach as an unquestioning acceptance of the judgments of others: we have already noted the ways in which his methodology was more sophisticated than that[28]. Second, in the context of an RCO application, it is wrong to conflate the question of reasonableness of

[28] See paragraph 167 above.

remediation costs with the question of whether those costs should be recoverable from any of the Respondents: the 'reasonableness' issue is not the same thing as the 'just and equitable' issue. Third, whilst it is plainly correct that the principles underlying the BSF regime were not aligned with the statutory regime governing RCOs, the funding approval process clearly was intended to ensure that remediation costs were only funded from the public purse to the extent that those costs were reasonable. Whilst the fact that certain costs were approved for such funding is not conclusive proof that they were in fact reasonable, it is certainly an important indicator that they were.

186. A further difficulty arises from the extent to which R1-4's criticism of the claimed costs tended to conflate questions of entitlement with questions of reasonableness. In a conventional construction dispute, claims for prolongation, extensions of time and loss and expense frequently require detailed consideration of contractual entitlement, causation and critical path delay. Such issues often necessitate the involvement of specialist delay experts and extensive forensic analysis of project records. None of those matters formed part of the present proceedings. No delay expert evidence was adduced. Nor was the Tribunal asked to determine whether particular contractors or consultants were contractually entitled to recover the sums which they claimed. Those questions had already been addressed, rightly or wrongly, through the contractual and professional processes by which the projects were administered.

187. In our view, aspects of Ms Allen's methodology risked importing into the present proceedings requirements more appropriate to the determination of contractual entitlement than to the assessment of whether costs had been reasonably incurred. Repeated emphasis was placed upon the absence of detailed substantiation demonstrating the precise basis upon which prolongation and loss and expense claims had been calculated, the contractual justification for particular variations, and the evidential material which might ordinarily be expected in litigation concerning final accounts or delay claims. However, the question before us is not whether every contractor or consultant would have succeeded in a claim brought under the relevant contract. It is whether the evidence available is sufficient to establish that the resulting expenditure was reasonably incurred in connection with the remediation of relevant defects. The distinction is an important one. A respondent may identify reasons why a particular item of expenditure was excessive, unnecessary or otherwise unreasonable. What it may not do is simply assume that expenditure was unreasonable because the evidence falls short of that which might be required to establish contractual entitlement in a different forum and for a different purpose.

Alternative remedial schemes

188. A further aspect of R1-4's challenge to the reasonableness of the remediation costs concerned the contention that some of the Buildings could have been remediated at materially lower cost had different remediation strategies been adopted. This was not merely a criticism of particular items of expenditure. Rather, it formed part of a broader case that the schemes ultimately implemented were unnecessarily extensive and that alternative schemes

existed which would have achieved the necessary level of fire-safety at substantially lower cost.

189. In principle, there can be no objection to such an argument. The fact that a remediation scheme was professionally designed, competitively procured, approved for BSF funding and ultimately implemented does not place it beyond scrutiny. If a respondent is able to demonstrate, by appropriate evidence, that a materially cheaper scheme would have addressed the relevant defects and achieved an acceptable level of safety, that may plainly be relevant to the question whether the costs of the adopted scheme were reasonably incurred. The Tribunal would therefore have been receptive to a properly evidenced case that particular Buildings could have been remediated by different means and at materially lower cost.

190. However, the viability of any such argument necessarily depends upon a proper evidential foundation. As explained earlier in this Decision[29], part of the quantity-surveying evidence relied upon by R1-4 in support of alternative remedial schemes was excluded before the final hearing. As a result, whilst R1-4 remained free to contend that the adopted remediation schemes were unnecessarily extensive or expensive, they could not rely upon expert costings of alternative schemes unsupported by admissible fire-safety engineering evidence. The evidential landscape at the hearing was therefore materially narrower than originally envisaged.

191. Although they continued to contend that cheaper alternatives existed, neither quantity-surveying expert ultimately identified any alternative remediation scheme which had been demonstrated to be both technically viable and materially cheaper than the solution actually adopted. Nor was there admissible evidence quantifying the likely cost savings which any such alternative would have generated.

192. We recognise the force of the underlying concern which lay behind this aspect of R1-4's case. Some of the remediation projects involved very substantial expenditure indeed. Burton Place provides an obvious example. In closing submissions, Mr Dennys KC observed that the building was now "resplendent" but also "extremely expensive". He further submitted that, when considered on a per-flat basis, the remediation expenditure was strikingly high. We accept the general thrust of those observations. The completed building is plainly very different from that which existed before remediation. The overall cost of the works was exceptionally high and, as Mr Dennys KC also emphasised, becomes all the more striking when considered on a per-flat basis. Those are legitimate grounds for scrutiny. They naturally prompt the question whether the same fire-safety objectives could have been achieved more economically.

193. However, concern is not evidence. Burton Place may well be "resplendent". It may well be "extremely expensive". Its cost per flat may well strike an observer as remarkable. But none of those observations answers the critical question whether a viable alternative existed which would have addressed the relevant defects at materially lower cost. The difficulty for R1-4 is that the submission

[29] See paragraph 60 above.

only takes the analysis so far. Mr Dennys KC went on to contend that "cheaper solutions there undoubtedly were". That proposition was never proved. Following the exclusion ruling, there was no admissible expert evidence identifying what those cheaper solutions were, whether they were technically feasible, whether they would have complied with the relevant fire-safety requirements, whether they would have satisfied planning constraints, or what they would have cost. The Tribunal therefore has no evidential basis upon which it could conclude that the Burton Place scheme, or any other scheme, was unreasonable merely because it was expensive. Cost alone is not the test. To establish that expenditure was unreasonable, it was necessary to demonstrate that a realistic and viable alternative existed which would have addressed the relevant defects at materially lower cost. That evidential foundation is absent.

194. Similar observations may be made in relation to particular items of expenditure which, viewed in isolation, are capable of appearing striking or unusual. The replacement of the Chips lettering is one example. Such costs invite scrutiny and may naturally lead to questions about whether different solutions could have been adopted. However, the Tribunal cannot determine reasonableness by reference to intuition alone. Nor is it our role to devise hypothetical remediation schemes and then assume that they would have performed equally well, complied with all relevant constraints and cost less money. The burden of establishing the factual basis for the alternative-schemes argument rested upon R1-4. Whilst they remained free to advance that case following the exclusion ruling, they did not ultimately adduce evidence capable of proving it.

195. We therefore accept the Applicant's submission that this aspect of R1-4's quantum challenge is significantly weakened by the absence of evidence demonstrating the existence of viable and materially cheaper alternatives. The fact that some of the remediation works were expensive does not, without more, establish that they were unreasonable. The Tribunal would have been prepared to consider robust evidence showing that the necessary fire-safety outcomes could have been achieved at significantly lower cost. However, unevidenced submissions that timber could have been encapsulated rather than replaced, for example; that different façade strategies could have been chosen; or less extensive interventions adopted simply do not suffice. In the absence of such evidence we are left with the remediation schemes that were actually developed, professionally scrutinised, approved and implemented. The mere possibility that some other solution might conceivably have existed is not a sufficient evidential basis upon which to reject the reasonableness of the costs actually incurred.

196. We would add that even the existence of a viable and cheaper alternative would not necessarily compel a conclusion that the adopted remediation scheme was unreasonable. Professional decision-makers are frequently required to choose between a range of possible responses, each of which may properly fall within the range of reasonable options. The question for the Tribunal is not whether the least expensive solution could theoretically have been adopted. Rather, it is whether the solution actually selected was one which a reasonable and competent professional could properly have chosen in the circumstances then prevailing. The existence of a cheaper alternative may therefore be relevant to the assessment of reasonableness, but it is not by itself determinative of it.

Disclosure and quantum

197. If prior scrutiny is capable of establishing a *prima facie* case in favour of reasonableness, fairness requires the Respondents to have sufficient and timely information to test it. A significant subsidiary dispute emerged in these proceedings concerning the extent to which Ms Allen had been provided with the documentation necessary to carry out a comprehensive quantum assessment. The issue featured prominently in her reports, during her oral evidence, and in both parties' written and oral submissions. Although expressed in terms of disclosure, it was in reality closely connected with the parties' broader disagreement as to how the reasonableness of expenditure should be evaluated.

198. By any measure the amount of documentation concerning the remediation of the Buildings disclosed during the course of the proceedings was immense, probably running to hundreds of thousands of pages. Further documentation emerged as a result of requests made by the quantity-surveying experts during their review. For example, Mr Lynch told us that he had maintained a request schedule, sharing information with Ms Allen as he received it. He said that his requests had resulted in the production of 2,126 further documents relating to incurred costs, which he had organised into 203 sub-folders before sharing with Ms Allen.

199. Nevertheless, Ms Allen's position was that the information made available to her was frequently insufficient to enable her to test the reasonableness of significant elements of the remediation costs. She stated that the Applicant had not adequately explained how many of the amounts claimed had been derived and that the documentation provided often lacked the level of detail ordinarily required to analyse contractors' costs. Particular concern was expressed regarding variation claims, extensions of time, prolongation costs and loss and expense claims. In her view, the available material frequently identified a claimed figure but did not disclose the underlying calculations, measurements, supporting records or other substantiating documents necessary to form an independent opinion as to reasonableness. It was for that reason that large parts of her assessment were expressed as provisional and why, in a number of instances, she applied partial allowances or made no allowance at all.

200. Some further material emerged late, including documents concerning loss and expense which Ms Allen received shortly before giving evidence and had not been able to analyse fully. We accept that late production was unsatisfactory and that it limited the assistance which she could give on those particular documents. It does not follow, however, that the quantum evidence as a whole was incapable of proper assessment.

201. The issue was explored in some detail during Ms Allen's oral evidence. The Applicant challenged the suggestion that significant documentary requests had remained outstanding for any substantial period and suggested that some of the concerns advanced during the proceedings had not previously been identified. Ms Allen rejected that proposition. She maintained that requests for additional information had been made through her instructing solicitors and that she had

consistently identified the categories of material which she regarded as necessary for her assessment. Particular reliance was placed in re-examination and closing submissions upon correspondence from October 2025 requesting final-account documentation, payment applications and documents evidencing the measured works and pricing against which payments had been made. Mr Dennys KC contended that those documents had been sought long before trial and that the complaint about inadequate disclosure had been a recurring issue throughout the preparation of the expert evidence.

202. The Applicant's response was twofold. First, it disputed the practical significance of the alleged deficiencies. Counsel submitted that Ms Allen's requests were principally directed towards final accounts, payment applications and related commercial records rather than to an absence of disclosure generally. Secondly, the Applicant emphasised the very substantial volume of material which had in fact been provided. The Applicant submitted that Ms Allen had not been operating in a documentary vacuum and that the extent of agreement ultimately reached between the experts demonstrated that sufficient material existed to permit a meaningful assessment of the claim. The Applicant further argued that many of the criticisms advanced by Ms Allen did not establish that costs were unreasonable; rather, they identified the absence of material which she considered desirable before expressing a firmer conclusion.

203. This seems to us to be a fair characterisation of the position, and we do not accept that Ms Allen had insufficient information available to her from which to form a view about whether the remediation costs were reasonable. The task was not to prepare, or to negotiate, a detailed bill of quantities, as if acting for a client during a live construction project. Rather, it was to review a wealth of historical information, which included substantial professional and expert input, to identify indications that costs had been unreasonably incurred. Ample information was available for that purpose.

204. A further point reinforces our conclusion on this issue. Notwithstanding Ms Allen's repeated complaints concerning the extent of disclosure, the expert process ultimately yielded agreement on the overwhelming majority of the remediation expenditure. As we have already noted, the quantity-surveying experts agreed that costs in excess of £57 million had been incurred and reached substantial agreement in relation to the principal contract sums, professional fees and many other categories of expenditure. The very fact that such extensive agreement was achieved tends to undermine the proposition that the material made available was fundamentally inadequate for the purposes of the exercise which the experts were asked to perform. Whilst additional disclosure may have enabled Ms Allen to express firmer views on particular disputed items, the extent of agreement ultimately reached demonstrates that the information available was sufficient to permit meaningful and informed analysis of the claim as a whole.

205. To deal directly with the assertion that requests for information made in October 2025 went unanswered, we note that the Applicant disputed this, relying on evidence that final-account and payment-application material was subsequently made available during late 2025 and that Mr Lynch had shared further project documentation directly with Ms Allen. Importantly, the

Applicant further contended that the exercise ultimately sought by Ms Allen extended beyond production of final accounts and involved a complete figure-by-figure reconstruction of the build-up behind amounts appearing in BSF applications, approvals, variations and associated claims. It was said that such information was not held centrally by the Applicant and would have required a substantial review exercise involving multiple consultants and contractors, likely taking several months to complete. Mr Lynch's evidence was that the first detailed schedule identifying the specific cost items for which such build-up information was sought was not provided until shortly before the deadline for expert reports. The issue therefore became one not simply of disclosure, but of proportionality and practicality: R1-4 contending that earlier provision of the requested material would have enabled a more complete assessment of reasonableness, and the Applicant contending that the exercise envisaged by Ms Allen would have required a fundamentally different and substantially more extensive investigation than that contemplated by the existing timetable for the proceedings. Again, we agree with the Applicant's characterisation of the position, and we view this as a further example of R1-4, and Ms Allen, misunderstanding where the reasonable bounds of the quantum exercise lay.

Costs arising after the award of remediation contracts

206. R1-4 directed particular criticism towards the treatment of variations and other costs arising after the award of the original contracts. They accepted that competitive procurement provided a meaningful test of the original contract sums. They argued, however, that many of the largest disputed items did not arise from those competitively procured prices, but from subsequent variations, prolongation claims, extension of time claims and loss and expense claims. The essence of their complaint was that Mr Lynch had attached the same confidence to those later claims as he attached to the original market-tested contract sums, notwithstanding that they had not been subjected to equivalent competitive pressures. Mr Dennys KC submitted that Mr Lynch had effectively demonstrated that money had been spent, but had not subjected substantial variation and consequential claims to the same detailed scrutiny which had originally tested the contract prices.

207. The Applicant's response was, in essence, that such criticism proceeded from a false premise. The Applicant accepted that variations, prolongation claims and loss and expense claims had not themselves been subjected to competitive tendering in the same way as the original contract sums. However, it argued that these later claims were not therefore unscreened or untested. Whilst post-contract variations and loss and expense claims were not themselves competitively tendered, they nevertheless arose under contracts which had been procured through competitive tendering and which contained agreed procedures for the valuation, assessment and payment of such claims. The additional costs were therefore subjected to recognised contractual and professional controls, even though they were not exposed to fresh market competition. They had thus been subjected to a different, but nonetheless rigorous, process of commercial and professional scrutiny.

208. The Applicant emphasised that the variations process typically involved preparation and review by specialist quantity surveyors and project consultants

acting on behalf of the building management companies. The resulting claims were then reviewed by other professional cost consultants and, where BSF funding was sought, scrutinised by Cushman & Wakefield acting on behalf of Homes England. Mr Lynch's evidence was that variation applications were prepared by specialist quantity surveying practices with knowledge of the relevant projects and local market, and were then reviewed by the BSF delivery partner, which assessed both eligibility and the reasonableness of the associated costs. He described this as a "robust process" involving multiple layers of professional quantity-surveying review.

209. The Applicant therefore submitted that Mr Lynch had not merely accepted variations because they had been paid. Nor had he treated BSF approval as conclusive. Rather, his opinion was that the existence of repeated professional scrutiny was itself evidence bearing upon reasonableness. Counsel submitted that R1-4's critique ignored the fact that the disputed claims had already been assessed by contract administrators, cost consultants and BSF reviewers before any litigation commenced. The Applicant characterised this as "two levels of scrutiny", namely review by the project's own professional team and review by Cushman & Wakefield and the BSF.

210. The Applicant also rejected the suggestion that Mr Lynch had done nothing beyond relying upon those processes. Counsel pointed to his review of underlying project documentation, his examination of procurement and contract-administration records, his consideration of variation materials, and his invoice sampling exercise. Although Mr Lynch "principally" relied upon the two-stage scrutiny process, he was also able from the available documentation to cross-check and assess the reasonableness of particular variations and loss and expense claims, and he had not identified any amount which he considered unreasonable. The Applicant further highlighted evidence from Samuel Styles, who had direct involvement in the BSF process and described it as receiving "an awful lot of scrutiny", with numerous items being disputed or rejected during the approval process.

211. The Applicant's broader submission was therefore that R1-4 were applying an unrealistically narrow conception of reasonableness review. Bearing in mind our previous comments about Ms Allen's approach to the exercise, we have to agree. In circumstances where major remediation projects had been competitively procured, administered by professional consultants, subjected to ongoing cost management, reviewed by Thomasons and other quantity surveyors, scrutinised by Cushman & Wakefield and ultimately approved for public funding, the Tribunal is entitled to regard those processes as significant evidence supporting the reasonableness of the resulting expenditure. On that analysis, we consider that Mr Lynch had done more than demonstrate that money had been spent; he had explained why the expenditure had passed through a series of professional and regulatory checks which provided independent support for his conclusion that the costs were reasonable. Nor was there any admissible expert evidence demonstrating that the remediation schemes could have achieved the same objectives through materially cheaper alternative solutions.

212. Ms Allen's stance that she had been provided with insufficient evidence to enable her to substantiate costs arising after contracts had been let led her routinely to apply a reduction (commonly 50%) to all post-contract variation amounts. However, there were no instances in which she advanced a positive case that the sums claimed were unreasonable: her assessments in this regard were stated to be "provisional" and capable of revision if more information was forthcoming. That approach is difficult to reconcile with the task entrusted to the experts in these proceedings. The purpose of their evidence was to assist the Tribunal in reaching final conclusions about the reasonableness of costs already incurred, not to identify figures which might require reconsideration following some future disclosure exercise. Whilst it was entirely proper for Ms Allen to identify limitations in the information available to her, the consequence of expressing significant elements of her assessment as provisional was that the Tribunal was left without any concluded expert opinion that the relevant costs were in fact unreasonable. Nor was any clear evidential or methodological basis advanced for the particular percentage reductions adopted. Where a claim was reduced by 50%, the reduction generally reflected a lack of substantiation rather than a concluded opinion that half of the expenditure was unreasonable. The Tribunal was therefore left without a principled basis for selecting one percentage reduction rather than another.

213. In circumstances where these proceedings are intended to achieve finality in relation to the costs claimed, an approach which reserves judgment pending the production of further material is of necessarily limited assistance. The Tribunal cannot determine the reasonableness of costs by assuming that the figures presently available are wrong and then postponing final evaluation until better evidence emerges. It must reach conclusions on the evidence before it.

214. Ms Allen's approach was illustrated by a particular example which was discussed in her oral evidence – it concerned Chips Building and the reasonableness of a variation relating to scaffold ties and subsequent damage remediation. The overall value of the variation was £357,260, being the aggregate of several itemised heads of expense, but Ms Allen had allowed only 50% of that sum, stating in her report that she had "not seen any further evidence to support the [itemised] quantities and rates". This 50% reduction had been applied across the board, including to an item of £29,610 relating to 1400 scaffold ties. Mr Burrell sought to explore this further (as well as other items included in this variation) in Ms Allen's cross-examination, given that she had also expressed the view in her report that this particular cost did not appear to be unreasonable. Ms Allen's response was that the cost would not be unreasonable for that quantity of scaffold ties, but that she had been unable to verify that the number of scaffold ties was indeed 1400. It was for that reason that she had reduced this element of the variation by 50%. However, there was no reason for Ms Allen to suppose that the number of scaffold ties had been misstated in the project documentation. This is a specific example, and concerns a modest item of cost, but it illustrates a methodology which assumes that the amounts of all post-contract variations were unreasonable unless the contrary can be proved in forensic detail. That, in our view, is to view the task of assessing reasonableness through the wrong end of the telescope. It is not an approach which is appropriate in the present context.

215. Of the disputed items, the replacement lettering at Chips was unusual because Ms Allen's criticism was directed not merely to substantiation but also to the apparent proportionality of the expenditure itself. We address that issue in the Appendix D. For the reasons given there, whilst the costs justified particular scrutiny, R1-4 did not establish that a viable alternative solution capable of satisfying the relevant planning, architectural and fire-performance requirements could have been achieved at materially lower cost.

Prolongation and loss and expense claims

216. Particular attention was devoted during the hearing to prolongation and loss and expense claims. These formed a significant component of the difference between the experts and, in many respects, represented the clearest illustration of their divergent methodologies. R1-4 submitted that such claims required especially close scrutiny because, unlike the original contract sums, they had not been subjected to competitive tendering and were frequently supported by less extensive contemporaneous documentation than conventional construction litigation might require. Ms Allen was generally unwilling to endorse such claims without detailed substantiation of entitlement, causation and valuation. Mr Lynch, by contrast, considered that significant weight could properly be attached to the fact that these claims had already been reviewed by project professionals, examined through the contract-administration process and, where relevant, scrutinised as part of the BSF approval process.

217. We accept that loss and expense claims require careful scrutiny and cannot be treated as reasonable merely because they have been incurred. However, we do not accept that the absence of a forensic reconstruction of every constituent element necessarily renders such claims incapable of assessment. As with post-contract variations generally, the relevant question is whether the available evidence, viewed in the round, is sufficient to support a conclusion that the expenditure was reasonably incurred. In many instances the prolongation and loss and expense claims considered in these proceedings had already been subjected to review by quantity surveyors, contract administrators, cost consultants and BSF assessors before they reached the Tribunal. Those review processes do not provide conclusive proof of reasonableness, but they form part of the evidential matrix against which the individual claims must be assessed. The application of those principles to the building-specific disputes is addressed in the Appendices. In Moho, for example, the remaining dispute ultimately concerned principally the substantiation and valuation of the post-contract expenditure, rather than the reasonableness of the adopted remediation strategy itself.

218. The building-specific disputes reflected that broader methodological disagreement rather than any common contention that particular prolongation or loss and expense claims were positively unreasonable. In Burton Place, Moho and Chips, for example, the remaining challenges were directed principally to substantiation rather than valuation. As discussed in the Appendices, we are not persuaded that those criticisms displaced the evidence arising from the procurement, contract-administration, professional-review and funding-approval processes through which the claims had already passed.

219. R1-4 also suggested that aspects of the remediation costs were increased by delays associated with the BSF approval process. We accept that delays occurred on some projects and may have generated additional expenditure. However, no coherent evidential basis was advanced upon which the Tribunal could identify the costs attributable to any particular delay, determine whether that delay was unreasonable, or quantify any resulting deduction. The existence of delay therefore does not provide a proper basis for reducing the remediation costs otherwise shown to have been reasonably incurred.

Moho: costs incurred outside the BSF

220. The costs sought pursuant to the RCO application in respect of Moho include £741,594 inclusive of VAT incurred by Moho Management Company Ltd outside the BSF. The description of those costs as "ineligible" reflects only their treatment under the BSF eligibility criteria and does not determine whether they were incurred in remedying, or otherwise in connection with, relevant defects. As explained in Appendix E, the quantity surveyors ultimately agreed that those costs had been incurred and paid, and we have concluded that they were reasonably incurred in connection with the remediation project.

221. Accordingly, those costs form part of the overall remediation expenditure which we have found to have been reasonably incurred.

Moho: waking watch and fire-alarm costs

222. The Moho RCO application also originally included costs said to have been incurred in connection with a waking watch and the installation of a fire-alarm system. The Applicant subsequently abandoned the fire-alarm element of that claim. The waking watch costs raised building-specific issues concerning proof, evidential sufficiency and reasonableness which differed materially from the principal remediation costs and are therefore considered separately in Appendix E.

223. In summary, whilst we accept that a waking watch was likely to have been necessary and that expenditure was incurred in providing it, we have concluded that the Applicant failed to establish that the costs claimed were reasonably incurred.

Value Added Tax

224. The remediation costs under discussion include VAT (so, for example, the costs identified in paragraph 162 above include any VAT charged on the underlying goods and services). However, the Respondents contended that, as a matter of law, the VAT element is not a recoverable "cost" for the purposes of section 124(2) of the BSA. We reject that submission.

225. It was not disputed that the contractors undertaking the remediation works to each of the Buildings charged VAT in the ordinary way and that the various building management companies were the recipients of the VAT invoices. Had the management companies been VAT-registered, they would have recovered the VAT as input tax and would not have borne that element of the expenditure

themselves. Because the management companies were not VAT-registered[30], the VAT was ultimately reimbursed through BSF funding.

226. The Respondents submitted that, viewed from the perspective of the Applicant, the VAT element was not a true remediation cost. It was tax levied by the state and paid back to the state[31]. They therefore contended that the Government was seeking to recover, by way of an RCO, sums which had already returned to the public purse as VAT receipts. On that analysis, the VAT element was not properly characterised as a "cost incurred" by the Applicant for the purposes of section 124. Mr Dennys KC distilled the point into the proposition that VAT was, from the Government's perspective, tax rather than remediation cost and that the Government should not obtain an advantage merely because the management companies happened not to be VAT-registered.

227. We share the Applicant's view that this analysis confuses the position of the Government with the position of the party which actually incurred the cost (i.e., the relevant management companies). The contracts for the remediation works were entered into by the management companies, not by the Secretary of State or MHCLG. The management companies were the recipients of the supplies and the recipients of the VAT invoices. The Government was not a contracting party and was not the recipient of any supply for VAT purposes.

228. Because the management companies were not VAT-registered and therefore bore the economic burden of the VAT charged on the remediation works, VAT formed part of the price paid for the goods and services supplied. It therefore fell within the ordinary meaning of a cost incurred. The VAT cannot be separated from the remediation expenditure because it was an integral component of the amount which had to be paid to obtain the remedial works.

229. We do not agree that this analysis opens the possibility of double-recovery or of "undue enrichment" of the Government: although contractors have accounted to HMRC for VAT, the BSF has in turn funded the management companies in respect of that VAT element. The Government has therefore incurred expenditure equal to the VAT paid. Recovery of that element through an RCO would merely reimburse sums already expended and would not amount to obtaining the same sum twice.

230. Of course, even though the VAT element of the remediation costs technically falls within the costs which may be the subject of an RCO, the question whether that element of those costs *should* be included in any such order must be determined by application of the 'just and equitable' test, and that is a question to which we shall return later in this decision.

[30] The fact that none of the management companies were VAT registered was not disputed.

[31] An alternative submission – that it would have been open to the Applicant to seek recovery of VAT from HM Treasury, either directly or through statutory mechanisms contained within the VAT legislation – was not pursued at the hearing.

Summary of costs reasonably incurred

231. Drawing together the findings we have made in this Part of the Decision, as well as in Appendices C to G, we find that the following sums were reasonably incurred in remedying, or otherwise in connection with, relevant defects relating to the Buildings.

232. Overall amounts (inclusive of VAT) incurred or to be incurred:

Burton Place	£22,954,848
Chips Building	£11,241,998
Christabel House	£1,910,824
Emmeline House	£2,027,778
Moho Building	£18,833,843
Sylvia House	£1,907,203
The Box Works	£1,762,054
TOTAL	**£60,638,548**

233. As we explain in the Appendices, not all of the above costs have been funded by the BSF. The amounts (inclusive of VAT) reasonably incurred or to be incurred by the BSF are:

Burton Place	£22,954,848
Chips Building	£4,705,670
Christabel House	£1,472,075
Emmeline House	£2,027,778
Moho Building	£18,092,248
Sylvia House	£495,390
The Box Works	£1,762,054
TOTAL	**£51,510,063**

234. The amount (inclusive of VAT) reasonably incurred by Moho Management Company Ltd is **£741,594**.

235. A particular feature of the Chips Building claim is that not all of the costs reflected in the figure above had been incurred by the date of the hearing. As explained in Appendix D, the physical remediation works were substantially complete, but certain contractor claims, final-account items, professional fees and other project costs remained to be resolved. The amount of £4,705,670 therefore includes costs which had already been incurred and also costs which, on the evidence before us, were reasonably expected to be incurred in completing the remediation project. Consistently with section 124(2), which extends to costs incurred or to be incurred, we are satisfied that those anticipated costs should be included in our assessment.

PART 3 – THE RESPONDENTS

236. In this Part, we examine the history, structure, governance, activities and financial position of the various Respondents. We begin with R1-4 and the development and reorganisation of the wider Urban Splash enterprise, before considering in turn the family investment companies, the Urban Splash Residential Fund, the Shed companies and Stubbs Mill LLP. Our purpose at this stage is principally descriptive: to identify the nature of each Respondent, its relationship with the wider Urban Splash enterprise, and the resources potentially available to it, thereby laying the factual foundation for our later consideration of association and whether it is just and equitable to make RCOs.

R1-4 AND THE URBAN SPLASH GROUP

Introduction

237. The First to Fourth Respondents form part of what was repeatedly described during the hearing as the "Urban Splash group", or the “Urban Splash family”. Those expressions may be convenient but they are also potentially misleading. A “family” of companies is not a legally distinct concept, of course, and whilst R1-4 are members of the Urban Splash group of companies, they are not its only members. Moreover, we heard that the structure, composition and activities of the group have evolved significantly over time. During the period relevant to these proceedings, major reorganisations occurred in 2013 and 2019. New companies were created, others assumed different functions, and business activities were reorganised between different corporate entities.

238. Notwithstanding these corporate machinations, it was common ground that each of R2, R3 and R4 are associated with R1 for the purposes of section 121 of the BSA.

239. The corporate structure which existed by the time of the hearing was complex. It included numerous subsidiaries, holding companies, investment companies, joint-venture vehicles and companies established for particular developments or commercial activities. Most of those entities are not parties to these proceedings. We found nothing inherently unusual or untoward in that complexity. It is a normal feature of a substantial and multi-faceted commercial enterprise. The existence of a complex structure does not, without more, establish that the structure was designed to obscure ownership, shelter assets or avoid liabilities. Its individual components and the relationships between

them must nevertheless be examined where they are relevant to the statutory questions before us.

240. At the same time as the reorganisations mentioned above, there was also substantial continuity. Business continued under the Urban Splash name. Longstanding senior personnel remained involved. Common commercial objectives persisted. Tom Bloxham remained (and remains) closely associated with the enterprise he founded in the early 1990s.

The Urban Splash enterprise

241. What began as a property development business subsequently expanded into a substantial enterprise involved in residential development, commercial property investment, urban regeneration projects, property management, joint-venture developments and, for a period, modular housing manufacture.

242. Mr Bloxham has occupied a unique position within the history of the business. He founded Urban Splash, remained heavily involved in its strategic direction, participated in significant financing and restructuring decisions, and continued to serve as its principal public representative. Whilst the present proceedings concern corporate entities rather than individuals, there was no real dispute that Mr Bloxham has been the central figure in the wider Urban Splash enterprise throughout its existence. He is still its Chairman to this day.

243. Both his written and oral evidence reflected that role. Mr Bloxham frequently described the development of Urban Splash in personal terms, referring to the growth of the business over more than three decades, the regeneration projects undertaken under its banner and the commercial relationships cultivated during that period. Whether and to what extent his influence has significance for the statutory issues arising in these proceedings is addressed later. For present purposes, it is sufficient to note that his involvement is a recurring feature of the evidence concerning the group's history, governance and operations.

244. Mr Bloxham's centrality was not confined to his public profile or practical involvement in the business. It was also reflected, to varying degrees, in the formal corporate records. He was registered as a person of significant control (PSC) of R3. R3, directly or through intermediate holding companies, occupied a position of significant control in relation to other companies within the group, including R1 and R2. Mr Bloxham was also registered as a PSC in relation to a number of other Urban Splash companies and entities as explained elsewhere in this decision.

245. Registration as a PSC does not by itself determine every question of ownership, control or association arising in the context of these proceedings. In relation to some entities, the evidence showed that Mr Bloxham was one of more than one registered PSC. The parties also differed about the legal and evidential significance of PSC status. At this stage, we record the PSC arrangements as part of the factual background. We consider their significance later.

246. The evidence also demonstrated the importance of Julian Curnuck within the Urban Splash organisation. Although less publicly prominent than Mr Bloxham, he occupies a central position in its financial and managerial affairs. He was closely involved in negotiations with lenders, played a significant role in the design and implementation of the 2013 restructuring, and remained deeply involved in the group's management thereafter. Much of the detailed evidence concerning the group's finances, borrowing arrangements and corporate restructuring derived from Mr Curnuck.

247. Accordingly, whilst Mr Bloxham may fairly be regarded as the founder and principal figure within the organisation, Mr Curnuck has been one of the principal architects and managers of its corporate and financial affairs.

248. A further theme emerging from the evidence was the continuity of the Urban Splash enterprise notwithstanding the changes made over time to its corporate structure. The Respondents emphasised the separate legal identities and purposes of the individual companies and the significance of the various restructurings. The Applicant placed greater emphasis upon continuity of ownership, management, branding, commercial purpose and economic interest across those changes. That tension between corporate form and commercial reality recurs in the issues considered later in this Decision.

Urban Splash group prior to 2013

249. Prior to the financial crisis of 2008, Urban Splash operated through a group structure headed by Urban Splash Group Limited. Within that structure, R1, Urban Splash Limited, served as the principal residential development vehicle. It was through R1 that the seven Buildings were developed. It is common ground that none of the remaining respondents played any role in their design or construction.

250. R4, Urban Splash Work Limited, formed part of the same wider group but undertook materially different activities. Whereas R1 principally carried on development activities, R4's role centred upon ownership and management of commercial property assets.

251. Contemporary accounts reveal that, prior to the financial crisis, the group possessed substantial assets and had grown into a significant regeneration and development business.

252. The financial crisis had a profound effect upon the group. Asset values fell sharply, development activity slowed and lending arrangements came under increasing pressure. Mr Curnuck described the business as spending a prolonged period managing debt and working through the consequences of the downturn. His evidence portrayed a business focussed principally upon survival and debt reduction rather than expansion.

The 2013 restructuring

253. Against that background, a substantial restructuring was implemented in 2013. Mr Curnuck explained that the immediate catalyst for the restructuring was

pressure arising from lending arrangements affecting parts of the group, particularly debt associated with R4 and secured against commercial property assets. According to his evidence, the group faced significant refinancing pressures in relation to that indebtedness, creating a risk of wider financial consequences extending beyond a single company. The restructuring was therefore devised as a means of preserving the wider business and enabling it to continue trading.

254. The restructuring produced three principal strands. First, the existing Urban Splash group structure remained in existence and continued to contain R1 and R4 together with associated historic assets and liabilities. Although R1 ceased in due course to operate as the group's principal property development vehicle, Mr Curnuck's evidence was that it retained substantial tax losses from which other companies within the wider enterprise continued to derive benefit. Secondly, Urban Splash Assets 1 Limited was established as a vehicle through which certain assets, liabilities and lending arrangements could be managed and worked out. Thirdly, a new development and trading structure was established beneath Urban Splash Investments Limited. Assets transferred into that structure were independently valued. Most employees transferred into the new organisation. The new structure became the principal platform through which future development activity was undertaken.

255. Mr Curnuck repeatedly emphasised that the restructuring was intended to ring-fence liabilities and segregate financial risk. On R1-4's case, one of its central purposes was to protect the continuing business from liabilities associated with historic assets and activities.

256. Nevertheless, the evidence also demonstrates continuity across the reorganisation. Leadership remained substantially unchanged. The business continued to trade under the Urban Splash brand. Mr Bloxham remained heavily involved. Existing relationships with public-sector bodies and development partners continued. The restructuring altered the corporate architecture of the enterprise but did not create an entirely new business.

257. Nor did the restructuring eliminate economic connections between group companies. Whilst liabilities and security arrangements were reorganised, substantial inter-company relationships remained. The evidence concerning group finances, borrowing arrangements and insolvency consequences demonstrated continuing financial interdependence notwithstanding the formal separation of corporate entities.

258. The parties attached differing significance to these matters. R1-4 characterised the restructuring principally as a commercially necessary rescue exercise implemented in response to severe financial pressures. The Applicant placed greater emphasis upon the movement of assets, personnel and future business opportunities into entities other than R1. The implications of those competing characterisations are considered later.

The 2019 reorganisation and Urban Splash House

259. A further significant reorganisation occurred in 2019. By that stage the Urban Splash enterprise had expanded into modular housing through a business known as Urban Splash House. This venture represented a substantial development of the group's activities. It pursued the design, manufacture and delivery of modular homes and attracted significant institutional investment and public-sector support.

260. Urban Splash House occupied an important place within the ambitions of the wider Urban Splash enterprise. The venture reflected the group's continued efforts to expand beyond conventional development activities and demonstrated the scale of the business which had emerged following the 2013 restructuring. Although associated with the wider Urban Splash business and closely connected with Mr Bloxham's vision for its future development, Urban Splash House operated through a distinct corporate structure.

261. As part of the 2019 reorganisation, that business was separated from the remaining Urban Splash group. This reorganisation contributed significantly to the emergence of the corporate structure which existed by the time of these proceedings.

262. Urban Splash House subsequently entered administration. The significance of those events is disputed in certain respects. However, the creation, separation and eventual failure of the venture forms an important part of the wider history of the Urban Splash enterprise.

263. The 2019 reorganisation also resulted in the emergence of R3, Urban Splash Group Holdings Limited, as the principal holding company within the remaining group structure.

The "Urban Splash Respondents"

R1: Urban Splash Limited

264. R1 was incorporated in 1993, and it is common ground that it was the developer of each of the seven Buildings.

265. Following the 2013 restructuring, R1 ceased to function as the principal property development vehicle of the wider Urban Splash business. It no longer undertakes active development operations.

266. According to Mr Curnuck, R1 is technically insolvent and no longer trades. However, its continued existence has a purpose: Mr Curnuck's evidence was that companies within the current Urban Splash group continue to obtain financial benefit from tax losses retained within R1. He identified those tax losses as an important reason why R1 has been retained within the wider corporate structure notwithstanding the cessation of its trading activities.

267. Accordingly, whilst R1 no longer performs an operational property development function, it continues to possess economic significance for the broader enterprise.

R2: Urban Splash Developments Limited

268. R2 was incorporated shortly before the 2013 restructuring and became the principal vehicle through which future property development activities were pursued. Its operating model differed materially from that previously employed by R1. Development activity increasingly proceeded through partnerships, public-sector collaborations and joint-venture structures.

269. R1-4 placed considerable emphasis upon the distinction between R2 and the historic business which developed the Buildings. The Applicant placed greater emphasis upon continuing links between the two. As discussed later, that disagreement forms part of the wider debate concerning continuity and separation within the Urban Splash enterprise.

R3: Urban Splash Group Holdings Limited

270. R3 did not exist when the Buildings were developed. However, by the time of the hearing, it sat at the apex of the surviving corporate structure and functioned principally as a holding company. Mr Bloxham was registered as R3's PSC.

271. R3 played no role in the development of the Buildings. Rather, its significance derives from its position as ultimate parent company within the corporate structure created following the 2019 reorganisation.

R4: Urban Splash Work Limited

272. R4 occupies a distinct place within the history of the group. Unlike R1, its principal activities have historically related to ownership and management of commercial property assets rather than residential development.

273. The evidence nevertheless demonstrates that R4 played an important role within the wider group and featured prominently in the financial circumstances which ultimately led to the 2013 restructuring.

274. It also remained connected to the wider Urban Splash enterprise following that restructuring through ongoing corporate and financial relationships.

Current financial position of R1-4

275. The Tribunal was not provided with expert evidence in relation to the financial position of R1-4. Nevertheless, Mr Bloxham and Mr Curnuck are obviously well-placed to discuss the group's finances, and both gave evidence on the subject, which we were content to accept. Their evidence was supplemented by submissions made by Mr Dennys KC. Strictly speaking, some of the financial detail provided in those submissions went beyond the witness evidence, but Ms Bretherton KC made no objection to that. It is fair to say that dispute remained

as to whether, or to what extent, any of R1-4 would have the financial means to satisfy an RCO. For now, however, we confine ourselves to a broad description of their respective positions, leaving the parties' disputed assessments and the practical significance of those matters for consideration later in this decision.

276. R1 no longer trades and, according to Mr Curnuck, is technically insolvent. Its accounts record the progressive disposal or transfer of its assets, the cessation of turnover and substantial net liabilities. Its accounts for 2022 recorded no turnover, only nominal fixed assets, and net liabilities of approximately £15.6 million. As mentioned above, R1 nevertheless retains economic significance within the group because companies within the current group continue to obtain the benefit of tax losses held within it.

277. R2 remains an active property development company. Its business is conducted substantially through subsidiaries, joint ventures and other partnership arrangements. Its 2022 accounts recorded net assets of approximately £10.5 million. Its more recent accounts identify numerous interests in development, holding, investment and joint-venture entities. Those figures and interests establish that R2 has value, but do not, without further analysis, establish the amount of cash or other resources which it could readily make available to satisfy an order.

278. R3 is the ultimate holding company of the group. It does not conduct the underlying development and property businesses itself. The consolidated accounts describe the assets, liabilities and results of the group as a whole, whereas R3's individual company accounts concern its own assets and liabilities. The consolidated net assets of the group cannot simply be treated as though they were cash or other assets held directly by R3. The parties disagreed about R3's own value, resources and practical ability to meet an order.

279. R4 remains an active commercial property investment company and has the most substantial directly held asset base of R1-4. Its accounts for the year ended 31 December 2024 recorded turnover of approximately £5.5 million, fixed assets of approximately £44.9 million, cash of approximately £2.2 million and net assets of approximately £30 million. However, those headline figures do not provide a complete picture. R4's property portfolio is charged as security for borrowing. Its accounts also include substantial sums owed by other group undertakings, including a debt owed by R1 whose recoverability is doubtful if R1 is insolvent. R1-4 further contended that much of R4's value is held in illiquid commercial property and that only a limited proportion of its recorded cash was freely available.

R5 & R6: FAMILY INVESTMENT COMPANIES

Introduction

280. It was not disputed that, by virtue of Tom Bloxham's common directorship during "the relevant period", both R5 and R6 are associated with R1 for the purposes of section 121 of the BSA. However, neither company sits within the Urban Splash group, and neither was involved in the development or construction of any of the Buildings. Instead, both were presented as

investment vehicles established for purposes distinct from the property development activities undertaken by R1 and other companies within the wider Urban Splash enterprise.

R5: TBI 2000 Limited

281. R5 traces its origins to a company which Mr Bloxham acquired in 1995 and which he subsequently renamed Urban Splash (Developments) Limited. His evidence was that he adopted the "Urban Splash" name because he already operated a number of businesses using the "Splash" branding, including businesses known as Splash Leisure and Splash Posters.

282. The company initially served as a vehicle through which proceeds from a range of personal business activities and property investments could be deployed. These businesses (which Mr Bloxham had pursued before establishing the Urban Splash group) included poster publishing, licensed premises, radio and leisure ventures. However, the original purpose of the company was to hold and develop a property known as Smithfield Buildings in Manchester, using funds generated from activities unrelated to the developments which form the subject matter of these proceedings.

283. When the Urban Splash group was established, assets then held by Urban Splash (Developments) Limited were transferred into the newly formed group at market value, leaving Mr Bloxham's original capital within the company. The company's name was subsequently changed to TBI 2000 Limited, said to be an abbreviation of "Tom Bloxham Investments 2000".

284. By the time of the hearing, R5 functioned principally as a property investment company and had evolved into a family-owned business. Its shareholders were Mr Bloxham, his wife and their two sons. The company owned a portfolio of investment assets intended to generate income for family members. The company's value was represented primarily by investment property interests rather than liquid cash resources. Borrowing secured against those assets also featured prominently in the evidence concerning its financial position.

285. Nevertheless, there are ongoing practical connections between R5 and the Urban Splash organisation. R5 shared Urban Splash's Timber Wharf address and received accountancy, property management, marketing and administrative services from Urban Splash personnel. Mr Bloxham's evidence was that those services were provided pursuant to commercial arrangements under which R5 paid for the services received.

286. In addition to its own investment activities, R5 participated in the establishment and funding of R6 – TM Freeholds Limited. There was a loan arrangement between the two companies and a shareholders' agreement governing the relationship between R5 and the other investors in R6. Under those arrangements, R5 possessed certain contractual rights relating to the governance of R6, including contingent rights concerning the appointment of directors in specified circumstances. Mr Bloxham told us that R5 had never sought to exercise these rights.

R6: TM Freeholds Limited

287. R6 was incorporated in 2016 as a joint-venture investment company involving R5 on one side and Mark Hawthornthwaite on the other. The venture was conceived as a means through which the parties could invest private capital in residential freehold interests capable of generating ongoing income through ground rents, in addition to capital growth.

288. Both Mr Bloxham and Mr Hawthornthwaite were experienced property entrepreneurs, albeit with different commercial backgrounds. Mr Bloxham's business activities had principally centred upon property development, regeneration and property-led projects undertaken through Urban Splash and related ventures. Mr Hawthornthwaite's experience lay principally within property investment, particularly the acquisition and management of freehold interests and associated income and capital-growth producing assets, principally from ground rents and payments from leaseholders exercising enfranchisement rights.

289. Freehold investments acquired by R6 were identified and sourced principally through Mr Hawthornthwaite's activities. Financing was obtained through a combination of shareholder investment, funding from R5 and third-party borrowing. The resulting business was directed towards ownership and management of freehold interests rather than property development.

290. Governance arrangements reflected the joint-venture nature of the enterprise. Ownership was shared between interests associated with Mr Bloxham and interests associated with Mr Hawthornthwaite. Significant decisions required participation by representatives of both ownership groups. Day-to-day management of the portfolio was undertaken through external specialist firms rather than by employees of Urban Splash. The management of freehold interests was delegated to third-party organisations and operational activity was largely conducted through those arrangements.

291. R6 held no interest in any of the Buildings. Nor was it involved in their development. Rather, the evidence presented R6 as a company established years later to acquire and manage an unrelated portfolio of residential freehold interests for the benefit of particular individuals and their families.

292. By the time of the hearing, R6 owned a portfolio of residential freehold investments financed through a combination of investor capital and secured borrowing. Its accounts recorded net assets of approximately £1.35 million. However, the company operated with relatively modest cash resources and substantial borrowing secured against its portfolio.

R7 & R10: THE URBAN SPLASH RESIDENTIAL FUND

Introduction

293. R7 and R10 form part of an investment fund originally known as the Urban Splash Residential Fund but renamed the SURE Residential Fund (the Fund) on 18 March 2026. They are not property development companies, but instead

form part of a collective investment structure through which capital raised from investors is deployed in UK residential property.

294. The Fund's legal, regulatory and governance arrangements are complex. R7 and R10 are two of several entities involved in its operation. Other participants act as investment manager, investment adviser, feeder vehicles and property manager. We understand that such allocation of functions between different entities is a common feature of alternative investment fund structures.

295. It is necessary at the outset to distinguish between R7 and R10. R7 is a limited company, now called SURE Residential A Limited (formerly, Urban Splash Residential Limited). It is common ground that R7 is associated with R1 because Mr Bloxham was a director of both companies during the relevant period. R10, by contrast, is a limited liability partnership, now called SURE Residential LLP (formerly, Urban Splash UK Residential LLP). The statutory provisions which determine whether an LLP is associated with a company differ from those applicable where the two relevant entities are companies. Whether R10 is associated with R1 is therefore disputed and is one of the principal issues in the proceedings. The Applicant relies upon the Fund's origins, its relationship with the Urban Splash enterprise and the roles played by individuals connected with Urban Splash. R10 relies upon the Fund's constitutional arrangements, its regulatory status and the distribution of decision-making responsibilities between its various governing bodies. We determine that dispute later. For present purposes, we describe the Fund's origins, structure, activities, governance and resources.

The founders and other key individuals

296. The Fund was co-founded by Tom Bloxham and Paul Gough. Mr Bloxham brought his experience of residential development and regeneration, together with access to the Urban Splash development pipeline. His involvement reflected the central position which he occupied within the wider Urban Splash enterprise. He also invested personally in the Fund and remained involved in the bodies concerned with its investment advice and governance.

297. Mr Gough approached the venture from an investment-management background. He is managing partner of STAR Capital Partners LLP (STAR), sits on STAR's executive board and is approved by the Financial Conduct Authority. In common with Mr Bloxham, he is also a partner and designated member of SURE Capital Partners LLP (SURE), a director of R7, and a member of the Fund's Investment Committee. He also sits on the Fund's Investors' Advisory Committee and operational board. He described himself as the most senior person at STAR involved in the running of the Fund.

298. A third significant figure is John Forbes. Mr Forbes worked for PwC for 26 years, latterly as its international subject-matter expert for real estate funds. After leaving PwC, he undertook consultancy, non-executive and public policy work concerning the structure, operation and governance of real estate investment funds. He acted as the independent non-executive chair of the Fund's Investment Committee, Investors' Advisory Committee, operational board and annual investor meetings.

299. A fourth important figure is Akeel Malik. He joined the Fund after its establishment and became a partner and designated member of SURE. He has day-to-day responsibility for SURE's activities as investment adviser to the Fund. Mr Malik described Mr Bloxham and Mr Gough as his business partners in SURE; each shared in its profits and voting rights. He also described both men as mentors, although the parties disputed the practical extent to which Mr Bloxham and other senior Urban Splash figures influenced his work for the Fund.

300. Mr Gough, Mr Forbes and Mr Malik gave extensive evidence concerning the structure, operation and governance of the Fund. Their evidence forms much of the factual foundation for the account which follows.

Establishment and purposes of the Fund

301. R7 and R10 were both incorporated on 27 March 2017. The Fund was established to raise capital from investors and invest that capital in property-related assets with the object of achieving targeted returns. Its investment remit extended to direct and indirect investment in real estate and property-backed operating businesses in the UK, subject to investment guidelines contained in its governing documents.

302. In practical terms, the Fund's principal activity became the acquisition and ownership of completed UK residential properties for letting. It seeks to generate rental income and longer-term capital growth from a professionally managed portfolio. It does not undertake property development itself. Nor does it take on the development risk associated with bringing uncompleted projects to fruition.

The Fund as an Alternative Investment Fund

303. R10 is an Alternative Investment Fund (AIF). That status is fundamental to an understanding of the Fund's structure. An AIF pools capital raised from a number of investors and invests it in accordance with a defined investment policy for their benefit. As such, an AIF is a collective investment scheme for the purposes of section 235 of the Financial Services and Markets Act 2000[32]. The Fund therefore required legal and governance arrangements which distinguish between the investors, the vehicle holding the investments, the regulated manager, the investment adviser and those providing operational services. In particular, those arrangements must achieve compliance with section 235(2) of the 2000 Act, which provides:

> *The arrangements must be such that the persons who are to participate ("participants") do not have day-to-day control over the management*

[32] A collective investment scheme is defined as "any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income." (section 235(1) of the 2000 Act).

of the property, whether or not they have the right to be consulted or to give directions.

304. The regulatory framework derives from the Alternative Investment Fund Managers Directive (AIFMD), implemented domestically by the Alternative Investment Fund Managers Regulations 2013 and corresponding provisions of the FCA Handbook. Following the UK's withdrawal from the European Union, the domestic regime has continued to regulate the management of UK AIFs.

305. The regime requires an AIF to have an authorised Alternative Investment Fund Manager (AIFM). The functions which must be assigned to the AIFM include portfolio management and risk management. The AIFM may also undertake functions relating to administration, marketing and the Fund's assets. The purpose of this regulatory architecture is to protect investors by vesting responsibility for those functions in an FCA-authorised manager and by preventing one participant in the management chain from acting alone.

306. The Fund's original AIFM was an entity called Mariana. However, STAR assumed that role on 12 October 2020. Mr Gough explained that Mariana was not a "full-scope" AIFM and would not have been authorised to continue managing the Fund after it exceeded the relevant size threshold. STAR is a full-scope UK AIFM authorised by the FCA.

307. Mr Gough, Mr Forbes and Mr Malik each maintained that the Fund's constitutional and governance arrangements reflected ordinary alternative investment fund practice and were designed to ensure that investment, governance and regulatory functions were distributed between different participants. The Applicant disputed whether the practical operation of the Fund corresponded with that formal allocation of responsibilities. We return to that issue later.

The Fund's relationship with Urban Splash

308. The Fund's original commercial proposition was, however, closely connected with Urban Splash. Access to Urban Splash's anticipated pipeline of completed residential properties provided a means by which the Fund could assemble an initial portfolio. It also offered investors prospective access to properties produced by Urban Splash developments and by joint ventures in which Urban Splash participated.

309. Properties connected with Urban Splash accordingly formed the Fund's seed portfolio. There were commercial advantages on both sides. Urban Splash and its joint ventures obtained a potential purchaser able to acquire completed residential units, while the Fund obtained access to a known pipeline and the opportunity to negotiate purchases in quantity or at particular stages of a development. Mr Forbes explained that favourable terms could sometimes be negotiated where the Fund agreed to acquire the first or last flats available at a development and where the seller had confidence in the Fund's ability to complete.

310. The relationship was later recorded in arrangements which gave the Fund preferential or first-look access to part of the Urban Splash development pipeline. Access to that pipeline represented a commercial advantage for the Fund and was regarded by some investors as an attractive feature of the investment proposition. It did not oblige the Fund to acquire every property offered to it. Proposed acquisitions remained subject to the Fund's investment criteria and approval processes.

311. This connection was particularly pronounced at "the qualifying time": as at 14 February 2022, the Fund's property assets were almost entirely derived from Urban Splash developments. Its regulatory structure and external investor base were therefore already substantial features of the Fund, but the composition of its portfolio still reflected its origins and the commercial importance of the Urban Splash pipeline.

312. The portfolio subsequently became more diversified. Mr Forbes explained that changes in market conditions made it commercially attractive to purchase existing investment assets from motivated sellers, in some cases at less than replacement cost. The Fund developed relationships with other counterparties, including Places for People and Citu, and acquired properties from third parties. Its final acquisition connected directly with the Urban Splash enterprise was said to have comprised two homes acquired from the administrators of Urban Splash House Limited in 2023. Acquisitions thereafter were said to have been from third parties.

313. The history was therefore one of evolution. The Fund was established with the benefit of the Urban Splash brand and pipeline; its original portfolio was overwhelmingly composed of Urban Splash-related properties; and the Urban Splash enterprise remained an important property manager, service provider and potential source of investments. Over time, however, the Fund's portfolio and sources of acquisitions broadened.

The master-feeder structure

314. R7 and R10 occupy different positions within the Fund. R10 is the master fund and the entity which holds the properties acquired by the Fund. R7 is one of three feeder vehicles through which investors invest in the master fund.

315. R7 provides the investment route for high-net-worth individuals, other than where those investors invest through pension arrangements. A separate exempt unauthorised unit trust serves pension-fund investors, while another serves the institutional investor. In each case, the feeder vehicle's investment consists of its membership interest in R10. Investors do not acquire a direct interest in each property held by R10.

316. Mr Forbes and Mr Gough described this as a conventional master-feeder arrangement. Its purpose is to accommodate the differing tax, regulatory, liquidity and administrative requirements of different classes of investor while pooling their capital in a single underlying investment vehicle. R10 was constituted as a limited liability partnership and is tax-transparent. That

characteristic enables different feeder vehicles to participate in the same master fund.

317. R7 also operates as a "corporate blocker" for individual investors. Without that vehicle, each individual investing directly in R10 would potentially be required to account for a proportionate share of the income and expenditure arising from each underlying property. R7 instead accounts for the relevant income at feeder level and pays dividends to its individual shareholders. There are tax advantages to investors from such an arrangement.

318. The entities which are members of R10 include Urban Splash Management Limited, R7, the trustee of the pension feeder, Urban Splash Residential (CI) LP, SURE and the institutional feeder. STAR is not itself a member of R10, but acts as the Fund's regulated AIFM. Urban Splash Management Limited provides property management services. SURE acts as investment adviser.

The "carry" arrangements

319. A further part of the structure concerns the entitlement of certain individuals and groups to participate in the Fund's financial success. Urban Splash Residential (CI) LP is the vehicle through which founder investors and other senior figures within Urban Splash and SURE may receive a share of the Fund's profits, commonly described in the investment industry as carried interest (or "carry"), if the applicable conditions are satisfied.

320. The carry arrangements therefore created an economic interest for those entitled to participate in them which is distinct from an ordinary return upon invested capital. They provide a means of rewarding the founders and others if the Fund achieves the stipulated level of performance. The carry forms part of the Fund's constitutional and economic structure and provides those concerned with a contingent interest in its financial success. No carry has become payable since the Fund's inception, however. The significance of those arrangements to the issues of association and control are considered later.

