TECBAR Review
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The Newsletter of the Technology and Construction Bar Association

in association with Lloyd's List Intelligence

Message from the Chair

This year marks the TCC 150 anniversary. There are numerous entertainments awaiting our membership:

- All the dates for seminars/receptions (London and regional) and details of their content are set out here: https://tecbar.org/tcc-150/.
- The final all-day conference in London is to be followed by a reception and gala dinner, with further details set out here: https://tecbar.org/wp-content/uploads/2023/01/TCC150_2-Nov_Future-of-Construction-Law.pdf.
- The TCC 150 exhibition will be running in the Rolls Building from 16 March 2023, including archival and other interesting materials from 150 years of the Official Referees and the TCC.
- There is a book marking the 150th anniversary. There is an overview of the book in this edition of *TECBAR Review*, and details of the book can be found here: https://www.bloomsbury.com/uk/history-of-the-technology-and-construction-court-on-its-150th-anniversary-9781509964178/ .

Please advertise these events within Chambers and where applicable to your solicitor clients, lay clients and experts. This is also a great opportunity to showcase the TCC domestically and abroad and, where applicable, to build networking and other activities around a TCC 150 base. The TECBAR Committee looks forward to welcoming as many attendees as possible to the exhibition and likewise to the many TCC 150 events.

Stop press: Congratulations to Mr Adam Constable KC on his elevation to the High Court Bench.

With all best wishes,
Simon Hargreaves KC
Chair of TECBAR

From the Editors

This issue of the *TECBAR Review* contains two contributions.

In the first, David Sawtell introduces a forthcoming book, edited by himself and Sir Peter Coulson, entitled *The History of the Technology and Construction Court on Its 150th Anniversary: Rewriting the Rules*. David provides an overview of the topics addressed in this collection of essays, and includes an extract recording an amusing courtroom anecdote.

The second contribution continues the theme of our previous issue, which explored some of the most significant provisions of the Building Safety Act 2022. Samantha Jones

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considers remediation contribution orders, as introduced by section 124 of the Act. She examines the legislative framework and analyses one of the first FTT decisions to consider the granting of a remediation contribution order.

We invite proposals for articles for future editions of the *TECBAR Review* via email to cgreenfield@atkinchambers.com and mtwivy@atkinchambers.com.

Caroline Greenfield and Max Twivy
Atkin Chambers

The History of the Technology and Construction Court on Its 150th Anniversary: Rewriting the Rules

As part of the celebration of the 150th anniversary of the Technology and Construction Court (TCC), Sir Peter Coulson and I have edited a collection of essays on aspects of its history, its contribution to the modern law, its work today, and insights into its future. Contributors to the book include: notable current and former members of the judiciary, including Lord Dyson, Sir Rupert Jackson, Dame Finola O'Farrell, Her Honour Frances Kirkham CBE and His Honour Judge Stephen Davies; academics such as Professor Renato Nazzini; and practitioners including Rachel Ansell KC. The chapters present the Official Referees' business (the antecedent to the modern TCC) and the current court from a range of different viewpoints, drawing on personal recollection, documentary research and doctrinal scholarship. In this article, I shall give a taste of what the book contains.

The opening chapters of the book set out the early history of the Official Referees. Dr Elizabeth Norton writes about the difficulties faced by litigants involved in construction disputes. She identifies from her original research examples of early flirtations with the Court of Chancery in the sixteenth century, but by the nineteenth century, the story was very much one of delay and expense. In the notorious case of *Macintosh v The Great Western Railway Company* (1851) S.C.3 Sm. & G.146; 42 ER 29, sums that became due in 1838 for railway works carried out for the Great Western Railway Company led to a Bill of Complaint in 1847, which only received an official response and an order for an enquiry in 1855. This took eight years to complete, but it was successfully appealed and discharged, putting the plaintiff back to the beginning again.

In 1867, the government appointed a Royal Commission to report into the conduct of civil litigation. Dr Laura Lintott sets out how its report, which led into the Judicature Act 1873, recommended the creation of the office of Official Referee, who would be empowered to try a cause. Their work began slowly. By the 1920s, however, the Official Referees were taking on significant amounts of work and, as Dr Michael Reynolds sets out in his chapter, pioneering revolutionary forms of case management. A number of the chapters allude to the way in which the Official Referees and then the TCC has led the way in procedural reform, from Scott Schedules to paperless trials.

