Falcon Chambers

Vista Tower and RCOs (and ROs and BLOs) by Edward Blakeney

1. Every statute has its fair share of acronyms, but the Building Safety Act 2022 ("**the Act**") seems to have a greater number to get to grips with compared to many others.
2. When it comes to remedying 'relevant defects' (as defined in s.120 of the Act) in a 'relevant building' (as defined in s.117 of the Act), the Tribunal can make a Remediation Order ("**RO**") under s.123 of the Act and a Remediation Contribution Order ("**RCO**") under s.124 of the Act. The High Court also has a separate jurisdiction to make a Building Liability Order ("**BLO**") under s.130 of the Act.
3. In Falcon Chambers' series of articles discussing key points and developments under the Act, we have already discussed the RO decision of the Tribunal in Vista Tower and the RCO decision of the Tribunal in Triathlon Homes. We now have the RCO decision of the Tribunal in Vista Tower (Grey GR Limited Partnership v Edgewater (Stevenage) Limited and others (CAM/26UH/HYI/2023/0003)), which builds on those developments and provides more for us to unpack.
4. This article does just that, and also looks at how the RCO, RO and BLO regimes can be utilised together and in tandem with one another.

The background to Vista Tower

5. Vista Tower is a 16-storey building of almost 50 meters in height and was constructed in the early 1960s. In 2015/2016, it was converted from office use to residential use by the then freeholder, Edgewater (Stevenage) Limited ("**Edgewater**"). The new development contained 73 two-bedroom residential flats, and a long lease was granted in respect of each flat. The building was then sold by Edgewater to Grey GR Limited Partnership ("**Grey GR**") in July 2018 as an investment opportunity.
6. That sale was, of course, after the Grenfell tragedy had already occurred. Over the subsequent years, a number of fire-safety defects were identified, particularly in relation to the windows and panels on the exterior of the tower.
7. Grey GR had been working with experts since 2020 to identify and carry out the requisite works. It submitted a number of applications to the Building Safety Fund, and works were commenced in January 2024 and scheduled to finish in September 2025. Grey GR was, however, facing a shortfall of some £13 million in respect of those works.
8. In parallel to those developments:
    a. The government applied for an RO against Grey GR. Although Grey GR resisted such an order being made, and although works were ongoing, the Tribunal nevertheless agreed with the Secretary of State that an RO should be made to ensure works were completed quickly and efficiently.
    b. Grey GR applied for an RCO against a range of entities connected with Edgewater. Originally there were 17 respondents, but this was later expanded to 96 as a result of information disclosed by individuals at the centre of the corporate structure.

The Decision of the Tribunal

9. The Tribunal granted Grey GR an RCO in respect of Edgewater and 75 other entities (a helpful table at the end of the Decision sets out those respondents who were made subject to the RCO and those who weren't, together with reasoning in each case).

10. This was a joint and several liability, the Tribunal deciding that that was more appropriate than awarding individual amounts in respect of each Respondent. This was more practical for Grey GR and was more consistent with the purposes of the jurisdiction, which was to recover money quickly. The costs included not just costs which had been incurred to remedy a defect that caused a building safety risk but also those that had been incurred for "*types of consequential or other works involved in a package of works to remedy relevant defects*"; this was appropriate as they were within a reasonable range of responses/ costs.

11. Other elements of interest from the Tribunal's decision (and these are just some highlights):

    a. 'Defect' did not solely mean non-compliance with building regulations in force at the relevant time – that would be odd given that the Hackitt reviews had held those regulations to be inadequate. Non-compliance with building regulations was merely one way, not the only way, in which something can be considered a defect for RCO purposes.

    b. Any risk above a low risk as categorised in the building safety standard PAS9980:2022 constituted a building safety risk. S.120(5) of the Act did not operate by reference to tolerable risks or any other specific threshold.

    c. The Tribunal re-emphasised its broad discretion whether to grant an RCO.