Governance changes following institutional investment

321. The Fund's governance arrangements evolved as it grew. STAR became the AIFM in 2020 and, in December 2021, the Fund's governing documents were amended when a sovereign wealth fund, unconnected with Urban Splash, made a substantial institutional investment. Mr Gough referred to an investment of £100 million. The investor undertook due diligence concerning the Fund's structure and required changes intended to protect its capital and bring the arrangements into line with its institutional requirements. Mr Gough's evidence was that the Fund's earlier governance arrangements differed in certain respects from those operating at the time of the hearing. In particular, he explained that, prior to the 2021 changes, he and Mr Bloxham possessed rights which effectively enabled them to prevent proposed activities from proceeding. According to Mr Gough, those rights were removed as part of the governance changes required by the incoming institutional investor, resulting in a more institutionalised governance structure and a more formal allocation of responsibilities than had existed previously.

322. The changes also included provision for additional feeder vehicles, differing liquidity arrangements, and the formal definition of the roles of the Fund's principal governing bodies. An Investors' Advisory Committee was established and a separate feeder vehicle accommodated the institutional investment. Mr Forbes described these as amendments to the Fund's governance rather than a corporate restructuring.

323. The principal constitutional documents included an amended and restated LLP agreement governing R10, an advisory agreement between R10, STAR and SURE, a management agreement between R10 and STAR, and a property management agreement between R10 and Urban Splash Management Limited.

324. The regulatory regime and the contractual allocation of responsibilities were central to R7 and R10's case concerning management and control. We record the arrangements at this stage without deciding whether their formal terms accurately or exhaustively described the practical exercise of influence over R10. That question requires consideration of the documentary and oral evidence as a whole and is addressed separately.

Governance arrangements and their practical operation

325. The Fund is managed on a discretionary basis. Investors entrust responsibility for management to STAR, advised by SURE, rather than themselves participating in day-to-day investment decisions. Investors receive information and can express views through annual investor meetings. Investors whose commitment exceeds the threshold stipulated in the Fund's documents are entitled to appoint a representative to participate directly in the Investors' Advisory Committee. Mr Gough represents smaller investors who do not meet that threshold.

326. Under the current governance arrangements, STAR acts as AIFM and bears regulatory responsibility for portfolio management and risk management. Although STAR is not a member of R10, its powers derive from the management agreement, the LLP agreement and the regulatory regime. Those documents state that STAR has exclusive responsibility, subject to their remaining provisions, for the management, operation and administration of R10's business and affairs.

327. SURE acts as investment adviser. Through Mr Malik and his team, it sources and analyses investment opportunities, negotiates with counterparties and prepares recommendations. Under the formal arrangements, SURE cannot commit R10 to an acquisition merely by making a recommendation.

328. The Investment Committee is a committee of SURE chaired by Mr Forbes. Its formal role is to consider proposed investments, approve the advice which SURE proposes to give to STAR, and determine prescribed "Reserved Matters". Those matters include acquisitions and certain disposals, approval of the annual business plan, material changes to rents, changes to the nature of R10's business, the admission or removal of members, and the incurring of debt by R10 or its underlying asset vehicles.

329. The governing documents require the unanimous consent of all eligible voting members for Reserved Matters, subject to restrictions arising from actual or potential conflicts. Mr Forbes said that the committee also proceeds by consensus in practice when considering matters which could formally be determined by majority vote. On the formal structure, no individual member can secure approval of a Reserved Matter without the agreement of the other eligible members.

330. Mr Forbes described an active committee process. He said that the committee usually meets monthly; that detailed papers are circulated in advance; and that proposals commonly return to the committee while further investigation, negotiation or risk mitigation takes place. He said that committee members challenge pricing and require SURE to seek the best terms reasonably available. Mr Forbes also explained that the governance arrangements evolved over time. Before the December 2021 restructuring, he was one of the individuals whose consent was required to approve Reserved Matters. After that restructuring, he remained independent chair of the Investment Committee, but no longer possessed a formal vote, although his views continued to be taken into account as part of the committee's decision-making process.

331. Mr Malik has day-to-day operational oversight of SURE's activities in relation to the Fund. His evidence concerning the flats at Sylvia and Christabel also illustrates the distribution of functions between SURE and Urban Splash Management Limited. SURE receives portfolio, tenancy and disposal information from the managing agent, holds regular meetings concerning portfolio performance and disposals, and gives instructions on R10's behalf. Urban Splash Management Limited performs the day-to-day property management function.

332. The Investors' Advisory Committee formally provides a forum in which qualifying institutional investors can question SURE and exercise rights relating to specified matters and conflicts. R10 also has an operational board, chaired by Mr Forbes, which considers Fund reports, performance and general operation. Annual investor meetings provide a further opportunity to report to investors and receive feedback.

333. The Applicant did not accept that the Fund invariably operated in accordance with that formal allocation of responsibilities. It contended that the documentary evidence showed substantial practical involvement by Mr Bloxham, Mr Curnuck and other persons connected with Urban Splash; that elements of the committee structure developed incrementally; and that aspects of the process operated more informally than the constitutional documents suggested. It characterised parts of the committee process as approval of decisions predetermined elsewhere. R7 and R10 rejected that characterisation. They relied upon the committee scrutiny, transactions which did not proceed, the terms obtained in acquisitions, STAR's ultimate authority and the regulatory obligations of those involved. We record the formal architecture and the witnesses' account of its operation at this stage, but defer our findings about the practical exercise of influence and control.

Conflicts of interest and the Urban Splash relationship

334. The witnesses accepted that the Fund's relationship with Urban Splash created actual or potential conflicts of interest. Urban Splash had supplied properties to the Fund, Urban Splash Management Limited provided property management and support services, the Fund used the Urban Splash brand, and the pipeline arrangements gave it preferential access to potential acquisitions arising from Urban Splash developments. Individuals connected with Urban Splash – most notably, Tom Bloxham – were also involved in SURE and the Investment Committee and possessed economic interests in the Fund, including through the carry arrangements.

335. Mr Forbes said that conflicts of that kind were not unusual in investment funds associated with property developers. He regarded the appropriate response as the identification, disclosure and management of the conflict through governance controls rather than the assumption that no conflict existed. The relationship with Urban Splash offered commercial benefits, particularly pipeline access, but required safeguards when the Fund considered transactions with Urban Splash entities or their joint ventures.

336. The controls identified in the evidence included the requirement for unanimous approval of Reserved Matters, final approval by STAR, oversight by the Investors' Advisory Committee, independent valuation of acquisitions and restrictions upon participation by conflicted committee members. Neither Mr Bloxham nor Mr Curnuck was entitled to vote in Investment Committee decisions concerning the Urban Splash group. STAR also had regulatory responsibility for monitoring conflicts.

337. All acquisitions, including those connected with Urban Splash, were subject to an independent valuation by the Fund's appointed valuer. At the time described by Mr Forbes, that role was performed by Savills, unless conflicted. Savills also provided quarterly valuations of the portfolio.

338. Mr Forbes described occasions when tension arose between the SURE team acting for the Fund and Urban Splash as counterparty. His evidence was that the Investment Committee expected SURE to negotiate robustly in the Fund's interests. The existence and practical effectiveness of these protections form part of the evidence relevant to the later association analysis.

Investors and resources

339. The Fund's capital is provided through its feeder vehicles by high-net-worth individuals, pension investors and an institutional investor. At its inception, Mr Bloxham and Mr Gough each invested £3 million personally, and other Urban Splash directors and shareholders have also made smaller personal investments. However, external capital subsequently became the predominant source of the Fund's equity, including a substantial commitment by a sovereign wealth fund unconnected with Urban Splash. Mr Gough's evidence was that, as at 31 March 2025, only 4.24% of the units in the Fund (with each unit in the Fund having equal value) were owned by Urban Splash group directors and

shareholders, while more than 94% were owned by investors who had no connection with the Urban Splash enterprise.

340. The Fund has grown substantially since its establishment. Its accounts for the year ended 31 March 2022 recorded a net asset value of approximately £90.3 million. Mr Malik explained that the reported net asset value included committed equity which had been drawn as cash and therefore exceeded the value of the properties then held. The evidence was that the Fund has since continued to acquire and dispose of properties and to seek further institutional capital.

341. R7's principal asset is its membership interest in R10. It is the feeder through which individual investors participate in the Fund. Its position therefore differs from that of R10, which holds the underlying property investments.

342. Neither R7 nor R10 had any involvement in the construction or development of the seven Buildings. R10 did subsequently acquire 14 flats at Sylvia and Christabel from Places for People Homes Limited in May 2023. Mr Malik explained that, by the time of the hearing, all three Christabel flats had been sold; a number of the Sylvia flats had also been sold; and the remaining flats were vacant and intended for sale. R10 has no other interests in any of the Buildings.

R8 & R9: THE SHED COMPANIES

343. For the sake of completeness, we mention here R8 and R9: Shed KM Holding Limited and Shed KM Limited.

344. Shed KM is an architectural practice based in Liverpool and co-founded by Jonathan Falkingham, who was also one of the founders of Urban Splash. The Shed Companies are associated with R1 by virtue of Mr Falkingham's common directorship during the relevant period, and there have been various business dealings between these organisations over the years: indeed, Shed KM were engaged as architects when R1 undertook the Moho development.

345. The Shed Companies were two of the seven additional respondents joined in these proceedings in November 2024. However, they reached a settlement with the Applicant before the final hearing commenced. It is therefore unnecessary to say more about them.

R11: STUBBS MILL LLP

Introduction

346. R11, Stubbs Mill LLP, was incorporated on 19 December 2014. It played no role in the design, development or construction of any of the seven Buildings.

347. In common with R10, R11 is a limited liability partnership rather than a company. And, again in common with R10, such legal status gives rise to a dispute in these proceedings as to whether R11 is associated with R1. We will return to that issue in due course.

348. The Applicant's case focussed principally upon the identity of R11's members, the LLP's ongoing relationship with the wider Urban Splash enterprise and the practical reality of those relationships. R11 placed greater emphasis upon its LLP structure, separate ownership, independent financial affairs and the absence of any corporate ownership link with Urban Splash companies. Those differences are also addressed later. Before considering them, it is necessary to explain why R11 was created, how it operated and the nature of its relationship with the wider Urban Splash enterprise.

Origins of the Stubbs Mill venture

349. The property known as Stubbs Mill (a former mill building in Manchester) had been owned by the Urban Splash group for many years before the creation of R11. Both Mr Bloxham and Mr Curnuck described it as a site which had proved difficult to bring forward successfully. Following the 2008 financial crisis, the property remained derelict and reduced property values rendered redevelopment commercially unattractive on conventional terms. No viable redevelopment solution had been identified.

350. According to Mr Curnuck, the emergence of Business Premises Renovation Allowance (BPRA) altered that position. BPRA was intended to encourage redevelopment of commercial premises in disadvantaged areas through the provision of tax relief to qualifying investors. He explained that the Urban Splash group itself could not benefit from the relief because it already possessed substantial accumulated tax losses, which he estimated at approximately £68 million.

351. Both Mr Bloxham and Mr Curnuck described the resulting solution as one in which individuals associated with Urban Splash would invest personally rather than through the Urban Splash group. They considered the project capable of generating an acceptable return if the available tax relief could be utilised by individual taxpayers rather than by the group itself.

352. Mr Curnuck described the project as serving two related purposes: facilitating the use of BPRA relief and providing an investment vehicle through which individuals associated with Urban Splash could deploy personal capital outside the wider group's activities. The Applicant, however, characterised Stubbs Mill as an Urban Splash-led development and investment opportunity, involving many of the same individuals, which had been placed in a separate structure principally to secure tax advantages unavailable within the existing corporate group.

353. Either way, R11 was established as a specific vehicle through which redevelopment of the site could be undertaken, and the LLP structure was selected because it facilitated participation by individual investors whilst enabling the tax consequences of the project to flow through to those investors directly.

354. The redevelopment project proceeded through R11 following acquisition of the property from R2 in March 2015. We were taken to documentary evidence that

the acquisition took place at an arm's-length value supported by an independent valuation.

Membership and governance

355. Since its incorporation, the members of R11 have been Tom Bloxham; Julian Curnuck; Nathan Cornish; Jonathan Falkingham; and Simon Gawthorpe. All five individuals were closely associated with Urban Splash and occupied senior positions within the wider Urban Splash enterprise. However, both Mr Bloxham and Mr Curnuck stressed that the investment in Stubbs Mill was made in a personal capacity and not through Urban Splash group companies. They described R11 as a vehicle through which they and a small number of colleagues sought to invest their own capital in a project distinct from the Urban Splash group: the investors wished to keep the project distinct from the group's wider assets, liabilities, borrowing arrangements and tax position.

356. R11's five members participate in its governance through an LLP agreement. Two of those members, namely Mr Bloxham and Mr Curnuck, act as designated members. The evidence concerning voting rights, reserved matters, designated-member powers, PSC status and practical influence formed a substantial part of the parties' disagreement concerning association and control. Those matters are addressed separately when considering the statutory test for association. For present purposes, it is sufficient to note that the LLP agreement established the formal framework through which decisions concerning R11 were made.

Finances and relationship with the Urban Splash enterprise

357. The acquisition of Stubbs Mill and its subsequent redevelopment by R11 was financed through a combination of capital contributed by R11's members and borrowing secured against the redevelopment project. Both Mr Bloxham and Mr Curnuck characterised R11 as a long-term private investment rather than an operating business within the Urban Splash group.

358. An issue explored in some detail was whether profits generated by Urban Splash developments ultimately funded R11. Mr Curnuck accepted that R1 paid substantial dividends to its parent company, Urban Splash Group Limited, in 2009 and 2010. However, his evidence was that those dividends remained within the Urban Splash group and were not distributed onwards to the individuals who later invested in R11. He therefore denied that R11 had been funded using profits generated by the seven Buildings or by other developments.

359. Mr Curnuck also identified particular sources from which members' investment capital was said to have been derived, including proceeds from earlier investments and ventures unrelated to development of the Buildings. In closing submissions, Mr Charlesworth relied upon that evidence and submitted that it had not been materially undermined during cross-examination.

360. Notwithstanding the members' stated desire to separate their investment in R11 from Urban Splash's wider activities, its financing subsequently became connected with that of a number of Urban Splash entities. The development was

initially funded through members' capital and loans from Mr Bloxham. In December 2016, R2 provided R11 with a £2.5 million bridging facility, principally to enable the earlier loan from Mr Bloxham to be repaid (which it was necessary to do for tax reasons). Mr Curnuck explained that R2 then had surplus cash available and earned interest upon the facility; the arrangement was intended to bridge the period until longer-term property finance became available.

361. In August 2017, that bridging facility was repaid when R11 entered into a five-year financing arrangement with Rothschild, under which approximately £2.496 million of the borrowing was allocated to R11. The facility also involved Urban Splash Commercial 2017 Limited and was secured upon both Stubbs Mill and commercial properties held by that company. Mr Curnuck explained that finance had proved difficult to secure against Stubbs Mill alone and that combining properties into a larger security pool made the borrowing more attractive to lenders. In February 2020, the facility was re-geared to release further capital: the amount allocated to R11 increased by £616,305, which R11 then lent to Urban Splash Commercial 2017 Limited for capital expenditure. Interest was payable on that onward loan.

362. The Rothschild facility was itself refinanced in July 2022 through a new eight-year facility with Aviva. That arrangement consolidated the existing financing with borrowing relating to R4, producing a wider pool of security. Mr Curnuck explained that this enabled finance to be obtained on favourable commercial terms. When asked about the resulting interdependence, he accepted that R11 thereby exposed itself to wider business risk because Stubbs Mill stood as collateral for borrowing extending beyond R11 itself; he also explained that the arrangement benefited R11 by enabling it to obtain finance which had proved difficult to secure on a standalone basis, whilst the wider pool of properties also benefited the other businesses by producing a more attractive lending proposition.

363. The evidence therefore disclosed financial relationships operating in both directions between R11 and Urban Splash entities. Urban Splash resources were used temporarily to finance R11; Stubbs Mill subsequently formed part of security pools which supported borrowing by R11 alongside Urban Splash commercial property businesses; and capital released against the property was lent onwards to Urban Splash Commercial 2017 Limited. The parties attached different significance to those arrangements. The Applicant relied upon them as evidence of continuing financial integration between R11 and the wider Urban Splash enterprise. R11 emphasised that the transactions were entered into on commercial terms, were mutually beneficial and enabled it to obtain long-term finance which would have been more difficult to secure independently.

364. At the time of the hearing, R11's accounts recorded fixed assets of approximately £4.5 million and net assets of approximately £1.46 million. The parties differed as to the practical significance of those figures and the extent to which those assets would be available to satisfy any RCO.

PART 4 – "ASSOCIATION" AND THE APPLICATION OF SECTION 121 OF THE BSA

365. In this Part, we determine which of the disputed Respondents are associated with R1 for the purposes of section 121 of the BSA. We first identify the extent of the dispute and consider the proper construction of the statutory test for control in section 121(8), including the means by which control may be exercised and the degree of power which the provision requires. We then apply that test separately to R10 and R11, examining in each case whether R1 or R3 had the power, directly or indirectly, to secure that the LLP's affairs were conducted in accordance with its wishes.

THE EXTENT OF THE DISPUTE

366. Section 124(1) of the BSA provides that 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. Nevertheless, by virtue of subsections (2) and (3) of section 124, such an order may only be made against a specified body corporate or partnership; and a body corporate or partnership may be specified as a person required to make payments pursuant to an RCO 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).

367. "Developer" is defined for these purposes in section 124(5):

> *"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;*

368. It is common ground that R1 meets that definition in relation to each of the seven Buildings.

369. The meaning of the term "associated" is addressed in section 121. Each of R2 to R7 admitted that they are associated with the developer, R1. However, both R10 and R11 denied association and submitted that, irrespective of whether it would be just and equitable to do so, the Tribunal has no jurisdiction to make an RCO against either of them.

370. The question of "association" was therefore a central theme in the proceedings, with evidence and argument on this issue taking up a significant proportion of Phase 2 of the hearing. The parties disagreed about the meaning of the concept as a matter of law. They also disagreed about the facts which could properly be established on the evidence.

371. Before moving on to consider the issue of association in detail, we pause to note that the Applicant relied upon a separate basis upon which R10 falls within section 124(3). When the RCO applications were made, R10 was a landlord under leases of parts of Christabel House and Sylvia House, and therefore satisfied the condition in section 124(3)(a). That conclusion says nothing, however, about whether it is just and equitable to make an RCO against R10. The circumstances in which R10 satisfies the landlord condition, including the nature and extent of its interests in those Buildings and the obligations attaching to them, are matters which fall to be considered separately under section 124(1). We return to those matters in Part 5[33].

CONSTRUCTION OF SECTION 121(8) OF THE BSA

Reason why section 121(8) is relevant

372. As limited liability partnerships, neither R10 nor R11 (the LLPs) have directors, but each is a body corporate[34].

373. Section 121(5) of the BSA provides:

> *A body corporate is associated with another body corporate if–*
>
> *(a) at any time in the relevant period a person was a director of both of them, or*
>
> *(b) at the qualifying time, one of them controlled the other or a third body corporate controlled both of them.*
>
> *Subsections (6) to (8) set out the cases in which a body corporate is regarded as controlling another body corporate.*

374. "The qualifying time" is defined in section 119(2)(d) as "the beginning of 14 February 2022".

375. It is common ground that R3 is the parent company of R1, and consequently that R3 controls R1 (and that it did so at the qualifying time). It therefore follows that each LLP is associated with R1 if, at the beginning of 14 February 2022, it was controlled by either R1 or R3.

376. R1/R3 are not members of either LLP. Nor do R1/R3 hold voting rights in either of them. So, there is no control of the LLPs by virtue of section 121(7) of the BSA. However, section 121(8) provides:

[33] See paragraphs 828-833 below.

[34] By virtue of section 1(2) of the Limited Liability Partnerships Act 2000. Note, however, that neither LLP is a "partnership" as defined by section 121(11) of the BSA (and so the relevant test for association is not that set out in section 121(3)).

A body corporate (X) controls another body corporate (Y) if X has the power, directly or indirectly, to secure that the affairs of Y are conducted in accordance with X's wishes.

377. And section 121(10) provides:

> *In determining whether one body corporate (X) controls another, X is treated as possessing–*
>
> *(a) any rights and powers possessed by a person as nominee for it, and*
>
> *(b) any rights and powers possessed by a body corporate which it controls (including rights and powers which such a body corporate would be taken to possess by virtue of this paragraph).*

378. Given that neither R10 nor R11 admitted association with R1, it is necessary to determine whether, at the qualifying time, either or both of them were "controlled" for the purposes of section 121(8) by R1 or R3.

The disputed question of law

379. There was a fundamental disagreement between the parties as to what the Applicant must prove in order to establish control of either LLP by R1/R3 for the purposes of section 121(8) of the BSA. Although the parties frequently characterised their disagreement as a dispute between "legal" and "practical" control, both sides appeared to accept that practical realities are relevant to the enquiry required by section 121(8). The principal disagreement concerned the attribution of powers and wishes to a body corporate; whether powers exercised by common individuals could properly constitute the means by which a body corporate exercises control; the significance of independent governance structures such as the AIFM arrangements applicable to R10; and the extent of the affairs of Y which X must be capable of securing in accordance with its wishes.

380. Essentially, the Tribunal was invited to decide between a 'narrow' and a 'broad' construction of the statutory provision.

381. The narrow construction of section 121(8) contends that:

a) "control" is anchored in established corporate law concepts;

b) section 121(8) operates within a structured framework defined by ownership and voting rights; and

c) broader influence is insufficient unless it approximates legal control.

382. On this construction, the controller must be X, the body corporate. It is not sufficient that the same natural person controls, influences or occupies positions of authority within both X and Y. Any power exercised over Y must be

a power belonging or properly attributable to X. Further, the ability to influence particular decisions or achieve isolated outcomes does not amount to control unless X possesses a sufficiently general and continuing power over the conduct of Y's affairs.

383. Conversely, the broad construction contends that:

a) "control" must be interpreted purposively and expansively;

b) the statutory language captures practical ability, however derived, to secure that another's affairs follow X's wishes; and

c) the test is functional, focussing on real-world power rather than formal rights.

384. On this construction, a body corporate necessarily acts through human agents. The practical powers of an individual who controls X and also possesses powers in respect of Y may therefore provide the means by which X exercises indirect control over Y. It is not necessary for X's control to be exclusive, to displace all other influences, or to extend to every individual affair of Y.

385. Both constructions accept that control may be exercised indirectly – as that is explicitly provided for in the statute – but they differ as to the threshold. On the narrow view, indirect control must still resolve into equivalent legal control (e.g., through chains of ownership). On the broader view, indirect control may arise through contractual networks or economic arrangements, even absent ownership.

386. The question which this boils down to is whether *de facto* rights and powers of a common individual or individuals – Tom Bloxham and/or Julian Curnuck in this case – to determine or direct the affairs of both X and Y would amount to control by X of Y[35].

387. That question gives rise to a number of subsidiary issues. They include whose power must be identified; how the wishes of an artificial legal person are to be ascertained; whether an individual's powers in relation to Y may be attributed to X when the individual acts in different capacities within the two entities; whether X must be able to secure the continuing and general conduct of Y's affairs or only a sufficiently material sphere of them; and whether the requisite power must enable X to prevail where other persons responsible for the governance of Y oppose its wishes.

The LLPs' narrow construction of section 121(8)

388. On behalf of R10, Ms Gibaud KC submitted that:

> "The relevant criterion under ss.121(5)(b) and 121(8) is "control" by reference to the power of a body corporate to "secure" that another's affairs are conducted in accordance with its wishes. The word "control" ordinarily connotes a

[35] It is, of course, disputed that Mr Bloxham (or anyone else) has such ability in respect of either LLP.

> relationship in which one party determines the acts of another. It obviously and on its clear language requires more than simply a commercial or counterparty relationship between parties, or having some common personnel. The definitional word "secure" is consistent with this high threshold, as opposed to a lower threshold of eg. a power (even a significant power) to influence or alter the affairs of the other."

and that:

> "On the plain text of s.121(8), the person exercising control must be a body corporate."

389. She argued that, whatever the powers of individuals such as Mr Bloxham and Mr Curnuck, these are irrelevant as section 121(8) is not concerned with individuals but rather with the power of the body corporate X over the LLPs.

390. Both Ms Gibaud KC and Mr Charlesworth (on behalf of R11) relied upon the deliberate contrast between the language of sections 121(5)(b) and 121(8), which refers to a body corporate, and other provisions of section 121 which refer more generally to a "person". They submitted that Parliament expressly provided for association through natural persons in sections 121(3), (4) and (5)(a), but did not provide that two bodies corporate are associated merely because they are controlled by the same natural person. Under section 121(5)(b), common control must be exercised by a third body corporate.

391. It was therefore submitted that the Applicant's case conflates three distinct propositions: first, that an individual controls X; secondly, that the same individual possesses powers or influence in relation to Y; and, thirdly, that X controls Y. The LLPs submitted that the first two propositions do not establish the third.

392. Nor, on their case, does the proposition that a body corporate can act only through individuals resolve the issue. A director or shareholder of X may separately possess powers as a member, designated member or committee member of Y. Powers exercised in the latter capacity are not necessarily powers of X. The individual may owe separate duties to each entity and may act for different purposes in each capacity.

393. Ms Gibaud KC also submitted that the Applicant did not establish how R1/R3 itself formed or expressed any relevant wish concerning R10. Mr Bloxham was not synonymous with R1/R3, each of which had a board whose directors owed independent duties to it. Even evidence that Mr Bloxham wanted R10 to pursue a particular course would not, without more, establish that the course represented the wishes of R1/R3 or that R1/R3 possessed a power capable of translating those wishes into R10's affairs.

The meaning of "directly or indirectly"

394. The LLPs argued that the statutory reference to indirect control should be understood as involving control by X, through one or more intermediary bodies which it controls, of body corporate Y. They relied in support upon the

Explanatory Notes to the BSA, which explain in relation to section 121(10)(b) that:

> "bodies corporate which are not directly associated can be taken as associated if there is a chain of associated bodies corporate which connects them." [36]

395. They also relied upon sections 1154 and 1155 of the Corporation Tax Act 2010, which explain indirect ownership by reference to ownership through another body corporate or a chain of bodies corporate. Ms Gibaud KC submitted that, because the Explanatory Notes identify the Corporation Tax Act 2010 as one of the sources upon which section 121 of the BSA was based, those provisions support an interpretation of "directly or indirectly" concerned with corporate chains and other identifiable mechanisms of attribution.

396. Section 121(10) of the BSA was said to support the same construction. Parliament expressly provided that X is to be treated as possessing rights and powers held by its nominee and by a body corporate which X controls. The LLPs argued that those express attribution provisions would be unnecessary if every power possessed by a director, shareholder or controller of X in some other capacity were automatically treated as a power of X.

397. It was asserted that it is not sufficient for the Applicant to establish a close commercial relationship between the LLPs (or either of them) and R1/R3, aligned marketing and/or sharing of resources. Instead, what the Applicant must show is that, at the qualifying time, R1/R3 had the power to secure that the affairs of the LLP were conducted in accordance with the wishes of R1/R3.

398. In Ms Gibaud KC's submission, "indirectly" does not dilute that requirement. Strategic alignment, coordinated decision-making, overlapping personnel and projects, the ability to acquire properties on a first-look basis, shared branding and the shared use of resources might demonstrate commercial connection or mutual advantage. They do not themselves establish that R1/R3 possessed a power capable of securing R10's affairs in accordance with R1/R3's wishes.

The significance of the words "secure that the affairs of Y are conducted in accordance with X's wishes"

399. Particular emphasis was placed upon the word "secure". Ms Gibaud KC submitted that the statutory test is not whether X can influence, encourage, recommend or contribute to Y's decisions. X must possess the power to bring about the result that Y's affairs are conducted in accordance with X's wishes.

400. Relying on the authority of *Farnborough Airport Properties Company v HMRC*[37] in which the Court of Appeal considered the definition of "control" in section 1124(2) of the Corporation Tax Act 2010[38], it was argued that this requirement sets a high formal and practical threshold for control intended to

[36] Explanatory Notes to the BSA, para 972.
[37] [2019] EWCA Civ 118.
[38] In so doing, the Court of Appeal considered and followed *CIR v Lithgows* (1960) 39 TC 270, in which the Court of Session had considered a materially similar provision of the Income Tax Act 1952.

be imposed by the language used in section 121(8) of the BSA. It is not a test of significant influence, nor even a test of "significant control" in the sense in which that expression is used by the PSC regime. Ms Gibaud KC submitted that the outcome must be secured in accordance with X's wishes and that, where control was disputed, the required power left no room for a contrary influence to determine the outcome. Her formulation was that the power had to amount to actual control, leaving no room for other influence.

401. Accordingly, a distinction was drawn between evidence that X's preferred outcome occurred; evidence that Y was receptive to proposals advanced by X or by common individuals; and a power by which X could ensure the chosen outcome, including where those responsible for Y's independent governance took a different view. The LLPs argued that section 121(8) requires the third of those propositions. The power to secure one acquisition, one disposal, one resolution or one class of transactions does not necessarily amount to control. Moreover, power amounting to control must be capable of producing X's chosen outcome where the wishes of X and Y diverge.

The Companies Act and accounting treatment

402. On behalf of R11, Mr Charlesworth submitted that:

> "the test for control in section 121 of the BSA is very similar to the test for subsidiary undertakings in sections 405 and 1159 of the Companies Act 2006. In particular, the test under section 121(7) of the BSA is materially the same as the Companies Act 2006, section 1159."

403. Based on that assertion, it was argued that, if either LLP was controlled by R3, then it would meet the definition of a subsidiary of R3 and consequently would be required under section 405 of the 2006 Act to be consolidated into R3's group accounts and listed as a subsidiary undertaking. In fact, however, neither LLP is a subsidiary of R3, as shown in R3's audited accounts. It follows that two separate firms of auditors accepted that R3 does not control the LLPs for the purposes of the 2006 Act.

404. More generally, the LLPs argued that the BSA's association provisions should be construed having proper regard to corporate separateness and legal certainty. Section 121 undoubtedly modifies the ordinary consequences of incorporation, but does so for specific purposes and within specific statutory limits. The width of the just and equitable discretion under section 124 cannot excuse a failure to satisfy the anterior jurisdictional gateway.

The Applicant's broader construction

405. On behalf of the Applicant, Ms Bretherton KC submitted that, in construing section 121(8), the words "power" and "indirectly" in particular must be construed broadly, as should what it means to "secure the affairs" of an entity.

406. Consistent with the context of association being a gateway condition for an RCO, the making of which will always be subject to the broad and discretionary 'just and equitable' test, it was argued that the words "directly or indirectly" are

plainly intended to cast the net wide. The decision to impose a test of *de facto* rather than purely *de jure* control (one arising out of what can be seen on the facts) was said to be entirely consistent with the intention and structure of the BSA. The focus should not be on the legal right to control but rather on what actually happens in practice.

407. Ms Bretherton KC submitted that:

> "Section 121(5) to (8) identify alternative cases of control. The consequence is that s.121(8) does identify control other than by way of the matters specified in s.121(7). It is significant that the word "power" is used by Parliament rather than "right(s)" as appears elsewhere in s.121. This is significant, particularly when the word "power" is read with "directly or indirectly".
>
> It is the Secretary of State's case that the requisite control exists in the present case because R1/R3, whether acting through Thomas Bloxham and/or Julian Curnuck or otherwise, has the power, both directly or indirectly, to secure the affairs of R10 and R11 respectively. The Secretary of State does not distinguish between direct and indirect control in the analysis set out, and argues both direct control, and indirect control in the alternative, are established on the evidence."

408. Sections 121(6) and (7) already address cases of control arising from shareholding, voting rights, membership and rights of appointment. The Applicant's case was that section 121(8) must perform additional work and cannot be confined to substantially the same forms of constitutional control.

A body corporate may exert control through common individuals

409. The Applicant asserted that control by a body corporate, X, may be manifested by the *de facto* rights and powers of one or more individuals through whom X acts. It denied that indirect control must be through the rights and powers possessed by a body corporate which X controls (as there is nothing in the wording of the statute that imports such a limitation). The Applicant's case was that key individual(s) were "the levers of control" by which R1/R3 imposed its indirect control over the affairs of various entities, including the LLPs.

410. Ms Bretherton KC relied upon the elementary proposition that a body corporate is an artificial legal person which can act only through human agents. A strict separation between the wishes and powers of a body corporate and the wishes and powers of those who direct it would therefore be artificial. A director, shareholder, PSC or other controlling individual may provide the mechanism through which X forms and implements its wishes.

411. On the Applicant's construction, section 121(8) may therefore be satisfied where the same individual controls X and Y and, through the exercise of those common powers, possesses the practical ability to ensure that Y's affairs are conducted consistently with the objectives or wishes of X. It is unnecessary to identify a chain of enforceable legal rights running from X, through the individual, to Y. The word "indirectly" accommodates the practical route through which the result is achieved.

Extent and exclusivity of the required control

412. Ms Bretherton KC further submitted that:

> "… indirect control does not necessarily mean that the affairs of Y are solely conducted in accordance with the wishes of X. It could be that indirect control of X is a significant but not isolated factor in how Y conducts its affairs. Similarly, it does not need to be all the affairs of Y that X is able to secure in accordance with its wishes. In any event, there may be more than one person with the "power, directly or indirectly, to secure that the affairs of Y are conducted in accordance with X's wishes".

413. According to the Applicant's analysis, therefore, there are a number of ways in which such indirect control could be exerted:

a) Indirect control can be established if there are common individuals in positions of authority in R1/R3 and R10/R11 respectively, and they have the power to secure the affairs of R10 and R11, for the benefit of/or in accordance with the objectives of R1/R3 (or otherwise).

b) Indirect control can be established if the business of R10/R11 is inextricably linked (or even reliant) on R1/R3.

c) Indirect control can be established via body corporate PSCs.

d) R1/R3 and R10 have other indirect connections through body corporates.

414. The Applicant therefore submitted that section 121(8) does not require exclusive control or complete domination. X need not determine every aspect of Y's governance or every individual transaction. There may be concurrent controllers, and the existence of other influences, duties or decision-makers does not necessarily prevent X from possessing the relevant power.

415. Nor, in the Applicant's submission, does *Farnborough Airport* require X to be capable of dictating every aspect of Y's affairs or securing whichever outcome it chooses in every conceivable situation. "The affairs" does not mean every individual affair. The ability to secure the conduct of a sufficiently material field of Y's activities may amount to control.

416. The Applicant accepted that one isolated decision may not establish control. However, evidence of particular decisions is capable of demonstrating a broader continuing power when considered cumulatively. Repeated compliance, patterns of decision-making, strategic dependence, common personnel, the "Urban Splash pipeline", management arrangements and the practical organisation of the business were said to be capable of establishing that power.

The PSC regime

417. The Applicant placed substantial reliance upon the statutory regime governing Persons of Significant Control. It submitted that PSC status demonstrates legislative recognition that practical control may arise through powers and relationships extending beyond formal ownership and voting arrangements. The Applicant relied in particular upon statutory guidance concerning absolute decision rights, veto rights, influence over business plans, management involvement, important assets and the cumulative effect of a person's relationships with an LLP and those responsible for managing it.

418. The Applicant argued that the PSC regime is, if anything, more demanding than section 121(8), because it refers to "significant influence or control", whereas section 121(8) refers simply to control. PSC status was said to be sufficient to establish the relevant power and, in Ms Bretherton KC's submission, it was difficult to envisage a person who was a PSC of an LLP but did not fall within section 121(8).

Discussion

Scope of the dispute

419. The competing arguments accordingly raised two related, but distinct, questions about the proper construction of section 121(8) of the BSA.

420. The first concerns the means by which control may be exerted. In particular, can control for the purposes of section 121(8) be exercised by a body corporate through the powers of common individuals, or must the relevant power always be found within a conventional chain of corporate ownership or constitutional rights?

421. The second concerns the degree of power which section 121(8) requires. Even if a body corporate may exert control through common individuals, what must be shown before it can properly be said that X has the power to secure that the affairs of Y are conducted in accordance with X's wishes?

422. These questions should be considered separately. The parties' submissions frequently moved between them, but they raise distinct issues of interpretation. Nor must the two questions necessarily be resolved in favour of the same party: the choice between the parties' competing 'narrow' and 'broad' constructions is thus not a binary one. These questions are connected to, but separate from, the evidential question whether the powers of Mr Bloxham, Mr Curnuck or other common individuals can properly be attributed to R1 or R3.

The means by which control may be exerted

423. We begin with the question whether control under section 121(8) of the BSA is confined to powers arising through ownership rights, voting rights, formal constitutional arrangements or chains of controlled body corporates.

424. We do not accept the LLPs' submission that the statutory concept is so limited. In enacting section 121(8) in its present terms, Parliament did not provide that X controls Y only where particular categories of legal rights exist. Nor did it adopt language such as that used in section 1155 of the Corporation Tax Act 2010 to identify specific sources from which the relevant power must arise. Instead, section 121(8) asks the broader question whether X has the power, directly or indirectly, to secure that the affairs of Y are conducted in accordance with X's wishes.

425. The inclusion of the words "directly or indirectly" is plainly significant. Control exercised through chains of corporate ownership undoubtedly falls within the provision. However, if those words were intended to refer only to circumstances already addressed by section 121(10), they would add little of substance to the statutory scheme. Section 121(10)(b) already provides that X is treated as possessing the rights and powers of body corporates which it controls.

426. We acknowledge the LLPs' converse submission that the express attribution rules in section 121(10) may indicate limits upon the attribution of powers held by others. However, subsection (10) provides that X is to be treated as possessing the specified rights and powers. It does not state that those are the only circumstances in which X may possess or exercise an indirect practical power. Treating subsection (10) as exhaustive would require words of limitation which Parliament did not use and would risk depriving "indirectly" in subsection (8) of independent effect.

427. We therefore accept the Applicant's submission that, for the purposes of section 121(8), the concept of indirect control extends beyond conventional ownership structures. The language employed is directed towards practical power rather than solely towards formal legal rights.

428. We also accept that a body corporate can act only through human agents. It follows that, in an appropriate case, powers possessed and exercised by common individuals may constitute the means through which body corporate X exerts control over body corporate Y. The existence of such powers is not excluded merely because they are exercised through individuals rather than through a chain of intermediary corporate entities.

429. We do not consider that paragraph 972 of the Explanatory Notes to the BSA compels a different conclusion[39]. The Explanatory Notes post-date the enactment of the legislation and must therefore be treated with appropriate caution. In any event, whilst they identify one example of indirect control operating through a chain of associated bodies corporate, they do not state that this is the only possible form of indirect control.

430. The language of section 121(8) is identical to that of section 131(4) of the BSA[40], which was considered in *381 Southwark Park Road RTM Co Ltd v Click St Andrews Ltd (In Liquidation)*,[41] where Jefford J said this:

[39] See paragraph 394 above.
[40] Section 131 defines association for the purposes of section 130 (Building Liability Orders).
[41] [2024] EWHC 3569 (TCC) 219 ConLR 29.

> "The position in relation to these two companies, Click St Andrews and Click Group Holdings, is that Click Group Holdings, in my judgment, does control or did control Click St Andrews. That is because Click Group Holdings holds all the shares of Click Above Limited and Click St Andrews is a wholly owned subsidiary of Click Above Limited. **Therefore, Holdings controlled Click St Andrews indirectly in the sense that it was able, through that corporate structure, to secure that the affairs of Click St Andrews were conducted in accordance with its wishes**. Indeed, on the facts, as Mr Levenstein has submitted, the controlling or directing mind of both of these companies was the same person, that is, Mr Emmett who appeared at trial on behalf of Click Group Holdings."[42] [Emphasis added]

431. The LLPs relied on the passage emphasised in the above extract in support of their narrow construction of section 121(8). However, we do not regard *381 Southwark Park Road* as providing decisive assistance. That case concerned a conventional corporate chain. However, as Ms Bretherton KC observed, the judgment also referred to the same person being "the controlling or directing mind" of the relevant entities. Consequently, the authority is capable of lending limited support to both sides. It demonstrates that corporate chains may establish control, but does not resolve the distinct question whether common controlling individuals may do so in the absence of such a chain.

432. For those reasons, we conclude that control for the purposes of section 121(8) may, in principle, be exerted through the powers of common individuals.

433. But this begs a further question: what must be proved to establish that control is exerted through the powers of common individuals? Acceptance of the proposition that X may exercise control through common individuals does not mean that every common director, shareholder, member or PSC thereby establishes control for the purposes of section 121(8). The statutory controller remains body corporate X, and the question is whether the powers possessed by the individual can properly be treated as the means by which X secures that Y's affairs are conducted in accordance with X's wishes.

434. We agree in substance with Ms Bretherton KC's submission that, before control can be established in a case of this kind, it will ordinarily be necessary to identify at least two matters. First, the relevant individual must possess sufficient power within X to enable that individual to shape, determine or implement X's wishes. Secondly, the same individual must possess sufficient power in relation to Y to secure the relevant outcome. The Applicant therefore treated common control as providing the practical mechanism through which the statutory relationship of control arises.

435. Those matters are necessary, but they may not always be sufficient. The fact that an individual determines the wishes of X and separately controls Y may establish common control by that individual without necessarily establishing that X controls Y. The individual's power in relation to Y must also operate as the means by which X's wishes are implemented, rather than merely as the exercise of the individual's separate personal power or of powers held in a

[42] *Ibid*. at para 7.

distinct capacity. That connection may be demonstrated by evidence that the individual exercises the power in relation to Y for the purposes of X, pursuant to a strategy or objective adopted by X, through commercial arrangements linking the two entities, or in circumstances in which the wishes attributed to X and implemented within Y can properly be distinguished from the individual's personal preferences. The question is one of substance, but the necessary relationship between the power of X and the conduct of Y must be proved rather than assumed.

The degree of power required

436. Our conclusion that control may, in principle, be exercised through common individuals does not resolve the dispute. It merely identifies one possible mechanism by which control may be exercised. The more difficult question concerns what level of power must exist before it can properly be said that X has the power to secure that the affairs of Y are conducted in accordance with X's wishes.

437. In our judgment, the Applicant's submissions on this issue travel too far.

438. Ms Gibaud KC submitted that the most useful authority to which we should have regard is the Court of Appeal's judgment in the *Farnborough Airport* case[43]. Whilst Ms Bretherton KC stopped short of arguing that the case had been wrongly decided, she urged considerable caution before relying upon it for present purposes. She submitted that *Farnborough Airport*, as well as the earlier decision of the Court of Session in *CIR v Lithgows Ltd*[44] was "simply not dealing with similar provisions". In particular, those cases were concerned with a different statutory definition of control.

439. That is true, but only to a point. *Farnborough Airport* concerned the construction of section 1124(2) of the Corporation Tax Act 2010, which provides:

> *In relation to a body corporate ("company A"), "control" means the power of a person ("P") to secure–*
> *(a) by means of the holding of shares or the possession of voting power in relation to that or any other body corporate, or*
> *(b) as a result of any powers conferred by the articles of association or other document regulating that or any other body corporate,*
> *that the affairs of company A are conducted in accordance with P's wishes.*

440. This statutory definition plainly confines the relevant sources of control to specified categories of shareholding, voting and constitutional rights. The same can be said about the materially identical definition which had been the subject of the earlier decision in *Lithgows*[45]. Section 121(8) is materially broader in that

[43] See paragraph 400 above.
[44] (1960) 39 TC 270.
[45] *Lithgows* had concerned section 333(1) of the Income Tax Act 1952 (the precursor to section 1124 of the CTA 2010): 'Control,' in relation to a body corporate, means the power of a person to secure, by means of the

it permits direct or indirect control without prescribing the mechanism by which the power must arise.

441. Nevertheless, the difference between these provisions concerns the *means* by which control may be exercised, not the *degree* of the control itself. The provisions have a crucial feature in common: they all concern a concept of "control" which depends upon an alleged controller having the power to secure that the affairs of another entity are conducted in accordance with its wishes. This goes to the degree of the required power, and it is the reason why we consider the Applicant's submissions to be unduly dismissive of both *Lithgows* and *Farnborough Airport*. Those cases therefore provide substantial assistance in understanding the degree and continuity of power connoted by the common statutory language, although their reasoning must be applied with care because the permitted sources of that power were more narrowly prescribed.

442. Lord President Clyde gave the leading judgment in *Lithgows*. He said this at p278:

> "In order that a person may have 'control' he must be in a position to secure that the affairs of the company are conducted according to his wishes. That phrase means that the ability to achieve an isolated result, the power to carry a particular resolution, is insufficient to establish control in the statutory sense; and that what is required is the power to secure the continuing conduct of the company's affairs in accordance with the will of the person. Secondly the definition does not state that control is the power of a person to secure that the affairs of the company are conducted according to his votes. The use of the word 'wishes' suggests that the Statute requires that he shall be able to achieve his personal aims'.

443. And, at p275, Lord President Clyde expressed the following view:

> "In my opinion, what the subsection is referring to is real control by one person, so that the company is really his creature."

444. We do not understand the reference to the continuing conduct of an entity's affairs as requiring X to make every operational decision or to control every individual matter arising within Y. Nor is the use of the expression "the affairs of Y" necessarily equivalent to "every affair of Y". The relevant power must, however, extend beyond the ability to procure an isolated transaction or outcome. It must concern the continuing conduct of Y's affairs generally, or at least a sufficiently substantial and coherent sphere of those affairs that the relationship can properly be characterised as one of control of Y, rather than influence over a particular decision or activity. Whether the relevant sphere is sufficiently substantial cannot be answered by an abstract percentage or fixed category: it requires consideration of its significance to Y's purpose, business and governance.

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holding of shares or the possession of voting power in or in relation to that or any other body corporate, or by virtue of any powers conferred by the articles of association or other document regulating that or any other body corporate, that the affairs of the first-mentioned body corporate are conducted in accordance with the wishes of that person ... ".

445. In *Farnborough Airport*, the Court of Appeal considered and followed *Lithgows* for the purposes of deciding whether companies were a corporate group, so as to be entitled to group tax relief. The Court's reasoning was that section 1124 of the 2010 Act required not only the formal constitutional powers of control built in by sub-sections (a) and (b) but also required the ability in fact to bring about the result that a company's affairs are conducted in accordance with the wishes of the person exercising control.

446. We respectfully agree with that analysis. In our judgment, the phrase "secure that the affairs of Y are conducted in accordance with X's wishes" denotes something considerably stronger than influence, strategic alignment, commercial dependence, shared objectives, overlapping personnel or the ability to persuade. Nor do we accept the Applicant's submission that the statutory test is satisfied whenever X is a significant, albeit non-exclusive, influence upon some material aspect of Y's affairs. Section 121(8) of the BSA does not use the language of significant influence. Nor does it adopt the PSC formulation of "significant influence or control". Instead, it requires control.

447. The Applicant placed considerable reliance upon the PSC regime. We accept that PSC status may constitute relevant evidence in an assessment of practical control, because it may identify those individuals in whom substantial powers or influence reside. However, we do not accept that PSC status is determinative of the question posed by section 121(8). The PSC regime is directed towards a different statutory question. It encompasses "significant influence or control", whereas section 121(8) is concerned solely with control. Parliament could readily have provided that association exists where bodies corporate share a common PSC, or where a person exercises control for the purposes of the PSC legislation. It did not do so. Instead, it adopted a distinct test requiring body corporate X to have the power to secure that the affairs of Y are conducted in accordance with X's wishes. The existence of a PSC does not answer the statutory question whether X possesses the degree of power required by section 121(8). Nor does the fact that the PSC regime uses the composite expression "significant influence or control" mean that every person registered as a PSC necessarily possesses control. PSC status may arise on a basis which demonstrates significant influence but falls short of the determinative power required by section 121(8). The statutory basis upon which the individual is a PSC, and the powers actually possessed, must therefore be examined carefully.

448. A similar point arises in relation to the LLPs' submissions concerning subsidiary undertakings. We do not consider that the accounting treatment of the LLPs provides significant assistance in construing section 121(8). The Companies Act 2006 employs its own statutory definitions, directed towards different purposes. Indeed, the legislation itself contains more than one concept of corporate control. Section 1159 adopts a predominantly rights-based concept of a "subsidiary", whereas section 1162 employs the broader concept of a "subsidiary undertaking", extending in some circumstances to actual exercise of dominant influence or unified management. As the Court of Appeal recognised in *Westbrook Dolphin Square Ltd v Friends Life Ltd (No.2)*[46], the latter concept is deliberately wider than the former. The issue before us is not

[46] [2014] EWHC 2433 (Ch).

whether either LLP was a subsidiary or subsidiary undertaking of R3 for accounting purposes, but whether the requirements of section 121(8) of the BSA are satisfied. The absence of consolidation may be relevant factual evidence that the relationship did not satisfy the applicable accounting and Companies Act tests, but it cannot determine either the construction or the application of section 121(8), which employs a different definition for a different statutory purpose.

449. We agree with the LLPs that the statutory focus is upon the power of X to secure a result. In ordinary language, if X possesses the power to secure that Y acts in accordance with X's wishes, X must be capable of obtaining its desired outcome when the issue arises. In that respect, we consider the LLPs' reliance upon *Lithgows* and *Farnborough Airport* to be well-founded. Those authorities demonstrate that the concept of control is concerned with practical command rather than influence and with the ability to determine outcomes rather than merely contribute to them.

450. That does not necessarily mean that control must be exclusive. It is possible, at least in principle, that two or more persons may each possess the requisite power, or that the power may be exercisable jointly. However, the possibility of concurrent or joint control does not dilute the statutory threshold. It remains necessary to establish that X possesses a power capable of securing the relevant result, whether alone or through a mechanism in which its participation is necessary or determinative. It is not enough that X is merely one influential voice among several persons, any of whom remains free to reject its wishes.

451. We therefore reject the proposition that control exists merely because X is one of several significant influences affecting Y's decision-making. The statutory concept requires something more. It requires a practical ability by X to obtain the result it wishes. Put differently, if X genuinely lacks the ability to secure its preferred outcome when the relevant question falls to be decided, it is difficult to see how it can properly be said that Y's affairs are conducted in accordance with X's wishes.

IS R10 ASSOCIATED WITH R1?

The Applicant's case in overview

452. The Applicant's case that R10 is associated with R1 for the purposes of section 121 of the BSA was advanced on a number of overlapping grounds. At its heart, however, was the contention that, at the qualifying time, Mr Bloxham had the power (either alone or jointly with Mr Curnuck) to secure that the affairs of R10 were conducted in accordance with the wishes of R3. This was said to be the case because:

    a) Mr Bloxham was a PSC in relation to R10;

    b) Mr Bloxham and/or Mr Curnuck had extensive *de facto* control over the affairs of R10. In particular, Mr Bloxham had placed himself in a position of dominance within the Fund and exercised day-to-day influence over its operation;

c) Mr Bloxham and/or Mr Curnuck also exercised practical managerial authority over the Fund's operations and personnel; and

d) They both occupied positions of authority in both the Urban Splash group and R10, including membership of the Investment Committee, and were thereby able in practice to influence or secure investment and acquisition decisions made by the Fund.

453. The Applicant's case was predicated on the assertion that Mr Bloxham simultaneously controlled R1 and R3, and that R3 was thus able to secure outcomes within R10 by virtue of Mr Bloxham's dominance, and because of the overlapping roles which both he and Mr Curnuck held.

454. The Applicant did not contend that R3 thus had control over *all* the affairs of R10. However, it submitted that control extended at least to the Fund's property acquisitions and investment decisions. Given the Fund's purpose and the nature of its activities, we accept that this would be a sufficiently substantial and coherent sphere of R10's affairs for the relationship properly to be characterised as one of control.

455. As explained above, we have concluded that section 121(8) of the BSA requires more than the existence of influence, alignment of interests, commercial co-operation or overlapping personnel. The statutory question is whether, at the qualifying time, the relevant body corporate possessed the power, directly or indirectly, to secure that the affairs of R10 were conducted in accordance with its wishes. That distinction is important because the Applicant's case was advanced by reference to a number of different factual matters, not all of which bear equally upon that question.

456. It is therefore convenient to distinguish between two broad groups of argument advanced by the Applicant. The first consists of matters relied upon to demonstrate the close relationship between the wider Urban Splash enterprise and R10. The second consists of matters relied upon to establish that Mr Bloxham and/or Mr Curnuck possessed powers which in practice enabled R3 to secure outcomes within R10. The former category largely concerns context and commercial reality. The latter engages directly with the statutory test. We address each in turn.

The relationship between R10 and the wider Urban Splash enterprise

457. The Applicant's first group of arguments sought to demonstrate that R10 and the wider Urban Splash enterprise formed parts of a closely integrated commercial venture. It was submitted that the Fund was conceived, promoted and operated in close conjunction with Urban Splash and that the relationship between the two was far more substantial than a conventional arm's-length commercial arrangement.

458. Particular emphasis was placed upon the origins and purpose of the Fund. The Applicant relied on evidence that the Fund was established against the background of Urban Splash's development activities and that an important

part of its intended function was to provide a long-term investment vehicle capable of acquiring residential assets emerging from the Urban Splash development pipeline. Mr Bloxham, Mr Gough and Mr Malik all confirmed that the availability of a visible Urban Splash pipeline was regarded as an attractive feature from an investor's perspective and formed a recurring theme in discussions with prospective investors.

459. The Applicant also relied on evidence concerning the way in which the Fund was marketed. It pointed to the use of the Urban Splash name pursuant to a brand licence agreement, references in promotional material to the Urban Splash pipeline, and the proposition that investors were invited to invest in a fund closely associated with an established developer with a recognised track record. The Applicant's submission was, in substance, that the Fund's identity and commercial proposition were closely bound up with its relationship with Urban Splash. R10's witnesses resisted some aspects of that characterisation, maintaining that investors were investing in the Fund rather than in Urban Splash itself, but the existence of contractual arrangements concerning branding, services and pipeline access was undisputed.

460. The operational relationship was also close. During the Fund's early years, Urban Splash provided it, or those responsible for its management, with a range of services and infrastructure. Those arrangements included the provision of office accommodation and support from Urban Splash's finance and information technology functions. Urban Splash also hosted the Fund's email and website arrangements for a period. The result was that the Fund's activities were, in practical terms, conducted with substantial assistance from the existing Urban Splash infrastructure.

461. We accept that those arrangements reinforced the appearance of integration upon which the Applicant relied. They also gave Urban Splash personnel access to information concerning aspects of the Fund's operation. Mr Bloxham's receipt of information about the Fund's weekly cash balance was one example relied upon by the Applicant. Mr Gough's evidence, however, was that Urban Splash provided treasury and other services under contractual outsourcing arrangements and acted upon the instructions of Mr Malik and other SURE employees, rather than controlling the relevant accounts.

462. We do not consider that the provision of such services established control. The services were supplied for value pursuant to contractual arrangements. They represented one means by which a relatively new investment business obtained administrative and operational support without immediately reproducing within its own structure all the functions already available from its commercial partners. The fact that Urban Splash performed those functions does not demonstrate that it thereby acquired power to determine how R10's affairs were conducted. It is necessary to distinguish between providing the machinery through which another entity operates and possessing authority over the decisions which that entity makes.

463. The Applicant further relied on the extent of the overlap in personnel between the Fund and the wider Urban Splash enterprise. Various individuals, notably Mr Bloxham and Curnuck, but also including other senior Urban Splash

managers, featured prominently in the evidence relating to both. The Applicant drew attention to their participation in investment and fundraising activities and to the fact that they appeared repeatedly in communications concerning the Fund's affairs. It likewise relied upon the involvement of Mr Bloxham and Mr Curnuck in the Fund's governance arrangements, including their participation in the Investment Committee established by SURE.

464. A related theme concerned the prominence and influence of Mr Bloxham and Mr Curnuck. The Applicant submitted that Mr Bloxham was the driving force behind the creation and development of the Fund and remained closely involved in its affairs. It likewise relied upon evidence demonstrating the continuing involvement of Mr Curnuck in investment and strategic matters. In the Applicant's submission, both men occupied positions of considerable importance within the Fund and exercised substantial influence over its direction.

465. The Applicant also relied upon evidence that sophisticated third-party investors themselves perceived the relationship between Urban Splash and the Fund as giving rise to potential conflicts of interest. Particular reliance was placed upon discussions with prospective institutional investors in which concerns were raised about what were described as "left-hand/right-hand" issues arising from acquisitions from the Urban Splash pipeline and the need for governance protections in relation to such transactions. Mr Malik, for example, accepted that conflict issues of this kind were frequently raised by prospective investors and that they were matters which required management through governance structures.