Sir Peter Coulson draws upon a number of personal recollections, including his own, but also from past and present members of the Bench and the Bar, of the Official Referees and judges of the TCC who are still within living memory. This record captures their personalities in a way that is very rarely seen in print. One example is the description of Edgar Fay QC, whose career included carrying out an independent review into the Munich air crash which killed eight of the Manchester United "Busby Babes". This thumbnail sketch includes a lighter moment as well:

> *"Judge Fay was a diligent Official Referee who was described as having a 'radar-like intellect'. He was not, however, known for his sense of humour. The only recorded occasion when he laughed openly in court was during a lengthy opening of a very dull case by Bruce Mauleverer. The case was being heard in Alexander House in Kingsway in the summer. It was very hot and stuffy, so some of the windows had been opened. Judge Fay was concerned that Brian Knight, counsel for one of the many defendants, was sitting by an open window with the traffic rumbling by. The judge said: 'Mr Knight, you would be able to hear much more of what Mr Mauleverer is saying if you close the window.'. Brian Knight immediately retorted: 'If your Honour is offering me a choice between hearing what Mr Mauleverer is saying or staying cool, I will respectfully opt to keep the window open.' Apparently Judge Fay broke with tradition and hooted with laughter."*

How and why the Official Referees and their business became the TCC is described by Lord Dyson. In the mid-1990s, the Official Referees were handling High Court-level work, but were not High Court Judges. Lord Dyson explains that when he was appointed as a judge to the Queen's Bench Division of the High Court in 1993, he did not expect to try any construction cases, despite his previous experience in practice. In his chapter, he describes how the Lord Chief Justice of the time, Lord Bingham, asked him if he would be willing to be the judge in charge of the Official Referees in order to enhance the standing of the court. He decided that the name of the court had to change, settling on the appellation "the Technology

and Construction Court" to reflect the types of technical, modern and cutting-edge disputes that it handled (and, as Dame Finola O'Farrell sets out in her chapter, continues to try).

The book does not only consider the history of the court. One of the most important developments in construction law, which the TCC made a decisive contribution to, was the development of adjudication as a form of rapid dispute resolution. Lord Dyson considers how his decision in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 set firm footings for this. Sir Rupert Jackson, together with Nicholas Higgs and Hannah Fry, go on to explain how the TCC continued to embed the Housing Grants, Construction and Regeneration Act 1996 into the mainstream of construction law. The TCC has also provided considerable support for arbitration as a form of dispute resolution. Professor Renato Nazzini and Aleksander Kalisz, both of King's College, London, demonstrate the considerable contribution of the TCC to arbitration.

From their inception, the Official Referees were intended to bring their form of dispute resolution into the regions. This has become a rich heritage, with the Official Referees and the TCC resolving disputes and trying actions throughout the geographical jurisdiction. Her Honour Frances Kirkham and His Honour Judge Stephen Davis, together with Michael Levenstein, provide an account of the court's work in the regions. Dr Stacy Sinclair and Simon Tolson, both of Fenwick Elliott solicitors, describe how the court has engaged with important developments in technology as part of its case management and trial work. One of the most important parts of the TCC's work involves building safety. Rachel Ansell KC and Dr Douglas Maxwell illustrate the changing landscape of building regulation and dispute resolution, showing how the fire at Alexandra Palace in 1873, the same year as the Judicature Act, would be tackled by the Official Referees and the TCC at different snapshots in time, in 1873, 1923, 1973 and 2023.

The final two chapters of the book then take a step back to provide an overview of the Officials Referees and the TCC. I examine in my chapter the doctrinal and legal historical evidence for their distinct contribution to the development of construction law, both in terms of the decisions made and in the identification of construction law as a distinct topic in the overall taxonomy of English law. Juan Lopez wraps up the book with an insight into how energy and environment litigation might well comprise part of the future work of the TCC in the years to come.

