RCO appeals KO'd: Upper Tribunal Confirms Previous Rulings and Clarifies Accountability of Developer and Associated Companies

In a significant decision on remediation contribution orders ("**RCO**") the Upper Tribunal ("**UT**") has handed down a much-anticipated ruling confirming the decision of the First Tier Tribunal ("**FTT**") and providing further guidance as to the operation of s.124 of the Building Safety Act 2022 (the "**BSA**").

Our previous bulletin on the FTT's decision, which can be found through the following link: Significant Contributions: Tribunal Makes RCO Against Developer and over 70 Related Entities, provides additional background to this latest ruling.

Key takeaways:

- **A RCO can be made against multiple related entities on a joint and several basis.**
- **"Building safety risk" has been defined broadly, promoting greater access to protections under the Building Safety Act 2022.**
- **The "just and equitable" test does not require that an associated company to have been involved in or received remuneration from a development for them to be made subject to a RCO.**

Factual Background

Vista Tower is a 16-storey residential block which contained combustible insulation within the external walls and defective cladding / blanking panels. Investigations prompted by the Grenfell Tower tragedy revealed these significant fire safety defects.

Grey GR Limited Partnership ("**Grey**") purchased the freehold from Edgewater (Stevenage) Limited ("**Edgewater**") in 2018 and upon finding the defects within the building, applied to the FTT for a RCO against 96 companies, including the developer, Edgewater, and several entities connected to Edgewater through common ownership and directors.

The FTT ordered a RCO against 76 of those companies for a total of £13,262,119.08; liability for the sum awarded being on a joint and several basis.

The Appellants appealed the decision of the FTT on four grounds, which will be examined in turn below.

Held

Ground 1: Jurisdiction to make Joint and Several Orders

Under their first ground of appeal, the Appellants argued that the FTT had no jurisdiction to make multiple respondents jointly and severally liable under a RCO. They argued that BSA's reference to "*a specified body corporate or partnership"* showed Parliament only intended for RCOs to be made against a single party and so the FTT could not make a single order that made multiple parties jointly and severally liable for the same total sum.

The UT rejected this and held the singular wording "*specified body"* was to be taken as including the plural. The UT held this interpretation of the BSA would uphold Parliament's underlying intention in enacting the BSA, which was to prevent developers from using shell companies or "Special Purpose Vehicles" ("**SPVs**") to avoid responsibility for historic fire safety defects.

Significantly, this means a joint and several RCO may be made against multiple associated companies. The

FTT does not have to apportion liability between companies as this could prevent applicants from obtaining necessary funding for remediation works if various entities became insolvent or the orders otherwise went unsatisfied.

Ground 2: "Just and Equitable" Test

The Appellants argued that the FTT had erred in its judgment, since many of the companies subject to the RCO had not participated in the construction of Vista Tower, or profited from it, such that it would not be "just and equitable" for them to be obliged to contribute to the cost of remediation. They argued instead that there ought to be a minimum requirement of work done or remuneration received from the development before it could be "just and equitable" to make an RCO against an associated company in this situation.

The UT disagreed with this argument, noting that the wording of "just and equitable" within s.124(1) BSA gives the Tribunal a very wide discretion. If the applicant can satisfy the Tribunal that it would prima facie be just and equitable to make the RCO (which it acknowledged would be fact sensitive in each case), it is then for the respondent to make their case against the RCO being made against the particular entities concerned.

In this instance, the UT found that the FTT had made the RCO justly and equitably, since the companies did not run as genuinely separate SPVs but rather were part of an opaque, disorganised and blurred network. The entities were therefore associated for the purposes of s.121 BSA and there was a sufficient link between them, justifying liability.

Ground 3: The Meaning of "Building Safety Risk"

Within the BSA, a RCO can only be made in respect of a "relevant defect", which causes a "building safety risk".

On this point, the UT corrected the FTT on one point. The FTT had explained for there to be a "building safety risk" there needed to be at least a "low" risk, as per the PAS9980 specification.

The UT took a less restrictive approach and found that on proper interpretation of s.120(5) BSA and the accompanying explanatory notes, there is no such threshold and any "risk" would suffice if it satisfied the statutory elements. These elements comprise a risk to people, arising from spread of fire, or structural collapse, caused by a relevant defect. Any risk which satisfies this definition is capable of being a building safety risk for the purposes of s.120(5) BSA.

Therefore, the risk may be relevant to the question of what remedial works are necessary, but it does not form part of the gateway requirements for making an RCO.

Ground 4: The Reasonableness of Remedial Costs

On their final ground of appeal, the Appellants argued that a total replacement of combustible insulation from the cavity wall, was disproportionate and highlighted how the experts had agreed on this from a "*purely technical perspective*". Therefore, the Appellants argued that the remedial costs incurred by Grey were excessive.

Despite this, the UT rejected this argument and held that Grey had reasonably relied on a report from a specialist fire engineering company in advance of carrying out the remedial works. Given the pressures from the Secretary of State and Building Control to remediate the defects quickly and safely, the UT concluded that Grey was justified in not scrutinising in depth and challenging the advice received from its expert.

On a practical note, this suggests a reasonable remediation scheme will not always necessarily be the most minimal or proportionate scheme – especially where external pressures surround the remediation. It is important though to demonstrate that an expert's opinion was relied upon as the basis for a more comprehensive remediation scheme.

Comment

This important decision confirms RCOs are a powerful, flexible and far-reaching mechanism for recovering historic remediation costs from those responsible for the defects.

The ruling highlights how RCOs can be validly made on a joint and several basis, providing it is "just and equitable" to do so. Further clarity has also been provided in respect of the just and equitable test, confirming that associated companies need not have developed or profited from the development to be made subject to a RCO.

A clearer and less onerous test for what a "building safety risk" comprises has been provided and remediation schemes need not necessarily represent the minimum amount of work required; and can be more comprehensive where a party reasonably relies on an expert's opinion and is facing competing pressures from various stakeholders.