466. We accept that the evidence demonstrated a close and mutually beneficial commercial relationship between the Fund and the wider Urban Splash enterprise. We also accept that the Fund derived substantial advantages from that relationship, including access to the Urban Splash pipeline, the use of its brand and the provision of administrative and operational services. This was not seriously disputed by the witnesses called on behalf of R10.

467. The Applicant also relied upon a diagram prepared by Mr Bloxham, headed “Urban Splash Group Structure” and referred to by Ms Bretherton KC as the “money-go-round”. The diagram depicted the Fund alongside other Urban Splash-related businesses. It identified individuals and investors connected with those businesses and used arrows to depict movements of land, completed homes and commercial buildings, together with management services, licensing fees and carried interest. Among other things, it showed completed private rented sector properties being sold into the Fund and the Fund holding investments acquired with capital provided by high-net-worth individuals, institutions and persons connected with Urban Splash.

468. Mr Bloxham accepted that he had prepared the diagram. His evidence was that it had been an informal first attempt to explain a complicated series of relationships, inspired by a diagram concerning the Virgin businesses. He described it as his “scribblings”, said that it had not been regarded as successful and maintained that it had neither been adopted as an Urban Splash corporate document nor used beyond the internal meeting for which it was prepared. He

did not, however, dispute that the relationships and transactions depicted by the document existed. His position was that they were relationships between separate businesses and did not establish that those businesses formed a single undertaking.

469. We accept that the document was informal and incomplete. It was not a constitutional document, an organisation chart or a comprehensive account of the Fund's governance and decision-making arrangements. Nevertheless, it was Mr Bloxham's own depiction of the commercial relationships which existed between the Fund and the wider Urban Splash enterprise. It provides useful support for the conclusion that the relationship was close and deliberately mutually beneficial. In particular, it illustrates the intended relationship between Urban Splash's development pipeline and the Fund's acquisition of completed residential assets, together with the services and potential economic benefits flowing between the different businesses.

470. Nevertheless, the diagram does not take the Applicant's case on control materially further. At its highest, it demonstrates commercial connection, reciprocal benefit and a degree of interdependence. Those matters form part of the context in which the issue of control must be considered, but they are not synonymous with control. The diagram does not identify who possessed authority to determine R10's acquisitions or other investment decisions, nor does it address the functions of SURE, the Investment Committee or STAR. It therefore sheds little light upon the critical question whether R3, acting through Mr Bloxham, Mr Curnuck or otherwise, possessed the practical power to secure that R10's affairs were conducted in accordance with its wishes.

471. The above matters provide important context, but do not themselves establish the power required by section 121(8). Commercial alignment, mutual advantage, shared objectives, common branding, overlapping personnel and substantial influence may all form part of the factual background against which the question of control falls to be determined. They do not necessarily demonstrate that R3 possessed the power, directly or indirectly, to secure that R10's affairs were conducted in accordance with its wishes. Nor does the fact that outside investors perceived the relationship as sufficiently close to require governance safeguards answer the statutory question.

472. The contingent "carry" arrangements[47] do not alter that conclusion. Although they gave the founders, among others, a potential additional economic interest in the Fund's success, the conditions for the carry to be activated were never met and, in any event, its existence did not affect the distribution or exercise of control within the Fund.

473. We therefore regard these matters principally as contextual. They assist in understanding the relationship between the entities and the environment within which decisions were made. The critical issue remains whether the evidence established something more: namely that powers possessed by Mr Bloxham and/or Mr Curnuck operated as the means by which R3 was able to secure outcomes within R10. It is to that issue that we now turn.

[47] See paragraphs 319 & 320 above.

Securing outcomes within R10

474. For the Applicant's case on association in relation to R10 to succeed, it must establish that, at the qualifying time, Mr Bloxham and/or Mr Curnuck had the practical ability to obtain a desired outcome when an issue arose in respect of R10's property acquisitions or investment decisions. If they lacked the ability to secure their preferred outcome when the relevant question fell to be decided, then it cannot be said that R3 had the power to secure that the affairs of R10 were conducted in accordance with its wishes.

475. It is therefore necessary to examine the way in which such decisions were made by R10 at the qualifying time. R10's formal governance arrangements need to be examined for this purpose, but so too does the evidence about the way in which decisions were made in practice.

The constitutional position

476. The members of R10 at the qualifying time (being the only entities with voting rights at a meeting of R10) were:

    1) Urban Splash Management Ltd[48];
    2) R7;
    3) STAR USR Ltd[49];
    4) Urban Splash Residential (CI) LP[50];
    5) SURE[51]; and
    6) Urban Splash Residential Feeder LP[52].

477. Arrangements for the governance of R10 were set out in a suite of contractual documents which comprised an LLP Agreement, an Advisory Agreement, a Management Agreement, and a Property Management Agreement. On 21 December 2021, these agreements had been amended and restated to make changes in the Fund's governance arrangements as a result of the investment of an institutional investor[53]. The management and control of R10 was (and still is) governed by the LLP Agreement, which conferred significant powers on STAR, as AIFM[54]. A role was also given to SURE, whose function was to advise and assist the AIFM[55].

478. Pursuant to clause 7.1(b) of the LLP Agreement, STAR had exclusive responsibility for the management, operation and administration of the business and affairs of R10 and, subject to the remainder of the LLP Agreement's terms, had the power and authority to do all things necessary to

[48] The Fund's appointed property manager.
[49] As trustee for Urban Splash Residential Exempt Unit Trust (pension investors).
[50] The carry vehicle (see paragraph 319 & 320 above).
[51] The Investment Adviser. At the qualifying time SURE was called Urban Splash Residential Advisers LLP.
[52] The institutional investor feeder vehicle.
[53] See paragraphs 321-324 above. We understand that the institutional investor had no connection to the Urban Splash group.
[54] See paragraphs 303-307 and 325-330 above.
[55] See paragraphs 327-330 above.

carry out the purposes of R10. Under clause 7.3, STAR was given full power and authority in its capacity as Manager, including the authority to bind R10 and each of its members as the context required, to fulfil its mandate under the LLP Agreement and discharge its obligations under the Management Agreement *inter alia* in formulating the investment policy of R10, identifying and evaluating investment opportunities and acquiring and disposing of investments for the account of R10, admitting new members or substitute investors in accordance with the terms of the LLP Agreement and generally doing all such other acts as it may deem necessary and advisable for, or as may be incidental to, the conduct of the business of R10.

479. Under clause 4 of the Advisory Agreement, the Investment Advisor (SURE) established an Investment Committee. The Investment Committee had the power to approve the "Reserved Matters" (as defined by the Advisory Agreement). The Reserved Matters included:

- The admission or removal of any member of R10;
- The sale and purchase of property;
- Any change to the nature of the business of R10; and
- The approval of R10's annual business plan.

480. All members of the Investment Committee were required to consent to a Reserved Matter unless an actual or potential conflict of interest subsisted in relation to that member in respect of such decision, in which case such member was not entitled to vote but was entitled to attend the Investment Committee's meeting.

481. The chair of the Investment Committee was John Forbes, and its members were Paul Gough, Tom Bloxham and Julian Curnuck.

482. It is therefore quite clear that no single member of R10, let alone Mr Bloxham and/or Mr Curnuck as individuals, had the formal power to secure a particular outcome when R10 made decisions about its property acquisitions. Indeed, R10's governance arrangements were designed specifically to prevent that possibility: the purchase of property was a Reserved Matter under the Advisory Agreement, and thus required approval by the Investment Committee of SURE before a decision to proceed could be made by STAR. Although both Mr Bloxham and Mr Curnuck were members of the Investment Committee, their entitlement to vote was subject to the Advisory Agreement's rules about conflicts of interest. Moreover, neither Mr Bloxham nor Mr Curnuck had authority over STAR, the ultimate decision-maker.

Mr Bloxham's registration as a person of significant control

483. The Applicant nevertheless placed considerable emphasis upon the fact that, according to the register maintained at Companies House (as the register stood when these proceedings were commenced against R10), Mr Bloxham was

recorded as a person with significant control of R10 at the qualifying time. Its submission was not merely that the registration formed part of the historical background. It contended that the entry constituted important evidence that Mr Bloxham possessed significant influence or control over R10 and supported its wider case that the formal allocation of authority under the Fund documents did not reflect the practical reality. The Applicant also relied upon Mr Bloxham's registration as a PSC of a number of entities within the Fund structure and upon the many capacities in which he acted.

484. For the reasons given earlier in this Part of the Decision[56], we do not accept that registration as a PSC determines, or materially alters, the application of section 121(8) of the BSA. The statutory regimes ask different questions. An entry in the PSC register may constitute evidence relevant to the factual enquiry, but it does not establish that the registered person possessed the power required by section 121(8), still less that R3 could exercise that power through him. The Tribunal must examine the rights and powers actually possessed at the qualifying time and determine whether they enabled the affairs of R10 to be secured in accordance with R3's wishes.

485. There is, moreover, a dispute about whether the register accurately recorded the position at the qualifying time. After these proceedings commenced, an application was made to amend the register retrospectively. The Applicant disputed the legal effect of such an amendment and maintained that the contemporaneous register continued to show Mr Bloxham as a PSC at the qualifying time. R10's case was that the continuing entry resulted from an administrative failure to update the register following subsequent changes to the Fund's governance arrangements and the removal of the veto rights upon which the original PSC status was said to depend.

486. It is unnecessary for us to determine whether the register could lawfully be rectified with retrospective effect. The important point for present purposes is that the underlying rights did not remain static. The veto rights upon which the original registration was said to have depended had been removed before the qualifying time. That factual change is more significant than whether the administrative record had by then been amended to reflect it. Nor did the Applicant identify any equivalent right retained by Mr Bloxham after the restructuring which enabled him, alone or jointly with Mr Curnuck, to require R10 to adopt a particular decision.

487. We therefore reject the proposition that Mr Bloxham's recorded PSC status establishes control for the purposes of section 121(8). At its highest, the entry provides some support for the uncontroversial conclusion that he had occupied an important and influential position in the creation and development of the Fund. But the same can be said about Mr Gough. It does not answer the critical question whether, under the arrangements existing at the qualifying time, Mr Bloxham possessed the practical ability to secure a preferred outcome notwithstanding the powers conferred upon SURE, the Investment Committee and STAR.

[56] See paragraph 447 above.

Significance of AIFM arrangements

488. The Applicant submitted that R10's governance structure amounted to an agency arrangement, by which STAR was appointed as R10's agent and whose authority could therefore be revoked. Although correct in theory, we do not find that submission persuasive. It is not apparent how in practice Mr Bloxham and/or Mr Curnuck could have procured such revocation in order to force through a decision which STAR would otherwise have declined to make.

489. Ms Gibaud KC submitted that STAR's appointment as AIFM was itself inconsistent with any finding that R3 controlled R10. Relying on *Farnborough Airport*[57], she argued that control of the Fund had, by virtue of the regulatory regime and the constitutional documents, passed to STAR. We do not accept that proposition in its full extent. Unlike the position following the appointment of a receiver, the AIFM regime does not itself transfer control as a matter of law. Rather, it requires that appropriate governance arrangements be established and maintained. A failure to do so may give rise to regulatory consequences, but it does not determine the section 121(8) question.

490. We do, however, accept a more limited aspect of the submission. If R3 in fact possessed the power to secure that R10's affairs were conducted in accordance with its wishes, notwithstanding the governance arrangements under which STAR operated, that would necessarily call into question whether those arrangements functioned as represented. The existence of an AIFM structure is therefore not a complete answer to the Applicant's case, but it forms an important part of the factual matrix against which that case must be evaluated. The significance of those arrangements falls to be assessed in light of the evidence concerning how the Fund operated in practice.

The Applicant's allegations concerning decision-making in practice

491. In light of the above, there remain two central aspects of the Applicant's case on practical control. First, the Applicant contended that R10's formal governance arrangements did not reflect the reality of decision-making. Secondly, it contended that practical control over the Urban Splash acquisition pipeline translated into practical control over the Fund's investment decisions.

492. These arguments, unlike the more general evidence discussed above, are capable in principle of engaging the statutory concept of control, as understood for the purposes of section 121(8). If either proposition were established on the facts, it might support the conclusion that powers formally conferred upon STAR and the Investment Committee did not reflect the true distribution of decision-making authority within R10. Whilst the two arguments are related, they are distinct, and we therefore examine each argument in turn.

[57] See paragraphs 438-446 above.

Independent decision-making

493. The Applicant's first argument was that, at the qualifying time, acquisitions were effectively settled before they reached the bodies formally responsible for approval. It submitted that the Investment Committee and STAR functioned largely as a mechanism for ratifying decisions already taken elsewhere and that the involvement of Mr Bloxham and Mr Curnuck in the generation and development of opportunities meant that the outcome of the approval process was, in practice, largely predetermined.

494. R10's witnesses were largely consistent in rejecting that characterisation. Mr Gough, Mr Bloxham, Mr Malik and Mr Forbes each described a process involving several stages of scrutiny. Opportunities were identified and developed, commercial and investment analysis was undertaken, acquisition terms were negotiated, recommendations were prepared, and opportunities were thereafter considered through the governance structure established for the Fund.

495. Taken together, this evidence presented a coherent account in which Urban Splash personnel originated and promoted opportunities, the SURE team analysed and negotiated them, and independent governance bodies determined whether those opportunities should be pursued. The witness evidence therefore provides a substantial answer to the Applicant's contention that the formal approval process was merely a façade.

496. The Applicant nevertheless relied upon a number of features of the evidence. It pointed to the absence of formal votes, the extent of pre-Committee discussions, the overlap in personnel, and the relative lack of examples in which a strongly supported Urban Splash transaction was demonstrably rejected. It submitted that these matters support the inference that the formal governance process was less significant in practice than R10 suggested.

The Urban Splash pipeline

497. The Applicant's second argument concerned the significance of the "Urban Splash pipeline", to which references were made throughout the evidence. The expression was used to describe residential development opportunities being brought forward by Urban Splash entities which might, at some future stage, become suitable for acquisition by R10.

498. R10 and Urban Splash had entered into memoranda of understanding, including an MoU dated 9 December 2021, pursuant to which R10 had been granted a right of first refusal, or "first look", in respect of properties emerging from the pipeline. The purpose of those arrangements was to provide R10 with visibility over a potentially substantial stream of future acquisition opportunities whilst leaving it under no obligation to acquire any particular property. The arrangements were repeatedly presented to prospective investors as one of the attractions of the Fund, because they offered access to a defined and visible source of potential acquisitions.

499. All the witnesses accepted that access to the Urban Splash pipeline formed an important part of the Fund's commercial proposition. Investor-facing materials referred extensively to that pipeline, access to future Urban Splash developments was regarded as attractive from an investor perspective, and the overwhelming majority of the Fund's acquisitions prior to the qualifying time originated from Urban Splash-related entities.

500. The Applicant relied upon those matters to contend that practical control over the supply of opportunities translated into practical control over R10's investment activity. In substance, its case was that those who controlled the generation and presentation of opportunities exercised a significant degree of influence over the Fund's acquisitions because they determined which opportunities came before the Investment Committee and STAR for consideration.

501. The witnesses did not seriously dispute that Urban Splash controlled a substantial proportion of the opportunities available to R10 during its formative years. Their response was instead that control over origination did not equate to control over acquisition decisions. They emphasised that the memorandum of understanding provided only a right of first refusal and imposed no obligation upon R10 to acquire particular assets, and that opportunities emerging via the pipeline remained subject to independent assessment and approval.

502. Mr Malik's evidence was particularly important on this issue. Whilst accepting the significance of the pipeline, he repeatedly distinguished between access to opportunities and decisions to invest. His evidence was that opportunities were evaluated against defined investment criteria, that third-party acquisitions were actively considered, and that investment decisions were based upon the characteristics of suitable residential assets rather than simply upon their origin within the Urban Splash group. He therefore rejected the proposition that pipeline access amounted to a mechanism by which Urban Splash could dictate investment outcomes.

503. The importance of the Urban Splash pipeline was thus largely common ground, as was the existence of formal governance mechanisms within R10. The critical issue is whether practical control over the generation and supply of investment opportunities enabled Mr Bloxham and/or Mr Curnuck to secure particular acquisition outcomes notwithstanding the existence of those governance structures.

Discussion and conclusion in respect of the R10 association issue

504. We turn, therefore, to the two aspects of the Applicant's case which are capable in principle of establishing practical control over R10's investment affairs. The first is the allegation that the Fund's formal decision-making arrangements did not reflect the reality of how acquisitions were approved: that proposals were effectively settled in advance by Mr Bloxham and/or Mr Curnuck and were thereafter presented to the Investment Committee and STAR for formal endorsement. The second is the contention that Urban Splash's control over the development pipeline enabled Mr Bloxham and/or Mr Curnuck to determine

which acquisition opportunities were available to the Fund and thereby, in practice, to determine its investment decisions. Both arguments require us to consider whether the influence which they undoubtedly exercised translated into a practical ability to secure the outcomes desired by R3. We address them by examining, first, whether R10 retained genuinely independent decision-making processes and, secondly, the practical significance of the Urban Splash pipeline.

505. The Fund and the wider Urban Splash enterprise enjoyed a close and deliberately symbiotic commercial relationship. The Applicant was therefore right to draw attention to the predominance of Urban Splash properties in the Fund's portfolio at the qualifying time: all but one of the acquisitions made before then were of properties developed by Urban Splash or associated ventures. The Urban Splash pipeline was not merely incidental to the Fund's early operation. It supplied most of the assets from which the seed portfolio was built and featured prominently in the Fund's presentations to prospective investors.

506. Nevertheless, the statutory question is whether R3 had the power to secure that R10's investment affairs were conducted in accordance with R3's wishes. The fact that Urban Splash supplied most of the opportunities does not tell us whether R10 genuinely decided which of those opportunities to accept, nor whether it determined the terms upon which any transaction would proceed.

Independent decision-making

507. We reject the Applicant's allegation that R10's decision-making arrangements were a façade, or that acquisition decisions were pre-determined and then presented to the Investment Committee and STAR for rubber-stamping. The evidence, viewed as a whole, demonstrated a real process of analysis, negotiation and approval. That process did not generate formal votes or recorded disagreement, but we do not infer from that that no independent judgment was exercised.

508. The Fund initially originated as a joint venture between Mr Bloxham and Mr Gough. Their respective contributions were different. Mr Bloxham brought knowledge of property development, the Urban Splash pipeline and the market in which suitable assets might be found. Mr Gough brought experience of investment funds and played the leading role in devising the regulated structure through which external investment could be raised and managed. That was not simply presentational: its purpose was to convert the founders' initial venture into a regulated investment fund capable of attracting substantial capital from external investors.

509. We found Mr Gough's evidence on this subject particularly significant. The Applicant's treatment of his role tended to understate both his importance to the Fund and the degree of independence which he exercised. He was not simply a technical adviser retained to document arrangements proposed by Mr Bloxham. He was a co-founder, one of the earliest substantial investors, a senior participant in STAR, and a member of the Investment Committee. He described STAR's function, in straightforward terms, as ensuring that the Fund did what

it had represented to investors that it would do, including investing in appropriate rental properties, remaining within its stated risk parameters and pursuing investments capable of achieving the target returns. He confirmed that his own investment in the Fund had been increased to demonstrate alignment with the other investors.

510. Mr Gough reacted with some indignation when it was suggested that the governance documents did not reflect what occurred in practice. We consider that reaction understandable. His response was that permitting the Fund to be operated otherwise than in accordance with its stated arrangements would have placed his reputation, regulatory standing, commercial relationships and personal financial investment at risk. We do not treat the strength of that reaction as a substitute for evidence. It was nevertheless consistent with Mr Gough's substantial personal and professional interests which favoured adherence to the Fund's investment policy rather than acquiescence in the wishes of Urban Splash.

511. Nor do we accept Ms Bretherton KC's contention that "nobody said 'no' to Mr Bloxham". Mr Gough gave clear evidence that Mr Bloxham had proposed a restructuring which would have altered the 'carry' arrangements within the Fund[58], with a view to securing more favourable terms for senior Urban Splash figures, and had also proposed a sidecar vehicle through which properties might be extracted. Mr Gough said that he had "flat out refused" both proposals. Mr Bloxham's own evidence was consistent with the substance of that account. His recollection was that he had attempted to obtain the agreement of Mr Malik and Mr Gough to proposals concerning the carry arrangements, but had received a "very firm kickback" because they regarded the existing deal as concluded and saw no justification for reopening it.

512. Those proposals did not themselves concern an individual property acquisition. They are nevertheless important because they provide a direct test of the proposition that Mr Bloxham's wishes invariably prevailed within the Fund. They demonstrate that, where his proposals conflicted with what Mr Gough and Mr Malik regarded as the agreed interests or structure of the Fund, he could not secure their implementation. They also demonstrate the existence of interests which diverged materially from those of Urban Splash.

513. The evidence concerning R10's proposed acquisitions pointed in the same direction. Mr Gough explained that the Fund was not a developer, did not intend to assume development risk and was required to acquire assets in accordance with defined investment criteria. He described the acquisition process as containing "many filters", the first of which was the work undertaken by Mr Malik and his team at SURE to remove proposals which did not satisfy those criteria. That evidence provides an important qualification to the Applicant's reliance upon the absence of rejected proposals in Investment Committee minutes. If an unsuitable proposal was filtered out before it reached the Committee, no formal rejection would be recorded.

[58] See paragraphs 319 & 320 above.

514. By way of illustration, we were taken to email correspondence in which Mr Bloxham had floated the idea that the Fund purchase a development site at New Islington in Manchester from Urban Splash House. That idea did not accord with the Fund's policy of acquiring completed stock without assuming development risk, and it was not taken up by Mr Malik. Mr Gough's evidence was that the Fund did not proceed on that basis for precisely that reason. The episode demonstrates that an idea originating with Mr Bloxham did not progress where it fell outside the Fund's investment policy.

515. Other New Islington transactions also demonstrated a genuine tension between the Fund as purchaser and Urban Splash or House as vendor. The evidence included negotiations about the price and specification of the units and whether flooring was included. The exchanges showed Mr Malik and the SURE team seeking terms favourable to the Fund and expressing dissatisfaction when they considered that Urban Splash was not treating it as the strategic partner they had expected. The fact that transactions ultimately resulted does not establish that their terms had been predetermined.

516. We also accept the evidence of Mr Malik about the role performed by SURE. That role supplied an important intermediate stage between the origination of opportunities and their consideration by the Investment Committee and STAR. Mr Malik and his team were responsible for sourcing and reviewing opportunities, applying the Fund's investment criteria, carrying out financial analysis, negotiating commercial terms and preparing recommendations. The Fund's criteria included requirements concerning location, transport or parking, yield, rental affordability, energy performance, tenure mix and, importantly, completed stock. The Fund expressly avoided development risk.

517. Ms Bretherton KC tested Mr Malik's independence rigorously. She established that he had a close professional relationship with Mr Bloxham (who had also been instrumental in his recruitment), that he had regarded Mr Bloxham and Mr Gough as mentors, that he communicated frequently with Mr Bloxham, and that Mr Curnuck offered him assistance and held regular discussions with him. Mr Malik also accepted that he was not initially of equal seniority with Mr Bloxham and Mr Gough within SURE. Those matters support the conclusion, already reached above, that Mr Bloxham and Mr Curnuck possessed substantial influence within the commercial environment in which the Fund operated.

518. They do not, however, establish that Mr Malik acted as Mr Bloxham's instrument. We saw no evidence that pressure from Mr Bloxham or Mr Curnuck led Mr Malik to recommend an acquisition which he regarded as unsuitable, to accept a price or contractual term which he regarded as adverse to the Fund, or to depart from the Fund's investment criteria. The restructuring episode provides affirmative evidence of his willingness to resist Mr Bloxham. The negotiations over properties offered by Urban Splash also show him acting for the purchaser and seeking favourable terms, rather than merely facilitating sales desired by the vendor.

519. We recognise that Mr Malik was positively disposed towards opportunities from the Urban Splash pipeline. That was unsurprising. Access to that pipeline was one of the Fund's declared commercial advantages, and Urban Splash

properties had characteristics which the Fund wished to offer to investors. But receptiveness to such opportunities did not mean acceptance on whatever terms Urban Splash proposed. The evidence supports a distinction between a commercial preference for suitable Urban Splash stock and an obligation, formal or practical, to acquire whatever Urban Splash chose to present.

520. The Investment Committee formed a further stage in this process. Mr Gough's evidence was that proposals were commonly refined through discussion and might return to the Committee more than once. The Committee did not determine matters by taking a formal vote. Decisions emerged through an iterative process which resulted in consensus. We do not regard that as inherently suspicious. Professional decision-making bodies commonly resolve issues through analysis and discussion before a final position is recorded. An absence of division does not itself demonstrate an absence of scrutiny.

521. Mr Forbes' evidence reinforced this conclusion. He had substantial experience of investment fund governance, undertook due diligence before accepting his role, and was brought into the Fund to provide independent oversight. He was not a peripheral or purely honorary chair. He remained in regular contact with Mr Malik, received extensive correspondence and regarded Mr Malik as leading the Fund's structuring and investment recommendations. Mr Forbes regarded Mr Malik as performing the Fund management role and saw Mr Curnuck principally as the Urban Splash representative. Indeed, he said that in his dealings with Mr Curnuck, the latter had "very much had his Urban Splash CEO hat on". Mr Forbes rejected the suggestion that decisions were taken elsewhere and merely rubber-stamped by the Fund's formal governance bodies.

522. STAR retained the ultimate investment decision as AIFM. Its role was not confined to checking that papers had been completed. It held responsibility for portfolio management and risk management and was required to decide whether a proposed investment should proceed. Mr Forbes' evidence was that, if another person had in reality taken that decision, this would have raised a regulatory issue. The existence of regulatory duties cannot prove that they were invariably fulfilled, but it supplies important context. There was no evidence that STAR's decision-makers were subject to the authority of Mr Bloxham or Mr Curnuck, or that they failed to exercise the functions assigned to them.

523. We attach some weight also to the involvement of external investors. Concerns about conflicts between the Fund and Urban Splash were natural and were repeatedly raised. As Mr Forbes explained, such conflicts were not unusual in a fund associated with a developer; the important question was whether they were identified, disclosed and managed. The institutional investor carried out due diligence, required refinements to the governance arrangements and then made a substantial investment. That does not bind the Tribunal's assessment of control, but it is objective evidence that the arrangements were subjected to scrutiny by an investor whose economic interests were independent of Urban Splash. It does not support the proposition that those arrangements were knowingly accepted as a sham.

524. Taking the evidence together, we find that the absence of formal voting records reflected the consensual and iterative character of the decision-making process.

It did not result from decisions having been made in advance by Mr Bloxham or Mr Curnuck. SURE applied a commercial filter; the Investment Committee scrutinised Reserved Matters; and STAR retained the final decision. Mr Bloxham and Mr Curnuck contributed knowledge, ideas and opportunities, and exercised considerable influence, but the evidence does not establish that they could displace those processes or procure an outcome which the independent participants did not consider to be in the Fund's interests.

The effect of the Urban Splash pipeline

525. We also reject the Applicant's submission that control of the Urban Splash pipeline amounted to control of the Fund's investment decisions. Two propositions should not be conflated. Urban Splash plainly controlled which of its own properties it developed and chose to make available to the Fund. It does not follow that it controlled which properties the Fund acquired.

526. The pipeline was important because a new residential investment fund needed visibility over assets which it might acquire. Mr Forbes explained that, until the Fund reached sufficient scale, it was difficult to compete generally for suitable properties. A relationship with a developer capable of delivering completed assets at an attractive price therefore supplied a sensible starting point. Urban Splash fulfilled that role during the seed phase. Its brand and track record also assisted the Fund in attracting its first investors.

527. That commercial model created a genuine benefit for Urban Splash. A fund able to acquire completed units in volume could reduce the developer's exposure to sales risk and provide greater certainty about disposals. Mr Malik accepted this when explaining what he had meant by "de-risking" the Urban Splash pipeline. He also explained, however, that his ambition was to create a larger institutional investment platform capable of acquiring assets beyond the immediate Urban Splash pipeline. He would not have wished to join a venture confined to serving as a purchaser of Urban Splash's existing stock.

528. The benefit was reciprocal. The Fund received visibility of potential acquisitions and an opportunity to negotiate the purchase of completed, design-led residential properties. The memorandum of understanding formalised that commercial relationship by giving the Fund a first look at relevant opportunities. It did not oblige Urban Splash to sell or the Fund to buy. Each proposed acquisition remained subject to negotiation, application of the Fund's criteria and the approval process described above.

529. We do not consider the predominance of Urban Splash properties at the qualifying time inconsistent with independent decision-making. During the Fund's formative period, the Urban Splash pipeline supplied readily identifiable assets of the type around which the Fund had been conceived. That enabled the Fund to assemble a seed portfolio and establish a track record which could be examined by prospective institutional investors. It was commercially rational for the Fund to make extensive use of that opportunity, provided the individual investments remained suitable and were obtained on satisfactory terms.

530. The Applicant placed emphasis upon the possibility that control might be exercised by determining the menu from which the formal decision-makers were required to choose. We accept the force of that proposition in principle. If the Investment Committee and STAR had been required to choose only between acquiring an Urban Splash property and making no investment at all, and if the Fund had no realistic capacity to seek opportunities elsewhere, control over origination might have conferred substantial practical power over the Fund's investment activity.

531. The evidence did not establish that factual premise. Mr Malik and his team had responsibility for sourcing opportunities as well as evaluating those offered by Urban Splash. They reviewed third-party opportunities, made offers in respect of some and completed a third-party acquisition before the qualifying time. The fact that such acquisitions were comparatively scarce is relevant, but it does not demonstrate that SURE lacked the freedom to seek them or that R10 was required to acquire Urban Splash stock. The Fund subsequently developed comparable pipeline relationships with other developers. That later development is consistent with the witnesses' evidence that the relevant commercial advantage lay in access to a suitable developer pipeline, not in submission to Urban Splash's wishes.

532. Most importantly, the evidence did not identify any occasion on which Mr Bloxham or Mr Curnuck successfully procured the acquisition of a property which SURE, the Investment Committee or STAR considered inconsistent with the investment criteria or commercially unattractive. Discussion of potential opportunities was extensive, but control under section 121(8) is concerned with the power to secure outcomes, not merely with the power to propose them. The New Islington examples discussed above illustrate both the application of the Fund's investment criteria and SURE's negotiation of commercial terms on the Fund's behalf.

Conclusion on association of R10

533. Standing back, we accept that Mr Bloxham and Mr Curnuck had substantial influence over the commercial environment in which R10 operated at the qualifying time. Mr Bloxham was one of the Fund's founders, an investor and an influential source of ideas and property expertise. Mr Curnuck possessed financial and operational knowledge of the Urban Splash business, contributed to the development of opportunities and participated in the Investment Committee. Urban Splash supplied most of the Fund's early acquisitions and derived a strategic benefit from doing so.

534. Those findings do not establish the further proposition which the Applicant was required to prove. Mr Gough was a co-founder with substantial capital and professional standing of his own. Mr Malik and the SURE team examined opportunities, negotiated on behalf of the Fund and applied defined investment criteria. Mr Forbes provided independent governance oversight. The Investment Committee considered Reserved Matters through an iterative process, and STAR retained the ultimate authority to approve or reject investments. The evidence does not establish that any of those functions were merely nominal. Mr Bloxham's recorded status as a PSC in relation to R10 does

not displace those findings, particularly where the veto rights said to have justified his original registration had ceased to exist before the qualifying time.

535. Nor does the evidence establish that Mr Malik was acting as Mr Bloxham's 'yes-man', or that Mr Gough, Mr Forbes or STAR deferred to Mr Bloxham or Mr Curnuck when their own assessment pointed elsewhere. The evidence of resistance to Mr Bloxham's restructuring proposals, the application of the policy against development risk, the commercial negotiations over Urban Splash properties and the further scrutiny of proposed investments all point away from such a conclusion.

536. We therefore find that R10 retained genuinely independent decision-making processes in relation to its acquisitions and investments. Urban Splash's control of its own development pipeline gave Mr Bloxham and Mr Curnuck influence over the opportunities available to the Fund, but not the power to determine which opportunities it accepted or on what terms. Nor does the evidence establish that decisions were predetermined before reaching the Investment Committee or STAR, or that either body merely endorsed outcomes already secured by Mr Bloxham or Mr Curnuck.

537. It follows that neither individual had, at the qualifying time, the practical ability to secure a preferred outcome concerning R10's property acquisitions or investments. Their influence did not operate as a means by which R3 could secure that R10's affairs were conducted in accordance with its wishes. R3 therefore did not control R10 within the meaning of section 121(8) of the BSA, and R10 is not associated with R1 by virtue of section 121(5)(b).

IS R11 ASSOCIATED WITH R1?

The Applicant's case

538. The dispute concerning R11's association with R1 was considerably narrower than that concerning R10. There was no equivalent dispute about the effect of an AIFM structure, delegated investment management functions or independent governance arrangements. Rather, the central issue was whether, for the purposes of section 121(8) of the BSA, the overlap between those who controlled the Urban Splash group (R3 in particular) and those who controlled R11 was sufficient to establish that, at the qualifying time, R3 had the power to secure that the affairs of R11 were conducted in accordance with R3's wishes.

539. The Applicant's case was that it did, because R11 was controlled by the same small group of individuals who controlled R3 and the wider Urban Splash enterprise. Particular emphasis was placed upon Mr Bloxham's position as the sole PSC of both R3 and R11, upon the fact that the members of R11 were the individuals referred to during the hearing as the "Urban Splash 5"[59], and upon the governance arrangements of R11, which vested effective decision-making authority in members of that same group. The Applicant submitted that these common individuals provided the practical mechanism through which R3 exercised indirect control over R11.

[59] Namely Mr Bloxham, Mr Curnuck, Mr Falkingham, Mr Gawthorpe and Mr Cornish.

540. The Applicant further submitted that the history, financing and operation of the Stubbs Mill development demonstrated that R11 functioned as part of the wider Urban Splash enterprise rather than as an independent commercial undertaking. It relied upon the acquisition of the property from R2, the involvement of Urban Splash companies in the subsequent development and management, and the financial relationships described in Part 3 of this Decision[60]. Those included R2's provision of bridging finance; the inclusion of Stubbs Mill within financing arrangements and as security together with other properties held by other Urban Splash businesses; the onward lending to Urban Splash Commercial 2017 Limited of capital released against Stubbs Mill; and, ultimately, the refinancing of R11's borrowing alongside borrowing relating to R4. Taken together, the Applicant submitted that these matters demonstrated a degree of practical and financial integration consistent with the existence of control for the purposes of section 121(8).

541. The Applicant therefore contended that the complete overlap between the controllers of R3 and R11, coupled with the practical and financial integration of R11 into the wider Urban Splash enterprise, established that R3 had the power to secure that the affairs of R11 were conducted in accordance with its wishes. On that basis, it was said that R11 is associated with R1 by virtue of sections 121(5)(b) and 121(8) of the BSA.

R11's Response

542. R11 denied association with R1. It submitted that the Applicant's case impermissibly conflated common control by natural persons with control by a body corporate. That issue has already been addressed in our discussion of section 121(8) earlier in this Part[61]. For the reasons there given, we do not accept the proposition that a body corporate can exercise control only through formal corporate rights and structures, or that the practical powers of common individuals are necessarily irrelevant to the enquiry required by section 121(8). The mere fact that the Applicant's case depends upon powers exercised through common individuals does not, therefore, present a legal obstacle to the establishment of association.

543. R11 also relied upon its treatment in the audited accounts of the Urban Splash group. The submission was that, if R3 truly controlled R11, R11 would have appeared as a subsidiary undertaking and would have been consolidated into the group accounts. Instead, it appeared merely as a related party. We have also addressed that submission when considering R10's alleged association with R1[62]. For the reasons already given, we do not consider that the accounting treatment of R11 determines the question posed by section 121(8) of the BSA.

544. Nevertheless, on behalf of R11, Mr Charlesworth also advanced a number of factual arguments directed specifically to its position. First, he placed considerable emphasis upon the constitutional arrangements of R11 itself. He

[60] See paragraphs 360-363 above.
[61] See paragraphs 423-435 above.
[62] See paragraph 448 above.

relied upon the LLP Agreement and submitted that its provisions were deliberately designed to prevent any single member from controlling the partnership. Although Mr Bloxham and Mr Curnuck were the designated members, significant decisions – relating to substantial capital expenditure or borrowing – required agreement between them, whilst other matters were determined by members' votes. On that basis, it was said that neither Mr Bloxham nor any other individual possessed the ability unilaterally to secure the outcome of decision-making within R11. As an alternative to his primary argument that control could not be exerted through common individuals, Mr Charlesworth therefore submitted that the terms of the LLP Agreement demonstrated that no individual had the degree of practical power required by section 121(8) anyway.

545. Secondly, Mr Charlesworth rejected the significance attached by the Applicant to Mr Bloxham's registration as a person of significant control. It was wrong, in his submission, to reason from PSC status to the existence of control for the purposes of section 121(8). At most, PSC status formed part of the background. It was not determinative of the statutory test the Tribunal is required to apply.

546. Thirdly, Mr Charlesworth contended that the origins, ownership and purpose of R11 pointed decisively away from any conclusion that it formed part of the Urban Splash corporate structure. He submitted that R11 was established as a separate LLP for the specific purpose of acquiring and redeveloping the Stubbs Mill property so as to take advantage of Business Premises Renovation Allowance (BPRA) which the Urban Splash group itself could not utilise. The members invested their own funds in the venture, and those funds were not derived from distributions paid by R1-R4. R11 therefore represented a vehicle for personal investment by its members rather than an extension of the Urban Splash group.

547. Finally, Mr Charlesworth submitted that the financing arrangements described in Part 3 did not demonstrate that R11's affairs were conducted in accordance with the wishes of R1 or R3. R11 accepted that Stubbs Mill had been used as security within financing arrangements extending beyond R11 itself, and that this exposed its members' investment to a degree of risk associated with other Urban Splash businesses. Its case, however, was that those arrangements were entered into for ordinary commercial reasons and conferred reciprocal benefits: in particular, the pooling of properties created a larger and more attractive lending proposition and enabled R11 to obtain long-term finance on terms which had proved difficult to secure on a standalone basis. The transactions were therefore said to demonstrate commercially rational co-operation between separate entities rather than control by R1 or R3.

548. In summary, R11’s response was that the Applicant's reliance upon common individuals, PSC registrations, overlapping personnel and financial links did not establish the statutory relationship of control required by section 121(8). Rather, R11’s constitutional arrangements, ownership structure and commercial purpose all pointed in the opposite direction and demonstrated that it remained an independent entity whose affairs could not be secured by R1 or R3.

Discussion and conclusion in respect of the R11 association issue

The membership and constitutional governance of R11

549. The constitutional arrangements governing the LLP provide some support for R11's case, but they do not resolve the issue of control.

550. The members of R11 at the qualifying time were (and still are): Tom Bloxham, Julian Curnuck, Jonathan Falkingham, Simon Gawthorpe and Nathan Cornish (the so-called "Urban Splash 5"). All five were also directors of R3 at that time, and four of them[63] were directors of R1 too. However, neither R1 nor R3 has ever been a member of R11.

551. The members' formal rights and obligations in relation to R11 were set out in an LLP Agreement dated 13 March 2015. That agreement plainly precluded unilateral decision-making by Mr Bloxham or anyone else. Decisions were generally made by simple majority, whilst certain matters required a three-quarters majority. Matters reserved to the designated members required the agreement of both Mr Bloxham and Mr Curnuck, and in the absence of agreement fell to be determined by the members as a whole. To that extent, the constitutional documents do not support a simple submission that Mr Bloxham could dictate the affairs of R11 by virtue of formal voting rights alone.

552. The difficulty with R11's argument, however, is that it assumes the enquiry begins and ends with the formal allocation of voting rights. The question posed by section 121(8) of the BSA is whether R3 possessed the power to secure that R11's affairs were conducted in accordance with its wishes. The LLP Agreement demonstrates that no individual member possessed unfettered formal control. But it does not tell us whether the same small group of individuals exercised effective control over both R3 and R11. The significance of the constitutional arrangements must therefore be assessed alongside the evidence concerning the identity, relationships and respective roles of those exercising powers under them.

Mr Bloxham's PSC status

553. The parties also disagreed as to the significance of Mr Bloxham's position as the sole PSC of both R3 and R11.

554. We do not accept the Applicant's submission that PSC status, without more, establishes the existence of the power required by section 121(8)[64]. Nor do we accept R11's submission that the designation carries little or no significance. The PSC regime serves a different statutory purpose and applies a different legal test. Nevertheless, the designation is capable of shedding light upon the practical distribution of influence within an organisation.

555. The fact that Mr Bloxham was recorded as the sole PSC of both entities tends to support the broader proposition that he occupied a position of particular

[63] The exception being Mr Cornish.
[64] See paragraph 447 above.

prominence within each. That evidence acquires additional significance when viewed alongside other features relied upon by the Applicant, including Mr Bloxham's economic interest in R11, his position as a designated member, his provision of initial development funding and his wider role within the Urban Splash enterprise.

556. At the same time, we bear in mind Mr Curnuck's evidence that the Companies House filings incorrectly suggested that Mr Bloxham possessed more than 50% of the voting rights in R11 and that his PSC status in reality arose from his economic entitlement upon a winding up rather than any additional voting rights. The PSC designation is therefore neither determinative nor irrelevant. Its significance lies in what it reveals about Mr Bloxham's practical position within R11 when considered alongside the wider evidence.

The origins and purpose of R11

557. The circumstances in which R11 was created lend some support to R11's contention that it was intended to operate separately from the Urban Splash enterprise.

558. The evidence of Mr Bloxham and Mr Curnuck was that redevelopment of Stubbs Mill was not commercially viable without the benefit of BPRA. Because Urban Splash already possessed substantial tax losses, it could not make effective use of that relief itself. The availability of BPRA to the individual members was therefore an important reason why the development was undertaken through R11. Mr Curnuck did not, however, accept that Urban Splash would otherwise have undertaken the development. His evidence was that the project also required substantial private equity and was intended to secure investment outside the Urban Splash group.

559. We accept that R11 was legally and structurally separate from the formal Urban Splash group and that its establishment served both purposes identified by Mr Curnuck. Nevertheless, the fiscal circumstances help to explain why an Urban Splash development opportunity was pursued through a separate vehicle owned by the five individuals comprising its senior leadership. They do not establish that Urban Splash itself would otherwise have undertaken the development, but they form part of the wider circumstances in which the relationship between R11 and the Urban Splash enterprise must be assessed.

Financial relationships with the wider Urban Splash enterprise

560. The financial arrangements described in Part 3 of this Decision provide further context in which to assess the Applicant's case on control. They demonstrate that, notwithstanding the original intention to hold Stubbs Mill as an investment separate from the financial fortunes of the Urban Splash group, R11's subsequent financing became materially interconnected with that of other Urban Splash entities.

561. That interconnection developed over time. R2 first provided temporary bridging finance to R11 pending its longer-term refinancing. Under the subsequent Rothschild facility, Stubbs Mill and properties held by Urban

Splash Commercial 2017 Limited formed part of a common security pool. Following the re-gearing of that facility in 2020, capital released against Stubbs Mill was lent by R11 to Urban Splash Commercial 2017 Limited for capital expenditure. The subsequent Aviva refinancing extended the arrangement further by consolidating the existing financing with borrowing relating to R4. We have set out the detail of those transactions in Part 3[65] and do not repeat it here.

562. The Applicant relied upon that history as materially qualifying R11's description of itself as an investment vehicle established and maintained independently of Urban Splash. In particular, it emphasised that the members had chosen to permit Stubbs Mill to stand as security under facilities which also financed other Urban Splash commercial businesses and had thereby exposed their investment to risks arising outside R11. The onward loan to Urban Splash Commercial 2017 Limited was said to provide a particularly clear example of R11's resources being deployed in a manner which assisted another Urban Splash business.

563. There is considerable force in the factual premise of that submission, although its significance must not be overstated. Mr Curnuck accepted that the financing arrangements exposed R11 to wider business risk. But his evidence also provided a commercial explanation for them. Obtaining appropriately priced standalone finance for Stubbs Mill had proved difficult; pooling properties produced a larger and more attractive lending proposition; and R11 itself benefited from the resulting access to long-term finance. The onward lending to Urban Splash Commercial 2017 Limited also carried interest. The arrangements therefore produced benefits for R11 as well as for the Urban Splash businesses with which its financing became intertwined.

564. Nevertheless, we find the extent of the risk which R11 was prepared to assume surprising. The original rationale for keeping R11 outside the Urban Splash group included a desire on the part of its members to protect their personal investment from the financial risks affecting that group. Yet those same individuals subsequently agreed that Stubbs Mill should stand as security under financing arrangements extending beyond R11. Mr Curnuck accepted that, had the wider business failed and the facility been called, the members' investment in Stubbs Mill would have been at risk. We accept that pooling security made borrowing easier and more advantageous for R11, but we are not persuaded that the benefit thereby obtained provides an entirely satisfactory explanation for exposing what was intended to be a separate personal investment to that wider risk.

565. That does not establish that R3 controlled R11. Commercially surprising decisions are not evidence of control merely because they also benefit a connected business. But the financing arrangements are capable of bearing upon the wider evidential picture. One possible explanation for the willingness to assume those risks is that the interests of the wider Urban Splash enterprise were being given weight alongside, and potentially priority over, the separate interests of R11 and its members. We regard the evidence as providing some

[65] See paragraphs 360-363 above.

support for that inference. In the context of the substantial overlap between those exercising decision-making power over R11 and R3, it provides an example, albeit not a conclusive one in terms of control, of R11's affairs being conducted in a manner which served the interests of the wider Urban Splash enterprise.

Conclusion on R11 association

566. Having considered the evidence as a whole, we are satisfied that R11 is associated with R1.

567. The evidence does not establish that Mr Bloxham, acting alone, possessed the power to secure that the affairs of R11 were conducted in accordance with his wishes, or with the wishes of R3. The LLP Agreement was deliberately structured so as to prevent unilateral control. Decisions generally required support from other members and the matters reserved to the designated members required the agreement of both Mr Bloxham and Mr Curnuck. We therefore reject any suggestion that association is established simply because Mr Bloxham was the sole PSC of R11 or because he occupied a position of particular prominence within the Urban Splash enterprise.

568. Whilst we accordingly accept an important aspect of R11's submissions, this does not resolve the association issue. The Applicant's case does not depend upon demonstrating that Mr Bloxham alone controlled R11. Rather, the relevant question is whether the evidence establishes that R3 possessed the power required by section 121(8). The critical feature of the evidence, in our view, is therefore the complete overlap between those who controlled R11 at the qualifying time and those who controlled R3. The members of R11 were the five individuals referred to as the Urban Splash 5. Those same five individuals were also five of the six directors of R3[66]. Whilst the governance arrangements of the LLP prevented unilateral control by any single member, they nevertheless vested control of R11 in the Urban Splash 5 acting collectively. Equally, those same individuals collectively exercised control over R3.

569. We certainly do not regard the formal arrangements governing R11 as a sham, nor do we conflate membership of an LLP with directorship of a company – which is why, for example, Mr Bloxham's involvement in R11 is insufficient on its own to establish association with R1. The significance of the overlap lies elsewhere. It is that the directing minds of both organisations were materially the same. The evidence demonstrates not merely the existence of common individuals, but a commonality of control. That commonality of control is important, but we do not treat it as sufficient by itself. This is not simply a case in which the same five individuals happened independently to control two otherwise unrelated businesses. R3 and R11 operated within the same broad sphere of property development and property-related activity, under the collective control of the same small group of individuals and with substantial commercial and financial connections between them. The Stubbs Mill property had been held within the Urban Splash group and was acquired by R11 from R2, and its subsequent development, management and financing involved Urban

[66] The sixth director was Urban Splash Director 2 Ltd.

Splash entities. R11's later financing arrangements also became materially interconnected with those of the wider Urban Splash enterprise. Those circumstances provide the necessary connection between the commonality of control and the affairs of the two entities: the collective power exercised by the Urban Splash 5 in relation to R11 did not operate in a commercial sphere separate from the enterprise which they controlled through R3.

570. That conclusion is reinforced by the position of Mr Bloxham and Mr Curnuck as the LLP's designated members. Acting together, they possessed authority in relation to substantial matters including borrowing, lending and significant capital expenditure. Neither could exercise those powers alone. Nevertheless, they were capable of exercising them together and, at the qualifying time, were also the Chairman and Chief Executive/Finance Director of Urban Splash. Whilst not determinative, that arrangement reinforces the broader conclusion that the practical control of R11 rested in the hands of those who also controlled R3.

571. We accept the Applicant's submission that section 121(8) is concerned with power rather than its exercise. The provision does not require the Applicant to identify a particular occasion on which R3 actually secured that the affairs of R11 were conducted in accordance with its wishes, still less a specific set of wishes which R11 was required to implement. The question is whether the relevant power existed. In circumstances such as these, where the same individuals collectively controlled both entities and the evidence establishes the wider commercial and financial relationship which we have described, we consider it legitimate to treat their collective exercise of power in relation to R11 as the means by which R3 was capable of securing that R11's affairs were conducted in accordance with its wishes.

572. The financing history provides some further support for that conclusion. For the reasons already given, we regard the members' willingness to expose what had been intended as a separate personal investment to risks arising from other Urban Splash businesses as surprising. The arrangements were commercially advantageous to R11, but they also benefited those other businesses and exposed R11 to risks which the creation of the separate vehicle had originally been intended to avoid. Although this does not independently establish control, it provides some evidence that, where the interests of R11 and the wider Urban Splash enterprise intersected, those controlling R11 were willing to conduct its affairs in a manner which served the interests of that wider enterprise. Viewed alongside the commonality of decision-making power identified above, that evidence reinforces our conclusion as to the practical control of R11.

573. Finally, we acknowledge that this conclusion obviously differs from that we have reached on the question of R10's association with R1. Whilst the relevant legal principles are the same in each case, their application to the evidence produces contrasting outcomes. In relation to R10, we have concluded that there existed independent layers of decision-making and scrutiny within R10 which prevented the attribution of control to R3. In relation to R11, no equivalent separation existed. The individuals who controlled R11 at the qualifying time were, in form and reality, the same individuals who controlled R3. For that reason, we are satisfied that R3 had the power to secure that the

affairs of R11 were conducted in accordance with its wishes, and that R11 is therefore associated with R1 by virtue of section 121(5)(b) of the BSA.

PART 5 – EXERCISE OF THE TRIBUNAL'S DISCRETION

574. In this Part, we determine whether it is just and equitable to make RCOs against all or any of the Respondents. We first consider the nature and purpose of the discretion conferred by section 124 of the BSA, the factors relevant to its exercise and the Respondents' human-rights objections. We then apply those principles to each Respondent in turn and determine whether RCOs should be made.

575. We have already considered in Part 2 the reasonableness of the remediation expenditure. The costs which we have found to have been reasonably incurred, or reasonably to be incurred, therefore form the starting point for the wider just and equitable assessment which follows.

THE "JUST AND EQUITABLE" TEST IN SECTION 124 OF THE BSA

The power conferred upon the FTT

576. Section 124(1) of the BSA provides:

> *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.*

577. Subsection (2) defines an RCO by reference to the persons who may be required to make payments and the costs which an order may require them to meet. We have considered those matters elsewhere in this Decision. The central feature of section 124 for present purposes is that it confers a discretionary power upon the FTT: an RCO may be made only if the FTT considers it just and equitable to do so.

578. The BSA does not prescribe the circumstances in which that test will or will not be satisfied. However, the exercise of the discretion has now been considered by courts and tribunals on a number of occasions. We therefore consider the current state of the law before addressing the application of the test to the facts of this case.

579. Although the parties differed significantly about the application of the test, a number of general propositions were not materially disputed.

580. First, the power is discretionary. The fact that a person falls within one of the categories identified in section 124(3) does not, without more, entitle an applicant to an RCO. The FTT must determine separately whether it is just and equitable to make the order sought.

581. Secondly, the discretion is broad and fact-sensitive. The BSA contains no statutory checklist of relevant considerations, and the authorities explicitly do

not identify an exhaustive list. The question must be answered by reference to all material circumstances of the particular case.

582. Thirdly, the discretion must be exercised consistently with the purpose of the statutory scheme. The BSA is concerned with the remediation of historical building-safety defects and the allocation of responsibility for the resulting costs. The association provisions were intended, at least in part, to prevent liabilities being avoided through the use of corporate structures.

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

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

585. Despite that common ground, the parties differed materially about the weight to be given to particular considerations. Their disagreement centred upon the purpose of section 124, the significance of a respondent's connection with the relevant building, the competing relevance of public funding and the consequences of an order, and the extent to which ECHR considerations inform the exercise of the discretion. Other matters, including responsibility for the defects, participation in the development and receipt of its benefits, are best understood as informing those broader questions. We address the issues on that basis.

The purpose of the section 124 jurisdiction

586. Section 124 forms part of the statutory scheme of remediation provisions in Part 5 of the BSA. As the Supreme Court has acknowledged in *BDW Trading Ltd v URS Corporation Ltd*[67], the overall purpose of those provisions is twofold: to ensure that any risks to the safety of people in relevant buildings concerning the spread of fire or building collapse can be required to be remediated, and to ensure that where costs have been (or will be) incurred in remediating such risks, these are not borne by leaseholders, and can be fairly allocated elsewhere (the 'who pays' question).

587. *BDW* concerned building liability orders made under section 135 of the BSA, not RCOs, but the Supreme Court also accepted that:

> "A central purpose and policy of the BSA in general, and section 135 in particular, was to hold those responsible for building safety defects accountable. As was stated in the Secretary of State's written submissions, at

[67] [2025] UKSC 21 at paragraphs 83 and 84.

> para 15: "The BSA makes a number of important changes to the law including, at Part 5, several mechanisms that achieve the central aims of the BSA in relation to historical building safety defects. These mechanisms are designed to ensure that … those responsible for defects can be held to account …" "[68]

588. On a similar theme, Constable J said this in *Crest Nicholson Regeneration Ltd v Ardmore Construction Ltd (in administration) & Others*[69] (another case about BLOs):

> "The legislative purpose of the BSA is in ensuring those who caused historical building safety defects, not those with the deepest pockets, pay for their remediation."[70]

589. Once Parliament decided to intervene in the ordinary contractual allocation of remediation liabilities, it was necessary to make provision for costs which leaseholders would no longer bear. Section 124 is one component of that scheme. It enables remediation costs to be allocated to persons whom Parliament has identified as potential bearers of those costs, including, where it is just and equitable, developers and associated entities.

590. One important purpose of the association provisions is the prevention of avoidance. The FTT explained the point in *Triathlon Homes LLP v Stratford Village Development Partnership & Ors*[71]:

> " … 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."

591. The Upper Tribunal adopted the same theme in *Edgewater (Stevenage) Ltd v Grey GR Limited Partnership*[72]:

> "A primary purpose of the jurisdiction in Section 124 is to ensure that a wealthy parent company or other wealthy entity which is caught by the association provisions cannot evade responsibility for meeting the cost of remedying the relevant defects by hiding behind the separate personality of the development company.

592. Those passages explain why Parliament made associated entities potentially liable. They do not, however, establish that section 124 is confined to cases involving an avoidance structure or a thinly capitalised development vehicle. The Upper Tribunal described anti-avoidance as "a primary purpose" of the jurisdiction, not its sole purpose.

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[68] *Ibid.* at paragraph 104.
[69] [2026] EWHC 789 (TCC).
[70] At paragraph 92.
[71] [2024] UKFTT 26 (PC) at paragraph 266.
[72] [2026] UKUT 18 (LC) at paragraph 217.

593. The references in those authorities to a "wealthy parent company or other wealthy entity" are also significant. They indicate that, where an associated entity has the resources to meet remediation costs, the statutory policy ordinarily points towards those resources being considered before the costs are left with the taxpayer. That consideration may carry substantial weight, but it does not dispense with the need to determine whether an order against the particular associate would be just and equitable in all the circumstances.

594. Whilst anti-avoidance is thus an important manifestation of the statute's broader cost-allocation purpose, section 124 is clearly not intended merely to serve as a freestanding anti-avoidance jurisdiction. Not only is this consistent with the authorities mentioned above, but it also reflects the Court of Appeal's subsequent analysis in *Triathlon*[73]: Nugee LJ there described the policy of the BSA as being "to place primary responsibility on the developer",[74] noting also that the BSA does not contemplate taxpayer funding as the solution to the 'who pays' question, but instead provides for costs to be allocated between those with relevant connections to the building[75].