One of the goals of the book that Sir Peter Coulson and I set out to achieve was to provide a testament to the Official Referees from its inception to the modern day. Dr Elizabeth Norton has researched and written a detailed Appendix providing short biographical descriptions of them, up to the present day accounts compiled by Sir Peter Coulson. Dr Michael Reynolds also draws from his own research to provide a biography of Sir Francis Newbolt KC, who was the author of a number of innovations in the case management of Official Referees' business.

The book is therefore distinctive in describing the history of a single court, from its birth in the 1870s, its reformation during the 1990s, through to its work today; but also the number of different perspectives put forward. The Official Referee's business and the TCC is described through the Official Referees and judges who sat in it; the work it undertook; and the law it adjudicated upon. What I hope this book succeeds in demonstrating is that the impact of the TCC is more than the sum of these parts. The book also sets out the qualities that have allowed this institution to continue for 150 years: not only a reputation for dispute resolution, but an ability to change with the times, including the capacity to undertake significant reform and transformation.

The History of the Technology and Construction Court on Its 150th Anniversary: Rewriting the Rules (edited by Sir Peter Coulson and David Sawtell) is being published by Hart Publishing (an imprint of Bloomsbury Publishing) on 20 April 2023: https://www.bloomsbury.com/uk/history-of-the-technology-and-construction-court-on-its-150th-anniversary-9781509964178/.

David Sawtell
39 Essex Chambers

The Building Safety Act: An Ambitious Toolkit – Insights on Remediation Contribution Orders

On the introduction of the Building Safety Act 2022 ("the Act"), the government stated that it had introduced an "*ambitious toolkit of measures to enhance the ability of building owners, landlords and leaseholders to seek compensation for historical building safety defects and the use of defective or unsafe products*".[1] The new toolkit has brought about a new civil liability and remediation regime for anyone involved in owning, developing or constructing a residential building, or even selling or supplying construction and cladding products for a residential building project. This article seeks to explore one of those tools: remediation contribution orders.

1 https://www.gov.uk/guidance/redress-measures-information-sheet.

The regime concerning building liability orders, remediation orders and remediation contribution orders was inserted as House of Lords amendments shortly before the Bill completed its passage through Parliament. The speedy introduction of the amendments meant that there was very little debate or explanation in respect of building liability orders. Lord Greenhalgh set out the following when he introduced a group of government amendments on 28 February 2022:[2]

> *"Amendments 76 and 77 create a new power for the High Court to impose building liability orders in appropriate cases. These orders will allow civil claims to be made against the associated companies of a company involved in the development or refurbishment of a building in certain circumstances, including when the original company no longer exists. In this House and in the other place, we have discussed the lack of ongoing liability that large developers have due to their use of special purpose vehicles. These amendments directly address this issue and support the changes we have proposed to the Defective Premises Act. They rebalance the level of exposure that small and medium-sized businesses in the construction industry currently have compared with the larger players – and, most importantly, they unlock potential funding for those who have remediated or who need to remediate, if they bring a successful claim. I consider that these orders will be an important tool in holding 'polluters' to account and making them pay for their past misdeeds – so I hope that noble Lords will join me in supporting these amendments."*

There was limited discussion of remediation contribution orders:

> *"Amendment 70 would give the First-tier Tribunal powers to make a remediation contribution order on the application of an interested person if it considers it just and equitable to do so. For the purposes of Amendment 70, interested persons include the new regulator, the local authority and the fire and rescue service, as well as leaseholders and other persons who have a legal or equitable interest in the building. A remediation contribution order will require an associated company to make specified payments, at a specified time or event, to the landlord to remedy relevant fire safety defects in the building."*

Lord Young of Cookham's observation about the raft of amendments is apposite.

> *"My Lords, I am grateful to my noble friend. It was bit like listening to one of the advertisements on the radio when, right at the end, all the terms and conditions are read out very quickly and one has to listen to them very carefully."*

2 https://hansard.parliament.uk/lords/2022-02-28/debates/8374E7A2-1459-4261-AAB9-79B88C8888Do/BuildingSafetyBill.