    d. Edgewater and its associated companies were higher up the hierarchy/ waterfall of liability than Grey GR, notwithstanding the time and environment in which Grey GR purchased the freehold (the matter was not aided by Edgewater having given misleading answers to enquiries at the time of sale). That was even more so with regards to the taxpayers and the leaseholders themselves, and the suggestion that costs could be recovered from the leaseholders was contrary to the fundamental operation of the Act (albeit the position of non-qualifying leaseholders is more exposed).

    e. There is no automatic presumption that any associate be made liable unless they can show good reasons why they should not have to pay, particularly where they are associated only by common directorship.

    f. An RCO is a non-fault remedy.

    g. The respondents subject to the RCO were all linked by certain directors/ their families, who controlled the "*fluid, disorganised and blurred network or structure"* of companies, and all were involved in property development. The Tribunal was clearly unimpressed by what they considered to be inaccurate and misleading evidence from the directors as to the operations of the various entities.

The claim for a BLO

12. We also learned from the decision of the Tribunal that Grey GR had issued proceedings for a BLO against Edgewater and two other respondents, although those *"will not be heard for some time"*. Currently, there is only one known decision where a BLO was granted (in an extempore judgment subsequent to the reported judgment in 381 Southwark Park Road RTM Company Ltd & Ors v Click St Andrews Ltd & Anor [2024] EWHC 3179 (TCC)).

13. Unsurprisingly, only a limited amount of information was provided about the BLO proceedings. But a few points can be discerned from the Tribunal's judgment:

    a. The parties in the RCO proceedings referred to, and made use of, the pleadings in the BLO proceedings. There were seemingly, therefore, similar facts/ premises/ issues between the two sets of proceedings.

    b. The Tribunal noted that the relevant test for those who may be associated with Edgewater for the purposes of a BLO is narrower than the test for an RCO.

14. It is unknown whether, and if so how, the Tribunal's granting of an RCO will affect Grey GR's BLO proceedings. A BLO can apply, however, to any building of any height in respect of liability arising from the Defective Premises Act 1972, Building Act 1984, and a building safety risk pursuant to the Act. There may, therefore, be additional elements not captured by the RCO.

How can parties make use of RCOs, ROs and BLOs in tandem with one another?

15. The Act has provided those parties dealing with relevant defects with an arsenal of options. As Vista Tower demonstrates, these are not mutually exclusive and can be pursued separately and alongside one another.

16. There are some similarities between them – most obviously, RCOs and ROs both deal with the remedying and funding of 'relevant defects' as defined under the Act, whilst RCOs and BLOs both deal with seeking to impose liability for certain defects on other connected parties. There are also similarities in the tests that apply, with both RCOs and BLOs applying a 'just and equitable test' and ROs applying both a power and discretion to make the orders in question.

17. There are nevertheless differences between each type of order, and each serve different purposes either in the Tribunal or in the Court system. That is somewhat unsurprising; were it otherwise, there would be no point in Parliament having made the three separate jurisdictions. But the overlapping elements mean that it is likely that what is said or decided in one jurisdiction will impact the other(s).

18. When deciding on an overall litigation strategy, one will need to think carefully about how all sets of proceedings could be influenced. Indeed, in the Vista Tower RCO proceedings, it seems as though the Tribunal was unimpressed by the lack of clarity that had been provided by the Respondents, a lacking that was also seen in the BLO proceedings.

19. That ability to draw from other connected proceedings, particularly where each type of order contains substantial discretionary elements, has the potential to be both a blessing and a curse (depending on your perspective).

Conclusion

20. The decision in Vista Tower continues to develop matters following the decision in Triathlon (with an appeal in that case pending).

21. Whilst, as in Triathlon, the Tribunal noted that the effect of the RCO regime was to cut across and erode principles of company law, it was appropriate to give effect to the specific jurisdiction created by Parliament on the facts of this case. Given the background against which the Act was created, and the problems faced by buildings and leaseholders, that is not altogether surprising. The Tribunal clearly want to make use of this jurisdiction in ensuring a speedy and practically effective resolution to cases, and the existence of the RO and BLO jurisdictions add to, rather than detract from, that end goal.