595. We therefore regard anti-avoidance as an important manifestation of a broader statutory policy concerned with the allocation of remediation liabilities. It explains why associated entities are within the potential reach of section 124. It does not determine whether, or to what extent, it is just and equitable to impose liability upon a particular associate. That remains a fact-sensitive question requiring attention to the nature of the respondent's connection with the building and the liabilities in question.

The significance of a respondent's connection with the relevant building

596. The parties agreed that a respondent's connection with the relevant building is capable of being relevant. They differed about the importance of that consideration.

597. The Applicant submitted that Parliament has already identified, through section 124(3) and the association provisions, the categories of person against whom an order may potentially be made. It argued that the FTT should not introduce an additional connection requirement which has no basis in the statutory language. In particular, neither participation in the development, receipt of its profits nor responsibility for the defects is a legal prerequisite to an order.

598. The Respondents placed greater emphasis upon connection. They relied principally upon the Court of Appeal's observation in *Triathlon* that the BSA allocates costs "between those who have relevant connections to the building"[76]. They submitted that a respondent's relationship with the particular building is

[73] [2025] EWCA Civ 846.
[74] At paragraph 61.
[75] *Ibid*. at paragraph 87.
[76] At paragraph 87.

a central organising feature of the jurisdiction. The absence of a meaningful connection was said to point strongly away from an order.

599. Section 124 does not expressly require a respondent to have participated in the development, received its profits, owned the building or possessed any specified degree of connection with it. Parliament could have imposed such a requirement. Instead, it identified the categories of potential respondent in section 124(3) and conferred a discretion to determine whether it is just and equitable to make an order in the particular case.

600. That conclusion is supported by *Edgewater (Stevenage)*. The Upper Tribunal rejected the proposition that participation in the relevant development, or the direct or indirect receipt of its profits, constituted an "additional requirement" which had to be satisfied before an order could be made. Such matters were relevant to the exercise of the discretion but were not conditions of liability.

601. Connection is therefore not an express or implied jurisdictional gateway. But it does not follow that it lacks special importance. The references in *Triathlon* and *Edgewater (Stevenage)* to relevant connections with the building, together with the attention paid in those cases to participation in the development enterprise and receipt of its benefits, show that connection will often carry substantial practical weight.

602. A respondent's connection with the relevant building is therefore a highly important, but not determinative, consideration. A close connection will ordinarily strengthen the case for an order. A remote or merely technical association may point strongly against one. The strength of either conclusion will depend upon the facts.

603. It follows that section 124 is not confined to cases in which an anti-avoidance function must be performed. It may be just and equitable to make an RCO against an associated entity even where the developer was neither an SPV nor deliberately undercapitalised. Equally, the broader cost-allocation policy cannot dispense with the need to explain why it is fair to impose the particular liability upon the particular associate.

604. The difficulty is most acute where the proposed respondent has only a limited connection with the building and the practical alternative is that the remediation costs remain with the public. The absence of a close connection is not necessarily fatal in such a case, but nor can the involvement of public funds supply a connection which does not otherwise exist. The degree and nature of the respondent's connection must be weighed with the other circumstances in determining whether an order is just and equitable.

605. Where a respondent other than a developer has no direct connection with the relevant building, that does not make the nature of its connection irrelevant. Rather, the focus may shift to the relationship between that respondent and the developer, the enterprise through which the relevant development activities were undertaken, and the liabilities which resulted from them. A sufficiently substantial connection of that kind may provide a reason why it is just and equitable for an associated entity to share liabilities arising from the developer's

activities, notwithstanding that it did not itself develop, own or manage the relevant building. But connection with the wider enterprise is not a substitute for the statutory test, nor is participation in the same corporate group enough by itself. The nature and strength of the particular connection, and whether it provides a proper reason for transferring the relevant remediation liability to that respondent, must be assessed in each case.

Factors relevant to the exercise of the discretion

The nature and weight of the respondent's connection

606. Connection is not a single or binary concept. Its nature and weight may be informed by several matters, including whether the respondent caused or contributed to the defects, participated in or controlled the development enterprise, received profits or other benefits from it, retained an interest in the building, or subsequently assumed the assets and liabilities of the developer.

607. The Respondents relied upon the statements in *BDW* and *Crest Nicholson* concerning the policy of holding those responsible for defects to account and ensuring that remediation costs are borne by those who caused the problem, rather than simply by those with the deepest pockets. The Applicant did not contend that those matters were irrelevant. Its case was that Parliament had not made them conditions of liability.

608. Neither the BSA nor the authorities treat responsibility, participation or benefit as a prerequisite to an RCO. Those considerations are nevertheless capable of carrying substantial weight. A respondent which caused or contributed to the defects, participated in or controlled the development enterprise, profited from it, or otherwise obtained material benefits from the development will ordinarily have a stronger connection with the resulting remediation liabilities than one which did none of those things.

609. Responsibility, participation, control and benefit are therefore not freestanding legal tests. They inform the nature and strength of the respondent's connection with the development and the fairness of requiring that respondent to contribute. Their presence may substantially strengthen the case for an order. Their absence may weaken it, sometimes materially. The weight to be attached to either circumstance will depend upon the nature of the respondent, the basis of its association and the other facts of the case.

Public funding and the position of the taxpayer

610. Unsurprisingly, the parties also disagreed about the significance of public funding. The Applicant relied upon the treatment of the BSF in *Triathlon* and submitted that taxpayer funding was intended to be a measure of last resort. The Respondents accepted that the availability of public funding does not, by itself, justify refusing an otherwise appropriate order. They argued, however, that the Applicant's case erroneously elevated the position of the taxpayer into an overriding consideration.

611. The FTT in *Triathlon* stated:

> "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."[77]

612. The Court of Appeal agreed that the BSA creates a hierarchy of responsibility, in which the developer sits at the top[78]. When addressing the wider 'who pays' question, Nugee LJ said:

> "But the Act does not itself contemplate that taxpayer funding in the shape of the Fund (and other taxpayer-funded initiatives) will provide the solution to the problem. Instead it provides for costs to be allocated between those who have relevant connections to the building."[79]

613. Nugee LJ accordingly described the Fund as "a last resort". It stands outside the hierarchy of those whom the BSA identifies as potential funders. If the statutory mechanisms can be operated, the provision of public funding is not, without more, a reason not to operate them.

614. That proposition is subject to an important qualification. When addressing the FTT's wider statement that it was difficult to see how it could "ever" be just and equitable for a solvent person within section 124(3) to leave the costs with the public, Nugee LJ said:

> "I do not think it is necessary to consider whether the FT'T were right to say that it was 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 works to be able to claim that the works should instead be funded by the public purse. In saying that, they were expressing themselves rather more widely than was needed for the present case, and there may indeed be cases where it would not be just and equitable to make an RCO against those within section 124(3), even if the result was to leave the costs to be funded by the public."[80]

615. The Court gave the example of companies which fell within the association provisions only because they shared a director with a landlord, but which had no other connection with the landlord, its group or the development and might carry on entirely different businesses or include a charitable company. In the opinion of Nugee LJ, it was "not obvious that it would always be just and equitable to make RCOs against such associated companies even if the effect of refusing to do so was to leave the costs to be borne by the public"[81].

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[77] *Triathlon*, FTT at paragraph 278.
[78] *Triathlon*, CA at paragraph 61.
[79] *Ibid.* at paragraph 87.
[80] *Ibid.* at paragraph 65.
[81] *Ibid.*

616. These authorities establish two propositions. First, the availability of public funding does not displace the statutory mechanisms by which remediation costs may be allocated to developers and others with relevant connections to the building. The fact that remediation works have been funded through the BSF is not, without more, a reason to refuse an order which would otherwise be just and equitable. Secondly, however, public funding cannot by itself make an order just and equitable against a respondent whose connection with the building is otherwise insufficient. The Court of Appeal expressly recognised that there may be cases in which it would not be just and equitable to make an order against a person falling within section 124(3), even though the effect would be to leave the costs with the public purse.

617. Public funding is therefore neither irrelevant nor determinative. Where a person within section 124(3) has a sufficient connection with the relevant building and the resources to meet the remediation costs, the statutory policy provides a strong starting point against leaving those costs with the public purse. That starting point does not amount to an irrebuttable presumption, still less a rule that every solvent person within section 124(3) must pay. The question remains whether the nature and strength of the proposed respondent's connection, its resources and the other material circumstances make it just and equitable to require that respondent to contribute.

Other factors relevant to the exercise of discretion

618. The considerations identified above are not exhaustive. The authorities emphasise the breadth and fact-sensitive nature of the just and equitable enquiry. The parties also relied upon corporate separateness, the interests of investors, creditors and other third parties, and the practical consequences of an order.

619. Section 124 does not abolish ordinary principles of separate corporate personality. However, the association provisions necessarily qualify those principles for the purposes of remediation liability. Corporate separation therefore remains a relevant consideration, but it cannot constitute a complete answer to an application under section 124.

620. The parties disagreed about the significance to be attached to persons standing behind a respondent, including investors and creditors. The Applicant relied upon the reasoning in *Triathlon*, where considerable weight was placed upon the fact that those who acquired the developer chose to acquire the development vehicle itself and thereby assumed the risks, known and unknown, attaching to that vehicle. The Court of Appeal accepted that analysis, observing that investors who acquired interests in the developer took the risk of unforeseen liabilities attaching to the company in which they invested.

621. However, the authorities do not treat the interests of investors or other third parties as irrelevant. On the contrary, both the FTT and Upper Tribunal in *Edgewater (Stevenage)* treated the impact of an order on third-party investors as a relevant, and potentially important, consideration within the just and equitable balancing exercise. The significance of such interests will necessarily

depend upon the circumstances. Relevant matters may include the nature of the investment, the degree of connection between the investor and the development enterprise, the commercial risks assumed, and the extent to which the burden of an order would ultimately fall on persons who played no part in the development or the defects.

622. The practical and financial consequences of an order, including potential insolvency or effects upon investors and creditors, are likewise relevant. They do not necessarily point against an order: the imposition of substantial liabilities may be the intended consequence of Parliament's decision to reallocate remediation costs. Nor, however, must those consequences be disregarded. Their significance depends upon what they reveal about the fairness of requiring the particular respondent to bear the particular liability sought.

623. The consequences of declining to make an order must also be considered. Depending upon the circumstances, refusal may leave remediation expenditure with the applicant, another person who has already incurred the costs, leaseholders or the public purse. Those consequences do not themselves establish that an order is just and equitable against a particular respondent, but they form part of the circumstances to be weighed in the balance.

The nature of the evaluative exercise

624. The considerations identified above do not operate as a checklist or according to fixed rules. They must be considered together in determining whether it is just and equitable to require the particular respondent to bear the particular remediation liability sought, or an identified proportion of it. The statutory purpose and the strong starting point against leaving remediation costs with the public purse, where an appropriate private bearer exists, inform that assessment but do not determine its outcome. The weight of each consideration depends upon the circumstances of the applicant, the respondent and the proposed order.

625. The enquiry is applicant-specific, respondent-specific and order-specific. It is not sufficient to decide in the abstract that some contribution by a respondent would be just and equitable. The FTT must consider whether it is just and equitable to impose the particular liability under consideration, having regard to its amount, its practical consequences, the position of the applicant and the interests of those who would ultimately bear the burden of making or refusing the order. The exercise is therefore capable of accommodating considerations of fairness, burden and proportionality wherever those considerations materially arise on the facts of the case.

Human rights considerations

626. Section 3(1) Human Rights Act 1998 provides that, so far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with Convention rights. In the Respondents' submission, the way in which section 124 of the BSA gives effect to section 3 of the Human Rights Act is through the just and equitable test: even if the FTT considers it just and

equitable to make an RCO, it cannot do so if doing so would breach a respondent's Convention rights.

627. Thus, whilst the Respondents maintained that they did not challenge the general validity of section 124 of the BSA on human rights grounds, they nevertheless asserted that making RCOs against all or any of the Respondents in the circumstances of this case would amount to an unlawful interference with their Convention rights – in particular, their rights under Article 6 and/or Article 1 of the First Protocol. Mr Sawtell KC submitted that this would necessarily be the result, not only if RCOs were made against the Respondents for the very substantial sums sought by the Applicant, but also if RCOs were made against them at all.

Article 1 of the First Protocol (A1P1)

628. We accept Ms Bretherton KC's submission that the Respondents' Convention-based objections do not require the application of any legal test distinct from that already supplied by section 124 itself. The issue is not whether Convention rights are relevant. It is whether they operate as a freestanding basis for resisting an RCO, separate from the just and equitable assessment. In our judgment, they do not.

629. The Respondents' principal reliance was placed upon A1P1. In summary, they contended that the liabilities sought are retrospective in character, were not reasonably foreseeable when relevant corporate decisions were taken, undermine legitimate reliance upon separate corporate personality, and would impose an individual and excessive burden upon entities which, in their submission, either had only limited connections with the seven Buildings or derived no material benefit from them. They further relied upon the consequences which an order might have for investors, creditors, employees, commercial partners and future development activity.

630. We do not regard those considerations as irrelevant. On the contrary, they are all capable of informing the just and equitable balancing exercise required by section 124. However, the Respondents' submissions tended to treat proportionality as a separate and free-standing enquiry which exists outside the statutory discretion. We do not accept that characterisation.

631. The starting point is that the Respondents do not challenge the validity of section 124 itself. That concession was plainly correct in light of recent authorities. Although neither *BDW* nor *Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point*[82] concerned applications for RCOs, both authorities recognise that the remediation provisions in Part 5 of the BSA form part of a coherent legislative response to the building-safety crisis which emerged following the Grenfell Tower fire. In *BDW*, the Supreme Court described retrospectivity as a central feature of Parliament's response to historical building-safety defects and explained that Part 5 was intended to provide effective routes to redress and ensure that those responsible for defects

[82] [2025] EWCA Civ. 856.

could be held to account. The Court also identified section 124 as one element within a wider package of statutory mechanisms directed to those objectives[83].

632. Equally, in *Adriatic Land*, the Court of Appeal considered provisions which retrospectively deprived landlords of contractual rights they would otherwise have enjoyed. The Court accepted that the legislation interfered with accrued economic rights but nevertheless concluded that the interference pursued legitimate public objectives arising from the building-safety crisis and was compatible with A1P1. The Court further recognised that the statutory scheme involved questions of economic and social policy in respect of which Parliament enjoyed a wide margin of judgment[84]. While the case was concerned with Schedule 8 to the BSA rather than section 124, it confirms that retrospective interference with existing economic interests is not, of itself, incompatible with A1P1. The Court accepted that Parliament had deliberately adopted measures which altered pre-existing economic rights in pursuit of the wider objectives of the BSA and held that such interference was capable of being justified consistently with Convention rights.

633. These authorities do not establish that every exercise of every power contained in Part 5 will necessarily be proportionate. They do, however, demonstrate that retrospective reallocation of economic burdens is itself a deliberate and central feature of the legislative scheme and that such an approach is capable of operating consistently with Convention rights.

634. Against that background, we do not consider that A1P1 requires the FTT to undertake an exercise distinct from that already mandated by section 124. The just and equitable test is broad, evaluative and fact-sensitive. It requires consideration of all circumstances bearing upon the fairness of imposing remediation liabilities upon a particular respondent. Those circumstances include the respondent's connection with the relevant building, the burden imposed by an order, the interests of investors and creditors, and the practical consequences of liability. Indeed, those are precisely the matters upon which the Respondents relied in advancing their proportionality arguments.

635. In practical terms, therefore, it is difficult to envisage circumstances in which a Tribunal, having fully considered all matters bearing upon fairness, burden and proportionality, could conclude that an order is just and equitable whilst simultaneously regarding the same order as a disproportionate interference with Convention rights. The statutory discretion already requires the evaluative assessment upon which proportionality depends.

636. It follows that the Respondents' A1P1 case does not create a jurisdictional hurdle separate from section 124. Rather, the matters relied upon are relevant because they inform the just and equitable balancing exercise itself.

[83] *BDW* at paragraphs 83-87.
[84] *Adriatic Land* at paragraph 114.

Article 6

637. The Respondents also relied upon Article 6. They submitted that the retrospective operation of the BSA impaired their ability to defend the applications because of the passage of time, the potential loss of historic documentation, and what they characterised as an inequality of arms arising from the Applicant's access to information generated through the remediation and BSF processes.

638. We are unable to accept that submission. These proceedings have provided the Respondents with a full and fair opportunity to contest every aspect of the Applicant's case, and indeed they have maximised that opportunity. The applications were closely case managed over an extended period. Very substantial disclosure exercises were undertaken by all parties. The hearing itself occupied seven weeks. Extensive factual, expert and documentary evidence was deployed. All Respondents were represented by experienced legal teams and were able to pursue every argument they wished to advance.

639. Further, notwithstanding references to the possible loss of historic material, the Respondents did not identify any specific aspect of their case which could not properly be advanced because a particular document no longer existed. The submission remained at a general level, and no material issue requiring determination by this Tribunal was shown to be incapable of fair adjudication because of the absence of historic documentation.

640. There is a degree of irony in this complaint. This litigation has involved an exceptional volume of documentary evidence. Complaints regarding the sufficiency of disclosure were made by both sides. Yet no occasion arose on which the Respondents demonstrated that any identifiable line of argument was incapable of proper development because of the unavailability of documentary material from the original development period.

641. In any event, the actual design and construction of the seven Buildings did not emerge as a significant factual battleground in the way suggested by the Article 6 argument. The Respondents did not dispute the essential conclusions of the post-Grenfell investigations regarding the condition of the Buildings. The principal disputes instead concerned the implications of those findings, the appropriate remediation response, the allocation of responsibility and the exercise of the section 124 discretion. It is difficult to see how additional documents from the original construction era would have materially advanced those issues.

642. We also reject the Respondents' submission that the retrospective features of Part 5 of the BSA render section 124 analogous to the legislation considered in *Zielinski and Others v France*[85]. We accept that the BSA alters the legal consequences of historical events and may affect economic interests and expectations that were formed before its enactment. Indeed, as the Supreme Court recognised in *BDW*, retrospectivity is a deliberate and central feature of Parliament's response to historical building-safety defects. However, the

[85] (1999) 28 EHRR 776.

mischief identified in *Zielinski* was not retrospectivity in itself, but legislative intervention designed to influence the judicial determination of existing disputes. Section 124 does not operate in that way. Parliament created a new statutory jurisdiction directed to the allocation of remediation liabilities arising from historical building-safety defects and entrusted its application to an independent judicial tribunal through the broad just and equitable discretion. In those circumstances, we do not consider that the analogy with *Zielinski* assists the Respondents.

643. We are satisfied that the Respondents have received a hearing fully consistent with the requirements of Article 6.

Conclusion on Convention rights

644. Accordingly, we reject the submission that Convention rights considerations require the Tribunal to apply any legal test distinct from that already supplied by section 124. The matters relied upon under A1P1 are relevant because they inform the just and equitable balancing exercise. We reject the Respondents' reliance upon Article 6. We therefore consider the Respondents' Convention-based objections together with the other relevant circumstances identified above when applying the section 124 discretion to the facts of the present case.

APPLICATION OF THE DISCRETION TO THE RESPONDENTS

645. We now apply those principles to the individual Respondents. The section 124 discretion must be exercised separately in relation to each Respondent and the particular orders sought against it, having regard to the nature and strength of its connection with the Buildings and all the other circumstances bearing upon the fairness of imposing the liability in question. Those circumstances include, where relevant, the matters relied upon by the Respondents in support of their Convention-based objections, which we consider as part of the same evaluative exercise.

646. We begin with R1, whose position is distinct because it was the developer of each of the seven Buildings.

R1: URBAN SPLASH LIMITED (THE DEVELOPER)

The parties' positions

647. The Applicant submitted that the case for making RCOs against R1 was particularly strong. R1 is the developer of each of the seven Buildings. Its connection with them is therefore direct and obvious, rather than one arising only through the statutory association provisions. It was through R1 that the Buildings were developed and brought to market.

648. The Applicant relied upon the purpose of the statutory scheme. The BSA was intended to ensure that the costs of remediating historical building-safety defects fell upon those responsible for the developments, rather than upon leaseholders or the taxpayer. The Court of Appeal in *Triathlon* had identified the developer as occupying the first position in the hierarchy of responsibility.

R1 was therefore the most obvious person against whom the section 124 jurisdiction should be exercised.

649. The Applicant also relied upon the source of the costs claimed. Most of the expenditure had been met through the BSF and would remain with the public purse unless recovered through the statutory mechanisms created by the BSA. The BSF was intended as a measure of last resort, not as a means by which a developer could be permanently relieved of responsibility for the remediation of buildings which it had developed.

650. The Applicant further relied upon R1's failure to remediate or fund the remediation of the Buildings. Following the Grenfell Tower fire, the wider Urban Splash organisation became aware of the concerns raised about them and assisted those undertaking investigations by supplying historical information and design documentation. Nevertheless, R1 did not undertake the remediation works, fund them or reimburse the expenditure subsequently incurred. The Applicant submitted that public funding had been required because the developer had not "done the right thing" by meeting those costs itself.

651. R1 could not, the Applicant argued, avoid the consequences of that position by criticising after the event the decisions made by those who had assumed responsibility for making the Buildings safe. Others had been required to investigate the defects, select remediation strategies, procure the works and secure the necessary funding. Although R1 remained entitled to challenge whether particular works and costs fell within section 124, its decision not to undertake the remediation itself formed part of the context in which those criticisms should be assessed.

652. The Applicant also contended that the prospect of recovery action against developers was not wholly unforeseen. It relied upon Government statements and the terms of the BSF arrangements as demonstrating that public funding was not necessarily intended to represent the final allocation of responsibility. The subsequent enactment of the BSA provided the statutory machinery through which those costs could be reallocated. Although section 124 operated retrospectively, its retrospective character therefore carried limited weight against making an order.

653. R1 submitted that its status as developer did not resolve the separate question whether the orders sought were just and equitable. The broad discretion conferred by section 124 required the Tribunal to consider all the circumstances, including the retrospective nature of the liability, R1's conduct following the Grenfell Tower fire, its ability to obtain recourse against others, its present financial position and the practical consequences of an order.

654. R1 relied upon the retrospective nature of the statutory regime. The Buildings had been completed many years before the BSA was enacted. R1's development activities, contractual and insurance arrangements, and subsequent corporate affairs had been conducted under a legal framework which did not expose it to the liabilities now asserted. Although retrospectivity formed an intended

feature of the BSA, R1 submitted that its practical effect remained relevant to the fairness and proportionality of making the particular orders sought.

655. R1 also disputed the Applicant's suggestion that it had failed to do the right thing following the Grenfell Tower fire. Its case was that Urban Splash personnel had assisted managing agents and management companies, supplied substantial quantities of historical design and construction information, participated in meetings and supported the investigation of the Buildings. Financial assistance had also been provided to the management company at Chips. R1 submitted that its conduct had to be assessed against the Government policy then in force, which initially placed responsibility for securing remediation primarily upon building owners. The more explicit policy that developers should fund remediation emerged only in January 2022.

656. R1 further submitted that it could no longer obtain effective recourse against the designers, contractors or consultants who might bear responsibility for particular defects. The passage of time, expiry of relevant limitation periods, insolvency of some participants, evidential difficulties and the cost of further litigation were said to make supply-chain recovery largely unrealistic. An RCO against R1 would not merely place initial responsibility upon the developer pending recovery from those more directly responsible. In practical terms, the liability would remain with R1.

657. The Applicant responded that the BSA had created or extended rights of recovery against third parties and that the practical availability of such claims did not provide a sufficient reason to leave the remediation expenditure with the taxpayer. It was not incumbent upon the Applicant to pursue every other potentially responsible person before seeking an RCO against the developer.

658. R1 also relied upon its present financial condition. It no longer trades or undertakes development activity and was said to be technically insolvent. Its accounts recorded no turnover, nominal fixed assets and substantial net liabilities. Although the tax losses retained within R1 continued to provide an economic benefit to companies within the current group, R1 submitted that this did not provide it with resources capable of satisfying orders of the magnitude sought.

659. Finally, and principally, R1 relied upon the Government's own responsibility for the circumstances which gave rise to the building-safety crisis. It submitted that the Buildings had been designed and constructed within a regulatory system established and maintained by the state, and that the failings identified by the Hackitt Review and the Grenfell Tower Inquiry were directly relevant to the just and equitable assessment. Mr Dennys KC argued that it would be unjust for the Applicant to recover from R1 the whole of the expenditure incurred in addressing defects which, on R1's case, reflected systemic failures in regulation, guidance and enforcement to which Government had materially contributed.

660. The Applicant accepted that those reports identified shortcomings within the regulatory system, including failures attributable to Government. Ms Bretherton KC submitted, however, that the reports also identified serious failures within the construction industry and did not support R1's attempt to

attribute the crisis principally to Government. Parliament had enacted the BSA with knowledge of that wider background but had nevertheless placed developers within the class of persons against whom RCOs could be made. The existence of regulatory failures did not, therefore, displace the statutory allocation of responsibility or make the BSF the intended final bearer of the remediation costs.

661. The parties' competing submissions concerning Government responsibility require separate consideration. We return to them after considering the significance of R1's status as developer and the other matters relied upon in support of, and in opposition to, the orders sought.

R1's status as developer

662. R1's position differs fundamentally from that of every other Respondent: it was the developer of each of the seven Buildings. It procured their design and construction, brought them to market and obtained the commercial benefit of doing so. Its connection with the Buildings and the resulting remediation liabilities could scarcely be closer.

663. That does not mean that R1 designed or carried out every aspect of the work itself, or that every (or any) relevant defect resulted from a culpable decision taken by its directors or employees. Property development necessarily involves the appointment of architects, consultants, contractors and specialist subcontractors, as well as participation by building-control bodies and others. Nor does responsibility for relevant defects depend upon proof of negligence or other legal fault. The significance of R1's status lies in the fact that it was the entity which undertook the developments and assumed responsibility for bringing the completed/renovated Buildings into existence.

664. That distinction reflects the policy of the BSA. As we have already explained, the statutory scheme seeks both to ensure the remediation of historical building-safety defects and to allocate the resulting costs away from leaseholders. The Supreme Court in *BDW v URS* identified the holding to account of those responsible for such defects as a central purpose of Part 5 of the BSA. The Court of Appeal in *Triathlon* described the policy of the Act as placing primary responsibility upon the developer, and confirmed that the developer stands at the head of the hierarchy of those who should pay the costs of remediation. The association provisions extend the range of persons who may be required to contribute. They do not displace the developer's own primary position.

665. Although section 124 creates no presumption against a developer, the statutory policy provides an exceptionally powerful starting point in favour of requiring the developer to bear remediation costs, particularly where the alternative is that those costs remain with the public purse. That does not dispense with the statutory discretion or make an order inevitable in every case. It does, however, mean that substantial countervailing considerations will ordinarily be required before the developer's primary responsibility yields to some other allocation.

666. The historical nature of the developments does not materially weaken that starting point. The reallocation of liabilities arising from historical defects is an intended and central feature of Part 5 of the BSA. Parliament intervened because the existing contractual and legal arrangements had proved insufficient to resolve the building-safety crisis without leaving unacceptable burdens with leaseholders or the public. We therefore attach only limited weight to R1's reliance upon retrospectivity.

667. Nor is R1's apparent inability to obtain contribution from others a sufficient reason to refuse an order. We accept that some potential claims may now be affected by limitation, insolvency or evidential difficulties, and have taken that circumstance into account. It does not determine where the remediation costs should ultimately fall. As between the developer which procured and obtained the benefit of the developments and the taxpayer which funded their remediation, the policy of the BSA points clearly towards the developer. The absence of effective recourse may make the consequences for R1 more severe, but does not make that allocation unjust.

R1's conduct following the Grenfell Tower fire

668. We have also considered the parties' competing submissions concerning whether R1 failed to "do the right thing" after the Grenfell Tower fire. That expression risks obscuring rather than assisting the statutory enquiry. The question is not whether R1's conduct met an undefined moral standard. It is whether its conduct materially alters the fairness of requiring it to contribute to the remediation costs.

669. On that issue, we accept that Urban Splash did not remain passive. Simon Gawthorpe was the Urban Splash director who co-ordinated its response to the tragedy, and he described the steps taken immediately afterwards. Urban Splash undertook reviews of fire-risk information, external wall construction and its wider development portfolio; engaged with managing agents and building management companies; facilitated the appointment of fire-safety consultants; supplied historical design and construction information; and participated in discussions concerning the developing investigations.

670. That account is consistent with the building-specific evidence. As recorded elsewhere in this Decision, representatives of the original development team supplied documentation and information which assisted the investigations subsequently undertaken. At Chips, financial assistance was also provided to the management company. We accept that those actions were useful and responsible. They assisted those who had assumed responsibility for investigating the Buildings in understanding the construction of the developments and the issues requiring attention.

671. There is, however, an important distinction between assisting an investigation and accepting financial responsibility for the resulting remediation. R1 did not procure the remediation of any of the Buildings. It did not meet the remediation costs and has not reimbursed those who did. Whilst Urban Splash assisted during the investigative stage, the financial burden was ultimately borne through the BSF and other third-party sources.

672. We also accept that the public policy directed specifically towards developer funding developed over time. The immediate post-Grenfell focus included identifying unsafe buildings and securing their remediation. The more explicit and sustained expectation that developers should bear the costs emerged subsequently. It would therefore be unfair to treat every failure by R1 to offer funding from June 2017 onwards as defiance of an established legal or policy obligation.

673. Nevertheless, Parliament subsequently determined through the BSA that developers could be required to meet the costs of remedying historical defects. Urban Splash's participation in the investigations diminishes the force of any suggestion that it ignored the problem. But it does not materially weaken the case for an RCO.

R1's financial position

674. We have also considered R1's present financial position. We accept that R1 no longer trades, holds no substantial assets and is technically insolvent. That is a relevant consideration. It is not, however, one to which we attach substantial weight in the circumstances of this case.

675. An RCO allocates responsibility for remediation costs; it is not confined to an amount which a respondent can presently afford. If lack of resources were ordinarily sufficient to defeat an application, costs would frequently remain with leaseholders or the taxpayer whenever a developer had ceased trading or become insolvent. That outcome would be difficult to reconcile with section 124 and the association provisions. R1's financial position may affect the practical recovery of an order, but it is not a sufficient reason for refusing to recognise the liability which would otherwise rest upon it.

676. The substantial amount of the liabilities sought does not alter that conclusion. Parliament must have contemplated that RCOs concerning historical building-safety defects could involve very large sums and have serious consequences for those against whom they were made. The amount remains relevant to the statutory assessment, but its scale does not itself make an order unjust where it represents reasonable costs of remedying defects in relevant buildings developed by the respondent.

Pre-existing maintenance issues

677. As explained in Appendices C and E, both Burton Place and Moho were the subject of proposals for external maintenance before the relevant defects were identified. At Burton Place, the building management company had contemplated a comparatively limited and phased programme for the replacement of deteriorating timber cladding. At Moho, substantial maintenance works had been under consideration since at least 2015 and a major-works specification prepared by June 2017 included external redecoration, repairs to timber cladding and patch repairs to intumescent coatings. Money had been collected from leaseholders, although the evidence did not establish precisely which works had been completed before the later

fire-safety investigations. We have therefore considered whether those circumstances should affect the extent to which it is just and equitable to require R1 to contribute towards the remediation expenditure.

678. We do not consider that any separate reduction is justified. At Burton Place, the earlier proposal remained preliminary, had not obtained planning approval and was directed principally towards the visible deterioration of the external timber cladding. The project eventually undertaken was materially different in both scope and purpose. As investigations progressed, defects were identified within the external wall construction extending well beyond the deteriorating cladding.

679. The position at Moho is similar. The earlier maintenance proposals were directed towards matters including external decoration, deterioration of timber elements and intumescent coatings. The remediation project which was ultimately undertaken was much more extensive. It addressed the fire-safety defects identified in Appendix E and expanded further as opening-up revealed additional conditions within the walkway construction, service-riser locations and other parts of the building. We have recognised that some elements of the works also addressed pre-existing maintenance or weatherproofing problems, but found that this did not render the scope of the remediation inappropriate.

680. We accept that, absent the relevant defects, the management companies might in due course have incurred expenditure in repairing or replacing some of the external elements at Burton Place and Moho. In neither case, however, does the evidence provide a reliable basis for determining what works would probably have been undertaken, when they would have been undertaken, or what they would have cost. Nor does it enable us to identify and value any part of the remediation expenditure which would otherwise have been borne as maintenance expenditure. Any deduction would therefore be speculative.

681. In any event, to the extent that the BSF-funded remediation relieved the management companies or leaseholders of expenditure which they might otherwise have incurred on future maintenance, the resulting benefit accrued to them, rather than to the BSF. It would therefore provide no obvious reason for reducing the amount recoverable in respect of expenditure actually incurred by the BSF. We are not satisfied that the possibility of such an incidental benefit provides any basis for reducing the amount which it is otherwise just and equitable to require R1 to pay.

Conclusion on R1's status as a developer

682. R1's status as developer therefore points very strongly towards the making of RCOs against it. Its connection with the Buildings is direct; the costs arise from the remediation of defects in buildings which it developed; and the alternative is that those costs remain principally with the public purse. R1's post-Grenfell assistance, present financial position and limited practical recourse against others are relevant circumstances. Taken individually or collectively, however, they do not materially diminish the weight arising from R1's position as developer of all seven Buildings.

683. That conclusion remains subject to R1's principal argument that Government bore material responsibility for the regulatory failures which permitted the relevant defects to arise. Before turning to that issue, it is convenient to address R1's separate submission concerning VAT.

The VAT element of the remediation costs

684. We have already concluded that irrecoverable VAT is capable of forming part of the costs recoverable under section 124(2)[86], and do not repeat that analysis here. However, R1 submitted that the VAT element nevertheless remained relevant to the just and equitable assessment. Mr Dennys KC argued that, had R1 itself undertaken and funded the remediation works, it would have enjoyed the ordinary fiscal advantages available to a developer procuring those works directly, including the ability to recover or offset VAT. By contrast, because the remediation was carried out through building management companies which were unable to recover input VAT, the overall cost of the works included a substantial irrecoverable VAT element which is now reflected in the sums sought through the RCO applications. R1 submitted that this was a factor which should be taken into account when considering the extent of any recovery.

685. We reject that submission. The VAT formed part of the actual cost of carrying out the remediation works. There is no reason in principle to exclude it from an RCO merely because a different procurement route might have produced a more favourable fiscal outcome for the developer. A developer which undertakes and funds remediation may obtain the fiscal advantages available from that course. A developer which does not do so, and is later required to contribute through an RCO, cannot require those advantages to be attributed to it retrospectively. The VAT element therefore provides no separate basis for reducing an award which would otherwise be just and equitable.

Government responsibility

The parties' submissions

686. The parties adopted fundamentally different positions as to the significance of the Government's role in creating and maintaining the regulatory environment within which the Buildings were designed and constructed.

687. R1-4 submitted that the identity of the Applicant was itself material. The Secretary of State is not a private claimant seeking contribution from another private actor, but represents the department which was responsible for the building-safety regime during the relevant period. The same department subsequently established the BSF and the criteria by which the remedial works were funded. R1-4 argued that the Tribunal should therefore consider not only the responsibility of the Respondents, but also the Applicant's own contribution to the circumstances in which the expenditure was incurred.

688. That submission was partly founded upon the reports of the Independent Review of Building Regulations and Fire Safety produced by Dame Judith

[86] See paragraphs 224-230 above.

Hackitt[87] shortly after the Grenfell Tower fire (the Hackitt Review). R1-4 relied in particular upon Dame Judith's conclusion in her interim report that:

> "…the current regulatory system for ensuring fire safety in high-rise and complex buildings is not fit for purpose. This applies throughout the life cycle of a building, both during construction and occupation, and is a problem connected both to the culture of the construction industry and the effectiveness of the regulators."

689. R1-4 also relied upon Dame Judith's criticisms of unclear and inconsistent guidance, weak compliance processes, patchy competence, deficiencies in building control and shortcomings in the regulation of construction products.

690. They further relied upon findings of the Phase 2 Grenfell Tower Inquiry report[88] concerning the failure of central government to respond adequately to known concerns regarding combustible cladding, the drafting and maintenance of Approved Document B, the effectiveness of the building control system and the monitoring of emerging risks. Among other things, they highlighted the report's conclusions that:

> "…the fire at Grenfell Tower was the culmination of decades of failure by central government and other bodies in positions of responsibility in the construction industry to look carefully into the danger of incorporating combustible materials into the external walls of high-rise residential buildings and to act on the information available to them."[89]

and that:

> "…the system of regulating the construction and refurbishment of high-rise residential buildings that existed at the time of the Grenfell Tower fire was seriously defective in a number of respects. The statutory guidance in Approved Document B was poorly worded and liable to mislead designers into thinking that complying with its terms would inevitably ensure that the building would comply with the legal requirements of the Building Regulations. The government department responsible for the Building Regulations failed actively to monitor the performance of the system and failed to ensure that dangers of which it became aware were communicated to industry. It was not sensitive to the need to make urgent changes to the statutory guidance if conditions required it."[90]

691. R1-4 sought to connect those criticisms directly to the Buildings to which these proceedings relate. Mr Dennys KC submitted that, had the Government acted upon recommendations made in the late 1990s and the results of subsequent BRE testing, Approved Document B would have prohibited the use of combustible materials in external walls unless the complete system had been successfully tested. He also relied upon the Inquiry's criticisms of building control, professional competence and the regulation of construction products.

[87] Interim Report (December 2017), Final Report (May 2018).
[88] Report of the Public Inquiry into the Fire at Grenfell Tower on 14 June 2017, Phase 2 (September 2024).
[89] At paragraph 2.4.
[90] At paragraph 113.2.

692. R1-4's case was that R1 had appointed apparently competent designers, consultants and contractors, and had obtained the necessary approvals within the regulatory framework then in force. The defects now relied upon were said to reflect systemic failures in regulation, guidance and enforcement, rather than culpable decisions by R1. Mr Dennys KC submitted that those failures were causally connected to the defects and that it would be unjust to impose their financial consequences upon R1, particularly when it had little realistic recourse against others involved in the design, construction or approval of the Buildings.

693. The Applicant did not dispute that both the Hackitt Review and the Grenfell Tower Inquiry identified shortcomings within the building safety regulatory regime. Ms Bretherton KC accepted that the regulatory system was one of the factors identified by those reports. She submitted, however, that R1-4's account was incomplete and gave insufficient weight to the criticisms directed towards those operating within the construction industry itself. In particular, she relied upon Dame Judith's criticism of a "race to the bottom" within parts of the industry and submitted that the reports identified serious failings on the part of developers, contractors and others, as well as regulators. In her submission, R1-4 were wrong to characterise the crisis as having been caused principally by governmental failings.

694. Ms Bretherton KC further submitted that Parliament enacted the BSA with full knowledge of the background circumstances exposed by Grenfell and the subsequent reviews and inquiries. It nevertheless chose to create a scheme under which developers and associated entities could be required, where it was just and equitable to do so, to meet remediation costs. Compliance with the regulatory framework then in force, or the existence of failures within that framework, did not therefore prevent the making of an order.

695. Finally, Ms Bretherton KC submitted that the BSF was intended to secure prompt remediation where developers or owners had not funded the works themselves. Public funding was a measure of last resort and was never intended to determine where the ultimate financial burden should fall. Parliament had expressly authorised the Secretary of State to seek recovery of expenditure through the RCO regime. The relevant question therefore remained whether, applying the statutory scheme enacted by Parliament, it was just and equitable to require the Respondents to contribute to the costs incurred.

The reports and their proper use

696. Clearly, it would not be appropriate for this Tribunal to attempt to make independent findings concerning the responsibility of Government for the building-safety crisis. That was not a matter on which we heard evidence, and these proceedings could not provide a proper basis for determining it. It is nevertheless legitimate to have regard to the findings made by the Hackitt Review and the Grenfell Tower Inquiry, both because they were relied upon extensively by the parties and because they constitute authoritative examinations of the circumstances which gave rise to the legislative response now embodied in the BSA. The Government has accepted the findings and recommendations of the Hackitt Review and has also accepted the findings of the Grenfell Tower Inquiry.

697. Read fairly and as a whole, neither report attributes responsibility for the building-safety crisis to any single cause or participant. Both describe a systemic failure involving multiple contributing factors. Those factors included shortcomings within the regulatory framework, deficiencies in guidance, weaknesses in oversight and enforcement, and failures to respond to known risks. Equally, however, the reports identify significant failings within parts of the construction industry itself. Dame Judith Hackitt expressly identified ignorance, indifference, unclear allocation of responsibilities, inadequate regulatory oversight and a culture which she described as a "race to the bottom", while emphasising that the failures identified were connected both to the culture of the construction industry and to the effectiveness of regulators.

698. The reports therefore support the proposition that Government failures formed a material part of the background to the building-safety crisis. They do not support the attribution of responsibility solely, or even predominantly, to Government. Nor did either report attempt to quantify the relative responsibility of Government, regulators or the many industry participants involved. We are aware of no objective basis upon which this Tribunal could undertake that exercise. The significance of the Government failures identified in the reports is therefore a matter of evaluative judgment, not precise apportionment.

Relevance to the exercise of section 124 discretion

699. We accept that the Government's acknowledged role in the regulatory failures identified by those reports is capable of being relevant to the exercise of section 124 discretion. The Secretary of State represents the department responsible for the building-safety regime which existed when the Buildings were developed, and Parliament has not excluded an applicant's own responsibility from the circumstances which may bear upon the just and equitable assessment.

700. It does not follow that those failures justify refusing RCOs against R1. Parliament enacted the BSA against precisely the background exposed by the Hackitt Review and the Grenfell Tower Inquiry. It nevertheless placed developers at the head of the hierarchy of responsibility and authorised the recovery of publicly funded remediation expenditure from them. Government responsibility does not therefore displace R1's primary position as developer. The question is whether it should affect the extent of the liability imposed. In our judgment, it should.

The weight to be attached to Government responsibility

701. Had the evidence established that the Buildings were constructed in accordance with the Building Regulations and statutory guidance then applicable, we would have attached materially greater weight to R1's argument. In those circumstances, the defects would have arisen notwithstanding compliance with the standards and systems endorsed by Government itself. We consider that a reduction of approximately 20% would then have represented the outer limit of any adjustment which could properly be made.

702. That figure does not represent an attempted allocation of 20% responsibility to Government, nor do we suggest that the standard rate of VAT provides any measure of Government's responsibility for the building-safety crisis. In the acknowledged absence of any objective basis upon which that responsibility could be quantified, the exercise is necessarily one of broad evaluative judgment. The VAT rate nevertheless provides a useful benchmark against which the permissible extent of any adjustment can be tested. A developer which undertakes and funds remediation itself may enjoy fiscal advantages, including the recovery or offsetting of VAT. A developer required to pay only after remediation has been undertaken and funded by others does not obtain those advantages. But a reduction materially exceeding the standard rate of VAT would risk placing the latter developer in a more favourable economic position than one which had voluntarily met the remediation costs. We do not consider that could represent a just and equitable outcome. We therefore regard approximately 20% as the outer limit of any adjustment for Government responsibility capable of being justified on this basis. We do not treat that figure as a prescribed or mathematically correct measure of the weight to be given to Government responsibility. It provides a practical ceiling within the wider evaluative exercise required by section 124, beyond which the adjustment would, in our judgment, confer an unwarranted advantage upon R1.

703. The evidence does not, however, establish the premise upon which the strongest form of R1's argument depends. As explained elsewhere in this Decision, we accepted expert evidence that aspects of the original construction of a number of the Buildings failed to satisfy the Building Regulations or Approved Document B applicable at the time. R1 cannot therefore say that it merely complied with a defective regulatory framework.

704. That finding does not eliminate the Government-responsibility argument. The reports upon which R1 relied identified serious shortcomings in the regulatory and building-control systems, and it is common ground that the Buildings passed through those systems without the deficiencies now identified being prevented or corrected. However, the force of the argument is materially reduced. This is not a case in which R1 can properly say that it merely complied with a defective regulatory framework and is now being judged by standards imposed later.

Conclusion on Government responsibility

705. Starting from the powerful case for requiring R1, as developer, to bear the remediation costs, we are nevertheless satisfied that some reduction is justified to reflect the Government's accepted contribution to the circumstances which produced the building-safety crisis. For the reasons given, however, that reduction must be materially less than the 20% figure which we regard as the outer limit of any appropriate adjustment. Doing the best we can in what is necessarily an imprecise exercise, we conclude that the appropriate reduction is 10%. That reduction applies to the remediation expenditure funded by the BSF. It does not apply to the £741,594 of remediation expenditure incurred by Moho Management Company Ltd itself. That was not expenditure of public funds, and the considerations concerning Government responsibility which

justify the reduction therefore provide no basis for reducing the amount otherwise recoverable by the management company.

706. In our judgment, that produces an outcome which is just and equitable for the purposes of section 124. It recognises the Government's contribution to the regulatory failures identified by the Hackitt Review and the Grenfell Tower Inquiry, whilst reflecting both our findings concerning the original construction and development of the Buildings and Parliament's decision that developers should bear primary responsibility for remediation costs.

R2-4: URBAN SPLASH GROUP ASSOCIATES

Common issues

707. Before considering the position of R2, R3 and R4 individually, it is convenient to address a number of submissions which were common to all three (and, on occasion, to every Respondent beyond R1).

708. A central feature of the Applicant's case against each of the Respondents said to be liable as associates of R1 was that the Tribunal should look beyond the formal legal structure through which the relevant entities operated and focus instead upon the underlying commercial reality. The Applicant's case was not simply that R2, R3 and R4 were associated with R1 for the purposes of section 121 of the BSA. Rather, it contended that they formed part of the same Urban Splash enterprise as the developer and that this was a highly significant consideration in the application of the just and equitable test.

709. The Applicant advanced a broadly similar argument in relation to every Respondent which was said to be associated. Whilst the argument arose most obviously in relation to R2, R3 and R4, as companies within the Urban Splash group itself, it was also a recurring theme of the Applicant's case against R5 to R11. The Applicant repeatedly invited the Tribunal to look beyond the particular legal vehicle through which an activity was carried on and to consider instead whether the Respondent formed part of the same broader business enterprise as the developer. It submitted that common ownership, management, control, personnel, financial relationships and commercial objectives each pointed towards that conclusion. We shall therefore return to those themes repeatedly in the sections which follow.

710. The Applicant further submitted that this approach was consistent with the statutory purposes underlying section 124. In the earlier sections of this Part of the Decision, we have already explained our conclusion that the purpose of the association provisions is not confined to preventing the avoidance of remediation liabilities through the use of thinly capitalised development vehicles or other corporate structures. Anti-avoidance is plainly an important aspect of the statutory scheme. However, the authorities also identify a broader legislative purpose concerned with the allocation of remediation liabilities to persons with relevant connections to the development enterprise, rather than leaving them to be borne by leaseholders or the public purse. The Applicant therefore submitted that the absence of any deliberate avoidance arrangement did not materially diminish the significance of the close commercial,

organisational and financial links which it alleged existed between the various Respondents and the wider Urban Splash enterprise.

711. R1-4 disputed that analysis. Whilst accepting that R2, R3 and R4 are associated with R1 for the purposes of section 121, they submitted that the Applicant's reliance upon concepts such as the "Urban Splash group", the "Urban Splash family" and the "Urban Splash business" obscured important distinctions between legally separate companies carrying on different activities and holding different assets. They argued that association merely brings a respondent within the class of persons against whom an RCO may potentially be made. The separate question remains whether it is just and equitable to impose liability upon that respondent. In this regard, they emphasised that the Applicant sought the same relief against R2, R3 and R4 as it sought against R1 itself, namely RCOs extending to the entirety of the remediation costs claimed in respect of the seven Buildings. The exercise of the discretion therefore fell to be considered against the possibility that companies which had not developed any of the Buildings might become jointly and severally liable for the full amount of those costs.

712. A significant feature of R1-4's case was that the circumstances which had informed many of the previous authorities concerning associated entities were absent here. They submitted that the evidence disclosed no attempt to avoid building-safety liabilities, no asset-stripping, no movement of assets designed to defeat creditors and no use of a disposable special-purpose development vehicle. Rather, the various reorganisations within the Urban Splash group were said to reflect the ordinary evolution of a long-established property business responding to changing commercial circumstances. In those circumstances, they argued that considerable caution was required before imposing liability upon companies which had neither developed the Buildings nor assumed responsibility for them.

713. We accept that association is a gateway condition rather than a freestanding justification for making an RCO. However, we do not accept that it is relevant only to jurisdiction. Parliament deliberately extended the scope of section 124 beyond the developer itself and authorised the making of RCOs against associated entities. The nature, extent and significance of the relationship giving rise to association are therefore capable of carrying considerable weight in the exercise of the discretion. The critical question is what significance should properly be attached to that relationship in the particular case.

714. R1-4 also placed considerable emphasis upon the practical consequences of making RCOs against the Urban Splash respondents. Mr Dennys KC submitted that the liabilities sought by the Applicant would have effects extending well beyond the Respondents themselves. He described Urban Splash as an active regeneration and development business which continued to undertake major projects, work in partnership with public-sector bodies and contribute to urban regeneration and housebuilding. It was submitted that imposing liabilities of the magnitude sought by the Applicant would seriously impair, if not destroy, those activities; jeopardise ongoing developments; affect employees, creditors, lenders and commercial partners; and undermine the wider public benefits said to flow from the continued operation of the business.

715. The Applicant did not dispute that the consequences of an order were capable of being relevant to the exercise of the discretion. However, it submitted that such considerations could not be divorced from the statutory purpose of section 124 or from the wider question of who should bear the costs of remediating the relevant defects. It also contended that the evidence did not permit confident conclusions to be drawn about the financial consequences of any particular order.

716. We accept that the likely consequences of an RCO are capable of being relevant considerations for present purposes. However, a difficulty which arises in relation to this aspect of the case is that the parties did not adduce independent expert evidence enabling the Tribunal reliably to assess the financial impact which particular orders, or different levels of liability, might have upon the individual Respondents or the wider Urban Splash enterprise. Mr Bloxham himself expressed the view in evidence that, whilst he did not consider RCOs to be appropriate, any orders which were made should be "affordable". The difficulty, however, is that the evidence did not provide a clear basis upon which to determine what affordability means in this context, nor does it permit confident findings as to the likely consequences of orders of differing amounts. We therefore return to these issues when considering the position of the individual Respondents and the practical implications of any orders which might be made against them.

717. Against that background, we draw the following conclusions. First, the mere fact that a respondent falls within one of the classes identified in section 124(3), including through the association provisions, does not by itself make it just and equitable to impose liability upon that respondent. Secondly, the fact that remediation costs would otherwise remain with the taxpayer is capable of carrying very considerable weight, but it is not by itself a sufficient reason to make an RCO against every associated entity. Parliament created a broad discretion, not an automatic mechanism whereby public expenditure is transferred to any person who happens to satisfy the statutory conditions for association.

718. The circumstances which make it just and equitable to impose liability will vary from case to case. In some cases, they will be found in the respondent's connection with the relevant building, the defects or the benefits derived from the development. In others, they may arise from the nature and strength of the respondent's relationship with the developer, the wider development enterprise or the liabilities resulting from its activities. The essential question is whether, having regard to all the circumstances, there exists a sufficiently substantial reason why the particular respondent should bear the particular remediation costs in question.

719. The significance of those principles becomes apparent when considering the Respondents said to be associated in the present case. The Applicant repeatedly submitted that the Respondents are all part of the same Urban Splash business and that this provided a powerful reason for requiring them to share responsibility for remediation liabilities arising from developments undertaken by R1. That submission identifies an important feature of the case. Expressed

at that level of generality, however, it is too blunt an instrument for determining whether it is just and equitable to make an RCO against any particular Respondent. The expression "Urban Splash business" is capable of encompassing entities performing different functions and carrying on materially different activities. The fact that a Respondent forms part of that wider business is therefore relevant, but cannot by itself answer the statutory question.

720. The more discriminating inquiry concerns the nature and significance of that relationship. Relevant considerations may include the commercial sphere in which the Respondent operates, its participation in, control of or continuation of activities undertaken within the wider enterprise, and the organisational or economic benefits associated with its position within it. Those considerations are neither exhaustive nor a separate legal test. They are among the circumstances which may demonstrate why the connection between a particular Respondent and the developer provides a substantial reason for imposing liability.

721. The critical question is therefore not simply whether a Respondent can be described as part of the same business as R1, but what that description means in the particular case. We consider the nature of each Respondent's activities, its place within the wider Urban Splash enterprise and the relationship between that enterprise and R1, before asking whether those matters provide a sufficiently substantial reason why the Respondent should bear the remediation costs in question rather than the taxpayer. Although common themes recur, the nature and strength of the relevant connection differ from one Respondent to another.

R2 – Urban Splash Developments Limited

722. We turn first to R2. As explained in Part 3 of this Decision, R2 was incorporated shortly before the 2013 restructuring and subsequently became the principal vehicle through which the Urban Splash enterprise pursued its ongoing property development activities. It did not exist when any of the seven Buildings were developed. Nor therefore was it suggested that R2 participated directly in their design, construction or disposal. Its significance for present purposes instead derives from its position within the post-2013 Urban Splash structure and the Applicant's contention that it formed part of the same continuing enterprise as R1.

723. The parties advanced sharply differing views as to the significance which should be attached to those matters. Before considering our conclusions, it is convenient to summarise the arguments specifically directed to R2.

The parties' positions

724. The Applicant's case was that R2 is, in substance, the modern successor to the development business formerly carried on by R1. It submitted that, whilst the legal structure of the Urban Splash enterprise had changed following the 2013 restructuring, the underlying business had continued. According to the Applicant, development opportunities, employees, know-how, commercial

relationships and future trading activities were transferred into the structure of which R2 became the principal development vehicle. It was said that R2 therefore represented the continuation of the same enterprise which had originally developed the Buildings, albeit through a different corporate vehicle.

725. The Applicant accepted that R2 had not itself developed any of the Buildings and that it did not exist at the time they were built. However, it submitted that those matters were not determinative. Consistently with its broader case concerning associates, the Applicant argued that the Tribunal should focus upon commercial reality rather than formal corporate structure. It contended that R2 was not simply an unrelated associated company. Rather, it was said to be the principal vehicle through which the Urban Splash development business continued to operate after the 2013 restructuring. In those circumstances, the Applicant submitted that R2 possessed a sufficiently close connection with the enterprise responsible for the Buildings to justify the making of an RCO.

726. The Applicant further relied upon evidence concerning continuity within the wider Urban Splash enterprise. It pointed to the continuing involvement of individuals such as Tom Bloxham and Julian Curnuck, the continued use of the Urban Splash name and brand, the ongoing pursuit of development and regeneration activities, and what it characterised as the transfer of future business opportunities into the post-2013 structure. It submitted that these matters demonstrated that R2 formed part of the same business enterprise as R1 and that it would therefore be artificial to treat the two companies as wholly unrelated for the purposes of the just and equitable assessment.

727. The Applicant also relied upon the broader statutory purposes discussed earlier in this Part of the Decision. It submitted that Parliament had deliberately empowered the Tribunal to make RCOs against associated entities and that the present case exemplified the reasons why such powers were required. In the Applicant's submission, it would be inconsistent with those purposes if the continuation of a development business through a different corporate vehicle were treated as insulating that vehicle from any responsibility for remediation liabilities connected with developments undertaken under the same commercial enterprise.

728. R1-4 disputed that analysis. They submitted that the Applicant's case depended upon an impermissible conflation of separate companies within the Urban Splash group. They emphasised that R2 did not exist when any of the Buildings were developed, had played no role in their design or construction, had derived no profits from them and had assumed none of the liabilities arising from them. They therefore argued that the connection between R2 and the Buildings was remote and indirect.

729. R1-4 further submitted that the 2013 restructuring represented a genuine commercial reorganisation undertaken in response to the financial pressures facing the Urban Splash group following the 2008 financial crisis. The restructuring was intended to preserve the wider business, manage existing indebtedness and permit future development activities to continue through a new structure. It reflected ordinary commercial decision-making rather than

any attempt to avoid future building-safety liabilities, which had not then emerged.

730. They also submitted that the practical consequences of an RCO against R2 were potentially very significant. R2 was said to be the principal vehicle through which the Urban Splash enterprise now carried on its development and regeneration activities. According to R1-4, the imposition of liabilities of the scale sought by the Applicant would jeopardise ongoing projects, adversely affect employees, creditors and development partners, and impair the future delivery of regeneration schemes undertaken through R2. Particular emphasis was placed upon R2's involvement in public-sector partnerships and development projects which, it was said, could be disrupted or rendered unviable if substantial liabilities were imposed upon the company.

