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Insights

BUILDING SAFETY ACT: APPLICATION OF THE "JUST AND EQUITABLE" TEST FOR REMEDIATION CONTRIBUTION ORDERS

THE VISTA TOWER DECISION

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SUMMARY

Section 124 of the Building Safety Act allows the First Tier Tribunal to make remediation contribution orders ("RCOs") where it considers it "just and equitable" to do so. In this Insight, Marcus Birch considers the recent First Tier Tribunal decision in Grey GR Limited Partnership v Edgewater (Stevenage) and others which provides long-awaited guidance on how the Tribunal will apply the "just and equitable" test in fire safety cases involving large numbers of respondents.

BACKGROUND

Vista Tower in Stevenage was the subject of the government's first successful claim for a remediation order under section 123 against the owner of a building. While those proceedings were underway, the owner ("Grey") applied for an RCO against the original developer of the building and 95 others who qualified as "*associated persons*" by having had shared directors in the relevant period between 2017 and 2022. The owner sought an order that the respondents pay the past and future costs of fixing the fire safety defects (estimated at over £20 million).

THE DECISION

The case raised five issues of note.

1. The meaning of "*defect*" in section 120(2) of the Act;

2. The threshold for a "*building safety risk*" in section 120(5);

3. Should an order be made in favour of a well-funded applicant who had been aware of the fire safety defects at the time of purchase?

4. Should an order include remedial costs agreed by the experts to have been disproportionate?

5. If an order is to be made against parties other than the developer, how should the Tribunal distinguish between such parties?

WHAT IS A DEFECT?

On the first issue, the fire safety experts had agreed, and the developer had argued, that for the purposes of section 120(2) "*defect*" should be interpreted as building work that did not comply with the Building Regulations in force at the time of construction. The Tribunal rejected this: non-compliance with those regulations is merely one way, not the only way, in which something can be a "*defect*" for these purposes. In particular, it would be surprising if the Act limited the concept to non-compliance with the 2010 Regulations, which the Hackitt review had found not to be fit for purpose.

WHAT IS A BUILDING SAFETY RISK?

On the second issue, the developer contended that whether something causes a "*building safety risk*" depends on whether the risk is tolerable, having regard to the other features of the building. That was consistent with the fire safety experts' approach, that a situation rated "*Medium:tolerable*" under the PAS 9980 standard would not be a building safety risk. Again the Tribunal disagreed:

> "*any risk above "low" risk (understood as the ordinary unavoidable fire risks in residential buildings and/or in relation to PAS9980 as an assessment that fire spread would be within normal expectations) may be a building safety risk.*"

SHOULD AN RCO BE MADE IN FAVOUR OF A WELL-INFORMED INVESTOR?

On the third issue, the Tribunal was content to grant an order. As to the general purpose of the RCO, it followed Triathlon Homes LLP v Stratford Village Development Partnership & others, referring to the "*hierarchy or cascade of liability*" approved in that case and noting that: "*the new jurisdiction appears essentially not to be fault-based, providing a route to secure funding for remedial works, with the emphasis on protection of leaseholders/residents and helping to expedite remedial action.*"

Against that background, it considered various "Applicant factors", including that Grey was a well-funded and well-advised property investor, which had investigated the fire safety issues at the building and negotiated warranties and a retention in that respect, and had known that Edgewater was a single-purpose vehicle but chose not to seek a guarantee of its obligations. The Tribunal did not consider those factors to have any significant weight in this case. It was influenced by the facts that the developer's warranty as to compliance with Building Regulations was untrue, and that it had failed to disclose serious fire safety warnings during the sale process. Grey's case was also helped by the fact it was a pension fund, and under an obligation in its Grant Funding Agreement to seek recovery of monies through litigation.

SHOULD AN RCO INCLUDE "DISPROPORTIONATE" REMEDIAL COSTS?

The case involved complex technical evidence as to the necessity, reasonableness and proportionality of the remedial scheme adopted. The fire and architectural experts agreed that the remedial scheme to one wall type went beyond that which was strictly necessary, or was not proportionate.

The Tribunal held that this did not exclude recovery of those costs: remedial works or costs should be included in an order if they were within a reasonable range of responses or costs. The experts' agreement that certain works were not proportionate carried significant weight, but other factors were also relevant. These included the advice from the PAS 9980 assessor that the relevant wall was "High risk", the requirements of the Building Safety Fund process, the desire to avoid decanting residents, and pressure from the government in the remediation order proceedings. In all the circumstances, the Tribunal found that the building owner was justified in pressing ahead with the cautious remedial scheme recommended by its professional advisers.

TO WHICH RESPONDENTS SHOULD AN RCO EXTEND?

This was the first case under section 124 in which the applicant took full advantage of the wide definition of associated persons to seek an RCO against a very long list of respondents. It justified this on the basis that Edgewater had minimal assets, that the purpose of the jurisdiction was to ensure that there were sufficient funds to pay for remediation, and that it was for the respondents to sort out between themselves who would pay in what proportion.

The Tribunal broadly agreed, subject to certain exceptions based on the specific circumstances of certain respondents. It made the following general points:

- Even if the development made no profit or only modest profit, it would still have been just and equitable to include in the order all of the remedial costs;
- The developer is at the top of the hierarchy of liability;
- The asset position of a respondent is not a significant reason for or against making an order;
- There is no presumption that an associate must be made liable unless it can show good reasons why not; but some circumstances will suggest linking factors to the developer;
- The presence of a wider corporate or group structure is relevant; it is not necessary to prove ultimate beneficial ownership by a single person; it is sufficient to show some or all of the same relevant beneficial owners or other similar corporate connection.

Following a thorough review of the facts, the Tribunal found that most of the respondents should be included in the order, for these reasons:

- their business involved the property, development or construction sectors;
- they were presented to potential funders or third parties as if they were part of a group;
- they were all linked to the families of the two key individuals behind the developer; and
- they were probably linked by financial or other dealings, or their records were opaque or unreliable.

The Tribunal excluded a small number of respondents. Some were not involved in the property sector at all, being charities or other types of business. Others were in that sector, but had genuinely independent declared majority shareholders and professional advisers. The interests of external investors were given great weight, such that where the key individuals at the developer had only a minority stake in and no real control over a company, the Tribunal considered it unfair to include that company in the order.

IMPLICATIONS

The decision is not binding in later cases; the factors relevant to the exercise of the jurisdiction will depend on the facts in each case. Nonetheless, the Vista Tower decision provides helpful guidance on the approach the Tribunal is likely to take in RCO proceedings. The case provides comfort to applicants that the Tribunal will take a broad and purposive approach both to the costs which can be included in an order, and to the respondents against which an order is made. At the same time, the careful review of the factual background and express exclusion of certain respondents shows that the Tribunal is prepared to defend the interests of businesses and external investors who are genuinely unconnected with the developer.

The decision also fits into the wider landscape of how the new causes of action under the Building Safety Act are being used. Grey was the subject of remediation order proceedings, and commenced both RCO proceedings in the First Tier Tribunal and a claim for a building liability order in the Technology and Construction Court. It now appears understood, as mentioned in both Triathlon and Vista Tower decisions, that the purpose of the RCO is to ensure funding for works to get underway, leaving the developer and its associates to use building liability orders or contribution claims to pass the liability to its supply chain.

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