There was almost no opportunity to provide any observations or feedback on the proposed new regime of remediation and liability in the final version of the Building Safety Bill. The Act received Royal Assent on 28 April 2022.

Legislative Framework

A remediation contribution order establishes a two-fold legal remedy. Firstly it ensures that developers bear the costs of remediation of relevant defects, and secondly it ensures that landlords meet their obligations to remediate historical building safety defects under the leaseholder protections provisions in Schedule 8 of the Act. The provisions add to the power of a remediation order (the order described in section 123 of the Act whereby an applicant can compel a relevant landlord to remediate defects by a specified time), by providing a means to ensure that the cost burden for paying for that remediation is met.

The relevant provisions are found in section 124 of the Act, which states:

> *"(1) The First-tier Tribunal may, on the application of an interested person, make a remediation contribution order in relation to a relevant building if it considers it just and equitable to do so.*
>
> *(2) 'Remediation contribution order', in relation to a relevant building, means an order requiring a specified body corporate or partnership to make payments to a specified person, for the purpose of meeting costs incurred or to be incurred in remedying relevant defects (or specified relevant defects) relating to the relevant building."*

An "interested person" includes a broad list of applicants, including the Secretary of State, the regulator, a local authority, a fire and rescue authority, a person with a legal or equitable interest in the relevant building or any part of it (such as a freeholder or leaseholder) or any other person prescribed by regulations (section 124(5)). Remediation contribution orders can be applied for in respect of buildings that are self-contained, or self-contained in part, contain at least two dwellings and are at least 11 metres in height or have at least 5 storeys (section 117). The application of the remedy extends to far more buildings than many of the other provisions of the Act which only encompass residential buildings of more than 18 metres in height.

An application can only be made in respect of "relevant defects" and in that sense claims will be limited to defects that are akin to those that arose at the Grenfell Tower fire. Section 120 of the Act defines a "relevant defect" as one:

"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."

A building safety risk means a "*risk to the safety of people in or about the building arising from the spread of fire or the collapse of the building or any part of it*". However, as seen with other parts of the Act, retrospective application of the Act means that the "relevant works" which caused the defect can be any works completed within the 30 years prior to the coming into force of the section (on 28 June 2022). So, applications can be made for claims concerning works that were completed as far back as 28 June 1992. The far-reach of this Act is likely to pose numerous challenges to potential defendants simply on the basis of missing documents and/or witnesses which have understandably disappeared over the passage of time.

A "specified body corporate or partnership" is defined as a landlord under a lease of the relevant building or any part of it, a person who was such a landlord at the qualifying time, a developer in relation to the relevant building or any person associated with the aforementioned (section 124(3)). The construction of the provision means that landlords can seek remediation costs, for which they are now liable under Schedule 8 of the Act, by recovering those costs from the developer. Equally, leaseholders can make an application against a number of different parties involved in the development of their building to ensure that the costs of the remediation work are met. The far-reaching "associate test", set out in section 121 (and which deserves an article of its own) allows for a wide-range of associated persons to be brought into the sphere. This means that, for example, parent companies who ran the development through a thinly capitalised special purpose vehicle, which has potentially been wound up by the time the claim is brought, can be made liable to pay.

As the explanatory notes to the Act explain, as the government has now agreed with a number of residential property developers to remediate buildings that they had a role in refurbishing or developing in the past 30 years, it is unlikely that remediation contribution orders will need to be made against those developers. However, there may be developers that have not signed the agreement but which would be within scope of section 124 of the Act.[3] Arguably, there may also be a dispute about whether the defects to be remediated are "relevant defects" or not.