731. Finally, R1-4 submitted that R2 provided a particularly clear example of why association alone cannot determine the exercise of the discretion. Although R2 is associated with R1, it was said to be neither the developer of the Buildings nor the recipient of profits derived from their development. In those circumstances, they argued that the Tribunal should attach significant weight to the absence of any direct connection between R2 and the original developments when considering whether it would be just and equitable to impose liability upon it.

Discussion and conclusions

732. We accept a number of the factual propositions advanced on behalf of R1-4. R2 did not exist when any of the Buildings were developed. It played no role in their design, construction or disposal, derived no profits from those developments and assumed none of the associated liabilities. We also accept that the 2013 restructuring was a genuine commercial reorganisation undertaken in response to the financial pressures facing the Urban Splash enterprise following the 2008 financial crisis. The evidence does not support any suggestion that it was designed to avoid future building-safety liabilities or place assets beyond the reach of potential claimants.

733. To that extent, the present case differs from some of the authorities upon which the Applicant relied. The restructuring did not involve the transfer of assets away from a developer burdened by known remediation liabilities, nor did R2 assume ownership of assets which had previously belonged to R1. We therefore accept that the connection relied upon by the Applicant is less direct than in cases such as *Triathlon*.

734. However, a direct connection with the relevant buildings is not a prerequisite to the making of an RCO. As we have already explained, the purpose of the association provisions is not confined to cases involving avoidance. The question is whether there exists a sufficiently substantial reason why this Respondent should bear the remediation costs in issue.

735. In our judgment, the Applicant's characterisation of R2 as the continuation of the Urban Splash property development enterprise formerly carried on by R1 is substantially correct. We do not use that language in any formal legal sense.

Nevertheless, following the 2013 restructuring, R2 became the principal vehicle through which the Urban Splash enterprise continued to pursue property development activities. There was substantial continuity of ownership, management, control, personnel, commercial purpose and business identity. Development activity continued under the Urban Splash name and through the same core leadership. What changed was the corporate structure through which those activities were conducted. What did not change was the existence of an ongoing Urban Splash property development business.

736. We therefore accept that R2 cannot properly be viewed as merely an unrelated associated company. It forms part of the same broader enterprise as R1. Indeed, had the financial crisis and subsequent restructuring not occurred, there is every reason to suppose that the development activities now undertaken through R2 would instead have continued to be undertaken through R1 itself. We regard that continuity of ownership, control, purpose and business activity as a highly significant factor in the exercise of the discretion.

737. We have also considered carefully the submissions concerning the practical consequences of an RCO against R2. We accept that those consequences may be substantial. The evidence suggests that liabilities on the scale sought by the Applicant would have serious implications for the activities of R2 and potentially for the wider Urban Splash enterprise. However, the Tribunal was not provided with independent expert evidence enabling it to assess reliably what level of liability would be sustainable, what level would be unsustainable, or where the line of affordability should properly be drawn. Whilst the broad thrust of R1-4's argument is readily understandable, its practical application is difficult to evaluate with any precision.

738. In any event, the possibility that an RCO may adversely affect an ongoing property-centred business cannot by itself determine the exercise of the discretion. Parliament enacted Part 5 of the BSA in order to reallocate remediation liabilities away from leaseholders and the taxpayer and towards those with relevant connections to the enterprise responsible for them. That policy would be significantly undermined if the continued operation of such a business were, without more, sufficient reason to leave those costs with the public purse.

739. Drawing these matters together, we conclude that the case for making an RCO against R2 is strong. The absence of direct involvement in the development of the Buildings, the absence of any avoidance purpose behind the restructuring, and the potential consequences of an order are all relevant considerations. However, they are outweighed by the fact that R2 represents the continuation of the property development enterprise of which R1 formed part and through which the Buildings were developed. Through that continuing enterprise, R2 benefits from the expertise, opportunities, relationships and business identity developed under the Urban Splash brand. In our judgment, the resulting commonality of ownership, control, purpose and economic interest provides a sufficiently substantial reason why R2, rather than the taxpayer, should bear remediation liability. It is therefore just and equitable in principle that R2 should be the subject of an RCO. The appropriate extent of that liability is a matter to which we return later.

R3 – Urban Splash Group Holdings Limited

740. We next consider R3. In common with R2, R3 did not exist when any of the Buildings were developed and played no role in their design, construction or disposal. By the time of the hearing, however, it occupied the apex of the surviving Urban Splash corporate structure and functioned as the group's ultimate holding company. Its significance for present purposes therefore derived not from any direct connection with the Buildings, but from its position within the wider Urban Splash enterprise.

The parties' positions

741. The Applicant submitted that R3 occupied a unique position within the Urban Splash structure. As ultimate parent company, it stood above R1, R2 and R4 and represented the point at which ownership and control of the surviving Urban Splash enterprise ultimately resided. The Applicant argued that R3 could not properly be viewed as a disconnected holding company. Rather, it was said to sit at the centre of the wider Urban Splash business and to represent, in corporate form, the enterprise through which the relevant development activities had been conducted and continued to be pursued. The Applicant accordingly relied upon R3's position as the ultimate parent company, the continuity of ownership and management throughout the group, and its role as the entity through which control of the wider property-centred enterprise was exercised. It submitted that these matters provided a substantial connection between R3 and the enterprise responsible for the Buildings.

742. R1-4 disputed that analysis. They emphasised that R3 did not exist when the Buildings were developed, carried on no development activities itself, had derived no profits from the developments in question and had assumed none of the associated liabilities. They submitted that the Applicant's case impermissibly attributed to R3 the activities, assets and resources of other companies within the group. In particular, they argued that R3's position as holding company did not justify treating the consolidated value of the wider group as though it were available to R3 itself. R1-4 therefore contended that R3's connection with the Buildings was even more remote than that of R2 and that the Applicant's case ultimately depended upon little more than its status as ultimate parent company within the Urban Splash structure.

743. R1-4 also relied upon the wider arguments already discussed in relation to the Urban Splash Respondents generally, including the absence of any avoidance purpose behind the group reorganisations, the fact that R3 neither caused nor contributed to the relevant defects, and the potential consequences of imposing substantial liabilities upon the company at the apex of the Urban Splash group.

Discussion and conclusions

744. R3's significance lies in its position as the ultimate parent company of the Urban Splash group. It is the entity through which ultimate ownership and control of the wider Urban Splash property-centred enterprise are exercised.

745. We accept that R3 neither developed the Buildings nor assumed the liabilities associated with them. We also accept that the corporate reorganisations which ultimately resulted in R3 occupying its present position occurred after the Buildings were developed, and were not undertaken in anticipation of building-safety liabilities of the kind which subsequently emerged.

746. However, the absence of a direct connection with the Buildings is not determinative. As explained earlier in this Part of the Decision, the just and equitable test does not require the Tribunal to identify direct participation in the developments, direct receipt of development profits or direct responsibility for the defects. The question is whether there exists a sufficiently substantial reason why the particular respondent should bear the remediation costs in issue.

747. In our judgment, such a reason exists in the case of R3. Unlike R2, whose connection derives principally from its continuation of Urban Splash's property development business, R3's connection derives from its position as the parent company of the enterprise of which R1 forms part. It represents the point at which ultimate ownership and control of that enterprise reside. It shares substantially the same directing minds as R1 and sits at the apex of the corporate structure through which the wider Urban Splash business is conducted.

748. We also attach weight to the continuing economic relationship between R1 and the wider enterprise headed by R3. We accepted the evidence that, notwithstanding its insolvency and cessation of trading activities, R1 continues to be retained within the group structure because of the value of its accumulated tax losses and that other companies within the group continue to derive benefit from them. R1 has therefore not simply been left behind as a spent development vehicle. Rather, it continues to possess economic value for the wider enterprise. In our view, that is a significant indicator of the continuing connection between the developer and the group of which it forms part.

749. We are careful not to treat parent-company status as creating any automatic liability. Nor do we suggest that every parent company of every developer should ordinarily be made subject to an RCO. The issue remains one of connection and justification. However, in the case of R3, the position goes beyond the mere existence of a parent-subsidiary relationship. R3 occupies the point at which ultimate ownership and control of the enterprise reside, whilst the continuing retention of R1 within the group because of the value of its accumulated tax losses demonstrates an ongoing economic relationship between the developer and the wider enterprise. Taken together, those matters provide a substantial reason why remediation liabilities should be borne within that enterprise rather than remaining with the taxpayer.

750. We have also considered the submissions concerning affordability, resources and the practical consequences of an order. For the reasons already given in the common issues section and in relation to R2, those considerations do not alter our overall conclusion.

751. For these reasons, we conclude that the case for making an RCO against R3 is also strong. Whilst its connection with the Buildings themselves is remote, its connection with the developer, and with the enterprise through which the development activities were carried on, is immediate and substantial. Taking account of its position as parent company, its role in the ownership and control of that enterprise and the continuing economic relationship between the group and R1, we are satisfied that there exists a sufficiently substantial reason why R3 should stand behind R1 in respect of the remediation liabilities arising from the developer's activities. In our judgment, that is precisely the type of connection which Parliament intended the Tribunal to be able to take into account under section 124. It is therefore just and equitable in principle that R3 should be the subject of an RCO.

R4 – Urban Splash Work Limited

752. As explained in Part 3 of this Decision, R4 occupies a different position within the Urban Splash enterprise from either R1 or R2. It is a longstanding company whose principal activities have historically centred upon the ownership and management of commercial property assets rather than residential property development. Its connection with the present applications therefore differs in character from that alleged in relation to R2.

The parties' positions

753. The Applicant accepted that R4 did not develop any of the Buildings and that its principal business was not property development. Nevertheless, it submitted that R4 formed a substantial and integral part of the wider Urban Splash enterprise. Consistently with its broader case, the Applicant contended that the Tribunal should look beyond the formal allocation of functions between different companies and consider the economic reality of the business as a whole. It relied upon R4's place within the Urban Splash group, its common ownership and management with the other Urban Splash companies, and the financial and organisational links which continued to bind the various entities together. It submitted that R4 was not an external investor or remote associate, but a constituent part of the same enterprise of which R1 formed part.

754. The Applicant further emphasised that R4 held a substantial portfolio of commercial property assets and occupied an important position within the wider group. It relied upon evidence that R4 remained closely connected to the broader Urban Splash business following the 2013 restructuring and submitted that, viewed commercially, it continued to operate as part of the same enterprise which had developed the Buildings. In those circumstances, the Applicant argued that R4's role within, and economic relationship with, the wider Urban Splash enterprise provided a sufficiently substantial connection with R1 to justify the making of an RCO.

755. R1-4 disputed that analysis. They submitted that R4 provided a clear illustration of why group membership and association cannot by themselves justify liability. Unlike R2, R4 was not said to represent the continuation of the property development business formerly carried on by R1. Rather, its activities centred on the ownership and management of commercial property

investments. It neither developed the Buildings, nor carried on residential development activities of the kind with which these proceedings are concerned.

756. R1-4 further submitted that the Applicant's reliance upon the wider Urban Splash enterprise failed to engage adequately with the distinct role played by R4 within that structure. They emphasised that R4's assets principally comprised commercial property holdings and that its business was materially different from that of the developer. In their submission, the connection between R4 and the Buildings giving rise to the present liabilities was therefore weaker than that said to exist in relation to R2 and rested substantially upon its status as an associated company within the same corporate group.

757. Finally, R1-4 relied upon the wider arguments applicable to the Urban Splash Respondents generally, including the absence of any avoidance purpose behind the group's reorganisations, the lack of any direct involvement by R4 in the development of the Buildings, and the potential consequences of imposing substantial liabilities upon a company whose assets were principally held in commercial property. They submitted that these considerations weighed heavily against the making of an RCO in respect of R4.

Discussion and conclusions

758. R4 stands in a different position from R2 and R3. Its principal activities concern the ownership and management of commercial property rather than property development. But we do not regard those activities as belonging to an entirely separate enterprise. Urban Splash conducts a broader property-centred business through companies performing different, but complementary, functions. R4 is a longstanding constituent of that enterprise.

759. That relationship involves more than common branding or formal membership of the same corporate group. R4 shares common ownership and control with R1 and other Urban Splash companies and operates within a structure whose constituent businesses obtain mutual benefits from shared services and financial relationships. We also attach some weight to the continuing economic value which R1's accumulated tax losses have provided to the group after it ceased trading. We heard no evidence that R4 itself obtained group relief from those losses and do not assume that it did. The point is that membership of this particular group involved economic relationships through which value attributable to one group company, including R1, could benefit others.

760. We remain conscious that group membership cannot, by itself, make an RCO just and equitable. But its significance depends upon the circumstances. R4 was not a group company operating in some unrelated field: it was a longstanding participant in the same property-centred enterprise as R1. Although their functions differed, R1's development activities and R4's property-holding activities operated in the same general commercial sphere, under common ownership and control and within a corporate structure organised for the mutual benefit of its constituent companies. Those circumstances give R4's membership of the group greater significance than bare statutory association.

761. We emphasise that our conclusion does not rest merely upon R4 being a member of the same corporate group as R1, upon its participation in a property-related business, or upon its possession of assets from which an RCO might be satisfied. None of those matters, alone or in combination, would necessarily provide a sufficient reason for making an order. What is significant in R4's case is the particular relationship described above: it was a longstanding constituent of the same property-centred enterprise as R1 before the Buildings were developed and remained so after the 2013 restructuring; it operated throughout under common ownership and control; and its activities and financial affairs formed part of the wider commercial organisation within which R1's property development business operated. It is that cumulative relationship, rather than group membership or financial capacity in themselves, which gives R4's association with R1 substantive significance for the purposes of the just and equitable assessment.

762. Taking those matters together, we are satisfied that R4's relationship with R1 and its participation in the same property-centred enterprise provide a sufficiently substantial reason for requiring it to share responsibility for liabilities arising from R1's development activities. We have taken account of R4's different function, its lack of direct involvement with the Buildings and the countervailing considerations already identified. They do not alter our conclusion that it is just and equitable for R4 to share those liabilities rather than leaving them with the taxpayer. We therefore conclude that R4 should be the subject of an RCO.

R5 & R6: FAMILY INVESTMENT COMPANIES

763. We have described R5 and R6, both here and in Part 3 of this Decision, as 'family investment companies'. That description reflects our assessment of the evidence rather than an agreed characterisation. The Applicant maintained that both companies formed part of the same Urban Splash business as R1. R5 and R6 disputed that contention, presenting themselves instead as investment companies operating outside the Urban Splash group and for the benefit of the individuals and families whose capital was invested through them.

764. The circumstances of each company must, like those of every other Respondent, be considered individually. The mere fact that R5 and R6 share certain characteristics, or that both are associated with R1 through Tom Bloxham, cannot determine whether it is just and equitable to make an RCO against either of them. Nevertheless, it is convenient to consider their positions together. The Applicant's case against them rested upon common themes, as did much of their response. Those themes concerned whether either company formed part of the same business as R1 and the significance, for the section 124 discretion, of the private and family investment assets which they held.

765. There are also material differences between R5 and R6, including their origins, ownership, governance, activities and relationships with the wider Urban Splash enterprise. We shall address those differences as they arise and reach a separate conclusion in relation to each company.

The parties' positions

766. The Applicant's case against R5 and R6 proceeded upon substantially common themes. Consistently with its broader case, it submitted that the Tribunal should look beyond formal corporate structures and examine the underlying commercial reality. Although neither company belonged to the Urban Splash corporate group, the Applicant maintained that both formed part of the same wider Urban Splash business as R1. It relied upon the central role of Mr Bloxham, the companies' continuing relationships with the Urban Splash organisation, the provision of services and support by Urban Splash personnel, and the economic and commercial connections said to exist between the various entities.

767. The Applicant accordingly disputed the suggestion that R5 and R6 were merely unconnected investment companies. It submitted that both formed part of the broader commercial enterprise within which Urban Splash operated and should be regarded as having benefited from, and supported, that enterprise. Their association with R1 was not said to be determinative, but the Applicant argued that remediation liabilities should not remain with the taxpayer merely because assets were held through companies associated with R1, rather than through companies within the Urban Splash group.

768. R5 and R6 rejected that characterisation. They accepted that both companies are associated with R1, but emphasised that association merely brings a respondent within the class of persons against whom an RCO may potentially be made. They denied forming part of the Urban Splash business and relied upon the fact that neither company has a connection with any of the Buildings.

769. Both companies relied upon the evidence examined in Part 3 concerning their origins, ownership, activities and purposes. They maintained that they were established and operated as vehicles for the investment of private or family capital, rather than as components of any of the businesses carried on by the Urban Splash group or under the Urban Splash brand. Although they accepted that links nevertheless existed with Urban Splash, they submitted that those links reflected common individuals, commercial relationships and administrative arrangements, rather than joint participation in a wider business enterprise.

770. There were also differences in the parties' arguments concerning the individual companies. In relation to R5, the Applicant relied upon its longstanding connections with Mr Bloxham, its shared address and its receipt of accountancy, property-management, marketing and administrative services from Urban Splash personnel. R5 responded that it was a family-owned investment company whose capital and assets had origins distinct from the development activities undertaken by R1, and that it paid for the services which it received under commercial arrangements.

771. In relation to R6, the Applicant relied upon its establishment as a joint venture involving R5, its funding arrangements and its resulting connections with Mr Bloxham and the wider Urban Splash enterprise. R6 emphasised its joint ownership with interests associated with Mark Hawthornthwaite, its bilateral

governance arrangements, the external management of its portfolio and the nature of its business, which concerned the acquisition and management of residential freehold investments rather than property development. It maintained that it was an independent investment business established years after the Buildings had been developed.

The relationship between R5, R6 and the Urban Splash enterprise

772. The Applicant's case against both companies depended substantially upon the proposition that they formed part of the same wider Urban Splash business as R1. We do not accept that characterisation. The evidence examined in Part 3 establishes that both R5 and R6 were established, and continue to operate, as investment vehicles for the deployment of private or family capital. Neither company participated in the development of the Buildings, nor holds any interest in them. Neither formed part of the property-centred enterprise through which the Buildings were developed. Neither assumed any of the liabilities associated with that enterprise.

773. We accept the evidence of Mr Bloxham and Mr Hawthornthwaite concerning the nature of these businesses. R5 is a family-owned investment company whose activities and assets have always been distinct from those of the Urban Splash group. Its assets include an interest in R7, but that interest simply represents the vehicle through which R5 holds Mr Bloxham's personal investment in the Fund. It does not make R5 part of the Fund or the Urban Splash business. R6 was established later as a joint-venture investment company to acquire and manage residential freehold interests. Its activities are likewise separate from the property development activities undertaken through R1 and subsequently through R2.

774. We also accept that both companies have links with the Urban Splash organisation. R5 shares an address with Urban Splash and obtains administrative and other services from Urban Splash personnel. R6 has indirect connections with the wider enterprise through R5 and through the involvement of Mr Bloxham. Those matters were relied upon heavily by the Applicant. However, they do not establish that either company formed part of the same business as R1. At most, they demonstrate the existence of commercial and personal connections between legally and economically distinct enterprises.

775. In our judgment, the Applicant's case materially overstated the significance of those connections. The evidence does not establish that either company forms part of the Urban Splash property development business. Nor, viewed more broadly, does it establish that either company forms part of the wider Urban Splash property-centred enterprise in any meaningful operational sense. The existence of common individuals, shared services and commercial relationships does not convert these investment activities into components of the enterprise responsible for the Buildings. The Applicant's central characterisation of R5 and R6 is therefore not made out.

Personal wealth and the purpose of the RCO regime

776. A further and important issue arises from the nature of the assets held by R5 and R6. The evidence establishes that those assets represent private and family wealth, rather than assets of any Urban Splash company. Some of that wealth will ultimately have been generated by the business activities of Mr Bloxham, including activities undertaken through Urban Splash. That does not alter its character. The assets held by R5 and R6 are not disguised assets of R1, R2, R3 or any other Urban Splash entity. They are held beneficially for the individuals and families whose capital is invested through those companies.

777. That distinction is important. The RCO regime is directed towards specified body corporates and partnerships; it does not make the personal wealth of those who own or control them an independent target of the jurisdiction. The existence of private wealth, and the ability of a company holding that wealth to meet an order, cannot itself supply the connection with the Buildings or the relevant development enterprise which is otherwise absent. Much of the wealth invested through R5 may have been generated by Mr Bloxham's activities within Urban Splash, but that does not make R5's assets Urban Splash assets or provide a reason for requiring the company to meet liabilities arising from developments with which it had no involvement.

778. The unfairness inherent in the Applicant's approach is particularly apparent in relation to R6. An order against that company would affect not only the interests of Mr Bloxham and his family, but also those of Mr Hawthornthwaite and his family, notwithstanding the latter's complete lack of involvement in the Buildings or in any relevant Urban Splash activity. Their investment is potentially exposed to substantial remediation liabilities solely because R6 is associated with R1 by reason of Mr Bloxham's common directorship. Association provides the jurisdictional gateway, but it does not make that outcome just and equitable.

779. The fundamental difficulty with the Applicant's case against both companies is therefore clear. The evidence establishes connections between R5 and R6 and Mr Bloxham personally. It does not establish any meaningful connection between either company and the Buildings, the relevant defects or the property development enterprise responsible for them. We turn briefly to the individual circumstances of each company, and the separate conclusions to which they lead.

R5 – TBI 2000 Limited

780. We are not satisfied that it would be just and equitable to make an RCO against R5. Although associated with R1, R5 neither developed the Buildings, nor participated in the property development enterprise through which they were developed. Nor do we accept the Applicant's broader contention that R5 formed part of the same Urban Splash business as R1. Rather, we find that it is, and has always been, a family investment company whose assets and activities are distinct from those of Urban Splash.

781. In practical terms, an RCO against R5 would fall upon private and family investment assets having no relevant connection with the Buildings or the property-centred enterprise responsible for them. That would affect not only Mr Bloxham personally, but also members of his family whose capital is invested through the company. In our judgment, the Applicant's reliance upon R5's connections to Mr Bloxham does not provide a proper basis for imposing those liabilities.

R6 – TM Freeholds Limited

782. The case against R6 is weaker still. The evidence established that R6 was created years after the development of the Buildings as a joint-venture investment vehicle concerned with the acquisition and management of residential freehold interests. It neither participated in, nor forms part of, the property development business responsible for the Buildings. Nor do we accept that it formed part of the wider Urban Splash property-centred enterprise.

783. The consequences of the Applicant's case are particularly striking in relation to R6. Any order would affect not only interests associated with Mr Bloxham, but also those of Mr Hawthornthwaite and his family, notwithstanding their complete lack of involvement in the Buildings or the development activities from which the present liabilities arise. We do not consider that association alone can justify that outcome. In all the circumstances, we are satisfied that it would not be just and equitable to make an RCO against R6.

R7 AND R10: THE RESIDENTIAL FUND

784. We consider R7 and R10 together because both form constituent parts of the Fund. Although they occupy different positions within the Fund structure and have different legal characteristics, the arguments advanced in relation to the exercise of the section 124 discretion were, in substance, directed to the Fund as a whole. The Applicant's case was that the assets and resources of the Fund should bear responsibility for remediation liabilities arising from the Buildings. Conversely, R7 and R10 submitted that the Fund's assets are held for the benefit of a large body of external investors, the overwhelming majority of whom have no connection with the Buildings, their development or the wider Urban Splash enterprise. The principal considerations relevant to the just and equitable assessment therefore apply to both Respondents and it is convenient to address them together.

785. We have, of course, already concluded that R10 is not associated with R1. That conclusion substantially narrows the issues which arise in relation to R10. Nevertheless, the parties devoted substantial time and resources to the evidence and arguments relevant to the exercise of the section 124 discretion, and those issues were fully argued. In those circumstances, and in case our conclusion on R10's association with R1 is wrong, we consider it appropriate to record our conclusions on the discretionary issue in relation to R10 as well as R7. We also bear in mind that R10 independently satisfies section 124(3)(a) in relation to Christabel House and Sylvia House. That alternative gateway requires separate consideration, but does not materially affect the analysis of the Fund-related considerations which apply to both R7 and R10.

786. We begin by considering the issues common to both Respondents and to the Fund more generally. We then explain our conclusions in relation to R7 and R10 separately.

Common issues

The Fund and external investors

787. The parties approached the Fund from fundamentally different perspectives.

788. The Applicant submitted that the Tribunal should look beyond the formal structure of R7 and R10 and focus instead upon economic reality. Its case was that the Fund was conceived by Tom Bloxham, promoted through the Urban Splash brand, managed by individuals closely connected with Urban Splash, supplied with assets from the Urban Splash pipeline and integrated into a wider Urban Splash commercial ecosystem. On that footing, the Applicant contended that assets held within the Fund represented an appropriate source from which remediation liabilities associated with Urban Splash developments might be met.

789. R7 and R10 submitted that this analysis failed to distinguish between the origins of the Fund and the ownership of its assets. They emphasised that the assets against which the Applicant ultimately seeks relief are not assets beneficially owned by Urban Splash but assets held within a regulated investment fund for the benefit of investors. They further submitted that the overwhelming majority of those investors had no involvement in the development of the Buildings, no responsibility for the relevant defects and no connection with the Urban Splash enterprise beyond their investment in the Fund. Moreover, the stake belonging to those unconnected/third-party investors represented approximately 94% of the value of the Fund.

790. We accept that the Fund originated from a joint venture conceived by Mr Bloxham and Mr Gough and that, particularly during its early years, it maintained a close and mutually beneficial commercial relationship with Urban Splash. The Fund gained access to investment opportunities, property expertise and a pipeline of completed residential assets. Urban Splash gained access to investment capital and a potential purchaser for properties emerging from its developments.

791. The diagram prepared by Mr Bloxham and referred to during the hearing as the "money-go-round", which we have described in Part 4 of this Decision[91], provides a useful illustration of those relationships. It depicted the Fund alongside other Urban Splash-related businesses and identified movements of property, services and economic benefits between them, including the sale of completed residential properties to the Fund and the potential payment of carried interest. Although informal and incomplete, the document supports the Applicant's case that the Fund did not operate in commercial isolation from Urban Splash and that substantial benefits flowed in both directions.

[91] See paragraphs 467-470 above.

792. That evidence is significant, but it must not be taken further than it can reasonably bear. As we concluded in Part 4, the diagram did not establish that R3 controlled R10. Nor did it demonstrate that the Fund and Urban Splash were the same business, that the Fund's assets belonged beneficially to Urban Splash, or that the interests of the Fund's external investors could be equated with those of Urban Splash and its principals. What it demonstrated was a close and deliberately mutually beneficial commercial relationship between distinct enterprises, serving different purposes and holding assets for different constituencies.

793. We attach considerable significance to the fact that the overwhelming majority of the Fund's assets are beneficially owned by investors who had no involvement in the development of the Buildings and no responsibility for the relevant defects, and that those assets cannot realistically be characterised as assets belonging to Urban Splash or held for its benefit.

794. We also bear in mind that the exercise required by section 124 differs from the exercise required when considering association. Association falls to be determined by reference to the statutory qualifying time. The just and equitable assessment, by contrast, falls to be carried out at the time when the Tribunal exercises its discretion. Historical matters concerning the creation and early operation of the Fund therefore remain relevant but are not necessarily determinative. By the time of the hearing, the Fund was no longer simply a vehicle established by Mr Bloxham and Mr Gough. It had become a substantial investment fund whose assets were overwhelmingly beneficially owned by third-party investors. It is that reality with which the Tribunal is concerned when exercising its discretion.

The regulatory framework and fiduciary duties

795. Management of the Fund operates within a regulated alternative investment fund structure. Its management arrangements are subject to a framework designed to protect investors and to ensure that Fund assets are managed for their benefit. The role of the AIFM, the governance arrangements, the treatment of conflicts of interest and the segregation of functions are all features of that structure.

796. The significance of this point lies not in the fact of regulation itself. Parliament cannot have intended that participation in a regulated investment structure should create immunity from the section 124 jurisdiction. However, the regulatory framework assists in identifying the nature of the interests which would be affected by the order sought.

797. Those responsible for managing the Fund owe duties to Fund investors and are required to manage Fund assets in their interests. In practical terms, the Fund's assets are not (and never have been) available for deployment by Urban Splash or its principals as if they were their own assets. Nor are those responsible for the Fund free to apply Fund assets for purposes unconnected with the interests of investors.

798. This point emerged repeatedly during the evidence. The Applicant's case necessarily carried with it the proposition that those responsible for the Fund ought voluntarily to have deployed Fund resources to address liabilities arising from defective Urban Splash developments. However, the difficulty with that submission is that those decision-makers were not dealing with their own assets. The monies invested in the Fund were held and managed for investors. The evidence of the Fund witnesses was, in substance, that their obligations were owed to those investors and that they could not simply decide to deploy Fund assets for purposes unconnected with the Fund's investment objectives. Put colloquially, the managers of the Fund could not simply decide to "do the right thing" with other people's money.

799. We regard that as an important consideration. It does not follow that an RCO can never be made against a fund structure of this nature. It does, however, materially affect the fairness of criticising those responsible for managing the Fund for not having voluntarily assumed liabilities which were unconnected with Fund assets and which would ultimately be borne by investors.

The risks assumed by investors

800. The Applicant nevertheless submitted that the position of investors should carry limited weight because those were professional, or sophisticated, investors who knowingly assumed substantial risks. Ms Bretherton KC relied in particular upon the Private Placement Memorandum (PPM) provided to prospective investors and submitted that liabilities of the present nature fell within the broad commercial and regulatory risks which investors had accepted.

801. We accept that the PPM repeatedly warned prospective investors of substantial investment risk. Investors were told that:

> “An Investment in the Fund involves the risk of loss of all or some of a prospective investor's Investment"

and that:

> "Investment in the Fund, which has no trading record, carries substantial risk and Investors in the Fund could lose the whole of their investment.”

802. However, the relevant question is not whether investors accepted risk. Plainly they did. The question is what type of risk they were invited to accept.

803. The PPM described the Fund’s investment objective as being:

> "to acquire residential homes across the United Kingdom, through the Urban Splash pipeline & opportunistic acquisitions".

804. It also warned investors of numerous risks associated with that investment strategy, including risks affecting property values, tenant demand, planning restrictions, taxation, environmental liabilities, leverage, liquidity, regulatory

change and the performance of individual assets. In particular, investors were warned that adverse consequences could flow from:

> "A change in the political or social environment of a country, including economic factors such as fluctuating inflation rates"

and that:

> "A change in the legislation of any country may affect the renewal rights of a tenant, the ability to increase the rent or to review the rent on a lease, the costs of holding a vacant asset or the cost of holding a let asset."

805. The PPM therefore made clear that changes in law, regulation and Government policy could adversely affect the value and performance of Fund investments. We accept that those warnings were deliberately broad and were not confined to any single category of legal or regulatory change.

806. The Applicant placed particular reliance upon the environmental warnings. Those included the statement:

> "There is a risk that the Fund may face substantial loss from legislation necessitating removal, remediation or change of use in relation to hazardous or toxic substances on or in a property."

807. The same section of the PPM referred to claims from occupiers or third parties relating to environmental or physical problems associated with a property and to potentially substantial remediation costs.

808. Nevertheless, we do not accept that these provisions bear the meaning for which the Applicant contended. Read fairly and in context, they proceed on the basis that the relevant risk concerns assets acquired, held or managed by the Fund. The legislative change provisions are concerned with matters affecting the profitability, management and value of Fund investments. The environmental provisions are concerned with liabilities affecting Fund property. The risk analysis as a whole addresses risks associated with acquiring, holding, managing and disposing of Fund assets. It does not suggest that investors may be required to meet liabilities associated with buildings which were never Fund assets and in which the Fund had no proprietary interest.

809. The evidence of Mr Malik and Mr Gough was consistent with that interpretation. Both accepted that investors were warned about a broad range of commercial, regulatory and legal risks, including potentially significant remediation liabilities. Their evidence, however, was that those risks were consistently presented in the context of assets owned by, or invested in through, the Fund. They rejected the suggestion that a reasonable investor would have understood the PPM as communicating that investment in the Fund might expose them to liabilities associated with buildings outside the Fund portfolio. We found that evidence persuasive.

810. It is also consistent with the wider investment proposition presented to prospective investors. The Fund was described as an investment vehicle

acquiring and holding residential assets for income and capital growth. The evidence was that the Fund did not assume development risk and acquired completed assets rather than participating as a developer. Investors were therefore being invited to assume risks associated with the acquisition, ownership and management of Fund assets, including potentially substantial liabilities arising from those assets, rather than liabilities associated with buildings outside the Fund portfolio.

811. The PPM therefore demonstrates that investors accepted a broad range of commercial, political, regulatory and legal risks. However, for the reasons already given, we do not consider that a reasonable investor would have understood those warnings as extending to substantial liabilities associated with buildings which were never Fund assets and in which the Fund had no proprietary interest.

812. We emphasise, however, that this point is not determinative. The fact that investors did not contemplate exposure to liabilities of the present nature does not mean that it is impossible for the Tribunal to conclude that it is just and equitable to make an RCO against either R7 or R10. Parliament cannot have intended that the section 124 jurisdiction should be incapable of affecting the interests of investors or other third parties who did not anticipate such an outcome. If the statutory conditions are met and the circumstances justify it, the Tribunal may conclude that it is just and equitable to make an order notwithstanding the effect upon such persons. Nevertheless, the reasonable expectations of investors, the nature of the risks they were invited to assume and the extent to which the present liabilities fall outside those expected risks are all relevant considerations in the exercise of the discretion. In our judgment, those factors point away from, rather than towards, the making of an order.

Connection, responsibility and benefit

813. The Applicant is correct to submit that the Fund enjoyed a close commercial relationship with Urban Splash and derived substantial benefit from that relationship. We also accept that, in a broad sense, the success of the Fund was linked to the success of the Urban Splash residential property development business.

814. However, the existence of a close commercial relationship does not itself answer the question posed by section 124. As we have explained elsewhere in this Part of the Decision, the focus of the jurisdiction is upon the respondent's connection with the relevant remediation liability rather than upon its relationship with the original developer viewed in isolation.

815. The Fund did not develop any of the Buildings. Indeed, it did not exist at the time the Buildings were developed. It therefore played no role in the decisions that gave rise to the relevant defects. It was not responsible for the design, procurement or construction processes from which those defects arose. Nor did it receive the development profits generated by the Buildings.

816. The Applicant also pointed to the fact that the Fund held a relatively small number of leasehold interests in apartments within two of the Three Towers. In

our view, little turns on that fact. The acquisition of completed residential assets is entirely consistent with the Fund's investment purpose. It does not demonstrate any involvement in the development of the Buildings or any responsibility for the relevant defects. At most, it establishes a limited investment connection with part of the subject matter of these proceedings.

817. There is an important distinction between connection and responsibility. The evidence demonstrates a close commercial relationship between the Fund and Urban Splash and substantial benefits flowing in both directions. What it does not demonstrate is that the Fund assumed responsibility for the consequences of defects arising from Urban Splash developments which it did not acquire, or that it became, in any meaningful sense, a successor to the liabilities associated with those developments.

818. The Applicant's case therefore depends upon the proposition that the Fund's close commercial association with Urban Splash nevertheless provides a sufficient justification for treating Fund assets as an appropriate source from which these liabilities should be met. We are unable to accept that proposition. The relationship between the Fund and Urban Splash undoubtedly generated mutual benefit. However, the existence of such a relationship does not, without more, provide a convincing basis upon which the economic consequences of defects in buildings developed by Urban Splash should be borne by an investment fund which holds no interest in those buildings and whose assets are held overwhelmingly for the benefit of third-party investors.

819. Viewed in the round, the Applicant's case establishes a substantial degree of connection between the Fund and the wider Urban Splash enterprise and demonstrates that the Fund benefited from that relationship. Those considerations are capable of carrying weight in the exercise of the section 124 discretion. However, they do not, in our judgment, provide a sufficiently persuasive justification for imposing upon the Fund liabilities arising from defects in buildings which it did not develop and with which it had only a very limited investment connection. We recognise that the consequence of this conclusion may be that some or all of the remediation costs ultimately remain with the public purse. However, section 124 requires the Tribunal to determine whether it is just and equitable to impose liability upon the respondent before it. The fact that the taxpayer may otherwise bear the loss does not, without more, justify transferring that loss to an investment fund whose assets are held overwhelmingly for the benefit of investors who had no involvement in the development of the Buildings and whose only connection with them arises indirectly through the Fund's relationship with Urban Splash. In our judgment, those considerations are factors of substantial weight pointing against the exercise of the discretion.

R7 – SURE Residential A Limited

820. Unlike R10, R7 is associated with R1. The statutory gateway condition is therefore satisfied and the issue for the Tribunal is whether it is just and equitable to make an RCO against it.

821. The Applicant accepted that many of the considerations discussed above apply equally to R7 and R10. However, Ms Bretherton KC submitted that R7 should nevertheless be treated differently. She emphasised that R7 occupies a distinct position within the Fund structure and that the investors whose interests are represented through it are not typical institutional investors. Rather, they were described in the evidence as comprising, to a significant extent, high-net-worth individuals who are "family and friends" of Tom Bloxham and Urban Splash. They include personal and professional contacts of Mr Bloxham together with a number of senior individuals associated with the Urban Splash business. The Applicant submitted that those investors are therefore more closely connected to Urban Splash than the institutional and pension investors whose capital entered the Fund through other feeder vehicles.

822. We accept that there are differences between the investor profile represented through R7 and those represented through the Fund's other feeder vehicles. We also accept that the opportunity to invest in assets emerging from the Urban Splash pipeline was plainly one of the attractions of the investment proposition offered to those investors.

823. In our judgment, however, those distinctions do not materially alter the analysis. The relevant investors were not investing in Urban Splash itself. They were not acquiring shares in Urban Splash group companies, nor were they directly contributing capital to Urban Splash's property development activities. As explained in Part 3 of this Decision, R7 functions as a feeder vehicle through which investors acquire an interest in the Fund. The underlying investment remains an investment in a fund comprised of completed residential property assets. Whatever their personal or professional connections with Mr Bloxham or Urban Splash, those investors have participated in the same Fund and invested in substantially the same underlying asset base as investors entering through other feeder vehicles. In that respect, their position is not materially different from that of the institutional and pension investors whose interests form part of the wider Fund structure.

824. We recognise that there is a degree of incongruity in the fact that R7 satisfies the association provisions whereas R10 does not. However, that result arises from the particular statutory gateway conditions chosen by Parliament and from the specific factual circumstances of this case. As explained in Part 4, R7 is associated with R1 because of Mr Bloxham's common directorships during the relevant period. It is not associated because it formed part of the Urban Splash business, because it controlled Urban Splash, or because Urban Splash controlled it: none of those circumstances apply. The basis upon which the statutory gateway is crossed is therefore relatively narrow and technical.

825. Once the gateway question has been answered, however, the Tribunal must still undertake the separate just and equitable assessment required by section 124. When that assessment is carried out, the features of the Fund discussed above apply with substantially equal force to R7 and R10. The fact that investors entered the Fund through R7 rather than another feeder vehicle does not materially strengthen the case for imposing upon them liabilities arising from defects in the Buildings. In those circumstances, what might otherwise appear to be an anomalous result at the gateway stage is resolved by the exercise of the

discretion, which produces a coherent and uniform outcome across the different constituent parts of the Fund.

826. Taking all relevant circumstances into account, we do not consider that the position of R7 differs in any material respect from the position of the Fund more generally. The additional factors relied upon by the Applicant do not provide a sufficiently persuasive justification for departing from the conclusions set out above.

827. Accordingly, and giving particular weight to the considerations discussed under the heading "Common Issues", we do not consider it just and equitable to make an RCO against R7.

R10 – SURE Residential LLP

828. We concluded in Part 4 of this Decision that R10 is not associated with R1. That conclusion defeats the Applicant's primary case against R10. However, as we have also explained, R10 was, when the applications were made, a landlord under leases of parts of Christabel House and Sylvia House and therefore satisfies the condition in section 124(3)(a) in relation to those two Buildings. The remaining question is whether it would be just and equitable to make RCOs against R10 in relation to those two Buildings on that alternative basis.

829. The circumstances in which R10 satisfies the landlord condition are important to that assessment. R10 acquired a relatively small number of leasehold flats in Christabel House and Sylvia House as completed residential investments forming part of the Fund's wider portfolio. These flats were acquired from Places for People, not from Urban Splash. Its interests did not confer responsibility for the construction, repair or maintenance of the external walls of either Building, nor did they make R10 responsible for the relevant defects or their remediation.

830. There is therefore an important distinction between the fact that R10 was a landlord, which is sufficient to bring it within section 124(3)(a), and the circumstances in which it was a landlord, which form part of the separate just and equitable assessment under section 124(1). The breadth of the statutory gateway means that landlord status may arise in circumstances which establish little material connection between the landlord and the remediation liability in question. Satisfaction of the gateway does not, without more, provide a positive reason for making an order.

831. The considerations discussed under the heading "Common Issues" apply with substantially equal force to R10. Its ownership of a modest number of leasehold flats established a limited investment connection with Christabel House and Sylvia House, but no connection with their development or with the circumstances which gave rise to the relevant defects. R10 neither undertook nor commissioned their development, received no development profits from them and assumed no responsibility for the relevant defects or their remediation.

832. Nor does R10's landlord status alter our conclusions concerning the nature of the Fund, the interests of its investors and the absence of a sufficiently persuasive justification for transferring these liabilities to it. The particular circumstances in which R10 satisfies section 124(3)(a) provide no material reason for requiring the Fund and its investors to bear remediation liabilities arising from the development of Christabel House or Sylvia House.

833. Accordingly, although the landlord gateway is satisfied in relation to those two Buildings, we do not consider it just and equitable to make an RCO against R10 in respect of either of them. No RCO should therefore be made against R10.

R11: STUBBS MILL LLP

834. R11 occupies a distinctive position among the Respondents. It is not part of the corporate group headed by R3, but nor is it an enterprise involving investors or business partners external to Urban Splash. Its five members are the individuals who comprised the senior leadership of the Urban Splash business, and the Stubbs Mill property was acquired, developed, managed and financed through arrangements involving a number of Urban Splash entities. At the same time, R11 was not incorporated until after the Buildings had been completed; it had no involvement in their development; and its assets represent an investment made by its individual members in a separate property. Those features pull in different directions and require an assessment directed specifically to R11, rather than an assumption that the conclusions reached in relation to any other Respondent necessarily apply to it.

The parties' positions

The Applicant's case

835. The Applicant submitted that it would be just and equitable to make an RCO against R11 because its relationship with the wider Urban Splash enterprise goes substantially beyond the statutory association which provides the jurisdictional gateway. It relied upon the identity of R11's five members, all of whom occupied senior positions within Urban Splash, and upon the substantial overlap between those responsible for directing R11 and those responsible for directing R1 and R3. Mr Bloxham is R11's sole PSC, is entitled to a 53% share of its profits and is also the sole PSC of R3. The Applicant submitted that R11 could not therefore be compared with an associated entity whose relationship with the developer was merely technical or accidental.

836. The Applicant also relied upon R11's wider commercial relationship with Urban Splash. Stubbs Mill was acquired from R2; Urban Splash entities were involved in its development and subsequent management; and R11's financial affairs became materially interconnected with those of other Urban Splash businesses. The Applicant relied in particular upon the use of Stubbs Mill in pooled financing arrangements, the onward lending of capital released against it to Urban Splash Commercial 2017 Limited, and R11's participation in the later refinancing which also encompassed borrowing relating to R4. It submitted that these matters demonstrated that R11 was not maintained in commercial

isolation but participated actively in arrangements which supported, and were supported by, other parts of the Urban Splash property-centred enterprise.

837. In that context, the Applicant disputed the weight which R11 sought to attach to the fact that Stubbs Mill represents the members' personal investment. It emphasised that the members had themselves chosen to expose that investment to risks arising from other Urban Splash businesses by permitting Stubbs Mill to form part of wider security arrangements. The Applicant submitted that this materially qualified R11's reliance upon the members' intention to hold Stubbs Mill as an investment separate from the financial fortunes of Urban Splash and demonstrated the extent to which they had themselves been willing to integrate that investment with the financing of other Urban Splash businesses.

838. Finally, the Applicant relied upon R11's assets and the public funding of the remediation works. It submitted that section 124 of the BSA was intended to enable remediation liabilities to be allocated to associated entities with meaningful connections to the developer rather than remaining with the taxpayer. On its case, the combination of common control, close commercial and financial relationships and R11's available resources provided a sufficient reason for requiring R11 to make an appropriate contribution towards those costs.

R11's case

839. R11 submitted that the matters relied upon by the Applicant do not provide a sufficient basis for imposing upon it liabilities arising from the development of seven Buildings with which it had no involvement. It emphasised that R11 was established only after the last of the Buildings had been completed and had no role in their design, construction, ownership or management. Nor had it received any profits from their development. On its case, the close personal and commercial connections between R11 and Urban Splash did not provide a sufficient connection with the particular Buildings from which the remediation liabilities arose.

840. R11 did not dispute the existence of substantial commercial and financial dealings with Urban Splash entities, but submitted that those arrangements had ordinary commercial explanations and did not undermine the separate character of the members' investment. R11 had been established outside the Urban Splash group to enable its members to acquire and redevelop Stubbs Mill using BPRA relief which the group, with its substantial accumulated tax losses, could not itself use. The subsequent financing arrangements were said to have been entered into on commercial terms and to have conferred genuine advantages upon R11. In particular, combining Stubbs Mill with other commercial properties as security enabled R11 to obtain long-term finance which had proved difficult to secure on a standalone basis. R11 accepted that this exposed it to risks associated with other Urban Splash businesses, but submitted this did not convert the members' separate investment into an asset of Urban Splash, still less establish any relevant connection between that investment and the seven Buildings.

841. R11 also emphasised the source and character of the investment itself. Its case was that the capital contributed by its members represented their own funds and was not derived from dividends paid by R1-4 or from profits generated by the Buildings. An RCO would therefore fall economically upon an investment belonging to the members personally, notwithstanding their senior positions within Urban Splash. R11 submitted that Parliament had not imposed liability upon the directors or shareholders of a developer merely by reason of that status, and that the association provisions should not be used indirectly to expose their separate personal investments to liabilities arising from developments in which the associated entity had played no part.

842. Finally, R11 relied upon the practical consequences of an order. Stubbs Mill remained subject to secured borrowing and R11 submitted that a substantial RCO would be likely to lead to administration or a forced sale. The secured lender, Aviva, would have priority, whilst the members themselves would rank as unsecured creditors in respect of sums owed to them by R11. R11 contended that an order might therefore destroy or substantially diminish the members' investment, prejudice other creditors and produce only limited recovery for the Applicant. Those consequences were said to reinforce the absence of any sufficient justification for transferring to R11 liabilities arising from developments in which it had played no part.

Discussion and conclusion

843. We accept R11's starting point. It had no involvement in the development of any of the Buildings, all of which had been completed before R11 came into existence. There is no evidence that the capital invested in R11 derived from profits generated by the Buildings. Those are important considerations, but they are not determinative. The question is whether, having regard to all the circumstances, it is just and equitable that R11 should contribute towards the cost of remediation.

844. R11's description of itself as a vehicle for the members' personal investment tells only part of the story. It undoubtedly serves that purpose, and we accept that the five members invested their own capital with the intention of establishing an investment and income stream separate from their interests in Urban Splash. But R11 is also the vehicle through which those same individuals undertook a property development venture. They comprised the senior leadership of Urban Splash; the Stubbs Mill property was acquired from R2; and Urban Splash entities were involved in its development and subsequent management. The venture therefore formed part of the property-centred commercial activity around which the wider Urban Splash enterprise was organised. Indeed, it was property development activity.

845. The reasons why the development was undertaken through R11 are also material. The Urban Splash group had substantial accumulated tax losses and could not use the BPRA relief available for the redevelopment, whereas the individual members could obtain its benefit through the separate, tax-transparent vehicle. We accept that this was a legitimate commercial and fiscal arrangement. The fiscal structure was not the only reason for undertaking the development through R11: the members also wished to invest personal capital

outside the Urban Splash group. But the existence of that separate purpose does not mean that a property development undertaken by the individuals who owned and controlled Urban Splash was commercially remote from the wider enterprise.

846. The subsequent relationship between R11 and the Urban Splash businesses reinforces that conclusion. As we have explained in Parts 3 and 4 of this Decision, R11 did not thereafter conduct its affairs in complete commercial or financial isolation. R2 provided bridging finance; Urban Splash entities continued to provide services in connection with the Stubbs Mill property; and R11 subsequently participated in financing arrangements which intertwined its financial interests with those of other Urban Splash businesses. Those arrangements conferred genuine commercial advantages upon R11. But they also demonstrate the continuing importance to its business of its relationships with the wider Urban Splash enterprise.

847. The nature of the statutory association points in the same direction. This is not a case in which R11 is associated with R1 merely because of common directorships between otherwise separate businesses. We have found in Part 4 that R3 had the power to secure that the affairs of R11 were conducted in accordance with its wishes. That conclusion reflects the substantial commonality between those who controlled R3 and those who exercised decision-making power within R11. The statutory association therefore corresponds with a close relationship in commercial reality.

848. We have considered carefully R11's submission that an RCO would, in economic terms, expose the personal investments of its five members to liabilities which Parliament did not impose upon them individually. There is force in that point. But we do not regard this case as equivalent to R5 or R6. We are not making an order against R11 simply because it provides a means of reaching assets ultimately belonging to individuals connected with R1. The significance of the members' identity lies in the nature of R11 itself. They are the individuals who own and control the wider Urban Splash enterprise and who have used R11 to undertake a property development closely connected with it. Their investment does not cease to be personal investment, but neither does that characterisation provide a compelling reason to place R11 beyond the reach of section 124.

849. We also take account of the potential loss of that investment. Here there is an important distinction between R11's members and the external investors in the Residential Fund. The latter do not control the wider Urban Splash enterprise or determine the extent to which their investment vehicle should expose its assets to risks arising from other Urban Splash businesses. R11's members do. Despite their original intention to keep their investment separate from Urban Splash's financial fortunes, they subsequently agreed to arrangements which exposed the Stubbs Mill property to risks arising from other Urban Splash businesses. As we explained in Part 4, we find it surprising that they were prepared to assume that risk for the financing advantages which those arrangements offered.

850. That does not mean that the members assumed the quite different risk of a future statutory liability for remediation of the Buildings. But it materially

reduces the force of their reliance upon the separate character of their investment. Where the members considered it commercially advantageous to do so, they were prepared to allow R11's property and financial affairs to become intertwined with those of the wider Urban Splash enterprise. Their position is materially different from that of external investors whose capital was committed without any corresponding control over the wider enterprise.

851. We have also considered R11's evidence about its financial position and the consequences said to follow from an order. It is apparent that R11 does not have resources approaching the value of the remediation liability sought by the Applicant and that the Stubbs Mill property is subject to secured borrowing. We accept, therefore, that an order for the full amount would represent a very substantial liability for R11. R11 went further, contending that such an order would be likely to lead to administration or a forced sale, substantially or wholly destroying the members' investment and potentially producing only limited recovery for the Applicant.

852. We do not consider that those matters justify refusing an order. The evidence does not enable us to determine what sum R11 could in fact afford to pay, or what recovery would ultimately be available to the Applicant if an order were made and enforcement became necessary. Nor should the position be approached on the basis that R11 would alone bear the remediation liability. We have also concluded that RCOs should be made against R1-4 in respect of the same remediation costs. The relationship between those liabilities, and the terms upon which the orders should be made, are matters which we address in the final Part of this Decision. For present purposes, it is sufficient to say that the existence of secured borrowing and unsupported predictions of insolvency or other serious financial consequences do not establish that no useful recovery can be made from R11. We do not consider that such uncertainty should deprive the Applicant, and ultimately the taxpayer, of the opportunity to recover from an associated entity which holds an asset of substantial value.

853. Taking those matters together, we are satisfied that it is just and equitable to make an RCO against R11. We reach that conclusion neither because R11 was responsible for the defects in the Buildings nor because section 124 provides a means of pursuing the personal wealth of those responsible for a developer. We reach it because R11 was the vehicle through which the individuals who owned and controlled the wider Urban Splash property-centred enterprise undertook another property development; its establishment outside the corporate group reflected, in part, the particular fiscal circumstances of that development; the development and subsequent operation of R11 were facilitated by substantial commercial and financial connections with Urban Splash; the association with R3 reflects a genuine commonality of control; and R11 holds an asset of substantial value. Those considerations, taken cumulatively, provide sufficient justification for making an RCO against R11.

PART 6 – THE REMEDIATION CONTRIBUTION ORDERS

SEPARATE ORDERS

854. The RCOs made by the Tribunal are contained in seven separate documents, one relating to each of the Buildings, issued alongside this Decision. Those orders give effect to the conclusions reached in the preceding Parts of the Decision and in this Part too.

855. Although there is a single document relating to each Building, it operates separately in relation to each Respondent against whom an RCO is made. In substance, therefore, each document records a number of separate RCOs, each imposing an obligation upon a particular Respondent. That distinction is important when considering below the relationship between the liabilities imposed upon the different Respondents, including whether those liabilities should be joint and several.

856. The purpose of this final Part is not to repeat the conclusions reached earlier in the Decision or the reasons for them. It is to explain the terms of the orders. In particular, we identify the amounts payable, consider the relationship between the separate liabilities imposed upon R1, R2, R3, R4 and R11, and specify when payment must be made.

THE AMOUNTS PAYABLE BY R1

857. We begin with R1. As the developer of each of the seven Buildings, its position provides the natural starting point for quantifying the orders. In Part 5 we concluded that it is just and equitable to make RCOs against R1 in respect of each Building, but that the amount payable in respect of costs funded by the BSF should be reduced by 10% to reflect the Government's contribution to the circumstances which produced the building-safety crisis. We do not repeat the reasons for those conclusions here.

858. Subject to two matters concerning Moho, the calculation is therefore straightforward. The amount payable by R1 in respect of each Building is 90% of the BSF-funded remediation costs which we found in Part 2 were reasonably incurred or, in the case of Chips, are reasonably to be incurred.

859. Moho requires separate treatment. First, R8 and R9 paid £600,000 pursuant to their settlement with the Applicant. The £600,000 settlement does not alter the remediation costs which form the starting point for assessing R1's liability. Rather, it represents a sum already recovered towards those costs and must therefore be credited against the amount which R1 would otherwise be required to pay. We therefore apply the 10% reduction to the BSF costs which we found to have been reasonably incurred before giving credit for the £600,000 already recovered.

860. Secondly, Moho Management Company Ltd incurred £741,594 of remediation costs which were not funded by the BSF. We found in Part 2 that those costs were reasonably incurred in connection with the remediation project. As we have explained, the 10% reduction reflects the Government's contribution to

the circumstances giving rise to the expenditure of public funds. There is no corresponding reason to reduce the costs incurred by the management company. The whole of the £741,594 is therefore recoverable. However, that sum is not payable to the Secretary of State. Consistently with our conclusions in Part 1 concerning the operation of section 124(2), the Moho RCO will specify Moho Management Company Ltd as the person to whom that sum is to be paid.

861. The amounts payable by R1 are accordingly:

Building	**Calculation**	**Amount payable**
Burton Place	90% of £22,954,848	**£20,659,363**
Chips Building	90% of £4,705,670	**£4,235,103**
Christabel House	90% of £1,472,075	**£1,324,867**
Emmeline House	90% of £2,027,778	**£1,825,000**
Moho Building (BSF costs)	(90% of £18,092,248) - £600,000	**£15,683,023**
Moho Building (management company costs)	£741,594	**£741,594**
Sylvia House	90% of £495,390	**£445,851**
The Box Works	90% of £1,762,054	**£1,585,849**
Total		**£46,500,650**

862. The aggregate liability imposed upon R1 by the seven RCOs is therefore £46,500,650. Of that sum, £741,594 is payable directly to Moho Management Company Ltd under the Moho RCO. The remaining £45,759,056 is payable to the Secretary of State.

LIABILITY OF R2, R3, R4 AND R11

863. The remaining questions are whether each of R2, R3, R4 and R11 should be liable for the same payment obligations as R1 and whether the liabilities of the five Respondents should be joint and several. Although both subjects arose in the parties' cases, neither the possibility of apportionment nor the precise basis for joint and several liability was developed in any great detail in their submissions. R1-4 criticised the Applicant for pursuing the Urban Splash Respondents rather than seeking to distribute the remediation liabilities more widely among others potentially responsible for the design and construction of the Buildings. They also relied heavily upon the consequences said to follow from orders in the amounts sought. The Applicant's position was that it was not

obliged to pursue every potentially responsible party and that, where orders were properly made against multiple respondents in respect of the same remediation costs, liability could appropriately be joint and several.

