Remediation contribution orders: mitigating unintended consequences

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COMMENT Developers of historical high-rise blocks will be closely following the impact of the Building Safety Act 2022.

One objective of the Act is to ensure, so far as practical, that leaseholders do not pay for remediating fire safety defects which, following the Grenfell Tower tragedy, have been found to exist in high-rise blocks.

Context

To meet this objective, the Act gives a right to leaseholders and others with an interest in high-rise blocks to make applications to the First-tier Tribunal for a remediation contribution order. An RCO is aimed at entities "associated" with a developer of a high-rise block with fire safety defects. If granted, an RCO forces associates to pay all or part of the costs of remediating these defects.

During its legislative stages, the justification given by secretary of state Michael Gove for introducing the RCO was simple. Often, special purpose vehicles were used for developments of high-rise blocks and, after the profits generated were distributed upwards to the parent group, the SPVs were dissolved. So an RCO is necessary to enable applicants to pursue the (ultimate) recipients of the profits for the costs of remediating defects which their SPV caused.

Since last September there has been a steady stream of RCO applications. The perception of some lawyers acting for associates is that the FTT is fast-tracking applications so they will be heard as soon as the tribunal's diary permits. While fast-tracking applications is not, of itself, a bad thing, justice must be done and be seen to be done to both sides. RCO applications will invariably turn on complex technical questions relating to compliance with Building Regulations and costs of remediation. In deciding these questions at trial, the FTT will need to decide between competing expert professional opinions – no easy task.

Few RCO applications claim less than several hundreds of thousands of pounds, and many claim sums running into millions. To do justice to both sides, associates should be afforded the same opportunity to prepare their case that developers would have in defending comparable cases, for example for a breach of collateral warranties or under the Defective Premises Act 1972, if they were

before the Technology & Construction Court. Anecdotal evidence suggests the FTT's fast-tracking in particular cases puts at risk the ability of associates to properly prepare for trial as they would wish.

Concerns

There is a separate downside for associates in the fast-tracking of RCO applications. Faced with a substantial claim, associates will wish to investigate whether they can claim an indemnity or contribution from third parties. These third parties will include members of the professional team who participated in the development, such as the architects, fire safety consultants and, if relevant, the main contractor and any specialist sub-contractors. Investigating where responsibility lies for fire safety defects in high-rise blocks built years ago takes time and necessitates consideration of the same complex technical issues of compliance and costs of remediation which the FTT will have to decide.

If the Act permitted RCO applications to be issued in the TCC, in most, if not all, cases the TCC could be expected to exercise its case management powers so these applications would be tried alongside claims brought by associates against third parties. The TCC would surely wish to obviate the necessity of multiple proceedings to avoid increasing the burden of costs on parties and the inherent risk of inconsistencies in findings at separate trials.

This writer has contemplated advising associates (speedily) to issue third-party claims in the TCC and apply for directions in both the TCC and FTT to enable a judge who can sit in both jurisdictions to case-manage both sets of proceedings – with the intention that they are heard together. If this were to happen, much of the increased costs burden of multiple proceedings and inconsistencies in findings could be avoided. But the fast-tracking of RCO applications by the FTT makes this difficult to achieve.

Before claims are issued in the TCC, parties must follow a protocol governing the conduct of construction and engineering disputes. The protocol is designed to make proceedings a last resort by encouraging the parties pre-action, through an exchange of information, to "put their cards on the table" and reach a settlement by mediation (or another form of alternative dispute resolution).

To complete the protocol for claims of any complexity where the amount at stake is, say, more than £500,000 usually takes at least six months. As most claims by associates against third parties will engage the protocol, fast-tracking by the FTT will prevent claims issued in the TCC playing catch-up.

Final words

Fast-tracking RCO applications, while no doubt conceived with good intentions, has serious unintended consequences. There are risks that associates will be forced:

- to defend themselves at trial without being afforded an opportunity to prepare for trial as they would wish; and
- into a multiplicity of proceedings to obtain an indemnity or contribution from third parties who caused the fire safety defects.

These unintended consequences need addressing by the FTT to ensure that the "overriding objective", which mandates the tribunal to deal with cases justly and at proportionate cost, is met. Equally, lawyers acting for associates must consider from the off how these unintended consequences can be mitigated for their clients.

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