A remediation contribution order will only be made if it is "just and equitable" to do so but no such definition of the test has been laid out in the Act. The explanatory notes to the Act explain:

> *"This is intended to ensure fairness in proceedings while giving the Tribunal a wide decision-making remit which it is expected will allow it to take all appropriate factors into account when determining whether an order should be made, including the wider public interest in securing the safety of buildings, as well as the rights and interests of the individual against whom an order might be made."*

When Lord Greenhalgh introduced the amendments on 22 February 2022, he expanded a little on the use of the term "just and equitable", when considering the power of a liquidator to apply to court:

> *"Where a company needs to be wound up, our provisions enable the liquidator to apply to the court to access the assets of associated companies to contribute to the remediation of building safety defects. All too often, companies let subsidiaries go into liquidation to cut their losses. It is morally wrong that they can just fold a company up and leave leaseholders in unsafe buildings with outstanding building safety defects and the corresponding liabilities. The court's decision will be based on whether it is just and equitable to do so – in other words, whether it is right for that associated company to help to meet the building safety remediation liability of the failing landlord."*

Batish and Others v Inspired Sutton Ltd and Others (13 January 2023)

There is little case law since the promulgation of the Act. However, one of the first decisions to be issued by the First-tier Tribunal (Property Chamber) regarding the Act provides us with some insight into the Tribunal's approach to remediation contribution orders.

Mr Batish and 17 other leaseholders applied for a remediation contribution order in the sum of £192,635.64 for the remediation of relevant defects under 15 separate leases in a high-rise self-contained block of flats which was converted from office accommodation in about 2017. The leaseholders made the application against three respondents: (1) Inspired Sutton Ltd, which carried out the conversion and development and which was also the freeholder of the property; (2) Inspired Asset Management Ltd (in liquidation), the property investment business and holding company of a number of Special Purpose Vehicle subsidiaries (SPVs), incorporated to hold the various properties acquired and the parent company to the first respondent; and (3) the two directors of the first respondent.

It was accepted that the materials used for the development and its design constituted a significant risk, being unsafe ACM and HPL cladding and as such, architects and contractors were engaged to carry out remediation work to the cladding and balconies. On 27 September 2020, the lessees were served with a section 20 notice under the Landlord and Tenant Act 1985. The notice explained that the cost of the cladding works was to be funded by way of a government grant (presumably from the Building Safety Fund) but any works excluded from that grant would be funded by the leaseholders by way of the service charge. As it turned out, the grant did not include the cost of

3 For a list of developers which have signed the pledge, see: https://www.gov.uk/guidance/list-of-developers-who-have-signed-building-safety-repairs-pledge.

balcony replacement and it was these costs which the leaseholders sought.

The Tribunal made a remediation contribution order for the full amount of service charges they had already paid for the remediation work to the balconies (which differed slightly from their claimed figures). Of interest is that the applicants faced no resistance to the order they sought. Mr Friss, speaking for the first respondent, explained that he was unaware of any defence to the applicants' claim, and in any event he was debarred from taking part in the proceedings for failing to comply with the Tribunal's directions. The second respondent was removed as a party to the proceedings because the applicants had not applied to the Companies Court to lift the automatic stay against the second respondent pursuant to section 130(2) of the Insolvency Act 1986. The application against the third respondent was also dismissed because it was not properly a "specified body corporate or partnership" as required under section 124(2) of the Act.

Nonetheless, the Tribunal satisfied itself that the remediation contribution order would be properly made. The Tribunal considered that the costs relating to the remediation of the balconies were "relevant defects" because they had been assessed by the local authority as part of its Housing Health and Safety Rating System exercise as being one of the Category 1 hazards where works were required to remove or reduce the fire risk. As such, the Tribunal was satisfied that the external defects and the balconies constituted a "building safety risk", under section 120(5) of the Act, as they constituted a risk to the safety of people in or about the building due to the spread of fire.

In approaching the "just and equitable" test, the Tribunal considered that it "must be satisfied that the lessees paid for the costs of works which ought to have been met by Inspired Sutton Ltd". The Tribunal found that Inspired Sutton Ltd was the developer and landlord under the lease at the qualifying time, and, according to paragraphs 2 and 10 of Schedule 8 of the Act, the costs were ones that no service charge should be payable and for which the landlord was responsible. The Tribunal was satisfied that there were "no mitigations or other matters to be taken into account in the exercise of its discretion in this case".