864. The Upper Tribunal (Lands Chamber) considered the relationship between the liabilities of multiple respondents to RCO applications in *Edgewater (Stevenage) Limited & Ors v Grey GR Limited Partnership*[92]. Edwin Johnson J held that section 124 of the BSA permits the FTT to require two or more respondents to make payments on a joint and several basis where it considers that outcome just and equitable. But joint and several liability is not necessarily the starting point whenever RCOs are made against multiple respondents. The FTT must consider, in relation to each respondent, what form and extent of liability produces the appropriate just and equitable outcome. Depending upon the circumstances, that may be joint and several liability, apportioned liability, or no liability at all.

865. That assessment is necessarily fact-sensitive. The fact that respondents are associated for the purposes of section 121 does not, by itself, require them to bear identical liabilities or to do so jointly and severally. In *Edgewater (Stevenage)*, the justification for joint and several liability lay in the additional relationships between the respondents and the developer. The FTT had found that the relevant companies formed part of a wider corporate structure which operated as a "fluid, disorganised and blurred network or structure", involving common ownership and financial relationships. The Upper Tribunal held that those findings entitled the FTT to conclude that the relevant respondents should be held jointly responsible, without differentiation.

866. The practical consequences of the alternative forms of liability may also be relevant. The FTT may take account of the risk that an insolvent or impecunious respondent will be unable to meet an apportioned liability, leaving a shortfall in recovery notwithstanding that other respondents have also been found proper subjects of RCOs. Conversely, the potential unfairness which joint and several liability may produce as between respondents is also capable of consideration. The ultimate question remains what liability it is just and equitable to impose upon each respondent.

867. Applying those principles, we have considered in particular whether the differences between the positions of the five Respondents should be reflected not merely in deciding whether an RCO should be made against each of them, but also in the amount which each should be required to pay. We do not consider that they should. The differences identified in Part 5 were important in determining whether it was just and equitable to make an order against each Respondent, but they do not correspond to any identifiable share of the remediation expenditure. R2, R3, R4 and R11 cannot sensibly be associated with particular Buildings, defects or elements of expenditure, nor does the evidence provide any other principled basis for translating the relative strength of their connections into different proportions of the costs. Any such allocation would therefore be impressionistic rather than evidence-based. We are accordingly satisfied that each should be liable for the same amounts as R1.

[92] [2026] UKUT 18 (LC).

868. There are also positive reasons for imposing liability for the full amounts upon R2 and R3 in particular. R3 is R1's ultimate parent company. We concluded in Part 5 that there is a sufficiently substantial reason why it should "stand behind R1" in respect of remediation liabilities arising from R1's development activities. That conclusion has obvious practical significance because R1 is technically insolvent and holds no substantial assets. R2 occupies a different position, but we found that it represents the continuation of the property development enterprise formerly carried on through R1. The connections which justified making RCOs against R2 and R3 therefore also provide positive reasons for requiring each to stand behind the full remediation liability imposed upon R1.

869. R4 and R11 stand in different positions, for the reasons already explained in Part 5, and we do not repeat those reasons here. The important point for present purposes is that we found in each case a sufficiently substantial justification for requiring the Respondent to share responsibility for liabilities arising from R1's development activities.

870. Nor do we accept R1-4's submission that the orders sought against them are rendered unfair because the Applicant has not pursued other persons who might bear responsibility for the relevant defects or their remediation. The RCO jurisdiction does not require an applicant first to identify and pursue every potentially responsible person, nor does liability under section 124 depend upon the Applicant achieving a comprehensive allocation of responsibility amongst everyone involved in the design and construction of the relevant buildings. R1-4 were entitled to rely upon the existence and potential responsibility of others insofar as those matters bore upon whether the particular orders sought against them were just and equitable. But the possibility that claims might have been pursued against other persons does not provide a reason, of itself, for leaving with the taxpayer costs which we have concluded it is just and equitable for these Respondents to bear.

871. We have also considered the submission that imposing liabilities of this magnitude upon R1-4 may have serious consequences for the Urban Splash business. R1-4 submitted that orders in the form sought would result in the collapse of the group, insolvencies and job losses, and the loss of a pipeline of future housing and regeneration activity. Those are legitimate concerns. But, as explained in Part 5, the evidence does not enable us to determine whether those consequences will in fact result from the orders we make, still less to identify the amount at which any tipping point would be reached. Whilst we certainly do not dismiss, or disregard, the concerns expressed by Mr Bloxham and Mr Curnuck about the possible implications of these orders, no independent expert evidence was provided from which a sustainable or affordable level of liability could reliably be identified.

872. There is in any event a more fundamental point. In R1's case, the possibility of serious consequences for the developer does not justify leaving otherwise recoverable remediation expenditure with the taxpayer. The statutory policy considered in Part 5 places primary responsibility upon the developer and necessarily contemplates the imposition of substantial liabilities arising from

historical building-safety defects. We have found substantial reasons why R2, R3, R4 and R11 should share those liabilities. The possibility of serious consequences for the businesses concerned does not provide a sufficient reason to leave part of the remediation costs with the public purse or to substitute a lesser amount which the evidence provides no principled means of calculating.

873. We also consider that each Respondent's liability for the full amount should be joint and several. There is a real risk of under-recovery if liability is apportioned, particularly given R1's financial position. More fundamentally, there is no evidential basis upon which a rational apportionment could be undertaken. Although R1-4 criticised the Applicant for seeking to impose the remediation liabilities upon the Urban Splash Respondents rather than distributing them more widely, they did not identify any principled basis upon which the liabilities falling upon R1-4 themselves might be divided. The evidence provides no means of determining that R1 should bear one proportion, R2 another, and R3, R4 and R11 still others.

874. Nor would it be sensible to allocate costs attributable to different Buildings to different Respondents. None of these Respondents has a materially greater connection with, or responsibility for, one of the Buildings than another. The considerations which have led us to make RCOs against them operate across all seven Buildings. Neither percentage apportionment nor allocation by reference to particular Buildings therefore provides a rational means of distributing the liabilities.

875. In reaching that conclusion, we do not regard the factual circumstances of this case as analogous to those in *Edgewater (Stevenage)*. The justification there depended substantially upon the FTT's findings concerning the "fluid, disorganised and blurred network or structure" through which the relevant business was conducted. That is not our finding about Urban Splash. The evidence disclosed an identifiable corporate structure, which had undergone genuine reorganisations for legitimate commercial purposes. Our conclusion that joint and several liability is appropriate therefore does not rest upon any finding that the Urban Splash structure was disorganised, artificial or opaque.

876. There is, finally, no sufficient reason for the Tribunal itself to attempt to determine the ultimate incidence of the liability between the Respondents. R1-4 form part of the same corporate group under the ultimate ownership and control of R3. R11 is outside that group, but its members comprise senior figures within the Urban Splash enterprise and its relationship with that enterprise includes the financial arrangements examined earlier in this Decision. The relevant Respondents themselves are materially better placed than either the Applicant or the Tribunal to determine between themselves where the ultimate economic burden should fall. We therefore consider it just and equitable that the liabilities of all five Respondents should be joint and several. In relation to each payment required by an RCO, payment by any Respondent will reduce, to the corresponding extent, the amount of that payment recoverable from the others.

PAYMENT AND FORM OF ORDERS

877. The Applicant provided draft RCOs setting out the form of orders which it invited the Tribunal to make. Those drafts did not specify the time within which payment should be made. Ms Bretherton KC explained that the Applicant wished to consider any submissions made by the Respondents before proposing a payment date. However, no party subsequently made submissions about the appropriate period for payment.

878. In those circumstances, we consider that the relevant Respondents should be allowed 28 days from the date on which this Decision and the RCOs are issued to make the payments required by them. The orders are dated 5 November 2026. Payment must therefore be made by 4pm on 3 December 2026.

879. We have used the Applicant's draft orders as the starting point for the form of the RCOs, adapting them to give effect to our conclusions in this Decision. Five of the seven orders are straightforward in this respect. They specify the sum payable in relation to the relevant Building and require payment of that sum by 4pm on 3 December 2026.

880. The Moho order requires separate payments to two specified persons. Of the total liability of £16,424,617 in respect of that Building, £15,683,023 is payable to the Secretary of State in respect of the BSF-funded expenditure, after application of the 10% reduction and credit for the £600,000 settlement payment. The remaining £741,594 is payable directly to Moho Management Company Ltd in respect of the remediation expenditure which it incurred outside the BSF. Each of those payment obligations is joint and several as between R1, R2, R3, R4 and R11.

881. The Chips order is more complex for a different reason because some of the remediation costs which we have found to be reasonable have not yet been incurred. The order therefore distinguishes between £1,820,980 in respect of costs already incurred and £2,414,123 in respect of costs to be incurred, making a total of £4,235,103. Those amounts are both payable by 4pm on 3 December 2026. The order includes balancing provisions to address any difference between the anticipated expenditure and the costs ultimately incurred. In particular, it provides for the return of sums which remain unspent 12 months after practical completion of the current external remedial works and permits the parties thereafter to bring the final position back before the Tribunal.

882. Those provisions are intended to ensure that the Applicant receives the funds required to meet the costs which we have found are reasonably to be incurred, while providing a mechanism for adjustment once the final cost of the remediation works is known. They do not alter the amounts which we have determined are presently payable under the RCO.

Signed: J W HOLBROOK
Judge of the First-tier Tribunal
Date: 5 November 2026

APPENDIX A

LIST OF RESPONDENTS

(1) Urban Splash Limited

(2) Urban Splash Developments Limited

(3) Urban Splash Group Holdings Limited

(4) Urban Splash Work Limited

(5) TBI 2000 Limited

(6) TM Freeholds Limited

(7) SURE Residential A Limited
(formerly, Urban Splash Residential Limited)

(8) Shed KM Holding Limited
(applications withdrawn)

(9) Shed KM Limited
(applications withdrawn)

(10) SURE Residential LLP
(formerly, Urban Splash UK Residential LLP)

(11) Stubbs Mill LLP

APPENDIX B

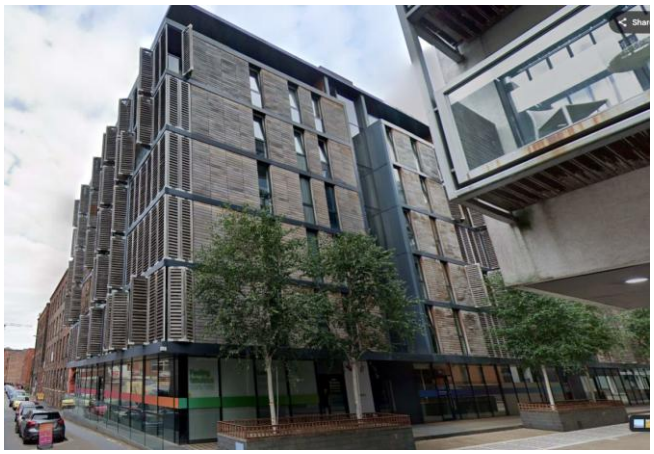
LIST OF WITNESSES[93]

Name	Role / Organisation	Called By
Samuel Styles	Director, Moho Management Company Ltd	Applicant
Arthur Lea	Director, Emmeline (Manchester) Management Ltd	Applicant
Justin Herbert	Managing director, Residential Management Group Ltd	Applicant
Jamie Davis	Group Chief Technical Officer, PartB Group Ltd	Applicant
Lauren Vice	Director, H + H Fire	R1-R4
Steven Lynch	Senior managing director, Delta Consulting Group Ltd	Applicant
Faye Allen	Managing director, Rimkus Consulting UK Ltd	R1-R4
Simon Wilson	Director, Burton Place (Manchester) Management Ltd	Applicant
Paul Gough	Managing partner, STAR Capital Partners LLP	R7 & R10
Thomas Bloxham	Chairman, Urban Splash group	R1-R7 & R10
Julian Curnuck	Chief executive, Urban Splash group	R1-R4, R7, R10 & R11
Mark Hawthornthwaite	Director, TM Freeholds Ltd	R6
Simon Gawthorpe	Director, Urban Splash group	R1-R4
Akeel Malik	Partner, SURE Capital Partners LLP	R7 & R10
John Forbes	John Forbes Consulting LLP	R7 & R10

[93] Witnesses are listed in the order in which they gave evidence.

APPENDIX C

BURTON PLACE





Burton Place, both before and after remediation

Description

C1. Burton Place is a seven-storey mixed-use residential development, constructed between 2003 and 2005 and situated in the Castlefield district of Manchester. The building comprises approximately 90 residential apartments together with commercial accommodation and basement parking. The development is adjacent to Moho, and the underground carpark extends to each development. Its top occupied storey is approximately 18.7 metres above ground level.

C2. The building is of steel-frame construction, incorporating composite concrete floor slabs and a variety of external wall constructions. Although often referred to simply as a "timber-clad" building, its façade was in fact formed from a number of distinct wall types, including extensive areas of Iroko timber rainscreen cladding, glazed curtain walling, balcony enclosures and other façade elements. The external walls varied depending upon their location within the building, but commonly incorporated combustible materials including timber cladding, timber support structures, oriented strand board (OSB), combustible insulation products and cavity construction.

C3. The principal external wall construction consisted of timber cladding fixed to a timber-framed support structure surrounding the primary steel frame. Investigations undertaken during the remediation project subsequently established that substantial parts of the façade, including wall supports, horizontal cladding elements, window surrounds and balcony finishing details, were formed from combustible timber. Other combustible materials identified within the external wall build-up included OSB sheathing and multifoil insulation products.

C4. Burton Place occupies a prominent position within the Castlefield Conservation Area. The appearance of the original timber façade was regarded as an important architectural feature of the building. During development of the remediation scheme, planning and conservation area considerations influenced the design of the replacement façade. An anodised aluminium system was ultimately adopted, intended to preserve aspects of the appearance and vertical emphasis of the original timber cladding whilst providing a non-combustible solution.

Investigations into the external wall construction

C5. The origins of the remediation project can be traced to concerns identified in 2015 regarding the condition of the external timber façade. An abseil survey undertaken in July 2015 was commissioned after sections of the timber cladding were observed to be bowing and concerns arose that elements of the façade might become detached. Loose panels were removed for safety reasons. BWP were appointed to oversee further investigations and remediation planning. BWP subsequently commissioned intrusive investigations into the façade construction, the results of which were reviewed by DFC fire consultants. Those investigations revealed concerns not merely about the physical condition of the cladding but also about the combustible nature of both the timber cladding and its supporting subframe.

C6. By this stage, the building's management company had already been considering a programme of works directed towards the deteriorating timber cladding itself. In oral evidence, Simon Wilson explained that, before the Grenfell Tower fire and the subsequent changes in Government guidance, a comparatively modest scheme had been envisaged involving the replacement of defective timber cladding panels on a broadly like-for-like basis. The works would have been undertaken in phases, beginning with the southern elevation, where the linear timber panels were warping and, in some cases, had fallen away. The other elevations would have followed over a period of years. At that stage, the focus remained upon the visible external elevations and the known deterioration of the timber cladding. However, the proposal had not progressed beyond a comparatively modest scheme directed towards the visible exterior cladding and had not obtained planning approval. As intrusive investigations progressed and concerns emerged regarding the combustible subframe and wider wall construction, the scope of the project expanded significantly beyond the replacement of deteriorated cladding panels alone.

C7. By early 2019, the investigations had identified sufficiently significant fire-safety concerns to justify interim mitigation measures. Following advice from

DFC, a waking watch was implemented in January 2019 whilst a new fire alarm system was installed. During this period DFC carried out further surveys and inspections and reported concerns relating to combustible cladding, combustible insulation, the timber support structure and deficiencies in cavity barriers and fire-stopping. The evidence suggests that, by this stage, concern had extended beyond the timber rainscreen itself to the wider composition of the overall external wall construction.

C8. In parallel with those technical investigations, the developing remediation proposals were influenced by planning and conservation considerations. Replacement timber and timber-look alternatives were explored, but concerns were raised about whether those solutions would provide an acceptable appearance within the Castlefield Conservation Area. The design process also addressed the retention of characteristic features such as the balcony shutters. An anodised aluminium system was ultimately selected as a non-combustible solution capable of retaining aspects of the original façade's character. The evidence did not, however, establish that the planning authority had insisted upon that precise solution or that no materially different design could have secured planning approval. The replacement of windows and glazed doors was also influenced by thermal, acoustic and façade-performance considerations.

C9. A detailed fire engineering assessment was undertaken by DFC in January 2020. DFC identified concerns relating to the timber cladding system, cavity barriers, compartmentation and other elements of the external wall construction. Rather than recommending a single solution, DFC identified three potential approaches. These ranged from relatively limited interventions directed towards life safety and compliance with the Fire Safety Order, through to wholesale replacement of combustible materials in order to achieve compliance with contemporary regulatory standards. DFC expressly recommended that a cost-benefit exercise be undertaken before a preferred strategy was selected.

C10. As investigations progressed, attention increasingly focussed upon the composition of the external wall construction itself. Subsequent intrusive inspections revealed that the façade was not limited to combustible timber cladding panels. Significant elements of the façade structure, including support framing, window surrounds and associated façade components, were also constructed from combustible timber products. Combustible insulation materials and deficiencies in cavity barriers and compartmentation were identified too.

C11. In November 2020, the BSF Eligibility Team confirmed that Burton Place was eligible for funding in relation both to the timber cladding system and the metal-clad flanking walls incorporating combustible insulation. The eligibility decision therefore encompassed not only the timber cladding system but also a separate construction comprising metal cladding and combustible insulation.

C12. The most significant stage of the investigation process occurred during 2020 and 2021, when Wintech[94] and other consultants carried out detailed assessments of the external wall construction. These investigations examined both fire performance and thermal performance. Wintech identified deficiencies in cavity barriers and compartmentation and concluded that the existing windows and doors could not achieve the thermal performance required for the proposed replacement façade in accordance with applicable Building Regulations. The report also considered insulation materials within the wall build-up and concluded that certain products were plainly combustible, rendering further fire testing unnecessary.

C13. Wintech ultimately concluded that wholesale replacement of the external wall was the only viable option capable of satisfying the required fire-safety and energy-performance objectives. The proposed scheme therefore involved removal of the timber cladding, supporting structure, insulation and associated façade elements, replacement with anodised aluminium cladding and non-combustible insulation, and replacement of windows and balcony doors throughout the development. Wintech expressly described the works as involving removal and replacement of the external wall construction serving each apartment.

C14. Further intrusive investigations undertaken by Fleetwood Architectural Aluminium Ltd in February 2021 added to the developing understanding of the building's construction. Opening-up works within Apartment 307 identified timber framing and timber spacers associated with the window and balcony door installations together with combustible acoustic material surrounding elements of the steel frame. These findings reinforced the conclusion that combustible materials were present throughout substantial parts of the external wall construction rather than being confined to the visible exterior timber cladding alone. Fleetwood subsequently concluded that compliance would ultimately require removal of the façade back to the primary steel frame and reconstruction using a steel-framed support system (SFS).

C15. Investigations continued during the remediation works themselves. Following removal of the interface between Burton Place and the adjoining Talbot Mill building, previously concealed construction became accessible for inspection. The investigations revealed combustible materials at the Talbot Mill interface together with deficiencies in cavity barriers and fire-stopping. Those deficiencies exposed routes by which fire could spread through the interface construction and led to the conclusion that sections of the wall construction serving residential floors 1 to 5 required complete replacement. Those discoveries informed later variations to the remediation works.

C16. The understanding of Burton Place therefore evolved significantly during the investigation process. What began as concern about the condition and possible detachment of timber cladding led, through increasingly intrusive investigations, to the identification of combustible materials and fire-safety

[94] Wintech Ltd is a façade engineering consultancy. It was appointed by the building's management company to provide façade engineering consultancy services, including external wall fire assessment, performance and works specifications, and thermal analysis and reporting.

deficiencies affecting numerous elements of the external wall construction. Further defects emerged once the works exposed previously concealed construction. By the time the remediation strategy was settled, the project was concerned not merely with the replacement of deteriorating cladding panels, but with wider defects affecting the fire performance of the overall external wall system.

Relevant defects

Overview

C17. The Applicant's case was that Burton Place was affected by a combination of deficiencies affecting the external wall system as a whole. In summary, those alleged defects comprised (a) defective or ineffective cavity barriers and fire-stopping arrangements; (b) combustible materials within Wall Types 1, 2, 3 and 4; (c) combustible materials and fire-stopping deficiencies at the Burton Place/Talbot Mill interface; (d) combustible materials associated with windows, doors and structural junctions; and (e) combustible balcony components including decking, screens and enclosure elements. The Applicant contended that those matters, whether considered individually or cumulatively, constituted relevant defects.

C18. For R1-4, Ms Vice accepted that Burton Place had relevant defects in several respects, though she declined to concede on certain specific items and maintained a non-committal position on others.

Wall Type 1: Aluminium fascia wall construction

C19. The Applicant alleged that the principal façade construction, identified in the expert evidence as Wall Type 1, contained a number of relevant defects. This wall type incorporated aluminium fascia panels fixed over a combustible build-up containing timber structural elements and combustible insulation materials. The Applicant further alleged that the cavity barrier arrangements within this construction were defective, relying in particular upon the use and installation of Envirograf cavity barriers.

C20. The Applicant's case was that the combination of combustible materials and defective, inadequate or improperly installed cavity barriers created a route for external fire spread within the rainscreen cavity. Mr Davis expressed the opinion that the interaction between combustible materials and ineffective cavity barriers within this wall construction gave rise to a building safety risk.

C21. Ms Vice accepted that in the one location where picture frame voids (as described in the DFC external walls assessment) had been identified, it was "probable that it was a relevant defect, in that single location," though she could not say whether the issue was systemic throughout the building. She further accepted that when the combination of Envirograf barriers, combustible foil-faced bubble wrap insulation, combustible SIPs panels, and combustible support systems were considered together, "the combination of the materials together would be a relevant defect". She also agreed that the timber cladding needed to be replaced.

C22. Ms Vice nevertheless distinguished between the presence of individual combustible components and the performance of the wall assembly as a whole. Her evidence was that the significance of the various materials could not properly be assessed in isolation and that the critical question was whether the overall wall construction created a route for fire spread giving rise to a building safety risk. It was in that context that she accepted that the combination of combustible materials and cavity barrier deficiencies within this wall type constituted a relevant defect.

Wall Type 2: Recessed core wall construction

C23. The Applicant also identified relevant defects within the recessed core wall construction, referred to as Wall Type 2. According to the Applicant, this wall type incorporated combustible timber stud construction, timber framing, oriented strand board, multifoil membranes and combustible insulation products within the wall build-up.

C24. The Applicant contended that these materials formed part of the external wall system and were capable of contributing both to the ignition and propagation of fire. It further alleged that deficiencies in cavity barriers and compartmentation associated with this wall type increased the potential for fire spread through the external wall construction.

C25. In her oral evidence, Ms Vice initially experienced some confusion as to the precise wall construction being discussed. However, once the relevant wall type had been identified, she accepted that cavity barriers were absent from the gable-end wall associated with the timber rainscreen cladding. Although she maintained her general position that the existence of a deficiency did not automatically establish a relevant defect, this concession represented acceptance of one of the principal factual matters relied upon by the Applicant in relation to this wall type.

Wall Type 3: Stair-core flanking wall construction

C26. The Applicant further alleged that relevant defects existed within the stair-core flanking wall construction, identified as Wall Type 3. This construction comprised a metal-clad wall assembly containing combustible insulation products.

C27. The Applicant's case was that the presence of combustible insulation within this wall type created a building safety risk irrespective of the fact that it did not form part of the principal timber façade. Particular reliance was placed upon the fact that this construction was separately recognised within the BSF eligibility process as requiring remediation.

C28. Ms Vice's position was more equivocal. She contended that the aluminium panels could have been reused as they were an A-rated product, and she was not sure the flanking walls were "the same construction as wall type 1". She did, however, agree that cavity barriers should be provided at junctions with compartment floors for this wall type. Ms Bretherton KC put it to Ms Vice that

her opinion about re-using the aluminium panels was essentially an "alternative schemes-type of point". Ms Vice did not accept that, and Ms Bretherton further put it to her that these flanking walls were essentially the same construction as Wall Type 1, which she had already accepted was a relevant defect. Ms Vice disagreed, stating that "these are aluminium and wall type 1 is timber". When pressed on whether they presented the same type of difficulties, Ms Vice said she was not sure that was “completely true”.

C29. In substance, Ms Vice's evidence was directed less towards whether this wall type required remediation and more towards the extent of that remediation. She considered that certain components, including the aluminium rainscreen panels themselves, might have been capable of retention and reuse. Her disagreement with the Applicant therefore concerned the scope of the remedial response rather than the proposition that cavity barriers were required or that combustible materials were present within the wall construction.

Wall Type 4: Talbot Mill interface construction

C30. The Applicant also relied upon defects identified at the interface between Burton Place and the adjoining Talbot Mill building.

C31. Investigations undertaken during the course of the works revealed previously concealed construction within this area. The Applicant alleged that the interface construction contained combustible materials and deficiencies in cavity barriers and fire-stopping. It contended that these conditions created an additional route for horizontal and vertical fire spread between parts of the buildings and therefore constituted relevant defects requiring remediation.

C32. In oral evidence, Ms Vice said she could not confirm whether she agreed with DFC's recommendation to improve the fire resistance of internal linings, stating, "I think this one is difficult to agree with, because I think there is very limited evidence as to what is actually there". She maintained this non-committal position when shown photographs, stating the photographs did not assist her in reaching a conclusion. She did agree, in principle, that if the wall was not fire resisting and had a cavity but no cavity barriers, it would have allowed for fire spread.

C33. Ms Vice's objection appeared to be that she had not seen sufficient evidence about the wall build-up to satisfy her that it was a relevant defect, a position she maintained even when taken to a contemporaneous facade remediation report by Callidas[95] in support of a BSF variation application which recorded the nature of the issues revealed by a detailed inspection and opined as to the appropriate remedial solution.

General cavity barrier and fire-stopping deficiencies

C34. Running across the various wall constructions was the Applicant's broader allegation that cavity barriers and fire-stopping arrangements throughout the

[95] Callidas Construction Consultancy Ltd served as the Project and Construction Management consultant for the remediation project.

external wall systems were defective. As we have noted above, this was generally accepted by R1-4 (although it was not agreed that such deficiencies necessarily constituted relevant defects). Ms Vice's evidence was that the presence of a technical non-compliance or deficiency did not, without more, establish a relevant defect. In her view, the question remained whether the identified deficiency gave rise to a building safety risk capable of causing harm to persons in or about the building.

C35. The Applicant's case was not limited to allegations that cavity barriers were absent. Rather, it contended that cavity barriers had in some locations been inadequately specified, improperly installed, incorrectly detailed or otherwise failed to provide the level of compartmentation and fire resistance intended by the design. Particular reliance was placed upon the evidence concerning Envirograf cavity barriers within the rainscreen wall constructions.

C36. The Applicant contended that these deficiencies, when considered in conjunction with the combustible materials present elsewhere within the façade, materially increased the potential for fire spread through the external wall system.

Balcony constructions

C37. The Applicant additionally alleged that combustible balcony components constituted relevant defects. These allegations extended to timber balcony decking, timber louvred screens, timber enclosure panels and other combustible balcony features.

C38. The Applicant's case was that these elements were capable of facilitating vertical and horizontal fire spread across the external elevations and between residential storeys. It contended that the balcony arrangements therefore formed part of the wider external wall defects requiring remediation.

C39. Ms Vice accepted that the timber on balconies "may cause an increase in the rate of fire spread in the area" and confirmed this was a relevant defect.

Conclusions on relevant defects

C40. In his report, Mr Davis concluded that "prior to the remediation works, there were some non-compliances in respect of the Functional Requirements of the Building Regulations 2000, and of Approved Document B 2002," specifically non-compliance with B3, B4(1), and the provisions of ADB 2002. He stated that the defects were "fundamental and endemic in nature, relating as they did to the insulation that was used across the Property, combustible timber elements, a lack of firestopping and the ineffective cavity barrier provision". In summary, Burton Place as built suffered from multiple, systemic failures to comply with the Building Regulations 2000 and ADB 2002 across Requirements B3(1), B3(2), B3(3), B3(4), and B4(1), encompassing defective cavity barriers, combustible materials in the external wall system, lack of structural fire protection, compartmentation breaches, and inadequate fire-stopping.

C41. We address the meaning of "relevant defect" and "building safety risk" in Part 2 of this Decision and do not repeat that analysis here. Applying the principles set out there, we are satisfied that the defects identified at Burton Place are capable of constituting relevant defects. The relevant question is not whether the associated risk was tolerable, intolerable, material or insignificant. Rather, it is whether the matters complained of created a risk to the safety of people in or about the building arising from the spread of fire. For the reasons explained in Part 2, we reject R1-4's contention that a more demanding threshold applies.

C42. We are satisfied that the Applicant has established the alleged defects on the balance of probabilities. We place substantial weight on the contemporary investigations undertaken by BWP, DFC, Wintech, Fleetwood and others, together with Mr Davis's review of that material. Further corroboration is provided by the fact that the identified defects were subsequently remediated and that funding for those works was approved following technical and eligibility scrutiny. Although neither circumstance is determinative, each adds significant weight to the contemporary evidence, particularly in the absence of expert evidence positively undermining the underlying findings. For the reasons given in Part 2, it was proper to rely upon those investigations. The fact that every underlying observation could not be independently replicated years later did not deprive the contemporary record of evidential weight.

C43. That evidence established combustible materials within multiple external wall constructions, defective or absent cavity barriers, deficiencies in fire-stopping and compartmentation, combustible balcony components, and additional combustible materials associated with interfaces, openings and structural junctions. Those matters created routes for fire spread and therefore gave rise to building safety risks. Ms Vice's concessions concerning Wall Types 1 to 3, the Talbot Mill interface and the balcony elements provided further support for that conclusion, although our finding does not depend upon those concessions. We find that the alleged relevant defects identified above are established.

Remediation works

Overview

C44. The remediation works undertaken at Burton Place involved the removal and replacement of substantial parts of the external wall system. The project ultimately extended beyond the replacement of the original timber cladding and included works to the external wall build-up, cavity barriers, insulation, windows, balcony doors, balconies and associated façade components. As is not unusual in building restoration or remediation projects, the scope of the works developed over time as further investigations were undertaken and as additional construction details became apparent following opening-up of the façade.

C45. The principal façade works involved the removal of the existing timber-clad external wall construction and its replacement with a new anodised aluminium rainscreen system. This required the removal of the timber cladding, timber support framework, insulation materials and associated façade elements. Replacement works included a new steel-framed support structure, non-

combustible insulation and a new aluminium-clad façade intended to preserve aspects of the original building's appearance and to respond to the conservation area context.

C46. The works also included the installation of new cavity barriers and fire-stopping measures throughout the façade system. These works were directed towards addressing deficiencies identified within the existing cavity barrier arrangements, compartmentation strategy and façade interfaces.

C47. Existing windows and balcony doors were removed and replaced as part of the remediation project. This element of the scheme was linked not only to the replacement of the external wall construction but also to issues relating to thermal performance, weatherproofing and acoustic performance. The adopted remediation strategy ultimately involved replacement of the windows and doors serving the apartments rather than their retention and re-use.

C48. Further works were undertaken to balcony structures and associated external features. Timber decking, timber screens, timber louvres and other combustible balcony elements were removed and replaced. Additional works were also carried out to façade interfaces, window surrounds, trims and other ancillary components affected by the remediation process.

C49. The scope of the project expanded during the course of the works. In particular, investigations undertaken following opening-up of the interface between Burton Place and Talbot Mill revealed previously concealed combustible construction and insulation. These discoveries led to additional remediation works affecting sections of the wall construction serving residential floors 1 to 5.

Applicant's position as to the appropriateness of the works

C50. Mr Davis considered that the remediation scheme represented an appropriate response to the relevant defects at Burton Place. His conclusion did not depend merely upon the presence of combustible timber cladding. He considered the external wall construction as an interacting system comprising combustible cladding and support structures, combustible insulation and SIPs construction, ineffective cavity barriers, deficiencies in fire-stopping and compartmentation, and combustible elements associated with balconies and openings. In his opinion, those features combined to create routes for fire spread through and over the external wall construction.

C51. His evidence was that the timber cladding had to be removed in order to address the combustible insulation, timber support system and ineffective cavity barriers behind it. Once removed, the cladding could not simply be reinstated as previously existing. A replacement non-combustible cladding system was required in order to comply with the regulatory requirements applicable to the new work[96]. To that extent, even if the original cladding were not viewed as

[96] Notably, regulation 7(2) of the Building Regulations, requiring cladding to have a European classification of A2.s1-d0 or A1 in respect of fire performance.

requiring removal in isolation, its removal and replacement were a necessary consequence of remedying the defects within the wall system.

C52. Mr Davis also regarded the various timber elements forming part of the external wall and balcony arrangements as creating what he described as a "chimney effect". He identified the interaction between the timber construction, ineffective cavity barriers, deficient fire-stopping, balcony decking and timber louvres as giving rise to a significant mechanism for fire spread. His opinion was therefore directed to the performance of the combined construction rather than to the combustibility of any single component considered in isolation.

C53. Mr Davis accepted that the replacement of the windows and balcony doors was not required for fire-safety reasons merely because the windows and doors were themselves defective. His evidence was instead that their replacement followed from the selected method of reconstructing the wall. The existing components were supported within, and integrated with, the SIPs and surrounding façade construction. Once that construction was removed back to the primary steel frame, the windows and doors could not realistically be treated as freestanding items capable of straightforward retention and reinstatement.

C54. We bear in mind the limits of Mr Davis's evidence. He did not purport to offer opinions on architectural design, planning, acoustics, thermal performance or quantum. Nor did he suggest that the scheme adopted was necessarily the only conceivable response. His evidence was that, viewed from a fire-engineering perspective, it fell within the range of reasonable professional responses to the defects which had been identified. Whether particular components could practicably have been retained, and whether their retention would have produced a less expensive but technically coherent scheme, required input from other disciplines.

C55. That distinction is important. Mr Davis's inability to define the precise upper or lower boundaries of the reasonable range did not undermine the opinion which he was qualified to give. The Tribunal was not required to identify an optimal scheme in the abstract. The relevant question was whether the scheme actually selected constituted a reasonable response to the building as it was then understood, taking account of the interaction between its wall constructions and the additional matters revealed through intrusive investigation and opening-up.

R1-4's objections to the scope of the remediation works

C56. Although R1-4 accepted that Burton Place was affected by relevant defects requiring remediation, they disputed whether the scope of the adopted remediation scheme was necessary to address those defects. Their case was that the project developed into a comprehensive façade replacement scheme extending beyond the works required to remedy the identified building safety risks.

C57. A recurring theme of Ms Vice's evidence was that the existence of combustible materials within an external wall system does not automatically require their removal. Consistently with her wider evidence regarding building safety risk,

she considered that the appropriate enquiry was whether particular materials or construction details created an unacceptable route for fire spread and, if so, what remedial intervention was necessary to address that risk. Her criticism was not that nothing required remediation, but that the adopted scheme proceeded from an assumption that combustible materials should wherever possible be removed rather than considering whether alternative measures might adequately control the relevant risk.

C58. In particular, Ms Vice questioned whether wholesale replacement of significant elements of the external wall construction was required where other approaches might have achieved the same fire-safety objectives. She drew attention to the possibility of retaining certain existing components whilst replacing defective insulation, cavity barriers and fire-stopping arrangements. Her evidence was that the adopted scheme did not sufficiently distinguish between components which contributed to the relevant defects and components which could potentially have remained *in situ*.

C59. This criticism extended to the treatment of the SIPs wall construction. Ms Vice considered that alternative approaches involving encapsulation or over-boarding warranted consideration and that wholesale removal and reconstruction had not been demonstrated to be the only appropriate response. Whilst she accepted that combustible materials were present within the construction, she questioned whether complete replacement necessarily followed from that fact.

C60. Similar considerations informed her evidence regarding the replacement of windows and balcony doors. R1-4 contended that these elements were replaced as part of the adopted remediation strategy but disputed whether their replacement was itself required in order to remedy the relevant defects. Their position was that the Applicant had not demonstrated that the relevant fire-safety objectives could not have been achieved whilst retaining some or all of those components.

C61. R1-4 advanced a similar argument in relation to Wall Type 3. Whilst Ms Vice accepted the need to address the combustible insulation and cavity-barrier issues affecting that construction, she questioned whether all elements of the wall assembly required replacement and contended that some existing components might potentially have been retained.

C62. More broadly, R1-4 relied upon the evolutionary history of the project. They observed that the scope of the works expanded substantially as investigations progressed and additional construction details came to light. Whilst accepting that some expansion of scope was a natural consequence of intrusive investigations, they contended that the final scheme extended significantly beyond the work necessary to address the original fire-safety concerns identified at the building.

C63. R1-4 also relied upon the evidence that parts of the timber façade were already exhibiting deterioration before the full extent of the post-Grenfell investigations had been carried out. They submitted that the adopted scheme did not always distinguish clearly between works required to remedy relevant defects and

works which addressed the condition, durability or future maintenance requirements of the original façade. Their case was that the final scheme incorporated elements directed towards broader renewal of the building envelope rather than the remediation of building safety risks alone.

C64. Accordingly, the essence of R1-4's case was not that Burton Place could or should have been left untreated. Rather, it was that the adopted scheme represented one of several possible responses to the relevant defects and that the Applicant had not demonstrated that the full scope of the works undertaken was necessary in order to achieve an acceptable level of fire-safety.

Conclusions on the scope of the works

C65. We are not persuaded by R1-4's criticisms of the scope of the remediation works undertaken at Burton Place. Whilst their submissions identified a number of matters which properly require scrutiny, we are satisfied that the scheme ultimately adopted fell within the range of reasonable professional responses to the relevant defects affecting the building.

C66. We begin with Ms Vice's central proposition that the mere presence of combustible materials does not automatically require their removal. We accept that proposition as a matter of principle. The existence of combustible materials within an external wall construction does not, without more, dictate the nature or extent of any remediation scheme. However, we do not consider that the Burton Place project can properly be characterised as a simple exercise in removing combustible materials wherever they happened to be found.

C67. As we have already explained when considering the existence of relevant defects, the external wall system incorporated a combination of combustible materials, defective or absent cavity barriers, deficiencies in fire-stopping and compartmentation, and other features capable of facilitating fire spread. Those deficiencies affected multiple wall constructions and associated building elements. The significance of the identified defects therefore lay not in any individual component viewed in isolation, but in the performance of the external wall system as a whole. In our view, this was a theme which emerged consistently from the contemporaneous investigations and from Mr Davis's evidence.

C68. Nor are we persuaded that the adopted scheme was inappropriate merely because less intrusive interventions could be contemplated. Ms Vice referred to encapsulation, over-boarding, selective retention of components and more limited replacement of insulation or cavity barriers. Those possibilities were not developed into an integrated scheme addressing the several wall types, the connection between the external wall and the windows and doors, the balcony construction, the Talbot Mill interface, the planning context or the further construction revealed during the works. Nor was any such scheme developed beyond the level of hypothesis. Ms Vice identified a number of respects in which different choices might have been made, but no coherent alternative remediation strategy was advanced identifying which elements could realistically have been retained, how the remaining defects would have been addressed, or how the resulting scheme would have provided an equivalent and

practicable response. In the absence of such evidence, those criticisms remain hypothetical rather than demonstrative.

C69. We accept that earlier project documents contemplated more limited intervention and that DFC recommended a cost-benefit exercise before selection of the preferred course. Those matters justified careful scrutiny of the project's development. They did not demonstrate that the earlier options remained viable after the later intrusive investigations, the Wintech and Fleetwood assessments and the opening-up undertaken during the works. A theoretical construction technique is not, without more, a practicable alternative scheme for this building.

C70. We also note that questions about proportionality, cost and potential alternative approaches were raised during the project itself, including within the BSF approval process. Internal Homes England correspondence expressed concern about the expense and disruption associated with the proposed scheme and suggested that a less intrusive solution might exist. Encapsulation was specifically mentioned as a possibility which might merit consideration. We do not disregard that material. It demonstrates that concerns of the kind now advanced by R1-4 were being considered contemporaneously rather than being developed solely for the purposes of this litigation. However, the existence of a suggestion that a cheaper solution might be available is not evidence that such a solution was in fact technically viable, capable of satisfying the relevant fire-safety, planning and performance requirements, or materially less expensive than the scheme ultimately adopted.

C71. The evidential history was one of an incomplete understanding becoming progressively fuller. The expansion of the works is better explained by the discovery of additional combustible construction, interfaces and cavity-barrier deficiencies than by any loss of focus upon the remediation of relevant defects. It would be unsafe to compare the final scheme with an earlier proposal formulated before the composition of the external walls was fully understood as though both addressed the same factual problem.

C72. Similar considerations apply to the criticisms concerning SIPs construction, Wall Type 3 and the replacement of particular façade components. The question is not whether individual elements of the completed scheme can be isolated and viewed differently in hindsight. It is whether the overall remediation strategy fell within the range of reasonable professional responses to the defects which had been identified. We are satisfied that it did.

C73. R1-4 also criticised works which went beyond the direct treatment of the relevant defects, particularly the replacement of windows and doors. The Applicant did not contend that those components were themselves relevant defects. Its case was that their replacement formed a necessary part of the façade strategy reasonably adopted. Wintech concluded that the existing windows and doors could not provide the thermal performance required for the replacement façade. Fleetwood considered their retention and reuse but regarded that course as difficult, time-consuming and potentially more expensive than replacement. More generally, the retention and reuse of existing façade elements carried its own practical difficulties, including the risk of

damage during removal, uncertainty as to the performance and durability of re-installed components, and the potential absence of equivalent warranties or assurances available in respect of a newly constructed façade system. Significantly, no evidence was adduced demonstrating how a scheme based upon selective retention and reuse would have addressed those practical difficulties whilst still providing an equivalent and warrantable façade solution. Ms Vice did not profess expertise in the architectural, thermal and façade-engineering matters underlying the design team's conclusions. We accept that, once the wall was to be dismantled and reconstructed, replacement of the integrated windows and doors fell within the range of reasonable professional responses.

C74. The new external wall also had to provide a lawful and functional replacement system, meeting the planning, thermal, acoustic, structural and weatherproofing requirements applicable to the work. Expenditure necessary to provide a lawful and functional replacement façade did not become unrelated betterment merely because the completed construction performed more satisfactorily than the defective construction which it replaced.

C75. Similar considerations apply to other consequential works. The evidence established that removal of blinds, decking and associated components flowed from the implementation of the remediation strategy. Whilst Ms Vice suggested that some items might potentially have been reinstated, no alternative scheme was developed demonstrating how the identified defects could have been effectively remediated whilst retaining those items. We therefore accept that these elements formed part of the remediation strategy adopted for the external wall system, rather than constituting separate or unrelated works.

C76. We also reject the submission that the eventual remediation project can properly be characterised as merely a maintenance scheme in another guise. We accept that concerns regarding the condition of the timber façade pre-dated the Grenfell Tower fire and that some form of replacement programme was under consideration before the full extent of the fire-safety issues became apparent. However, that fact does not accurately describe the project which was ultimately undertaken. By the time the remediation strategy crystallised, investigations had identified a range of defects extending well beyond deteriorating timber cladding on the surface of the external walls. The project had become concerned with combustible insulation, cavity barriers, fire-stopping, compartmentation, balcony constructions, interface details and other defects affecting the external wall system. In our judgment, it would be artificial to characterise the resulting scheme simply as a programme of façade renewal.

C77. Drawing these matters together, we are satisfied that R1-4's criticisms identify issues which were capable of investigation and debate during the design process. They do not establish that the adopted scheme fell outside the range of reasonable responses available to the professionals responsible for developing it. Nor do they demonstrate that the project was directed principally towards maintenance, improvement or aesthetic objectives rather than the remediation of relevant defects.

C78. We therefore conclude that the remediation works undertaken at Burton Place were, in principle, an appropriate response to the relevant defects affecting the building.

Costs and funding

Remediation project and BSF funding

C79. The management company for the building, Burton Place (Manchester) Management Limited, assembled a professional team to investigate, develop and deliver the remediation project. Mainstay Group acted as property manager. Martin Arnold was appointed as quantity surveyor, Callidas as construction manager, BWP as employer's agent and Thomasons as project manager. The project also involved input from specialist consultants, including fire engineers, façade engineers, structural engineers, architects and other construction professionals.

C80. The remediation works were procured through a competitive tender process. The evidence of Mr Lynch was that tender submissions were obtained and analysed by the project's professional team. Tender analysis reports were produced and the preferred contractor recommended by the appointed quantity surveyor.

C81. A notable feature of the Burton Place remediation project was that, unlike the other six Buildings, the project proceeded on a design-and-build basis. Fleetwood was appointed not merely to carry out the works but also to develop the detailed design solution. Accordingly, design development continued after the appointment of the principal contractor and during the course of the works themselves. That procurement route distinguished Burton Place from the more traditional procurement models adopted elsewhere within the portfolio.

C82. Funding was obtained through the BSF. Applications were scrutinised by Cushman & Wakefield, acting as the Government's delivery partner. Both the proposed scope of works was reviewed and also the associated costs in order to assess eligibility and compliance with BSF requirements. Where the proposed scheme and costs were approved, a grant funding agreement was entered into and funding was released by way of staged milestone payments.

C83. The same process applied to subsequent changes in scope. Where additional works were proposed, the variations were reviewed by the project's professional team and quantity surveyors before being submitted to the BSF. Cushman & Wakefield then assessed the proposed variations, including both their cost and programme implications, before determining whether additional funding should be approved. This process was repeated throughout the life of the project as the remediation strategy developed and additional information became available.

C84. This remediation project was certainly expensive, and the costs also increased substantially over time. Earlier iterations of the remediation scheme were costed at approximately £9 million. As investigations progressed, additional defects were identified, the proposed remediation strategy developed and the

design continued to evolve. The project ultimately became considerably larger than those earlier estimates. It is, however, important to distinguish between the cost of the principal works contract and the overall project cost. The latter included not only construction costs but also professional fees, project management, construction management, quantity surveying, façade engineering, decant costs and other associated expenditure. The parties disagreed as to whether the progression between those figures had been adequately explained and whether the resulting expenditure was reasonable in amount.

C85. By February 2024, BSF approval documentation recorded a maximum approved funding sum for Burton Place of approximately £23 million, reflecting increases in costs during the project through approved variations. According to Mr Lynch's summary of the final BSF payment schedule, that funding was released through a series of milestone payments comprising pre-tender support (£775,170), a signed works contract tranche (£5,490,717), a building control approval tranche (£9,151,195), a 50% completion tranche (£3,979,293), an additional cashflow-easing payment (£2,285,490), a further interim payment (£172,537) and a practical completion tranche (£1,150,232), producing an overall approved funding figure of approximately £23.0 million.

C86. The quantity-surveying experts ultimately agreed that the invoiced costs and accruals attributable to Burton Place were £22,954,848 inclusive of VAT. The largest single element was the Fleetwood contract, which accounted for approximately £19.47 million inclusive of VAT. The balance comprised professional fees, construction management costs, quantity surveying, façade engineering, decant expenditure and other project-related costs.

C87. In relation to the contract costs mentioned above, it should be noted that the first-stage tender return was approximately £9.67 million (excluding VAT). Following the pre-construction services and design-development process, Fleetwood entered into a JCT design-and-build contract with a contract sum of approximately £15.23 million (excluding VAT). The quantity-surveying evidence indicates that Fleetwood's ultimate invoiced costs were approximately £16.22 million (excluding VAT), or £19.47 million inclusive of VAT.

R1-4's challenge to the remediation costs

C88. R1-4 submitted that Burton Place provides an example of a project whose scope and cost expanded substantially over time. They argued that the progression from an earlier scheme of approximately £9 million to a project attracting BSF approvals exceeding £23 million required close scrutiny. Whilst accepting that BSF approvals and professional review processes had occurred, they contended that those approvals did not of themselves establish reasonableness. Particular reliance was placed upon the increase in the Fleetwood design-and-build contract, the evolution of successive variations, the absence of contemporaneous material explaining certain cost increases, and the contention that elements of the final project were driven by maintenance, planning, thermal, aesthetic or other non-remediation considerations. The Tribunal was therefore invited to conclude that the Applicant had failed to

demonstrate that the full cost of the Burton Place project had been reasonably incurred in connection with the remediation of relevant defects.

Relationship between scope of works and cost

C89. We have already concluded that the works undertaken, including replacement of the windows and doors and other consequential elements, formed part of an appropriate remediation strategy. That conclusion does not determine whether the resulting expenditure was reasonable in amount, of course. It does, however, define the factual basis upon which the cost challenge must be examined. R1-4 cannot establish that the Burton Place costs were unreasonable merely by repeating their contention that a more limited scheme ought to have been adopted. Their challenge to the amount spent must be considered by reference to the scheme which we have found to have been a reasonable response to the defects.

C90. The escalation in the headline figures nevertheless requires explanation. The first-stage tender return was approximately £9.67 million excluding VAT. Following the pre-construction services and design-development process, Fleetwood entered into the design-and-build contract at approximately £15.23 million excluding VAT. Its ultimate invoiced costs were approximately £16.22 million excluding VAT. The overall project expenditure of £22,954,848 inclusive of VAT was higher still, but that figure included VAT and expenditure outside the Fleetwood contract, including professional, construction-management, quantity-surveying, façade-engineering, decant and associated project costs. The comparison between an initial tender return excluding VAT and an eventual whole-project cost including VAT therefore risks materially overstating the increase in the price of the principal works.

C91. This is not to diminish the scale of the increase. The contract sum itself rose substantially between the first-stage tender and execution of the contract. However, Burton Place was procured on a design-and-build basis. Fleetwood's first-stage return was not a fixed price for the final scheme subsequently built. Detailed design continued through the pre-construction period and, to an extent, during construction. The building was also progressively better understood as further intrusive investigations and opening-up identified additional combustible construction, interface defects and consequential work. The movement between the successive figures therefore reflected changes in design maturity and scope, rather than an uncontrolled increase in the price of an unchanged package of work.

C92. It is also important that the quantity-surveying experts agreed that the Burton Place procurement exercise was appropriate and reasonable. They agreed that a competitive tendering process had been undertaken and that it represented fair value reflective of the market at the time for the proposed works. That agreement does not extend automatically to every later addition or variation. It does, however, provide strong evidence that the project began from a properly tested commercial basis.

Professional and BSF scrutiny

C93. The later development of the contract and project costs was not left solely to Fleetwood. Burton Place had an extensive professional team, and changes to the works were considered through the project's professional and contractual administration before applications for additional funding were made.

C94. A second stage of scrutiny occurred through the BSF process. Applications for increased funding and variations were reviewed by Cushman & Wakefield on behalf of the Fund. Mr Lynch's evidence was that the process considered both eligibility and cost. His proposition was not that BSF approval conclusively established reasonableness, but that approval following review by the project quantity surveyor and an external cost consultant provided positive evidence that the expenditure had been professionally examined.

C95. Mr Lynch accepted that he had not reconstructed every variation from its underlying build-up and did not know precisely what technical material Cushman & Wakefield had considered in every instance. BSF approval could not therefore prove the reasonableness of every constituent figure. Equally, his opinion did not depend upon the bare fact that public money had been paid. He relied upon the combined weight of competitive procurement, professional contract administration, external cost review, successive funding decisions, invoices and payment records, and his own review of the available documentation. That approach accords with our reasoning in Part 2: BSF approval creates no presumption and places no expenditure beyond scrutiny, but contemporaneous professional review remains relevant and persuasive evidence of reasonableness, particularly in the absence of contradictory evidence.

Challenge based on the headline increase

C96. R1-4 placed particular emphasis upon the increase from a project initially described as costing about £9 million to one for which more than £23 million was eventually approved. We accept that the figures are striking. In closing, Mr Dennys KC described Burton Place as now "resplendent" but "extremely expensive", and drew attention to the extraordinary expenditure when divided by the number of flats. Both observations provide legitimate reason to scrutinise the result. They do not, on their own, prove that the expenditure was unreasonable.

C97. The difficulty lies in identifying the correct comparator. The initial figure did not price the fully developed scheme ultimately undertaken. It preceded important stages of design development and investigation and did not represent the eventual whole-project cost on a common VAT and fee basis. Nor did R1-4 provide an analysis demonstrating that the increase arose from excessive rates, duplicated expenditure, unjustified quantities or identified departures from the contractual pricing mechanism. The amount of the increase quite legitimately invited the question whether such a large increase was justified. However, R1-4 did not answer that question by identifying any excessive category of expenditure or any evidenced, viable and materially cheaper alternative.

C98. Nor did the per-apartment calculation answer that question. Dividing a building-wide remediation cost by the number of flats may illustrate the financial scale of the project, but it does not provide a valuation methodology. No benchmarking evidence was adduced to show that the cost per apartment exceeded that of a genuinely comparable project.

C99. Most importantly, R1-4 did not establish what lesser amount the project should reasonably have cost. Following the exclusion of Ms Allen's alternative-scheme costings, no admissible expert evidence identified a technically viable and appropriately designed alternative scheme for Burton Place, still less the saving which it would have produced. The assertion in closing that cheaper solutions "undoubtedly" existed remained a bare assertion. The Tribunal cannot convert understandable surprise at the scale of the expenditure into a finding that some unidentified portion of it was unreasonable. It may be that a materially cheaper and technically viable solution could have been devised. However, no such scheme was established by the evidence before us and no reliable assessment was provided of the saving which it would have achieved. The Tribunal's task is to determine the reasonableness of the scheme and expenditure actually proved, not to speculate about alternatives which were never sufficiently developed or evidenced.

Anodised aluminium, planning and alleged betterment

C100. R1-4 relied upon the selection of anodised aluminium cladding and upon the marked improvement in the appearance and performance of the completed building. We accept that this aspect of the project requires separate scrutiny. The evidence established that planning and conservation considerations influenced the development of the replacement façade. It did not establish that the planning authority had required the precise anodised aluminium system ultimately adopted or that no materially different façade could have secured planning approval.

C101. That limitation does not, however, establish that the additional expenditure was unreasonable. Once the existing external wall was to be removed, the management company required a non-combustible replacement capable of satisfying the applicable planning, façade-performance and durability requirements. Anodised aluminium was selected through the design process as a means of providing that replacement while retaining aspects of the architectural character of the original elevations. The relevant question is not whether some different material might conceivably have been approved, but whether the evidence establishes that the selected solution carried an unreasonable additional cost.

C102. R1-4 did not identify a materially cheaper substitute which was shown to satisfy the combined technical and planning requirements of the project. Nor did they isolate and quantify the additional cost attributable to the anodised finish or identify a discrete aesthetic enhancement capable of separation from the replacement façade. The completed building is undoubtedly different from, and in significant respects superior to, the building before remediation. That does not of itself establish that the cost of the selected façade was unreasonable.

C103. We therefore treat the planning evidence as part of the context in which the design decision was made, but not as proof that anodised aluminium was the only available solution. Our conclusion rests instead upon the absence of evidence demonstrating that the selected system carried an unreasonable premium over an identified, technically and legally viable alternative.

Maintenance and pre-existing deterioration

C104. Nor do we accept that the costs should be reduced because the original timber cladding had already deteriorated. It is common ground that concerns about bowing and loose timber panels pre-dated the post-Grenfell investigations, and that some form of phased maintenance or replacement programme had been contemplated. However, that proposal remained preliminary, had not obtained planning approval and was directed principally towards the visible condition of the outer timber panels. It did not comprise the scheme eventually undertaken.

C105. The final project addressed defects within the external wall build-up, including combustible insulation and timber support construction, ineffective or absent cavity barriers, fire-stopping and compartmentation deficiencies, balcony elements and the Talbot Mill interface. The removal of deteriorated outer cladding may have conferred a maintenance benefit, but that does not mean that the cost of dismantling and reconstructing the defective wall was incurred for maintenance purposes.

C106. Had it not been necessary to remediate the relevant defects at Burton Place, for which BSF funding was available, the management company may have undertaken and paid for some work to the deteriorating timber cladding anyway. But that does not establish that the cost of the remediation scheme actually delivered was unreasonable. The reasonableness of that cost is a stand-alone question, to be determined by reference to the work undertaken and the evidence concerning its procurement, valuation and administration. Any pre-existing intention or liability to carry out a more limited programme of maintenance may instead be relevant when the Tribunal considers whether it is just and equitable to require a particular Respondent to meet the reasonably incurred remediation expenditure. At that stage, it may be necessary to consider whether the BSF funding conferred upon the management company a benefit by meeting expenditure which it would probably otherwise have borne, and, if so, the nature and extent of that benefit and any impact on whether it would be just and equitable to order another person to pay. We do not determine those separate questions here.

The quantity-surveying evidence

C107. The quantity-surveying evidence provides a further and, in our view, decisive answer to the cost challenge. The experts agreed that £22,954,848 inclusive of VAT had been invoiced or accrued in relation to Burton Place. They agreed that the procurement exercise was appropriate and that the competitively tendered contract represented fair market value. The dispute was therefore not about whether the expenditure occurred, nor about the commercial reasonableness of the original procurement. It concerned principally the extent to which later

costs and professional fees could be accepted without the further primary substantiation which Ms Allen wished to see.

C108. Ms Allen's alternative assessment of the Burton Place costs is revealing. Notwithstanding her methodological criticisms, Ms Allen's specific adjustments to the non-decant expenditure were confined to a relatively limited number of items, principally certain legal, management, insurance and fire-consultancy fees. Her figures did not substantiate a case that the project's rise to an overall cost of approximately £22.95 million resulted from widespread overcharging or commercially unreasonable expenditure.

C109. Some of those adjustments related to prolongation, decant and professional-fee claims. We have considered those items carefully. R1-4 criticised the evidential basis for elements of the prolongation claim, contending that no critical path analysis had been undertaken and that insufficient material had been provided to establish causation and entitlement. Similar criticisms were advanced in relation to aspects of the decant costs and certain categories of professional fees. However, these challenges were not developed through a detailed alternative valuation demonstrating what reasonable sums should have been incurred. Consistently with the wider quantum dispute addressed in Part 2, the criticism was principally that further primary substantiation should have been provided before the full amounts were accepted. For the reasons already given, we do not consider that criticism sufficient to justify the reductions proposed by Ms Allen.

C110. More generally, Ms Allen's reservations were often expressed provisionally and by reference to the absence of further documents. For the reasons explained in Part 2, that approach had limited value in proceedings which required the Tribunal to reach a final conclusion on the evidence before it. A provisional reduction does not amount to a positive opinion that the cost was excessive. Still less does it identify the proper amount which a reasonable employer would have paid.

C111. This is especially important at Burton Place because Ms Allen did not identify a systemic pricing error capable of explaining the supposed excess. She did not demonstrate that Fleetwood's rates were above the market. She did not advance a concluded alternative costing of the design-and-build works materially below the invoiced amount. Nor did she show that the post-contract expenditure had escaped professional assessment. Her case was, in substance, that she would have wished to see more granular substantiation before giving unqualified approval to every item.

C112. We do not dismiss that concern. The documentary record was imperfect and the scale of the project made transparency particularly important. However, applying the approach set out in Part 2, the evidential question is not whether the Applicant could reproduce the level of documentation which might be expected in litigation over a contractor's final account. It is whether the available evidence, viewed as a whole, establishes that the costs were reasonably incurred. In our judgment it does.

Conclusion on Burton Place costs

C113. Standing back, Burton Place was an exceptionally costly project. The final expenditure calls for explanation and cannot be justified merely by pointing to the availability of public funding. In this case, however, the explanation is found in the scale and complexity of the external wall reconstruction; the progressive discovery of further defects; the design-and-build procurement route; the integration of windows, doors, balconies and other components with the wall system; the need to develop a replacement façade capable of meeting the applicable planning and technical requirements; and the professional and BSF scrutiny applied to the contract and subsequent changes.

C114. R1-4's challenge exposed legitimate reasons to scrutinise an exceptional level of expenditure. It did not, however, identify any substantial category of cost which was shown to be excessive in amount or unrelated to the remediation, nor did it establish that an identified, technically and legally viable alternative would have achieved the necessary result at materially lower cost.

C115. We therefore accept the Applicant's submissions on the Burton Place costs, substantially for the reasons given in Part 2. We are satisfied that the Applicant has established a *prima facie* case of reasonableness through the agreed competitive procurement, the project and funding records, the successive professional reviews, the evidence of payment and Mr Lynch's independent assessment. Ms Allen's provisional reservations and R1-4's reliance upon the headline increase in cost do not displace that case. We recognise that Burton Place remains an unusual case because of the scale of the expenditure ultimately incurred. However, once the Applicant had established a *prima facie* case of reasonableness, it was necessary for R1-4 to identify evidence capable of displacing it. In our judgment they did not do so. The ultimate burden of establishing that the expenditure was reasonably incurred remained with the Applicant throughout, and we are satisfied that it discharged that burden.

C116. We find that the sum of £22,954,848 inclusive of VAT was reasonably incurred in remedying, or otherwise in connection with, the relevant defects at Burton Place.

APPENDIX D

CHIPS BUILDING



Description

D1. Chips Building is a mixed-use residential development at 1 New Islington, Manchester. It was designed by Alsop Architects and completed between 2005 and 2008 as part of the New Islington regeneration project. The building is distinctive in appearance, comprising a long rectangular structure broken into a series of projecting and recessed sections or "chips", from which it derives its name. It extends for more than 100 metres in length and rises to approximately 30 metres at its highest point. Residential accommodation is provided above ground-floor commercial units.

D2. The original external wall construction comprised an internal lining of plasterboard fixed to a steel-framed (SFS) backing wall containing mineral wool insulation. Externally of that were a sheathing board, a breather membrane, Kingspan Kooltherm K15 insulation, a ventilated cavity and Trespa non-fire-rated cladding panels fixed to a rail system. The external wall also incorporated decorative lettering fixed to the façade which formed an integral part of the building's architectural identity and remained a significant feature of the later remediation works.

Investigation of the external wall construction

D3. Following the Grenfell Tower fire, the construction and fire performance of Chips became the subject of investigation. RMG, the building's managing agents, worked with Thomasons and DFC to review the building. Historical

design and construction information was also obtained from Urban Splash and other sources as part of that process.

D4. The first intrusive investigation was carried out by Thomasons in October 2017. Opening-up works were undertaken at a location between the second and third floors of one of the building's 'chips'. Thomasons recorded the apparent external wall build-up and identified Kingspan Kooltherm K15 insulation and non-fire-rated Trespa cladding panels. The investigators also reported that cavity barriers were not identified at the location opened up, whether at floor levels, party-wall locations or around adjacent windows. Thomasons concluded that the wall construction would not comply with Approved Document B because of the combustible insulation and cladding materials identified and recommended that a qualified fire engineer undertake a holistic assessment of the building.

D5. That recommendation led to the preparation of a fire engineering assessment by DFC dated 9 November 2017. DFC adopted the findings of the Thomasons investigation and identified three principal concerns: the apparent absence of cavity barriers, the combustibility of the external cladding panels and the presence of combustible insulation within the cavity. DFC had identified external envelope meeting minutes which suggested that the construction team had proceeded on the basis that cavity barriers were only required between commercial and residential storeys at the bottom 'chip', and at 18m above ground level in the top 'chip' – that is, not at each floor level or in line with compartment walls. That had supported their assumption that the intrusive investigations carried out by Thomasons were representative of the external wall construction throughout the building. DFC concluded that, if the external wall system became involved in fire, fire spread could be more extensive and more rapid than in a building complying with the guidance in Approved Document B. The report identified concerns relating to means of escape, compartmentation between flats, firefighting operations and space separation and concluded that mitigation measures were required.

D6. The findings of the Thomasons investigation and the subsequent DFC assessment led to the adoption of interim fire-safety measures. According to the evidence of Justin Herbert, RMG's managing director, the issues identified at Chips were regarded as sufficiently serious to require temporary measures pending a longer-term solution. A waking watch was introduced, the existing stay-put strategy was replaced by an evacuation strategy, and a building-wide alarm system extending into individual apartments was installed. Mr Herbert's evidence was that these measures followed recommendations made by DFC and discussions involving Greater Manchester Fire and Rescue Service.

D7. DFC did not recommend a single remedial solution. Rather, it identified a range of possible mitigation measures. These included replacement of parts or all of the external wall construction, sprinkler protection, simultaneous evacuation arrangements, corridor protection measures and lobby protection measures. DFC considered a number of combinations of those measures and assessed their effectiveness in reducing the identified fire-safety risks. It observed that complete replacement of the external wall system would provide the most

comprehensive mitigation option, whilst also considering alternative life-safety measures.

D8. By October 2020, Thomasons had prepared a specification and schedule of works for the proposed recladding project. Amongst other matters, that specification addressed the replacement of the building's distinctive external lettering. Correspondence exchanged between architects, planners and building control officers in late 2020 records discussions concerning whether graphics applied to replacement cladding panels could satisfy the applicable fire-performance requirements and whether alternative aluminium lettering would be required. These discussions became a significant feature of the development of the remediation scheme.

Relevant defects

D9. The Applicant's case was that the original external wall construction contained a combination of defects which gave rise to a building safety risk. The rainscreen wall system comprised non-fire-rated Trespa HPL cladding panels fixed over Kingspan Kooltherm K15 insulation within a ventilated cavity. The Applicant contended that those materials, together with absent or inadequate cavity barriers and combustible sheathing board, created a mechanism by which fire could spread rapidly through and over the façade.

D10. Mr Davis considered that those features should not be viewed as separate risks. They formed part of a single external wall system which provided fuel for fire growth without adequate means of inhibiting its spread. Once the Trespa cladding and K15 insulation had been identified, extensive remediation was, in his opinion, required irrespective of what further investigation might reveal about cavity barriers elsewhere in the building.

D11. R1-4 challenged the alleged extent of the cavity-barrier deficiencies. Thomasons had investigated only a small number of locations within a building extending for more than 100 metres, while contemporary design documents indicated that cavity barriers had been specified at locations which had not been inspected. Further photographs and records disclosed during the proceedings showed cavity barriers to be absent at some additional locations, but the parties continued to disagree about whether those findings were representative of the building as a whole.

D12. By the conclusion of the expert evidence, however, there was substantial common ground about the external wall system. Ms Vice accepted that the combination of non-fire-rated Trespa cladding and K15 insulation created a building safety risk, which would be exacerbated by deficient cavity barriers. She considered Chips probably the most dangerous of the seven Buildings in terms of its external wall materials. She also accepted that further investigation of the cavity barriers would not have altered her conclusion that the building required remediation.

D13. There was therefore little dispute that the original external wall system contained relevant defects requiring substantial remediation. The remaining cavity-barrier dispute concerned the extent to which their absence had been

established across the building, rather than whether the Trespa and K15 façade presented a building safety risk.

D14. Further matters were identified when the original construction was opened up during the works. They included issues relating to concrete shear walls, the secondary steel framing system, the support arrangements for the lettering, lightning protection and scaffold tie installations. Their significance lies principally in the dispute about the scope of the works undertaken in response to them, to which we return below.

Remediation works

Overview of the works

D15. The remediation scheme involved the removal and replacement of the original external wall system. The works included the removal of the Trespa rainscreen cladding, insulation, cavity construction and associated components, followed by the installation of a new system incorporating replacement insulation, cavity barriers, fire-stopping and cladding materials. The replacement façade was designed and implemented as a complete external wall solution rather than as a series of localised repairs.

D16. The scheme also addressed the building's distinctive external lettering. Various means of reproducing the original graphics were considered during the design process. The scheme ultimately incorporated aluminium lettering fixed to the replacement façade.

D17. Further opening-up during the works revealed matters affecting the secondary steel framing, concrete shear walls, lightning protection, scaffold tie locations and interfaces with the replacement façade. Additional works were undertaken in response.

D18. The principal façade works were designed during 2020 and commenced thereafter. Unlike the other Buildings, the Chips project had not reached practical completion by the final hearing. The original façade had substantially been replaced, however, and only a relatively limited amount of work remained outstanding. Completion was anticipated in the near future.

R1-4's challenge to the appropriateness of the works

D19. R1-4 accepted that Chips required substantial façade remediation. Their challenge concerned the extent of the scheme and whether every element was reasonably required.

D20. The replacement lettering was a particular point of contention. The project team initially investigated whether the graphics could be reproduced using cast vinyl applied to the replacement panels. That solution depended upon the proposed assembly satisfying the necessary fire-testing regime. PPC aluminium lettering, which could achieve the required fire classification without further testing, had been identified as the alternative and was ultimately adopted.

D21. R1-4 contended that the aluminium solution was disproportionately elaborate and that less expensive alternatives should have been pursued. The possibility of using aluminium had been identified in the original specification; neither the application of regulation 7(2) of the Building Regulations nor the risk that vinyl testing might fail arose unexpectedly during construction. R1-4 maintained that further alternatives, including possible planning amendments, had not been adequately explored.

D22. Ms Vice agreed that alternatives merited further consideration and questioned whether aluminium lettering represented the only reasonable solution. She was not, however, an architect or planning expert. She could not say whether another treatment would have been technically suitable, obtained planning approval or satisfied the applicable fire-performance requirements. No developed alternative was advanced.

D23. R1-4 also objected to the treatment of matters such as the concrete shear walls, secondary steel framing, lettering supports, lightning protection and scaffold tie arrangements. They submitted that these had been advanced as additional defects when they were more properly characterised as consequential works or construction issues encountered during remediation. They also relied upon the limited evidence explaining why some of the works were required.

D24. A more limited disagreement concerned the removal of the sheathing board and K15 insulation. Ms Vice considered that these components might, in principle, have been retained within an appropriately designed replacement wall system. She accepted, however, that the feasibility of doing so depended upon architectural and structural matters outside her expertise and that no such alternative system had been designed. Mr Davis considered that the wall had to be approached as an integrated system and that retention was not a realistic solution.

D25. The Applicant responded that none of those criticisms undermined the need to remediate the external walls as a whole. No workable alternative scheme retaining the sheathing board or insulation had been produced. The project team had investigated alternatives to the aluminium lettering before adopting a solution capable of meeting the fire-performance requirements. Many of the additional works were consequential upon matters encountered once the original façade had been opened up.

Conclusion on the appropriateness of the works

D26. We accept that the pre-remediation investigation of the cavity barriers was inadequate to establish their absence throughout the building. That does not undermine the appropriateness of substantial façade remediation. The accepted combination of non-fire-rated Trespa cladding and K15 insulation presented a building safety risk, irrespective of the precise extent of the cavity-barrier deficiencies.

D27. Nor does the suggested retention of the sheathing board and K15 insulation demonstrate that the scheme was inappropriate. Those possibilities were not shown to be technically impossible, but no evidence established that a

replacement system incorporating them could in practice have been designed, approved and constructed. It is insufficient merely to identify a theoretical alternative to a scheme which was actually developed and implemented.

D28. The position is more difficult in relation to the lettering. Once the original cladding was removed, the loss of the original lettering could not simply be ignored. It formed a distinctive part of the building's design, and it was reasonable for the remediation scheme to address it. The question is not, therefore, whether some expenditure upon the lettering was justified, but whether the particular solution adopted fell outside the range of reasonable responses available to the project team.

D29. That did not entitle the project team to reproduce the lettering without regard to proportionality. The reasonable course was to adopt a method which met the applicable planning, architectural and fire-performance requirements at a proportionate cost.

D30. We are unable to determine with confidence whether the aluminium scheme represented the least expensive reasonable means of achieving that objective. There were, however, sensible reasons for its adoption. The project team initially explored a cast-vinyl solution, but that depended upon the proposed assembly satisfying the necessary fire-testing regime. The aluminium lettering was the identified alternative and could achieve the required fire classification without further testing. The project team also considered it necessary to preserve the appearance of the original lettering. Those matters provide an explanation for the solution adopted, although they do not demonstrate that it was the only proportionate solution available.

D31. The cost of the aluminium lettering nevertheless gives us considerable pause. The lettering was not itself a relevant defect. Its reproduction was not directed to eliminating a building safety risk, although some treatment of the façade was required once the original cladding had been removed. The expenditure instead preserved a distinctive feature of the building's architectural appearance. Against that background, the inclusion within the partly publicly funded scheme of an aesthetic element of such exceptional cost is a notable feature of this case.

D32. Ultimately, however, R1-4 did not demonstrate that a cheaper acceptable solution was in fact available. Ms Vice identified possible alternatives but could not say whether they would have been technically suitable, would have satisfied the applicable fire-performance requirements or would have secured planning approval. R1-4 called no architectural or planning evidence and advanced no developed alternative design. We cannot infer from the scale of the expenditure alone that a materially cheaper solution could have achieved the required result.

D33. We therefore accept that the inclusion of replacement lettering within the remediation scheme was reasonable. The proportionality of the particular solution adopted is less clearly established, but the reasons advanced for its selection were not displaced by evidence of a viable alternative. We are not satisfied that the aluminium lettering fell outside the range of reasonable

responses open to the project team. We consider separately below whether its costs were reasonably incurred.

D34. Many of the further matters encountered during construction were more accurately characterised as consequential works than as freestanding relevant defects. That does not make the works inappropriate. Once the façade replacement proceeded, it was reasonable to address matters which had to be resolved to install the new system safely and effectively. Although the evidence about some items was limited, R1-4 did not identify particular works which could safely and practicably have been omitted.

D35. We are accordingly satisfied that the works implemented fell within the range of reasonable and appropriate responses to the relevant defects at Chips.

Costs and funding

Remediation costs and sources of funding

D36. The Chips remediation project was managed by RMG, with Thomasons acting in project management and quantity surveying roles. Following development of the remediation scheme, the principal construction contract was awarded to Novo Facades for an original contract sum of £6,374,748, excluding VAT. The overall cost subsequently increased as a result of variations, additional works, delay-related claims and associated professional fees.

D37. Funding came from three principal sources. The BSF approved funding of £4,705,670. Liberty Managing Agency Ltd contributed £6,320,750 under a latent-defects insurance policy. Places for People, which owned a number of apartments within Chips, contributed a further £215,578. The quantity-surveying experts ultimately agreed that the total cost incurred, or expected to be incurred, in carrying out the project was £11,241,998. Third-party contributions therefore met a substantial majority of the overall project cost, leaving less than half to be funded by the BSF.

D38. The first BSF award was approved in April 2021. Further applications were made as the scope, programme and projected cost of the works developed. The funding history comprised a succession of variation submissions, revised cost plans and additional approvals extending over several years.

D39. The Applicant's case was that £2,023,311 of the approved BSF funding had been incurred by the date of the final hearing, while £2,682,359 remained to be incurred. The latter sum did not principally represent the cost of substantial areas of façade which remained to be reconstructed. The physical works were approaching completion. It related instead to the unresolved financial consequences of the project, including contractor variations, extension-of-time and loss and expense claims, scaffolding and preliminaries costs, associated professional fees and the resolution of the Novo Facades final account. Related claims involving Thomasons and RMG also remained outstanding.

The parties' positions

D40. By the end of the hearing, the quantity-surveying experts had achieved substantial agreement about the relevant figures. They agreed the overall cost of the project, the extent of the third-party contributions and the amounts already incurred or expected to be incurred. Nor was there any material dispute about the chronology of the BSF applications and grant approvals. Their remaining differences concerned the conclusions to be drawn from that material.

D41. The Applicant relied upon the scrutiny applied through the BSF approval process and contended that the approved expenditure provided persuasive contemporaneous evidence of reasonableness. R1-4 maintained that BSF approval was not determinative and that the Tribunal was still required to consider whether particular costs had been reasonably incurred. We have addressed that overarching dispute, including R1-4's criticisms of the supporting documentation and Ms Allen's ability to verify particular claims, in Part 2 of this Decision.

D42. The outstanding Chips-specific challenges were narrower. They concerned the cost of the replacement aluminium lettering; variations and additional works arising during the project; elements of Novo Facades' extension-of-time, loss and expense, preliminaries and scaffolding claims; and the associated professional fees. Many of those items formed part of the unresolved final account position at the date of the hearing.

D43. Although the parties therefore disagreed about a number of individual cost items, the dispute ultimately concerned only a relatively small proportion of the overall Chips project. The quantity-surveying experts substantially agreed the overall project cost, the level of BSF funding and the extent of the third-party contributions. The remaining objections focussed upon particular categories of expenditure said either to be insufficiently justified or to reflect choices which R1-4 contended were more expensive than reasonably necessary. We consider those issues below.

The lettering costs

D44. R1-4's most substantial challenge concerned the costs associated with the replacement lettering. The evidence established that the direct contract variation associated with the lettering was approximately £420,000. R1-4 contended that the true cost attributable to the lettering was materially higher once costs included within the original contract, associated professional fees and the consequences for the duration of the project were taken into account. Indeed, Ms Vice's impression was that the actual costs associated with the lettering were closer to £1 million. Whatever the precise total, it was clear that the expenditure concerned was unusually substantial.

D45. Unlike most of the other disputed costs, Ms Allen's criticism was not merely one of substantiation. She considered that the expenditure appeared unusually high for a feature whose purpose was predominantly aesthetic rather than the

remediation of a relevant defect. She questioned whether sufficient consideration had been given to less expensive alternatives.

D46. We addressed the merits of that challenge in the preceding section. The lettering costs require particular scrutiny because of their scale and because the lettering itself was not a relevant defect. Nevertheless, R1-4 did not establish that a materially cheaper solution satisfying the relevant planning, architectural and fire-performance requirements was in fact available. The critical difficulty for R1-4 was the absence of a viable alternative rather than the identification of theoretical alternatives. We are therefore not persuaded that the lettering costs were unreasonably incurred.

Variations and additional works

D47. R1-4 challenged a number of variations and additional works arising during the course of the project, including matters relating to concrete shear walls, secondary steel framing, lightning protection and scaffold tie arrangements. Their position was that several of these items were more accurately characterised as consequential works than as remediation of relevant defects.

D48. The Applicant accepted that many of these matters were consequential works. Its case, however, was that they were encountered during the implementation of the remediation scheme and had to be addressed if the replacement façade was to be properly installed and completed.

D49. We accept that a number of these items are more naturally described as consequential works than as defects in their own right. However, that distinction does not materially affect the outcome. Once the replacement façade scheme was adopted and the original construction opened up, it was inevitable that additional matters requiring resolution would emerge. R1-4 did not identify any significant category of work which ought not to have been undertaken at all.

D50. The scaffold-tie works provide a specific example of the nature of the remaining dispute. Ms Allen accepted that the rates claimed did not appear unreasonable if the underlying quantities were correct, but considered that the available material did not enable her to verify those quantities. Her objection therefore concerned substantiation rather than the necessity of the works or a positive opinion that the rates were excessive. That issue illustrates the broader distinction addressed in Part 2 between expenditure shown to be unreasonable and expenditure which Ms Allen felt unable positively to verify. For the reasons given there, we do not consider that this objection justifies a finding that the the scaffold-tie costs were unreasonable.

Novo final account, extension-of-time and loss and expense claims

D51. R1-4 also challenged elements of the unresolved Novo Facades final account, including extension-of-time, loss and expense, preliminaries and scaffolding-related claims. Reliance was placed upon Ms Allen's evidence that aspects of the supporting material were incomplete and that she was unable positively to verify certain elements of the claims.

D52. The Applicant relied upon the fact that these claims formed part of the live commercial resolution of the project and had been subjected to repeated review through the BSF process. It further relied upon the substantial convergence ultimately achieved between the quantity-surveying experts concerning the overall financial position of the project.

D53. We have already addressed the broader substantiation challenge in Part 2. So far as Chips is concerned, the dispute was ultimately less about the amount of the anticipated liabilities than about the quality of the supporting material and the methodology by which the disputed items should be evaluated. By the end of the hearing, the experts had largely agreed the overall figures associated with the unresolved final account position. We do not consider that the remaining evidential criticisms justify a finding that any material category of expenditure was unreasonable.

Professional fees

D54. R1-4 further challenged certain professional fees associated with the project, particularly where those fees were linked to the duration of the works or the existence of unresolved contractor claims.

D55. The Applicant's position was that a project of this scale and complexity inevitably required continuing involvement from project managers, quantity surveyors and other consultants, particularly given the evolving nature of the works and the unresolved final account position.

D56. We accept that professional fees of this nature were an inevitable feature of a remediation project of this scale. As with the contractor claims, the principal issue is not whether such fees should have been incurred at all, but whether they have been sufficiently evidenced and attributed to the project. We have addressed those broader evidential issues elsewhere. Nothing in the Chips-specific evidence persuades us that any material category of professional fee was unreasonable.

Conclusion

D57. Standing back from the individual items, we do not consider that the Chips-specific cost challenges justify a finding that the costs incurred, or to be incurred, in carrying out the remediation project are unreasonable. The lettering costs require the closest scrutiny because of their unusual scale and largely aesthetic purpose. However, for the reasons already given, no viable cheaper alternative was shown to exist. The remaining objections relate principally to consequential works, contractor claims and associated professional costs arising from the implementation of a remediation scheme whose necessity was substantially common ground. We are therefore satisfied that the costs associated with the Chips remediation project were reasonably incurred, or are reasonably to be incurred, in remedying or otherwise in connection with the relevant defects identified at the building.

APPENDIX E

MOHO BUILDING





Moho Building, before and after remediation.

Description

E1. Moho Building is a seven-storey mixed-use development on Ellesmere Street in Castlefield, Manchester. It was constructed in about 2006 and comprises 102 residential apartments, together with commercial accommodation at ground-floor level and underground parking. The building adjoins Burton Place, to which it is connected by the basement car park, and the two developments were constructed at broadly the same time.

E2. The name "Moho" is a derivative of the expression "modular housing", reflecting the fact that a distinguishing feature of this building is that it is composed of prefabricated steel-framed living pods/modules, manufactured

off-site by Yorkon and then assembled to a design by architects Shed KM[97]. The modules are supported above the ground-floor commercial accommodation on a transfer structure. The building is arranged around external access walkways and incorporates projecting dining modules, balconies and a prominent secondary steel frame fixed outside the main structure.

E3. Before remediation, Moho incorporated several distinct forms of external wall construction. The principal apartment façades were finished with a StoTherm Classic external wall insulation system, comprising acrylic render applied over combustible expanded polystyrene insulation outside the Yorkon modules. The building also incorporated separately detailed gable-end and walkway wall constructions. Those distinctions are important because the constructions differed in their physical arrangement and were assessed differently during the investigation process.

E4. At the walkway elevations, the rendered EPS system was not applied directly to the apartment modules. As constructed, it incorporated a cavity between the insulation and the outside face of the modules, with timber framing, steel cross-bracing and other components within or adjoining that void. The walkway slabs met the modular walls at each floor level. The adequacy of the fire-stopping and cavity barriers at those junctions later became a significant issue.

E5. The external appearance of the building is characterised by projecting dining modules, extensive glazing and a secondary steel frame which stood proud of the principal façade. Timber cladding was applied to parts of the dining modules, while timber louvres within the external steel frame screened the adjoining balcony areas. The alternating glazed, clad and louvred sections created a chequerboard arrangement across the elevations. There were additional areas of timber panelling at the Arundel Street and Burton Place elevations and around parts of the courtyard walkway façades.

E6. Timber was also used for balcony and walkway decking and for parts of the walkway soffits. Service risers were positioned against the rear walls of the apartments and were accessed from the external walkways and unconditioned corridor spaces. Although outside the apartments, the risers were integrated with the apartment façades: their side walls met the apartment walls and their rear faces were formed at, or immediately against, the external faces of the Yorkon modules. They enclosed electrical, water, drainage, ventilation and communications services serving the apartments. The building envelope therefore comprised an unusually complex combination of modular apartment construction, rendered insulation systems, cavities, structural steelwork, timber façade components, projecting dining modules, glazed doors and windows, access walkways and service installations.

E7. Moho lies within the Castlefield Conservation Area. Its modular construction, projecting dining modules and external secondary frame were important features of its architectural expression. In developing the replacement scheme, the design team sought to preserve those principal characteristics while replacing the original timber and rendered finishes with a different palette of

[97] R8 and R9 in these proceedings.

materials. Planning, architectural and façade-performance considerations therefore formed part of the development of the remediation scheme, in addition to the identified fire-safety concerns.

Investigations into the external wall construction

E8. Before the post-Grenfell fire-safety investigations began, Moho was already the subject of substantial maintenance proposals. By 2015, the matters under consideration included deterioration of intumescent coatings, external decorations and works to the external decking or its supporting frame. A major-works specification issued by June 2017 included external redecoration, repairs to timber cladding and patch repairs to intumescent coatings. Money was collected from leaseholders, although the evidence did not establish precisely which works had been completed before the later fire-safety investigation.

E9. The maintenance proposals reflected the condition of the building. The render had acquired a tired appearance; some timber cladding had warped, deteriorated or become detached; and the external intumescent coating had failed in places. The evidence did not establish comparable deterioration of the timber louvres. Following a balcony fire in February 2019[98], Mainstay (the building's managing agent) stopped the refurbishment because repaired or redecorated elements might shortly have to be removed as part of more extensive façade works. The remaining money collected from leaseholders was eventually refunded.

E10. Several professional advisers became involved. Thomasons undertook an early post-Grenfell review and reported in October 2017. BWP, which already knew the building through its work on maintenance and water-ingress issues, later coordinated the intrusive investigations, assembled the professional team and acted as project manager. DFC assessed the fire performance of the external wall constructions and advised on interim measures and permanent remediation. Shed KM and Wintech subsequently provided architectural and specialist façade input.

E11. Thomasons reported in October 2017 that, on the information then available, Moho presented a low risk when considering the fire-safety of the external walls and the associated risk to occupants. It nevertheless recommended that the building's fire risk assessment should address the construction of the external walls and any associated risk of fire spread.

E12. A small fire occurred on a balcony on or about 18 February 2019 after a discarded cigarette ignited a chair and other combustible materials. The incident prompted renewed examination of the external wall construction. Within days, Mainstay informed leaseholders that BWP and DFC had undertaken an initial investigation. Acting on DFC's advice, the Moho Management Company Ltd also introduced a waking watch and changed from a stay-put strategy to full evacuation. BWP then undertook intrusive façade investigations in March 2019.

[98] See paragraph E12 below.

E13. BWP selected opening-up locations at junctions where the design information indicated that mineral-wool firebreaks should interrupt the EPS insulation, including around structural steelwork passing through the façade. Its survey identified locations where intended firebreaks or cavity barriers were absent, interrupted or inadequately detailed. It also found that boards beneath the walkway soffits had been cut around structural cross-bracing without adequate fire-stopping.

E14. The inspections were not comprehensively plotted and did not establish the condition at every relevant junction. Nor did the evidence suggest that mineral wool was absent throughout the building. The significance of the survey was that the intended barriers had not been installed consistently at the locations examined. The survey provided an initial understanding of the wall construction, but did not reveal the full extent of the voids and fire-stopping deficiencies later exposed during the works.

E15. BWP, Mainstay and the management company sought original design and construction information from Urban Splash and Shed KM. A substantial quantity of technical material was provided and representatives of the original project team attended meetings. That process assisted the developing investigation, but did not identify a satisfactory explanation for the inconsistency between the intended firebreak arrangements and the conditions found on opening-up.

E16. DFC's assessment developed through a number of reports and revisions between 2019 and 2021. Its early advice distinguished between the walkway, typical front-elevation and gable-end constructions. Its principal concern was initially the typical front elevation, where it identified deficiencies at compartment-floor junctions and considered that the StoTherm Classic system was likely to require replacement. It did not initially recommend remediation of the walkway or gable-end constructions, provided that they had been built as specified, although unresolved questions remained about compartmentation and the continuity of firebreaks.

E17. By May 2021, DFC's assessment had broadened. It concluded that each principal wall construction required remediation to achieve compliance with Approved Document B and met the BSF eligibility criteria. It nevertheless recognised that alternative approaches might be available for the walkway and gable-end constructions. Its concern about the typical front elevation was sufficiently serious for it to conclude that a stay-put strategy was no longer appropriate.

E18. The developing fire-safety proposals overlapped with existing maintenance concerns. Some timber cladding had already deteriorated and partial replacement formed part of the earlier major-works proposals, although comparable deterioration of the timber louvres was not established. In September 2019, discussions involving DFC and the fire service contemplated retaining timber cladding on elevations accessible to firefighting appliances while replacing it at less accessible elevations where it was already failing.

E19. The external steelwork and the interfaces around the dining modules also required attention. Intumescent coating had deteriorated in some exposed locations, although the later professional advice did not require it to be reinstated throughout. Water ingress around the dining modules and balcony doors had also persisted despite patch repairs. Those maintenance and weatherproofing issues later became intertwined with the design of the replacement façade.

E20. As the technical investigations continued, the project moved from identifying defects to developing and funding a remedial scheme. The design process addressed not only the fire performance of the rendered walls, but also the treatment of the timber elements, dining modules, walkway finishes, windows and external doors. The BSF accepted some of those elements as eligible works and disputed or deferred others. We consider the development of the scheme and the funding decisions separately below.

E21. The pre-remediation history was therefore one of an evolving understanding of the building. The initial investigations identified inconsistent or defective firebreak arrangements within the rendered façades. DFC's early advice differentiated between the principal wall constructions, while its later assessment recommended remediation of each of them. At the same time, the proposed scheme had to address the practical interaction between the fire-safety works and pre-existing maintenance, weatherproofing and façade-performance issues.

E22. Further deficiencies emerged only after the works began. Opening-up revealed more extensive voids at the junctions between the apartment modules and walkway slabs and additional conditions behind the service risers. Those discoveries led to substantial variations to the remediation scheme initially conceived, including removal and reconstruction of the risers and the temporary decant of residents. We consider those matters in greater detail below.

Relevant defects – the parties' cases

E23. The alleged relevant defects were particularised in the parties' Scott Schedule by reference to separate wall constructions, building elements and works subsequently undertaken. Although that Schedule provides a useful framework, the parties did not present their cases as a series of entirely self-contained allegations. In particular, the Applicant relied upon the interaction between combustible materials, voids, penetrations and deficient measures for inhibiting fire spread. R1-4, for their part, emphasised the need to identify precisely the alleged defect, its location and the route by which it was said to cause a risk to people. We therefore summarise the competing cases theme by theme, in an order which broadly corresponds with the Scott Schedule but avoids separating matters which the parties treated as components of the same alleged fire-spread mechanism.

E24. The parties' general submissions about the statutory meaning of "relevant defect" are addressed in Part 2 of this Decision and are not repeated here. For present purposes, the Applicant contended that combustible materials,

deficient firebreaks, cavity barriers and fire-stopping created interacting routes for fire spread. R1-4 maintained that the materials and wall constructions had to be assessed in context and that combustibility or departure from guidance did not, without more, establish a relevant defect.

E25. The parties also differed as to whether Moho complied with the functional requirements of the Building Regulations. The Applicant's case was not simply that the presence of EPS made the building non-compliant. It relied upon Mr Davis's opinion that missing or ineffective firebreaks, cavity barriers and fire-stopping meant that the wall constructions failed adequately to resist fire spread. R1-4 emphasised that the Building Regulations imposed functional requirements rather than requiring strict adherence to every recommendation in Approved Document B, and relied upon DFC's earlier conclusions that not all wall types required remediation.

Rendered wall constructions – general position

E26. The investigations identified three principal rendered constructions: the walkway elevations, the typical apartment or front elevations, and the gable ends. Each incorporated EPS insulation within a StoTherm Classic external wall insulation system. The Applicant alleged that the wall types contained ineffective or missing measures for inhibiting fire spread. R1-4 did not dispute that EPS could contribute to fire spread, but maintained that the presence of EPS did not itself establish a relevant defect and that the performance of each construction had to be assessed as a whole.

Walkway construction

E27. The walkway elevations comprised an EPS-insulated rendered wall outside a cavity containing timber framing, steel cross-bracing and other components. The Applicant's primary allegation was that effective mineral-wool firebreaks were absent at the junctions between the walkway slabs and the Yorkon modules. It also relied upon concealed voids and deficiencies at party-wall junctions. Taken together, those matters were said to compromise compartmentation and permit horizontal and vertical fire spread.

E28. R1-4 accepted that proven absence of necessary firebreaks would require attention. They disputed, however, that the investigations established a widespread deficiency. They also relied upon DFC's early assessment that the walkway slabs interrupted the rendered system at floor level. More generally, they submitted that the walkway construction had to be assessed as a whole, including the means by which fire could enter and spread through it and the protection afforded by the modular construction.

Typical apartment elevations

E29. The Applicant alleged that combustible EPS continued across compartment-floor junctions where mineral-wool firebreaks should have interrupted the construction. It contended that the firebreaks had not been installed continuously or effectively, permitting fire to spread through the insulation, across compartment lines and potentially back into the building.

E30. R1-4 accepted that the StoTherm system required effective firebreaks, but disputed that the evidence established their absence throughout the elevations. They emphasised that the system was not inherently defective and could comply with the functional requirements if installed with the necessary barriers.

Gable-end construction

E31. The Applicant alleged that combustible EPS and inadequate firebreak arrangements created a route for concealed or external fire spread within the gable-end walls.

E32. R1-4 relied upon DFC's early conclusion that the gable construction was likely to comply with Part B if built as specified. They accepted that any proven absence of a necessary barrier might require local remediation, but disputed that the evidence established a defect affecting the gable construction as a whole.

Timber cladding to the dining modules

E33. The Applicant alleged that the timber cladding to the projecting dining modules formed combustible areas close to balconies, glazing and other façade elements. It contended that those elements created a stepped or "zigzag" route for external fire spread and that uncertainty concerning the original fire-retardant treatment reinforced the need for remediation.

E34. R1-4 submitted that timber façades were not prohibited when Moho was constructed and that Mr Davis had not identified a sufficiently developed basis for concluding that the cladding caused a building safety risk. They also relied upon the pre-existing deterioration of parts of the timber façade and maintained that some of the eventual replacement addressed maintenance rather than fire-safety. They further questioned whether the cladding was removed as a defect in its own right or to provide access for the wider façade works.

Timber louvres and balcony elements

E35. The Applicant distinguished the open timber louvres from the close-fitting cladding and contended that their configuration made them more susceptible to ignition and sustained burning. It also relied upon their removal as necessary to provide scaffold access for the principal façade works.

E36. R1-4 disputed that the louvres had been proved to cause a building safety risk. They characterised their removal primarily as consequential upon the need for access. The parties adopted a similar distinction in relation to timber decking: the Applicant relied upon its removal and replacement where necessary for the façade works, whereas R1-4 denied that this established that the decking itself was a relevant defect.

Walkway slab junctions, service risers and compartmentation

E37. The most substantial later dispute concerned conditions at the junctions between the Yorkon modules and the walkway slabs, particularly behind the service risers. Opening-up revealed voids, combustible timber framing, inadequately protected penetrations and alleged deficiencies in the horizontal firebreaks at floor level.

E38. The Applicant contended that those conditions created interconnected routes for fire and smoke and compromised compartmentation. Its primary case was that the risers obstructed the installation of effective floor-level firebreaks and that no satisfactory tested solution had been identified which allowed the existing risers to remain. It relied upon the timber, penetrations, ductwork and fire dampers as further aspects of the same problem.

E39. R1-4 disputed that the evidence established a defect requiring wholesale removal of all seventeen risers. They maintained that the relationship between the conditions found and the extensive works undertaken had not been demonstrated and that localised works, encapsulation or other measures had not been adequately explored. They also questioned whether the later works to services, ductwork and fire dampers remedied original defects or were consequential upon the selected riser scheme.

E40. The dispute therefore concerned both the nature of the compartmentation deficiency and whether complete removal and reconstruction of the risers was necessary to remedy it.

E41. A recurring feature of R1-4's case was that the Applicant sought to extrapolate from limited opening-up and insufficiently particularised observations to conclusions about entire wall constructions. We have not repeated that general objection under every heading. Where relevant, it forms part of R1-4's response to each allegation. The Applicant's answer was that the contemporary investigations, construction drawings and conditions exposed during the works provided a sufficient basis for inferring repeated deficiencies within constructions which were themselves repeated across the building.

Conclusions on relevant defects

E42. We have considered the meaning of "relevant defect" and "building safety risk" in Part 2 and do not repeat that analysis here. Applying the principles set out there, the question is whether the matters complained of created a risk to the safety of people in or about the building arising from the spread of fire. It is unnecessary to determine whether that risk was tolerable or intolerable, or whether it justified the particular remedial response ultimately adopted. Those issues arise later.

The rendered wall systems

E43. The principal external wall constructions at Moho incorporated combustible EPS insulation within a rendered system. We accept that the use of EPS did not, of itself, establish either non-compliance with the Building Regulations or the

existence of a relevant defect. The position was more nuanced than that. As Mr Davis accepted, the guidance applicable at the time of construction was not entirely straightforward in relation to insulated render systems, and there was room for debate as to whether the construction strictly complied with all aspects of Approved Document B.

E44. The critical issue, however, was not the mere presence of combustible insulation. It was the absence or inadequacy of the firebreaks, cavity barriers and fire-stopping measures intended to inhibit fire spread through the external wall system. We accept Mr Davis's evidence that the lack of effective cavity barriers and firebreaks within the rendered wall constructions created routes by which fire could spread through cavities fuelled by combustible insulation and cross compartment lines. In our judgment, those conditions created a building safety risk and therefore constituted relevant defects.

Walkway construction

E45. The walkway wall construction represented the clearest example of such a defect. As built, it incorporated acrylic render over EPS insulation, with a cavity behind and timber framing set away from the apartment-module walls. The evidence ultimately disclosed an unprotected void at the junction between the apartment modules and the walkway slabs together with deficiencies in the firebreak arrangements associated with that junction. We accept that the full extent of those deficiencies did not become apparent until the remediation works were underway. Nevertheless, the later discoveries confirmed rather than contradicted the concerns identified during the earlier investigations.

E46. We accept Mr Davis's distinction between the firebreaks required in the Sto render system and ordinary cavity barriers. Although Approved Document B did not prescribe a particular firebreak detail, the Sto technical documentation contemplated lamella mineral-wool firebreaks. The evidence established that such firebreaks were absent or ineffective in at least some critical locations. The resulting combination of combustible insulation, concealed voids and inadequate compartmentation was capable of facilitating the spread of fire. We therefore find that the walkway construction contained relevant defects.

Typical elevations and gable ends

E47. Although the evidence concerning the typical apartment elevations and gable ends was not identical, we are satisfied that the same essential fire-spread mechanism was present. The rendered EPS systems depended upon effective firebreaks and cavity barriers to interrupt fire spread. The evidence established deficiencies in those measures. Those deficiencies were capable of permitting fire to spread through and behind the external wall construction and therefore constituted relevant defects.

Service risers and compartmentation

E48. The service-riser locations formed part of the same broad compartmentation problem. The evidence established unprotected penetrations, inadequately protected voids, combustible timber within those voids, and the absence of

effective barriers at floor level. We accept that the central issue was not the mere presence of timber. Rather, the relevant defect consisted of the inadequately compartmented voids and associated conditions which permitted fire and smoke to spread vertically and horizontally between parts of the building.

E49. We also find that the arrangement of the extraction system, duct penetrations and fire dampers created a building safety risk. The evidence demonstrated that fire and smoke could pass from an apartment into the riser and associated voids before encountering an effective barrier. Those conditions therefore constituted relevant defects.

Timber cladding and timber louvres

E50. The timber cladding to the dining modules was a relevant defect. We accept Mr Davis's evidence that, although the cladding may not have represented a building safety risk in complete isolation, it contributed to the wider fire-spread risk presented by the building and did not comply with the guidance applicable to buildings exceeding 18 metres in height. We also accept that its significance cannot be divorced from its relationship with the dining-module roofs, soffits, balconies and surrounding façade.

E51. We reach the same conclusion concerning the timber louvres. Although the guidance did not deal with louvres in the same way as cladding, we accept Mr Davis's evidence that their configuration provided a route for fire spread over the external walls. We therefore find that the timber louvres also constituted relevant defects.

Nib walls, corrosion and structural repairs

E52. The evidence concerning the nib walls, corrosion to dining-module supports, balcony fixings and related structural issues stands on a different footing. We do not consider the evidence sufficient to establish that those matters constituted relevant defects in their own right. In particular, there was no structural-engineering evidence demonstrating that the corrosion or fixing issues created a building safety risk through structural failure or collapse. Those matters are better characterised as consequential or enabling works encountered during the remediation project. Whether the associated costs were reasonably incurred in remedying, or otherwise in connection with, the relevant defects identified above is a separate question which we address later.

Conclusion

E53. Accordingly, we find that Moho contained relevant defects comprising:

1. deficiencies in the firebreaks, cavity barriers and fire-stopping arrangements associated with the rendered EPS wall constructions;

2. the compartmentation deficiencies and voids identified at the walkway slab junctions;

3. the inadequately compartmented voids and associated conditions behind the service risers;

4. the extraction-system penetrations and fire-damper arrangements associated with those risers;

5. the timber cladding to the dining modules; and

6. the timber louvres serving the balconies.

E54. Those matters created risks to the safety of people in or about the building arising from the spread of fire and therefore constituted relevant defects within the meaning of section 120 of the BSA. The questions whether the remedial response was reasonable and proportionate, whether alternative schemes might have been adopted, and the reasonableness of the resulting costs are distinct issues which we consider below.

Remediation works – facts and arguments concerning scope of works

Overview

E55. The remediation project undertaken at Moho ultimately extended well beyond replacement of the original rendered external wall system. What began as a programme directed principally towards the fire performance of the external walls developed into a substantial façade remediation project affecting the rendered wall constructions, dining modules, balconies, walkways, service risers, extraction systems, windows, doors and associated building elements. The scope of the works evolved over time as investigations progressed and further conditions were revealed through opening-up of the building.

E56. The principal external wall works involved removal of the existing StoTherm Classic insulated render system from the apartment elevations, walkway façades and gable-end constructions. The combustible EPS insulation was removed and replaced with a non-combustible alternative. New firebreaks, cavity barriers and fire-stopping measures were installed within the replacement construction. The adopted design utilised a direct-fix insulated render system rather than a ventilated rainscreen façade.

Dining modules

E57. The project also involved substantial works to the projecting dining modules. Timber cladding was removed and replaced with aluminium cladding. The roofs to the dining modules were reconstructed and the original glazed doors and windows serving the modules were removed and replaced. The replacement design incorporated revised interfaces between the external wall construction, glazing systems and weatherproofing details.

Walkways and balconies

E58. Timber louvres, balcony decking, walkway decking, walkway soffits and associated timber elements were removed and replaced. The external steel

frame surrounding the balconies was retained but underwent associated treatment and repair works. Further works were undertaken to nib walls adjoining apartment entrances and to elements associated with the installation of cavity barriers and fire-stopping at floor level.

Service risers and associated works

E59. The most significant variation to the original project concerned the service risers. Opening-up works revealed conditions behind the risers which led to their removal and reconstruction. This required the temporary removal and subsequent reinstatement of electrical, water, drainage, ventilation and communications services serving the apartments. The extraction ductwork and fire dampers associated with the communal ventilation system were also altered as part of the works. Because interruption of the essential services could not be avoided, residents were decanted whilst the riser works were undertaken.

Further discoveries during the works

E60. As work progressed, a number of additional conditions were identified. These included voids and compartmentation deficiencies at walkway floor levels, penetrations through the Yorkon-module façades, replacement of sheathing boards in some locations, repairs to dining-module steelwork, installation of additional cavity barriers and various consequential modifications required to integrate the remediated façade with the existing building structure and services. The cumulative effect of these discoveries was a substantial increase in both the scope and cost of the project.

Applicant's position as to the appropriateness of the works

E61. Mr Davis considered that the remediation works undertaken at Moho represented an appropriate response to the relevant defects identified in the building. His opinion was that the deficiencies which have been described above created routes by which fire and smoke could spread within and between parts of the building and therefore required remediation.

E62. In relation to the principal rendered wall constructions, Mr Davis considered that removal of the existing EPS insulation and its replacement with a non-combustible alternative, together with the installation of appropriate firebreaks, cavity barriers and fire-stopping measures, was an appropriate means of addressing the identified fire-spread risks. He regarded the deficiencies in those measures, rather than the mere presence of EPS insulation, as the principal reason why remediation was required.

E63. Mr Davis also considered that the defects associated with the service-riser locations required intervention. He accepted that a number of the conditions ultimately encountered were not fully understood before the façade had been opened up. Nevertheless, once the continuous voids, missing barriers, penetrations and associated conditions had been identified, he considered the resulting works to be a reasonable response to the risks presented.

E64. More generally, Mr Davis regarded the various remedial measures adopted at Moho as falling within the range of reasonable professional responses to the defects identified. Whilst alternative approaches could be discussed in principle, he considered that the scheme ultimately adopted addressed the fire-spread mechanisms which had been identified within the building and brought the construction to a condition which appropriately mitigated those risks.

R1-4's objections to the scope of the remediation works

E65. R1-4 did not contend that Moho was free from fire-safety defects, nor that no remediation was required. Their case was that the remediation project ultimately extended well beyond what was necessary to address the relevant defects identified in the building. Through the evidence of Ms Vice and the submissions of Mr Dennys KC, they maintained that the project evolved from a scheme directed towards specific fire-safety concerns into one which systematically removed combustible materials and addressed a range of maintenance, weatherproofing and building-performance issues irrespective of whether those matters themselves constituted relevant defects.

E66. A recurring theme of R1-4's case was that combustible materials do not automatically require removal. Ms Vice accepted that combustible insulation, timber and other combustible materials may contribute to fire spread, but maintained that the proper question was whether they created a risk to people in or about the building. In her view, the presence of combustible materials was too often treated during the BSF process as sufficient reason for removal, without adequate consideration of whether a lesser intervention might have achieved an equivalent level of safety.

E67. This criticism extended to the rendered EPS wall systems. R1-4 accepted that deficiencies in firebreaks, cavity barriers and compartmentation required remediation. Their objection was that the identified defects did not necessarily require removal and replacement of every combustible component within the construction. They relied upon the changing conclusions expressed in DFC's reports and upon the fact that earlier assessments had not recommended remediation of every wall type. In their submission, the later scheme reflected not only the existence of defects but also the availability of BSF funding and the preference for complete replacement rather than more limited intervention.

E68. R1-4 advanced a similar argument in relation to the timber cladding and timber louvres. They pointed out that parts of the timber cladding were already the subject of contemplated maintenance works before the fire-safety remediation project commenced and that repairs or replacement had previously been proposed. They submitted that the distinction between deteriorating timber which required maintenance and timber which caused a building safety risk was not always maintained during the development of the project. They further relied upon evidence that both DFC and Mr Davis had, at various stages, expressed reservations about whether the timber cladding represented a standalone building safety risk.

E69. The strongest criticism advanced by R1-4 concerned the service-riser works. They submitted that the Applicant never identified clearly the particular defect

which justified removal and reconstruction of all seventeen risers. Mr Dennys KC characterised the case advanced against the risers as principally concerned with combustible timber concealed behind the riser locations. In his submission, the evidence did not establish why that condition could not have been addressed by more limited intervention, such as removal of local material, encapsulation, additional fire-stopping or other targeted works.

E70. R1-4 further submitted that the project team became committed to a complete riser-replacement solution before other possibilities had been explored adequately. Ms Vice suggested that combustible materials behind the risers could potentially have been encapsulated externally and also proposed that issues associated with extraction ductwork, service penetrations and fire dampers could have been addressed from within the apartments themselves. She considered it possible that the defective sections of ductwork could have been replaced locally, new dampers installed on the apartment line and penetrations sealed from within the modules without requiring wholesale reconstruction of the risers. No developed engineering proposal was produced to demonstrate those alternatives, but R1-4 nevertheless maintained that the adopted solution was insufficiently justified.

E71. A related criticism concerned the decant of residents and the reconstruction of services. R1-4 observed that removal of the risers triggered extensive consequential works, including isolation and reinstatement of electrical, water, drainage, telecommunications and ventilation services. They submitted that the scale of these consequential works reflected the choice of remediation strategy rather than the inherent seriousness of the underlying defects. In their submission, the need to decant residents arose because the project adopted complete riser replacement rather than a more localised solution.

E72. R1-4 also relied upon a number of conditions discovered during the works which, they said, were not fire-safety defects at all. Particular reliance was placed upon corrosion to dining-module steelwork, undersized fixing washers, water-ingress related deterioration and other maintenance issues. They submitted that those matters may well have required attention once exposed, but there was no structural-engineering evidence establishing that they gave rise to a building safety risk through collapse or structural failure. In their submission, such matters should properly be characterised as maintenance defects or consequential works rather than relevant defects.

E73. The nib walls formed another example. R1-4 disputed that combustible materials within the nib walls had been shown to create a building safety risk. To the extent that the nib walls required removal, they submitted that this was because the walls obstructed the chosen cavity-barrier strategy rather than because the nib walls themselves were defective. Their position was therefore that the nib-wall works were enabling or consequential works rather than remediation of a proven relevant defect.

E74. R1-4 raised a similar point in relation to the replacement of windows, balcony doors, glazing and other façade components. They accepted that those items became intertwined with the adopted remediation scheme, but maintained that they did not themselves present a building safety risk. In particular, they

submitted that the replacement of glazing systems was a consequence of the increased thickness of the replacement wall construction and the detailing selected by the design team. In their submission, that work reflected the chosen solution rather than the nature of the underlying defects.

E75. More generally, R1-4 characterised the project as one in which several distinct objectives became merged. They pointed to contemporaneous concerns about maintenance, water ingress, deteriorating façade elements, weatherproofing defects, building aesthetics, planning requirements and the availability of BSF funding. In their submission, the resulting works addressed a combination of those matters without maintaining a sufficiently clear distinction between the remediation of relevant defects and the wider improvement, repair or replacement of elements which the management company wished to address in any event.

Remediation works – discussion and conclusions on scope

The principal façade works

E76. We are satisfied that the remediation scheme adopted at Moho fell within the range of reasonable professional responses to the relevant defects. The question is not whether another competent team might have designed a different scheme, but whether the works carried out represented a reasonable response to the defects which had been identified. The existence of appropriate professional advice is not conclusive, but it is important evidence, particularly where the criticism advanced in response is not supported by a developed alternative design.

E77. We accept R1-4's general proposition that the presence of combustible material did not of itself require wholesale removal. That proposition does not, however, resolve the position at Moho. The defects comprised interacting deficiencies in the rendered wall systems, including combustible EPS, missing or ineffective firebreaks and cavity barriers, inadequately protected voids and failures of compartmentation. Those matters affected the operation of the wall constructions as systems, rather than a few isolated components. The project team was entitled to adopt a coherent replacement system incorporating non-combustible insulation and effective barriers, rather than retain substantial parts of constructions in which the required fire-protection measures had not been installed consistently.

E78. We reach the same conclusion concerning the walkway elevations. Ms Vice relied upon the principles applicable to open-deck access and the availability of three staircases. Her position was that, if fire affected one direction of travel, occupants could escape by another route. We do not regard that as an adequate answer to the defects in the walkway construction. It accepts that fire might spread through the combustible wall but treats the availability of another means of escape as sufficient mitigation. The open-deck guidance was relevant to the protection of the escape route, but did not displace the requirement to control the spread of fire through and over the external walls. Moreover, that analysis did not apply with equal force to the enclosed corridor legs in the rear wings of the building, where apartments faced one another.

E79. There was also an important distinction between a cavity barrier and the firebreak required within the StoTherm system. A cavity barrier divides or closes a cavity to inhibit fire and smoke passing through it. A lamella mineral-wool firebreak also interrupted the combustible EPS and was intended to absorb molten insulation if the EPS became involved in fire. Material which might restrict passage through a cavity did not necessarily perform that additional function. The evidence did not establish that the necessary firebreaks had been installed consistently at the critical junctions.

E80. The walkway defects therefore extended beyond isolated omissions at party-wall lines. They comprised inadequate interruption of the EPS system, the floor-edge void between the walkway slabs and apartment modules, and deficiencies in horizontal and vertical compartmentation. In those circumstances, removal and replacement of the walkway render and insulation, together with the installation of appropriate firebreaks, cavity barriers and floor-level compartmentation, represented a reasonable response.

Timber elements, windows and doors

E81. We are also satisfied that the treatment of the timber façade elements was appropriate. Some of the timber cladding had deteriorated and might have required repair or partial replacement as a maintenance matter. That does not alter our conclusion that the cladding and louvres also contributed to the risk of external fire spread and could reasonably be replaced with non-combustible materials as part of the façade scheme.

E82. Ms Vice relied upon the chequerboard geometry of the dining-module cladding. She considered that fire would have to travel laterally or in a "zigzag" direction between the panels, or bridge a vertical gap of approximately one storey, and was therefore unlikely to spread rapidly. We prefer Mr Davis's assessment of the elevation as a whole. The panels were connected at their corners and did not therefore operate as wholly separate combustible elements. The gaps might have moderated the rate of fire spread, but did not prevent it or remove the potential for fire to pass across the façade and re-enter the building.