While the case does not provide a deep exposé of the difficulties that may face other applicants in similar cases, it does provide a useful first insight into the steps the Tribunal will take in assessing claims for remediation contribution orders. The Tribunal did not have to grapple with whether the balconies were a "relevant defect" and a "building safety risk", given the incontrovertible evidence before it and the agreement between the parties that it required remediation. In other cases, it may not be anywhere near as clear cut. The Tribunal adopted a somewhat narrow approach to the "just and equitable" test, not expressly considering factors suggested in the explanatory notes to the Act, such as "*the wider public interest in securing the safety of buildings, as well as the rights and interests of the individual against whom an order might be made*". But that is no doubt for the reason that the facts in this case in favour of making an order were so clear cut. It will be of interest to see how the Tribunal approaches the test in less distinct situations.

Concluding Remarks

It certainly seems that remediation contribution orders will be a useful tool in a leaseholder's and/or landlord's toolkit when seeking to fund the cost of remediation work for fire safety defects in residential buildings. What remains to be seen is how the Tribunal will grapple with the tricky issues created by the Building Safety Act, including but in no way limited to the meaning of a building safety risk when presented with equivocal evidence, and how far it will exercise its discretion when determining that a remediation contribution order is "just and equitable".

Samantha Jones
*39 Essex Chambers**

**With thanks to David Sawtell, 39 Essex Chambers for his review. The subject matter of the article originated from two presentations and a paper submitted to the Society of Construction Law by David Sawtell and Samantha Jones in November 2022 and February 2023.*

Case Note

WRB (NI) Ltd v *Henry Construction Projects Ltd* [2023] EWHC 278 (TCC), Technology and Construction Court, Pepperall J, 10 February 2023

Enforcement of decision of adjudicator – Stay of execution – Stay refused because no change in financial position of claimant

The claimant, WRB (NI) Ltd, brought the present proceedings in order to enforce the decision of an adjudicator. The defendant disputed the sum for which judgment should be entered and also sought a stay of execution of any judgment.

The claim arose out of a project on which the defendant was the contractor and on which it sub-contracted some of the work to a company referred to as "WMB Ltd". The claimant's case was that the party to the subcontract was a company known as WRB Energy Ltd, while the defendant maintained that its contracting party was the claimant.

This produced what Pepperall J described as the "oddity" that the claimant, which was and always had been a dormant company, disputed that it was a party to the subcontract. Notwithstanding this, the claimant served a notice of adjudication in relation to an interim application for payment, which resulted in the adjudicator making a decision in its favour.

In seeking to defend the claim to enforce that decision, the first point taken by the defendant related to the amount for which it was liable. On this issue Pepperall J concluded that he should give summary judgment for the sum of £139,799.20.

The second point taken by the defendant was that it was entitled to a stay of execution applying the well-established principles laid down in cases such as *Wimbledon Construction Co 2000 Ltd v Derek Vago* [2005] BLR 374.

Pepperall J concluded that this was a case where it was probable that, should the court refuse to grant a stay and the defendant later make good its own cross-claim, the claimant, as a dormant company, would be unable to pay the judgment sum. However, for three reasons, Pepperall J was not convinced that he should grant to the defendant a stay.

First, the defendant chose to place the subcontract with a newly formed dormant company and, to this extent, it had taken the risk of which it now sought to complain. The risk that the claimant would be unable to make payment was held to be the "inevitable consequence" of having placed a subcontract with a dormant company and in this sense was "the result for which it contracted". Thus it would be unfair and contrary to the spirit of the adjudication regime to allow the defendant to escape its liability to meet an adjudication award on the basis of the claimant's "essentially unchanged financial position".

Second, it was the defendant which had resisted the argument that the true party to the subcontract was WRB Energy Ltd. In making its case that the claimant was the actual party to the subcontract, it was held to have "made its own bed" and so had created the difficulty of which it now sought to complain.

Third, there had been a delay in issuing judgment and so, by the time that Pepperall J handed down judgment, he concluded that the defendant would have had "ample opportunity" to proceed with its cross-claim.

Of these three reasons, the strongest is clearly the first and it acts as a reminder of the risks associated with entering into a contract with a party that is in a weak financial position or, as was the case here, a dormant company.

This summary is available via the https://www.i-law.com/ilaw/browse_onlineservices.htm?name=Construction+Law+Reporter&querySector=Construction. *For more information about Construction on i-law.com contact customersuccess@lloydslistintelligence.com*.

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