E83. The open construction of the louvres increased the timber surface exposed to heat and air. In any event, they had to be removed to permit the necessary scaffolding and could not be reinstated in combustible material. Their replacement was therefore appropriate both as a response to the risk they presented and as consequential work required by the principal façade remediation.

E84. The windows, balcony doors and associated glazing were not themselves relevant defects, but their replacement was also a necessary consequence of the adopted façade works. The replacement render system required different insulation depths, junctions, terminations and weathering details. The contemporaneous evidence accepted by Mr Davis was that the existing frames could not accommodate those details and could not practicably be removed and reinstated. Their replacement was therefore integral to the installation of the new wall system, rather than a separate programme of improvement.

The service-riser works

E85. The service-riser works require fuller consideration because they were exceptionally intrusive and expensive. Removal and reconstruction of all seventeen risers required the alteration and reinstatement of essential services and the temporary decant of residents. The issue also emerged only after the principal façade works had begun. The question is whether, once the concealed conditions had been identified, complete removal of the risers remained within the range of reasonable responses.

E86. We are satisfied that it did. The principal defect was not simply the presence of timber behind the risers. The risers concealed an inadequately protected void extending between the sheathing and the Yorkon modules, together with unprotected penetrations and an absence of effective compartmentation at floor level. Mr Davis described a clear cavity extending to the bottom of the building. The risers were positioned directly over the locations at which effective compartmentation and floor-level barriers were required. The difficulty was not simply one of access. The risers occupied the very locations at which the missing compartmentation and floor-level barriers needed to be installed.

E87. The contemporaneous evidence demonstrated that the project team sought a less intrusive solution. BWP undertook a detailed review specifically to identify whether the façade behind the risers, and the risers themselves, could be treated without complete removal and at lower cost. It was unable to identify a tested detail by which the timber and voids could be accessed, or effective floor-level barriers installed, while leaving the risers and services in place. In particular, no method could be identified by which the floor-level barriers required to address the walkway voids could be installed whilst maintaining the risers and associated services *in situ*. That conclusion was shared by the design and construction team responsible for the works. Samuel Styles' evidence was that the management company had "absolutely zero appetite" to encourage the riser works and regarded complete rebuilding, with the resulting decant, as a last resort. That evidence is consistent with the contemporaneous record and rebuts the suggestion that the most extensive option was adopted without proper consideration.

E88. Ms Vice suggested external encapsulation, local treatment of the ductwork and installation of dampers from within the apartments. Those suggestions did not amount to a viable alternative scheme. She did not explain how the concealed timber and continuous void could be accessed and compartmented without removing the risers; identify a tested encapsulation system; or produce a design showing how effective barriers could be installed around the retained services. Her suggestion concerning the extract duct also proceeded upon the mistaken understanding that the duct passing through the module wall was metal, whereas the investigation found plastic ductwork passing through a substantial opening which exposed the PIR core and incorporated timber packers. No mechanical or electrical engineering evidence supported the feasibility of her proposals.

E89. The project team had also considered abandoning the communal extraction system and installing individual kitchen and bathroom extract fans through the external walls. That option was rejected because it was expected to cost more, take longer and require 204 new penetrations through the replacement façade, increasing the risk of water ingress. The evidence therefore established that alternatives were considered and rejected for identified technical and practical reasons, rather than overlooked.

E90. The existing dampers could not simply be removed and reinstated. The relevant specialists considered that their location within the risers, rather than at the line of the apartment wall, allowed fire and smoke to enter the void before encountering a barrier. The evidence also established that the essential services could not practicably be diverted while residents remained in occupation, and Ms Vice accepted that residents would have to move if water and electricity were unavailable. The replacement ductwork and dampers, reinstatement of the services and temporary decant were therefore necessary components of the riser remediation.

E91. Against that evidence, R1-4's suggested alternatives remained possibilities rather than developed technical solutions. They did not establish that a practicable, less intrusive scheme would have remedied the interconnected compartmentation, penetration and service defects while retaining the existing risers. We are satisfied that removal and reconstruction of the risers, including the consequential service works and decant, fell within the range of reasonable professional responses.

Consequential and associated works

E92. The expansion of the project after opening-up does not demonstrate that it lost sight of its fire-safety purpose. The initial design necessarily proceeded upon an incomplete understanding of concealed construction. The walkway slab voids, riser conditions and service penetrations became fully apparent only during the works. The appropriate comparison is therefore between the final scheme and the defects ultimately revealed, not between that scheme and an earlier proposal prepared before the building had been opened up.

E93. Some works addressed matters which were not relevant defects in their own right. They included corrosion to dining-module supports, deterioration of existing components, weatherproofing problems and associated maintenance issues. Other works, including alterations to nib walls, access works and reinstatement, were enabling or consequential measures. The inclusion of such works did not make the project inappropriate. A scheme of this complexity could not reasonably be undertaken without addressing physical conditions which affected the safe installation and integration of the remediation.

E94. The different purposes served by individual elements must nevertheless be kept in view when considering funding and costs. Some works directly remedied relevant defects; others enabled that remediation or followed necessarily from it; and some also addressed pre-existing maintenance or weatherproofing problems. Those distinctions do not undermine our conclusion about the appropriateness of the scope of the works.

E95. Having considered the evidence as a whole, we are satisfied that the works undertaken at Moho fell within the range of reasonable responses to the relevant defects. The scheme addressed the principal fire-spread mechanisms identified in the rendered walls, walkway construction, timber façade and service-riser locations. Its scale, cost and disruptive consequences required close scrutiny, but did not make it inappropriate. Nor did the possibility that another competent professional team might have devised a different solution. R1-4 did not establish that a materially less extensive, practicable scheme would have addressed the defects to an equivalent standard.

Costs and funding

Remediation project and BSF funding

E96. The remediation works at Moho were funded principally, but not exclusively, through the BSF. Moho was registered with the Fund in July 2020 and passed the initial eligibility checks shortly afterwards. The design and funding processes thereafter proceeded in parallel. As the professional team developed the proposed scheme and further investigations were undertaken, the management company sought agreement that an expanding range of works fell within the BSF's eligibility criteria.

E97. The design team considered two broad approaches to replacement of the external wall system: a replacement rendered system and an aluminium rainscreen system. It recommended the rendered solution because of concerns about the architectural detailing, thermal performance and structural loading associated with the rainscreen alternative. The resulting scheme ultimately extended beyond replacement of the rendered front elevation and included proposals concerning the walkway façades, timber cladding and louvres, dining modules, balconies, doors and glazing, and associated consequential works.

E98. The BSF did not initially accept that all of the proposed elements formed part of an eligible cladding system. Its initial acceptance was confined to the front-elevation cladding and associated fire barriers. Questions remained about the dining modules, walkway render, timber soffits, louvres and balcony elements. The proposed replacement of the balcony doors and adjoining glazing was also removed from the eligible-cost assessment at that stage because of its substantial cost and because it had not then been established that those elements required replacement as part of the eligible works.

E99. BWP maintained that the existing balcony doors and adjoining glazing could not practicably be retained. The proposed non-combustible rendered system was deeper than the original construction and required redesigned heads, sills and junction details. BWP's position was that the existing frames could not accommodate those details, could not satisfactorily be removed and reinstated, and were in any event associated with existing drainage and weather-resistance problems.

E100. The BSF's appeal process accepted part, but not all, of the wider case advanced by the project team. In August 2021, reviewers recommended that the appeal

should be upheld in relation to the timber cladding and louvres because the evidence did not establish whether the timber had received an effective fire-retardant treatment. The resulting decision confirmed the eligibility of the timber cladding to the walls of the dining modules, but did not accept the material fixed beneath those modules as an eligible cladding system. Other preliminary and consequential works remained to be considered separately through the delivery and funding process.

E101. The remediation works were ultimately procured under a contract with H.H. Smith & Sons Co Ltd. The project team relied upon a tendering exercise undertaken during 2020 and 2021, following which a contract sum of approximately £8.45 million excluding VAT was agreed. The quantity-surveying experts initially differed as to the extent to which the available procurement documentation permitted detailed retrospective scrutiny of the tender exercise. Nevertheless, they ultimately agreed that the contract costs were reasonable.

E102. Commercial management of the project was undertaken principally by Walker Sime, who acted as quantity surveyor and prepared contract-sum analyses, variation assessments and funding submissions. Proposed variations were then reviewed by Cushman & Wakefield, acting as cost consultants to the BSF, before funding decisions were taken. The funding approvals therefore reflected a sequence of commercial, professional and funding reviews rather than a single-stage approval process.

E103. The initial BSF approval was granted in December 2022. The supporting cost assessment proceeded on the basis that the scheme involved removal and replacement of unsafe external wall elements, together with associated professional fees and irrecoverable VAT. The initial approval was approximately £9.86 million inclusive of VAT. It covered the principal façade remediation works but did not encompass every item which was subsequently undertaken.

E104. The first significant variation approval followed in March 2023 and concerned replacement of the timber louvre screens serving the balconies. Further and substantially larger variation applications followed after opening-up revealed additional conditions behind the façade. Those applications included works associated with the service risers, nib walls, floor-edge voids, sheathing boards, breather membranes, compartmentation measures, service penetrations, dining-module details and associated professional services. Substantial additional funding was approved in December 2023 and again during 2024.

E105. By November 2025, cumulative BSF approvals for Moho totalled approximately £18.26 million. The increase from the initial approval principally reflected the additional conditions discovered through opening-up, the extensive service-riser works, the associated decant costs and the consequential works arising from those matters.

E106. Those approvals did not follow automatically from the submission of funding requests. Each substantial variation application was reviewed by Cushman & Wakefield, acting on behalf of the BSF. The evidence demonstrated that further

information was sought from the management company and its advisers and that elements of proposed expenditure were, in some instances, reduced, omitted or amended before approval. The funding history therefore involved an iterative process of submission, examination and challenge.

E107. The quantity-surveying experts ultimately agreed that expenditure of £18,092,248 inclusive of VAT had been incurred by the BSF in connection with the Moho project. That did not represent the whole of the expenditure claimed in relation to the building, because further remediation costs had been incurred by the management company without BSF funding. Nor did the experts agree that every element of the BSF-funded expenditure had been reasonably incurred.

Costs incurred outside the BSF

E108. In addition to the BSF-funded expenditure, Moho Management Company Ltd incurred costs which fell outside the BSF's eligibility criteria. The parties and the quantity-surveying experts generally referred to these as the "ineligible costs". That expression described their treatment for BSF purposes. It did not mean that the expenditure was necessarily unrelated to the remediation project, or that it was incapable of being a cost incurred in remedying, or otherwise in connection with, a relevant defect.

E109. The Applicant's amended statement of case included £741,594 inclusive of VAT in respect of those costs. Its pleaded position was that the expenditure had been borne by the management company rather than the BSF and that the Applicant sought to recover it on the management company's behalf, subject to obtaining the necessary consent and, if required, holding any recovery on trust for it.

E110. The principal component was £568,368 excluding VAT identified in the contractor's final account and assessed by Walker Sime as ineligible for BSF funding. This covered the costs of works to the dining module floors/soffits, external decorations, some elements of the works to balconies, additional service installations in the risers, and alterations for hot water cylinders. The overall amount also included associated preliminaries, professional fees and contingency. The experts agreed by the time of their oral evidence that the relevant expenditure had been incurred, invoiced and paid. They were also broadly agreed as to the amount, subject to a limited difference concerning the allocation of professional fees.

E111. Separate costs were also claimed in relation to the installation of a fire-alarm system and the provision of a waking watch. The fire-alarm claim was later abandoned. The remaining waking watch claim is considered separately below because it raises issues materially different from those affecting the remediation expenditure generally.

Discussion and conclusions on the remediation costs

E112. Many of the criticisms advanced by R1-4 in relation to the costs incurred at Moho derived from their broader case that the adopted remediation scheme was unnecessarily extensive. For the reasons already given, we have rejected

that case. The remaining dispute therefore concerns principally the substantiation and valuation of post-contract expenditure, particularly variations, prolongation claims, loss and expense claims and certain professional-fee items. Those are the same methodological issues addressed in Part 2 and we do not repeat that discussion here.

E113. In relation to Moho specifically, the quantity-surveying experts ultimately agreed the total amount incurred by the BSF, and that the original contract costs were reasonable in amount. They also agreed that the "ineligible costs" had been incurred, invoiced and paid. Their only material difference concerned allocation of associated professional fees. We accept Mr Lynch's revised approach. The expenditure formed part of the remediation project and no developed case was advanced that the underlying works were unrelated to remediation of the relevant defects. The fact that those costs were categorised as ineligible for BSF purposes does not prevent them from constituting costs incurred in remedying, or otherwise in connection with, relevant defects.

E114. We are not persuaded by Ms Allen's remaining criticisms of the costs incurred by the BSF. Her principal reductions arose because she considered that she had not been provided with sufficient primary substantiation to verify the contractor's valuation, prolongation claims, loss and expense claims and certain professional-fee items. She did not, however, identify any specific Moho variation which had been overvalued, any actual duplication of costs, any unreasonable contractor rate or any professional fee which should not have been incurred. Her reductions were therefore primarily founded upon the absence of the level of substantiation she preferred rather than upon affirmative evidence that the expenditure was excessive.

E115. The only Moho-specific criticism which survived beyond that general methodological disagreement concerned the possibility that the fees of Joule Consulting Engineers duplicated those of another consultant. However, no duplicated service, overlapping scope of work or duplicated charge was identified. The concern remained speculative and was never investigated further. We do not consider that it provides a proper basis for disallowing costs which were incurred and paid during the project.

E116. Accordingly, subject to our separate consideration of the waking watch costs, we are satisfied that the remediation expenditure incurred at Moho was reasonably incurred in remedying, or otherwise in connection with, the relevant defects affecting the building. That conclusion applies both to the BSF-funded expenditure and to the costs incurred by the management company outside the BSF.

Waking watch costs

E117. In addition to the "ineligible costs" discussed above, the Applicant's pleaded case in relation to Moho claimed waking watch and installation of fire alarm costs in the sum of £218,443.86. Again, these are costs which were said to have been incurred by Moho Management Company Ltd, rather than the BSF. Unlike the principal remediation costs, those sums were not subjected to meaningful review within the quantity-surveying evidence. The Applicant's case was that

the waking watch represented an interim measure required because Moho contained relevant defects pending remediation. Reliance was placed upon section 124(2A) of the BSA and the proposition that such measures constituted "relevant steps". The Applicant also relied upon evidence from Mr Styles that costs had been incurred and upon a bundle of invoices said to record the expenditure in question (partially, at least). It was further submitted that a waking watch was a foreseeable and appropriate response where a building presented a significant fire-safety risk.

E118. R1-4 did not materially dispute that a waking watch may have been necessary in principle. Rather, they submitted that the Applicant had failed adequately to plead, explain or prove this aspect of the costs it sought to recover by way of RCO. They criticised the absence of any clear breakdown of the sums claimed, drew attention to the fact that the Tribunal had sought clarification of the claim during the hearing, and complained that supporting documentation had only been disclosed very late in the proceedings. They further noted that neither quantity-surveying expert had provided any opinion on the reasonableness of the waking watch costs.

E119. We agree with the substance of those criticisms. There is little reason to doubt that Moho required interim fire-safety measures prior to remediation, or that costs were in fact incurred in providing a waking watch. The evidence generally pointed towards that conclusion and we do not understand R1-4 seriously to have contended otherwise. The difficulty for the Applicant lies elsewhere. The burden rests upon the Applicant to establish not merely that expenditure was incurred, but that it was reasonably incurred. In relation to the principal remediation works, that burden was discharged through a combination of procurement evidence, cost consultant review, BSF scrutiny and expert quantity-surveying analysis. None of those safeguards was present here. This is significant because, as explained in Part 2, it is precisely those forms of commercial, professional and expert scrutiny which ordinarily provide the evidential foundation for a conclusion that costs were reasonably incurred. The problem for the Applicant is therefore not the absence of a forensic reconstruction of the waking watch expenditure, but the absence of any comparable process of professional, commercial or expert scrutiny capable of supporting a finding that the costs were reasonably incurred.

E120. In particular, the waking watch claim appears largely to have fallen outside the preparation of the case. The issue was not examined by the quantity-surveying experts. Mr Lynch accepted during cross-examination that he had not considered the waking watch costs, had not reviewed the supporting documentation and was unable to express any opinion as to their reasonableness. Ms Allen likewise provided no assessment of the claim. We make no criticism of either Mr Lynch or Ms Allen in this regard: it appears they were not instructed to carry out such a review.

E121. The omission in evidential preparation was tacitly recognised by counsel for the Applicant in closing: the claim for fire alarm installation costs was abandoned at that point, and the claim for waking watch costs was reduced to approximately £190,000 (that being the total of the invoices listed in the Applicant's bundle of (very) late evidence on this issue). However, that bundle

was introduced only during Phase 1 of the hearing and was not accompanied by any detailed analysis explaining the services provided, the basis of charging, the periods covered, the procurement of the service or why the amounts charged were reasonable. Whilst the bundle proved that invoices existed, it did not by itself provide an adequate evidential basis upon which the Tribunal can assess reasonableness. Likewise, although Mr Styles referred to the existence of waking watch costs in his witness statement, his evidence did not examine their composition, procurement or value in any detail. Indeed, all he said was that the waking watch had "proved to be very expensive amounting to approximately £280,000". No explanation was later given for the discrepancy between this figure and the lesser amount evidenced by the invoice bundle.

E122. In those circumstances, notwithstanding our conclusion that a waking watch was likely to have been necessary, we are not satisfied that the Applicant has discharged the burden of establishing that the waking watch costs were reasonably incurred. We accept that a waking watch was likely to have been necessary and that expenditure was incurred in providing it. However, necessity and incurrence are not, without more, sufficient. The evidential foundation required to permit a finding of reasonableness was not provided. This conclusion does not reflect acceptance of the broader criticisms advanced by R1-4 in relation to the remediation costs generally. On the contrary, as explained in Part 2, we regard procurement processes, professional review, contract administration, cost consultant scrutiny and expert assessment as capable of providing powerful evidence of reasonableness. The difficulty here is that none of those forms of scrutiny was available in relation to the waking watch costs.

APPENDIX F

THE BOX WORKS



Description

F1. The Box Works is situated in the Castlefield area of Manchester, in close proximity to both Burton Place and Moho. It is a six-storey mixed-use building, approximately 18 metres in height, comprising commercial and other non-residential accommodation at ground-floor level and residential apartments on the five upper floors. The site slopes towards the Bridgewater Canal, which runs along the northern side of the building.

F2. The development comprises the conversion of a 1920s Art Deco warehouse together with an adjoining extension, completed in or around 2000. The original warehouse is of concrete-framed construction, with areas of ashlar stone and decorated concrete render. The newer part of the building incorporates a galvanised exposed steel frame, glazed curtain walling and areas of zinc and terracotta rainscreen cladding.

F3. The residential floors are served by three stairs accessed from a T-shaped common corridor. Two stairs open from corridors designed as well-ventilated, non-thermal spaces, broadly comparable to covered external accessways. The third stair is enclosed and provided with dry-riser and conventional ventilation arrangements.

F4. Prior to the remediation works, the building had six principal forms of external wall finish: terracotta rainscreen cladding supported on steel brackets with mineral-wool insulation; zinc interlocking rainscreen panels incorporating XPS or “Polyfoam” insulation and fixed to timber framing; ashlar stone; render; glazing; and double glazing. Only the zinc-clad wall construction was ultimately remediated. This form of construction was present in a number of different locations and configurations, including single-storey gables, ground-floor

walls, recessed balcony areas, parapets, the canal-facing gable and the uppermost storey.

F5. The zinc outer panels were metallic. Behind them, the wall construction included Polyfoam insulation and, in some locations, timber support framing and OSB sheathing.

Investigation of the external wall construction

F6. In 2017, a sample of the zinc cladding was submitted to the Building Research Establishment for examination by Cardoe Martin (a firm of surveyors engaged by the building's management company). The sample was confirmed not to comprise aluminium composite material and was therefore not subjected to the screening process then applicable to ACM cladding. That result did not address the separate question of the fire performance of the insulation bonded to the rear of the zinc panels.

F7. Concerns about the external wall construction were then considered in greater detail by Cardoe Martin in an External Cladding Review completed in April 2019. The review included opening-up of parts of the zinc and terracotta cladding systems. Cardoe Martin concluded that, apart from the Polyfoam insulation fixed to the rear of the zinc cladding, the materials identified within the external wall construction were non-combustible. It did not, however, express a concluded opinion on the fire risk presented by the Polyfoam insulation. Instead, it recommended that a chartered fire engineer should review its findings and undertake a fire-risk assessment.

F8. In December 2019, Thomasons prepared a feasibility study directed specifically to the zinc rainscreen cladding. The study identified potential options for remediation. One option involved replacement of the existing zinc cladding system and associated supporting elements with a non-combustible alternative. A second option contemplated a more detailed fire-engineering assessment to determine whether some or all of the existing construction could safely remain in place. Thomasons recognised that the latter approach could prove less disruptive and less expensive, although it would leave combustible material within the external wall construction.

F9. By August 2020, two broad remedial strategies were under consideration. One focussed upon those areas of zinc cladding then thought sufficient to permit the issue of an EWS1 form. The other contemplated replacement of the zinc-clad construction more generally. The wider scheme was regarded as providing a more comprehensive and enduring solution and formed the basis of the subsequent BSF application.

F10. During the BSF assessment process, the BSF's technical advisers requested further information about the height of the building and the composition and distribution of the zinc wall systems. They also sought additional intrusive-survey evidence and construction records.

F11. DFC subsequently prepared an External Wall Construction Fire Engineering Assessment dated 9 June 2021. That assessment represented the first occasion

on which the different zinc-clad configurations were evaluated by reference to their particular fire-spread characteristics. DFC accepted that combustible insulation was present behind the zinc panels. However, it did not regard the mere presence of combustible material as determinative. Instead, it assessed each configuration by reference to its position on the building, its vertical extent, its proximity to openings and its potential contribution to fire spread.

F12. In consequence, DFC distinguished between configurations 3(a) to 3(d), on the one hand, and configurations 3(e) and 3(f), on the other. In relation to configurations 3(a) to 3(d), DFC considered that the combustible insulation did not extend across multiple storeys and was not associated with openings into apartments. Those configurations were therefore assessed as presenting a low hazard context and remediation was not recommended. By contrast, configuration 3(e), at the canal-facing gable, and configuration 3(f), at upper-storey level, were regarded as capable of facilitating vertical fire spread over more than one storey. DFC therefore recommended remedial measures in respect of those configurations.

F13. The BSF assessment did not correspond precisely with DFC's conclusions. Although the BSF's advisers initially treated only configurations 3(e) and 3(f) as eligible, they later concluded that configurations 3(a) to 3(d) also met the funding criteria because they incorporated combustible insulation.

F14. The investigation process therefore established that the external walls were not of uniform construction and that the significance of the zinc-clad wall system varied according to its location and configuration. There was broad agreement that combustible insulation was bonded to the rear of the zinc panels. The contemporaneous fire-engineering assessment nevertheless differentiated between the configurations which DFC considered to require remediation and those which it did not.

Relevant defects

Applicant's case

F15. The Applicant's case was that the zinc rainscreen wall construction contained relevant defects arising from combustible materials and deficiencies in cavity-barrier provision.

F16. The first alleged defect concerned the presence of combustible Polyfoam insulation bonded to the rear of the zinc rainscreen panels. The Applicant's case was that, whilst the zinc outer panels themselves were non-combustible, the Polyfoam insulation constituted a combustible component within the external wall construction. Mr Davis considered that the material was capable of contributing fuel to a fire within the rainscreen cavity and that its use within the wall build-up was inconsistent with the level of fire performance required of the external wall system. He identified that the insulation product used may have been Polyfoam Upstand Board, which includes an XPS core of Euroclass F fire classification. DFC had described the insulation generically as polystyrene, which would be Euroclass C or worse.

F17. The second category of alleged defect related to cavity barriers. The Applicant alleged that cavity barriers within the zinc-clad wall system were missing, defective, ineffective, or inadequately installed. The wall construction did not adequately inhibit the unseen spread of fire within concealed cavities and compartment lines. It was said that deficiencies in cavity-barrier provision increased the potential for fire propagation within the rainscreen cavity and between different parts of the external wall construction.

F18. The Applicant also relied upon the construction located behind the zinc panels. Intrusive investigations identified timber support framing and oriented strand board (OSB) sheathing in parts of the zinc wall build-up. The Applicant contended that these materials formed part of the external wall system and were capable of contributing to the ignition and spread of fire within the cavity. Mr Davis further considered that the use of combustible timber components as part of the cavity-barrier strategy was inappropriate and contributed to the deficiencies identified within the wall system. He identified that where the guidance in Approved Document B (2000) allowed for the use of timber of at least 38mm thickness as cavity barriers, this applied only to use within stud walls or partitions. Mr Davis considered that the external wall system met neither of those circumstances.

F19. The Applicant's case was that these features should not be considered in isolation. Rather, it alleged that the combination of combustible Polyfoam insulation, combustible timber-based components and deficiencies in cavity-barrier provision created conditions by which fire could spread through the external wall construction. Mr Davis expressed the view that the presence of combustible materials within a ventilated cavity, coupled with ineffective cavity barriers, increased the potential for hidden fire spread within the façade system.

F20. Mr Davis also expressed the opinion that the zinc wall construction, as installed, failed to comply with the Building Regulations and associated guidance applicable at the time of construction. In summary, his view was that the presence of combustible Polyfoam insulation, the use of timber as cavity barriers, and the existence of missing or ineffective cavity barriers constituted departures from the requirements governing fire spread within external walls. The Applicant relied upon those matters as further support for its contention that the zinc wall system contained relevant defects.

F21. Although DFC recommended remediation only of configurations 3(e) and 3(f), Mr Davis maintained that relevant defects existed throughout the zinc wall system. The DFC assessment accepted that combustible insulation was present throughout the zinc wall system but concluded that the risk profile varied according to configuration and location. DFC therefore distinguished between configurations 3(a) to 3(d), which it considered to present a low hazard context, and configurations 3(e) and 3(f), which it regarded as requiring remedial measures. Mr Davis, however, ultimately maintained that relevant defects existed throughout the zinc wall system.

F22. The Applicant sought to explain that difference by reference to the limited extent of the available investigations, uncertainty concerning the effectiveness

and continuity of cavity barriers, and the presence of combustible Polyfoam insulation throughout the zinc-clad construction. Mr Davis considered that DFC had not fully accounted for cavity-barrier issues affecting some configurations and identified a number of unknowns concerning the detailed construction of the wall system.

R1-4's case

F23. Through Ms Vice, R1-4 maintained that The Box Works did not contain relevant defects requiring the remediation carried out. Whilst accepting the presence of combustible materials within the zinc wall construction (indeed Ms Vice accepted that the Polyfoam insulation was highly combustible and a Euroclass F material), they contended that the Applicant had failed to demonstrate that those materials gave rise to building safety risks necessitating remediation throughout the zinc-clad façade. R1-4 emphasised that the available evidence was derived from a relatively limited programme of intrusive investigations and contended that Mr Davis had extrapolated too readily from a small number of opening-up locations. They argued that the evidence did not adequately establish the existence of missing or ineffective cavity barriers throughout the various zinc-clad configurations and placed particular reliance upon DFC's conclusion that configurations 3(a) to 3(d) presented a low hazard context and did not require remediation. R1-4 therefore challenged both the existence and significance of the alleged defects outside configurations 3(e) and 3(f).

Conclusions on relevant defects

F24. We prefer the evidence of Mr Davis to that of Ms Vice in relation to the existence of relevant defects at The Box Works. In reaching that conclusion, we have carefully considered R1-4's submission that the available evidence was derived from limited opening-up investigations and did not justify conclusions concerning the zinc wall system as a whole. We are nevertheless satisfied that the Applicant has established the existence of relevant defects for the reasons which follow.

F25. We accept Mr Davis's evidence that the zinc wall system incorporated combustible materials capable of contributing to fire spread within the external wall construction. In particular, we attach significance to the presence of Polyfoam insulation behind the zinc panels. The evidence established that this material had a Euroclass F rating, being the lowest classification available for reaction to fire. Whilst Ms Vice maintained that the presence of combustible material did not automatically justify remediation, she accepted both the combustible nature of the insulation and that it would not satisfy the limited-combustibility standards reflected in Approved Document B.

F26. We also accept Mr Davis's concerns regarding cavity barriers. The evidence before us established at least a substantial question as to whether cavity barriers within the zinc wall system were missing, ineffective or otherwise inadequate. In this respect we prefer his interpretation of Approved Document B (2000). In particular, we accept his view that the 38mm (minimum thickness) timber detail relied upon by R1-4 was not capable of satisfying the cavity-barrier requirements applicable to the external wall system. Although Ms Vice

disagreed with that interpretation, she accepted in cross-examination that Mr Davis's view was a reasonable one and fell within the scope of legitimate professional opinion.

F27. Nor do we accept R1-4's criticism that the limited extent of intrusive investigations prevents the Tribunal from reaching findings concerning the existence of relevant defects. The investigations were plainly less extensive than might ideally have been undertaken. However, they identified combustible Polyfoam insulation, combustible timber components, OSB sheathing and concerns regarding cavity barriers. R1-4 produced no positive evidence demonstrating that the conditions identified at the locations opened up were not representative of the wider zinc wall construction. In those circumstances, we consider it appropriate to draw conclusions from the available evidence concerning the external wall system as a whole.

F28. We further accept Mr Davis's evidence that these matters should not be considered separately. The significance of the defects lay in their cumulative effect. The combination of highly combustible insulation, combustible OSB and timber elements, and inadequate cavity-barrier provision created pathways by which fire might spread unseen within the external wall construction. We are satisfied that those conditions gave rise to building safety risks.

F29. We also accept Mr Davis's opinion that aspects of the zinc wall construction did not comply with the Building Regulations and associated guidance applicable at the time of construction. In particular, he identified the absence or ineffectiveness of cavity barriers at compartment lines as contrary to Requirement B3(4) of the Building Regulations 1991 and the guidance in Table 13 of Approved Document B 1992. He also identified the combustible insulation within the external wall construction as contrary to the guidance in section 12.7 of Approved Document B 1992 and as giving rise to non-compliance with Requirement B4(1). We accept that evidence. Our conclusion does not depend upon whether the particular timber detail identified within the wall construction was itself capable of satisfying the requirements for a cavity barrier under the guidance then applicable. Nor, as we have explained in Part 2, does our finding that these were relevant defects depend upon establishing that they contravened the standards applicable when the building was constructed.

F30. The more difficult question concerns DFC's distinction between configurations 3(a) to 3(d) and configurations 3(e) and 3(f). We accept that DFC concluded that remediation was required only in relation to the latter configurations. However, that conclusion was directed to the level of risk presented in different parts of the building and to the appropriate remedial response. It does not follow that configurations 3(a) to 3(d) were free from relevant defects. On the contrary, DFC accepted that combustible insulation was present throughout the zinc wall system. We therefore consider that DFC's analysis goes primarily to the question of the seriousness of the risk and the extent of any appropriate remediation, rather than to the question whether relevant defects existed.

Remediation works

Overview

F31. The remediation scheme ultimately implemented at The Box Works involved the removal of the existing zinc cladding panels together with the combustible Polyfoam insulation fixed to their rear. The works also included the removal of timber support framing, OSB sheathing and associated elements of the wall construction which sat behind the zinc façade. New cavity barriers were installed and the zinc-clad areas were reconstructed using replacement materials intended to achieve compliance with the contemporary fire-safety requirements applicable to external wall systems.

F32. The remediation works extended to all configurations of the zinc wall construction, including locations where DFC had previously concluded that remediation was not required. The completed scheme therefore encompassed not only the canal-facing gable and upper-storey areas identified by DFC as requiring intervention, but also the remaining zinc-clad configurations present elsewhere on the building.

F33. During the works, deteriorated timber elements and localised corrosion of the supporting steelwork were also identified and addressed. The parties disagreed whether the cost of doing so was properly consequential upon the façade remediation.

Applicant's position as to the appropriateness of the works

F34. Mr Davis considered the remediation scheme to be an appropriate response to the defects he had identified within the zinc wall construction. His starting point was that the wall system incorporated a combination of highly combustible Polyfoam insulation, combustible OSB sheathing, combustible timber support structures and deficiencies in cavity-barrier provision. In his view, those features operated together and should not be considered in isolation.

F35. Mr Davis considered that the defects affected the zinc wall system generally rather than configurations 3(e) and 3(f) alone. He relied upon the presence of combustible materials throughout the construction and the remaining uncertainty concerning concealed cavity barriers and wall configurations.

F36. Mr Davis considered that, having exposed the zinc wall system, it was appropriate to remove the combustible insulation and timber-based components, install compliant cavity barriers, and reconstruct the wall using non-combustible materials.

F37. The Applicant also relied upon the fact that some of the timber support construction exposed during the works had deteriorated through rot. Mr Davis considered that new cladding could not sensibly be fixed to deteriorated timber substrates and that replacement of those elements was therefore necessary. The Applicant similarly treated works to localised corroded steelwork as consequential upon the façade remediation scheme.

R1-4's objections to the scope of the remediation works

F38. R1-4 contended that the remediation scheme extended substantially beyond what was necessary to address any building safety risk affecting The Box Works. Their principal reliance was placed upon the DFC assessment, which had recommended remedial measures only in respect of wall configurations 3(e) and 3(f).

F39. Ms Vice argued that the presence of combustible materials within the zinc wall construction did not automatically require wholesale replacement, and that a competent fire engineer should undertake a holistic assessment of the building and consider the actual risk presented by the various wall configurations before recommending remediation. In R1-4's submission, DFC's analysis demonstrated that the majority of the zinc-clad locations did not present a sufficiently serious risk to justify the works ultimately undertaken.

F40. R1-4 repeated their criticisms of the limited intrusive investigations. They contended that the resulting uncertainty could not itself justify wholesale replacement of zinc-clad configurations which DFC had assessed as presenting a low risk.

F41. R1-4 further contended that some elements of the works related to matters which were not relevant defects. In particular, they argued that the timber support structure was remediated primarily because of deterioration associated with rot and that localised corrosion of steel supporting elements was essentially a maintenance or dilapidations issue rather than a fire-safety defect. They therefore maintained that the scope of the remediation scheme expanded beyond what was necessary to address the building safety issues identified by DFC.

Conclusions on the scope of the works

F42. We are satisfied that the remediation works undertaken at The Box Works were an appropriate response to the relevant defects identified above. We prefer the evidence of Mr Davis to that of Ms Vice on this issue, whilst recognising that reasonable fire engineers might legitimately differ as to both the seriousness of the risks presented and the extent of the remedial measures required. Nevertheless, we are satisfied that the remediation scheme adopted fell comfortably within the range of reasonable responses available to those advising in relation to the building.

F43. We have already found that the relevant defects affected the zinc wall system as a whole and should be considered cumulatively rather than individually. In those circumstances, we accept Mr Davis's view that the replacement of combustible components and the installation of appropriate cavity barriers represented a coherent and logical remediation strategy.

F44. We have carefully considered R1-4's reliance upon DFC's distinction between configurations 3(a) to 3(d) and configurations 3(e) and 3(f). We accept that DFC recommended remedial measures only in relation to the latter. However, DFC

did not suggest that the former were free from combustible materials and further assessment was expressly contemplated. DFC also recognised that replacement of all zinc-clad areas would achieve unambiguous compliance with Approved Document B. Whilst that did not compel the adoption of a comprehensive remediation strategy, it lends support to the reasonableness of the approach ultimately adopted.

F45. We likewise reject R1-4's submission that the limited extent of intrusive investigations rendered the remediation strategy unreasonable. Although additional investigations might have provided greater certainty, those responsible for the project were required to make decisions against a background of known combustible insulation and continuing uncertainty concerning concealed cavity barriers. In those circumstances, we do not regard the adoption of a comprehensive remediation strategy as unreasonable.

F46. We have also considered Mr Dennys KC's submission that some combustible materials elsewhere within the building were not remediated and that this undermines the reasonableness of the external works ultimately undertaken. We do not accept that submission. The remediation project with which we are concerned was directed towards the zinc-clad external wall construction and the fact that other combustible elements falling outside the scope of BSF funding (because they were internal) may have remained *in situ* does not provide a principled basis upon which to conclude that it was unreasonable to remediate the external wall construction which formed the subject of the investigations, funding application and remedial design process.

F47. Finally, insofar as the works addressed deteriorated timber elements and localised corrosion within the supporting structure, we are satisfied that those items were properly treated as consequential upon the façade remediation works. Once the zinc wall construction was removed and replaced, it was necessary to ensure that the supporting substrate was capable of performing its intended function. We therefore accept that such works necessarily formed part of the overall remediation project.

Costs and funding

F48. Remediation of The Box Works was entirely funded by the BSF. The works were completed in April 2023, and the parties agree that the total costs incurred were £1,762,054 (inclusive of VAT). They did not agree that the entirety of those costs had been *reasonably* incurred, however.

F49. As a result of the investigations described above, Thomasons had been instructed to obtain prices for the façade remediation and related works and, following a competitive tendering exercise, the contract for the works had been let to 2nd Generation Facades Limited. The contract price was approximately £1,132,000 (inclusive of VAT) and the quantity-surveying experts also agreed that this was a reasonable price for the works concerned. Where the experts differed was in relation to the reasonableness of a number of post-contract variations and loss and expense claims. These had been required in order to deal with an additional area of high-level zinc cladding not included in the original scope of works; removal and replacement of rotten timber framework;

replacement of combustible external timber stud framework supporting the cladding; and consequential works to corroded steel support structure. They also differed slightly in their approach to assessing professional fees. Overall, however, the disagreement between the quantity-surveying experts was relatively narrow.

F50. R1-4 further contended that, if remediation was only justified in relation to wall configurations 3(e) and 3(f), the Applicant had failed to prove what proportion of the overall project costs was attributable to those areas and what proportion related to the remaining zinc-clad configurations. We reject that submission. It proceeds from a premise which we have already rejected, namely that remediation of configurations 3(a) to 3(d) was unjustified. Having concluded that the remediation scheme as a whole represented an appropriate response to the relevant defects identified at The Box Works, no useful purpose would be served by attempting to apportion costs between individual wall configurations.

F51. In both her report and oral evidence, Ms Allen explained that the reductions she had made did not reflect a concluded view that the disputed items were unnecessary or unreasonably priced. Rather, she regarded many of her assessments as provisional. Her principal concern was that she had not been provided with sufficient supporting documentation to enable her independently to verify the reasonableness of particular variations, loss and expense claims or fee adjustments. In consequence, she applied percentage reductions pending the provision of further substantiation.

F52. We do not accept that approach. For the reasons given in Part 2 of this Decision, we prefer the methodology adopted by Mr Lynch. The costs in question had been incurred, the contract itself had been competitively tendered, and the variations had been reviewed and approved through the project governance arrangements established for the remediation works. The issue before us is not whether every element of every variation could be proven by the type of detailed build-up that might be expected in a construction adjudication or final account dispute. The question for present purposes is whether expenditure which was incurred in remedying, or otherwise in connection with, the relevant defects was reasonably incurred.

F53. We are satisfied that the variations challenged by Ms Allen meet that test. The additional high-level cladding formed part of the same zinc cladding system which was ultimately remediated. The works to the timber framework and timber stud construction followed directly from the decision to remove and replace the external wall build-up and were, for the reasons already given, properly treated as part of the remediation works. Similarly, the costs associated with the corroded steelwork were modest and arose only because the supporting structure was exposed during the course of the façade remediation. We are satisfied that each of those items was incurred in remedying, or otherwise in connection with, the relevant defects identified earlier in this Appendix.

F54. R1-4 also suggested that delays associated with the BSF approval process had increased the project costs. The evidence indicated that delays had occurred and had generated some additional expenditure. However, R1-4 provided no

coherent evidential basis upon which the Tribunal could identify the costs attributable to any particular period of delay, determine which part of that delay was unreasonable, or quantify any resulting deduction. The existence of delay therefore provides no proper basis for reducing the costs actually incurred.

F55. We therefore reject the reductions proposed by Ms Allen. To the extent that the experts differed in relation to variations, professional fees and consequential costs, we prefer the evidence of Mr Lynch for the reasons given above and in Part 2. We are satisfied that the full sum of £1,762,054 was reasonably incurred in remedying, or otherwise in connection with, the relevant defects at The Box Works.

APPENDIX G

THE THREE TOWERS





Above: Sylvia and Christabel

Left: Emmeline

Description

G1. The Three Towers comprise Christabel House, Emmeline House and Sylvia House. They are 13-storey concrete-framed residential tower blocks situated close to one another in the Collyhurst district of Manchester. The buildings date from the 1960s and were refurbished and overclad between about 2006 and 2008. They are similar in height, construction and external appearance. The common corridors at Emmeline are provided with louvres and are therefore

unheated, whereas those at Christabel and Sylvia are enclosed. The buildings are otherwise materially similar.

G2. During the original refurbishment, the internal floor plate of each building was extended to incorporate previously external balconies. The external walls at those locations were formed using structural insulated panels (SIPs). The overcladding comprised Prodema Lignum high-pressure laminate panels installed over Kingspan K15 insulation across most of the external walls, identified as Wall Type 1, and over SIPs where the floor plates had been extended, identified as Wall Type 2.

Investigations into the external wall construction

G3. The principal early investigation was a fire-engineering assessment undertaken by DFC in August 2017. DFC reviewed the external wall systems as constructed and identified the two principal wall types described above. It concluded that there was insufficient test evidence to demonstrate that the wall systems complied with the requirements of Approved Document B through any recognised testing route.

G4. DFC identified uncertainty concerning whether the wall systems would satisfy the BR135 performance criteria when tested in accordance with BS8414; the fire performance of the systems incorporating SIPs; and the ability of the external wall construction as a whole adequately to resist fire spread. It considered that, in the absence of satisfactory evidence of compliance, mitigation or remediation would be required. The potential responses identified included replacement or upgrading of the cladding systems, encapsulation and compensatory measures such as sprinklers.

G5. DFC produced an updated report in May 2018. Thomasons subsequently reported in May 2020. Although the Thomasons report was commissioned in relation to Emmeline, its findings were treated as applicable across the Three Towers. Thomasons concluded that neither principal wall type complied with the version of Approved Document B applicable when the original refurbishment works were undertaken.

G6. The investigations included desktop review, limited intrusive inspection, photographic material and abseil inspections. The evidence did not consist of comprehensive opening-up at every location, but it provided information about the principal wall constructions, the combustible materials incorporated within them and the cavity-barrier arrangements.

Relevant defects

The parties' cases

G7. The Applicant alleged that each of the Three Towers contained relevant defects affecting both principal wall types. In relation to Wall Type 1, the alleged defects comprised combustible 60 mm Kingspan K15 insulation within a vented cavity, ineffective Envirograf cavity barriers and combustible Prodema HPL cladding panels.

G8. In relation to Wall Type 2, the Applicant relied upon combustible OSB sheathing and PUR or PIR insulation incorporated within the SIPs construction, together with a vented cavity, ineffective Envirograf cavity barriers and combustible Prodema cladding panels

G9. Further combustible elements were identified during the remediation project, including timber window-surround trims and packing. The parties differed as to whether those elements constituted relevant defects in their own right and whether their removal was necessary as part of the remediation of the external walls.

G10. R1-4 did not ultimately maintain that the principal external wall constructions were free from relevant defects. In her oral evidence, Ms Vice acknowledged that the combination of Kingspan K15 insulation and HPL cladding constituted a relevant defect. She also accepted the position concerning the Envirograf cavity barriers. She agreed that the existing cladding panels had to be removed and could not then be reinstated.

Conclusions on relevant defects

G11. We are satisfied that relevant defects existed in both principal wall types at each of the Three Towers. Wall Type 1 combined combustible K15 insulation and combustible HPL cladding within a vented wall construction. Wall Type 2 incorporated combustible materials within the SIPs construction and was also finished with combustible HPL panels. The use of ineffective Envirograf cavity barriers materially increased the potential for fire to spread through the external wall cavities.

G12. We accept Mr Davis's evidence that the combustible insulation and deficient cavity-barrier arrangements represented breaches of the Building Regulations 2000 and the associated provisions of Approved Document B (2002). Ms Vice considered that the performance of the panels could not be determined conclusively without further testing. However, the issue was not the combustibility of a single product viewed in isolation. It was the operation of the external wall constructions as a whole, including the combination of combustible cladding, insulation or SIPs materials, vented cavities and ineffective cavity barriers.

G13. Those conditions created routes by which fire could spread through and over the external walls and therefore gave rise to building safety risks. Ms Vice's concessions provide further support for that conclusion, although our finding does not depend upon them. We find that the defects identified in Wall Types 1 and 2 constituted relevant defects.

G14. We do not make the same finding in relation to every item subsequently encountered during the works. In particular, the evidence about the timber window surrounds and packing did not establish with the same clarity that each such item constituted a relevant defect in its own right. That does not determine whether their removal and replacement were reasonably required in connection

with the remediation of the established defects. We consider that question below.

Remediation works – scope and argument

Overview

G15. The external walls of each Tower were remediated between 2020 and 2022. The existing cladding and insulation were removed and replaced with non-combustible alternatives. The existing Envirograf cavity barriers were removed and new cavity barriers installed, including at locations where barriers were required but had not previously been provided.

G16. A notable feature of the adopted scheme was the treatment of the SIPs. Rather than removing and replacing those panels, the project retained and encapsulated them *in situ*. R1-4 relied upon that aspect of the scheme as an example of a proportionate response which, in their submission, demonstrated a "closer grip on costs" than the approaches adopted at some of the other Buildings.

G17. Further works were undertaken as the project progressed. They included the removal and replacement of timber window-surround trims and packing; removal of redundant horizontal steel box sections at floor and roof levels; replacement of parapet structures affected by removal of the cladding rails; works associated with lightning protection; and other modifications required to integrate the replacement wall construction with the existing buildings.

Applicant's position as to the appropriateness of the works

G18. Mr Davis considered that the remediation of the external walls represented an appropriate response to the relevant defects. The combustible cladding and insulation had to be removed, the ineffective cavity barriers replaced and appropriate barriers installed where they were absent. The existing cladding could not properly be reinstated once removed.

G19. The Applicant also contended that the timber window-surround trims and packing required attention because they formed part of a façade construction capable of facilitating external fire spread. Alternatively, their removal and replacement were said to have followed necessarily from the principal cladding works. The Applicant relied upon the contemporaneous variation and funding records as evidence that the other disputed items arose during, and in consequence of, the façade remediation.

R1-4's objections to the scope of the works

G20. R1-4 accepted by the conclusion of the hearing that the principal remediation scheme was essentially reasonable. Ms Vice had previously suggested the installation of sprinklers combined with localised replacement of cladding at the lower two storeys as a potentially cheaper alternative. During cross-examination, however, she accepted that her position had changed. She

considered that the sprinkler proposal could possibly have worked in theory, but acknowledged that it presented difficulties, particularly at these buildings.

G21. The original DFC suggestion had also proceeded upon the understanding that effective Lamatherm cavity barriers were present within the wall constructions. The barriers installed were in fact Envirograf products for which there was no evidence of satisfactory performance as open-state cavity barriers under the relevant testing regime. That undermined the factual premise upon which the sprinkler alternative had originally been suggested.

G22. R1-4 nevertheless disputed the need for a number of the consequential works. They maintained that insufficient evidence had been provided to demonstrate that some of those items were required because of the relevant defects or as a consequence of the principal remediation scheme. Their objections concerned, in particular, the timber window surrounds and packing, the redundant steel box sections, works described as arising from storm damage, the parapet works and several other relatively modest contract variations.

Remediation works – conclusions

Generally

G23. We are satisfied that the principal remediation works fell within the range of reasonable professional responses to the relevant defects affecting the Three Towers. Indeed, by the conclusion of the hearing there was little material disagreement about the principal scheme. The combustible cladding and insulation required removal, the existing cavity barriers required replacement and further barriers had to be installed where they were absent.

G24. Nor are we persuaded that the earlier sprinkler proposal represented a developed and practicable alternative to the scheme adopted. Ms Vice's ultimate evidence did not support the proposition that sprinklers and localised cladding replacement provided an equivalent response to the defects as they were eventually understood. The proposal had also proceeded upon a mistaken understanding of the cavity barriers installed within the buildings.

G25. The retention and encapsulation of the SIPs demonstrates that the project did not proceed upon the assumption that every combustible component had to be removed. Instead, the design retained those panels where a satisfactory encapsulation solution was available, whilst replacing the cladding, insulation and ineffective cavity barriers which formed the principal relevant defects. We accept that this represented a proportionate approach to the conditions identified.

Timber window surrounds and packing

G26. The fire-safety experts agreed that the window surrounds incorporated combustible timber elements capable of contributing to external fire spread, although they differed as to whether those elements constituted relevant defects in their own right and whether their removal was required. Mr Davis regarded them as components of the façade system which should be addressed as part of

the overall remediation. Ms Vice considered their removal unnecessary and disproportionate.

G27. We accept Mr Davis's assessment. The timber elements were incorporated within or adjoining a wall system which required substantial dismantling and reconstruction. Their retention would have left combustible components within the remediated façade and would have required those components to be satisfactorily integrated with the replacement construction. The evidence did not identify a developed alternative by which they could practicably and safely have been retained. We are therefore satisfied that their removal and replacement fell within the range of reasonable responses to the relevant defects, whether or not every timber element constituted a relevant defect in isolation.

Redundant steel box sections

G28. The original refurbishment had used horizontal steel box sections at floor and roof levels to support the vertical cladding rails. The contemporaneous variation record stated that the box sections prevented the correct installation of fire barriers at compartment-floor and roof levels. The proposed variation removed the box sections and installed suitable brackets so that the new fire barriers could be installed correctly.

G29. We accept that evidence. The removal of the box sections was not a separate improvement unrelated to the defects. It was necessary to permit the compliant installation of the cavity barriers which formed a central part of the remediation scheme. The associated costs were therefore incurred in remedying, or otherwise in connection with, the relevant defects.

Parapet works

G30. Works were also undertaken to replace parapet structures at roof level. R1-4 relied upon the oral evidence of Arthur Lea, a director of the management company for Emmeline who acted as an unofficial clerk of works during the project. His understanding was that the parapets had been altered in order to raise their height for safety reasons. If that had been the reason for the works, the associated expenditure would not have been incurred in connection with the relevant defects.

G31. The contemporaneous documentary evidence provides a different and more persuasive explanation. The variation tracker records that the parapets had previously been raised when insulation and finishes were applied to the roofs. The cladding rails were bonded and mechanically fixed to the parapet structures and could not be separated from them without causing damage. Replacement of the parapet structures was therefore required because of damage caused by removal and replacement of the existing cladding rails.

G32. We consider that Mr Lea was honestly mistaken about the reason for these works. His evidence reflected his understanding of the project rather than direct technical responsibility for the relevant variation. We prefer the

contemporaneous variation record and find that the parapet works were a necessary consequence of removing and replacing the cladding system.

Storm damage

G33. The documentary material concerning the works described as arising from "storm damage" is limited. Those works were carried out at two of the Towers and cost £3,740 in total. R1-4 questioned the reason for the expenditure, and Ms Allen excluded the amount in full from her assessment.

G34. The works arose during the course of the remediation project and involved a modest sum. No positive evidence was adduced to suggest that they were unrelated to the project or that the amount charged was unreasonable. In those circumstances, and having regard to the project records as a whole, we are satisfied on the balance of probabilities that the expenditure was incurred in connection with the undertaking of remediation works.

Other additional or consequential works

G35. R1-4 also challenged a number of other relatively modest variations. These included works required to address gaps between entrance doors and the new cladding line; concealed openings in the original brick façade; gaps between retained ground-floor openings and the replacement cladding; and a substation ventilation duct which no longer fitted following the external wall works.

G36. The available variation records demonstrate that these conditions were identified during the façade works and required attention in order to integrate the replacement external wall with the retained parts of the buildings. Thomasons approved the works as contract administrator. That approval is not conclusive, but it provides contemporaneous professional support for the proposition that the variations arose from the remediation project and were reasonably required for its completion.

G37. R1-4 did not identify any particular item which was shown not to have been carried out, to have been unnecessary, or to have been unrelated to the façade works. Taken together, the variation records, Thomasons' approval and the nature of the works establish a *prima facie* case that the expenditure was properly incurred in connection with the remediation. R1-4's general complaint about the absence of further supporting material does not displace that case.

G38. We therefore conclude that the remediation scheme, including the consequential and integration works considered above, fell within the range of reasonable professional responses to the relevant defects affecting the Three Towers.

Costs and funding

Remediation project and BSF funding

G39. The works were undertaken by Clarke Facades Ltd. The principal works comprised the replacement of cavity barriers, sheathing boards, insulation and

cladding panels. The combined contract sum for the Three Towers was £4,662,790 excluding VAT. Further items of work were identified during construction and were dealt with through contract variations. No additional funding was sought for those variations because their value could be accommodated within the existing contingency.

G40. RMG, the managing agent for the Three Towers, sought to pursue claims under the relevant building-guarantee policies on behalf of the leaseholders, but those efforts were unsuccessful. The warranty relating to Emmeline had expired by the time the defects were identified, while the provider of the warranties for Sylvia and Christabel entered administration in 2020.

G41. The works proceeded following an award of BSF funding in 2021. The two management companies entered into grant funding agreements in August 2021. RMG guided them through the funding process with specialist input from DFC and Thomasons.

G42. The total cost of the remediation works was £5,845,806. The BSF did not bear the whole amount. Places for People owned a number of flats in Christabel and Sylvia and elected to fund its share of the remediation costs. The parties agreed that the amount incurred by the BSF was £3,995,243 inclusive of VAT. That figure comprised £1,472,075 for Christabel, £495,390 for Sylvia and £2,027,778 for Emmeline.

The quantity-surveying dispute

G43. The quantity-surveying experts agreed that the original contract sum was reasonable. The dispute did not concern whether the BSF expenditure identified above had been incurred. It concerned principally Ms Allen's treatment of the contract variations and, to a lesser extent, her assessment of professional fees.

G44. Ms Allen's assessment of the reasonable expenditure was approximately £340,000 lower than the amount incurred by the BSF. A substantial part of that difference arose from her treatment of the variations. She applied a reduction of 50% to nearly all of them and excluded the storm-damage variation in full. Her reason was that she had not received sufficient supporting material to provide an affirmative opinion that the costs were reasonable. Her assessments were provisional and she indicated that she would reconsider them if further information were produced.

G45. The experts were broadly agreed about the professional fees incurred, but Ms Allen applied a different methodology to some fees relating to the Three Towers. She assessed approximately £504,000 as reasonable, compared with actual fees of £543,500. Mr Lynch accepted the combination of percentage-based and fixed fees charged by Thomasons as project manager and RMG as property manager.

Conclusions on costs

G46. The general methodological dispute concerning substantiation of variations and professional fees is addressed in Part 2 of this Decision and is not repeated here. For the reasons given there, the absence of the further primary documents which Ms Allen wished to see did not, without more, establish that the expenditure was unreasonable. Her provisional reductions did not amount to affirmative evidence that the variations were overvalued or that some lower identified amount would have been reasonable.

G47. The position at the Three Towers also provides no factual basis for the reductions. The original contract sum was agreed to be reasonable and each of the Towers was ultimately remediated for less than its contract sum after allowance for the relevant contingency, notwithstanding the variations. The evidence did not identify excessive rates, duplication or any particular variation which had been overvalued.

G48. The variations were generally of the kind which might be expected when existing external walls are dismantled and replacement systems installed. They addressed conditions revealed during the works or modifications required to integrate the new construction with the retained building. Ms Allen accepted in oral evidence that these were the type of "bread and butter" variations which one would expect in works of this nature.

G49. Nor are we persuaded that the professional fees should be reduced. The amount of the fees was largely agreed and Ms Allen did not provide a satisfactory explanation for applying a materially different methodology to some of the Towers. We prefer Mr Lynch's assessment. The use of a combination of percentage-based and fixed fees for the project-management and property-management services does not establish that the resulting expenditure was unreasonable.

G50. The Applicant has therefore established a *prima facie* case that the expenditure was reasonably incurred through the agreed contract sum, the project and variation records, the professional review and administration of the works, the evidence of payment and Mr Lynch's assessment. Ms Allen's provisional reservations do not displace that case.

G51. We find that the sum of £3,995,243 inclusive of VAT was reasonably incurred by the BSF in remedying, or otherwise in connection with, the relevant defects affecting the Three Towers.