

This is a repository copy of *The History of the Technology and Construction Court on its 150th Anniversary: Rewriting the Rules*, Sir Peter Coulson, David Sawtell (eds).

White Rose Research Online URL for this paper:

<https://eprints.whiterose.ac.uk/214857/>

Article:

Ellis, Charlotte orcid.org/0000-0002-0847-2753 (2024) *The History of the Technology and Construction Court on its 150th Anniversary: Rewriting the Rules*, Sir Peter Coulson, David Sawtell (eds). *Law Quarterly Review*. pp. 326-329. ISSN 0023-933X

Reuse

This article is distributed under the terms of the Creative Commons Attribution (CC BY) licence. This licence allows you to distribute, remix, tweak, and build upon the work, even commercially, as long as you credit the authors for the original work. More information and the full terms of the licence here:

<https://creativecommons.org/licenses/>

Takedown

If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.

The History of the Technology and Construction Court on its 150th Anniversary: Rewriting the Rules, Sir Peter Coulson and David Sawtell (eds), (Oxford: Bloomsbury Hart, 2023) xxxii +398pp., hardback, £100.00, ISBN: 978-1-50-9964178

Judges and academics have enjoyed an increasingly productive dialogue over the last half-century on questions of general private law. But the Technology and Construction Court (TCC) and its predecessor the Official Referees (ORs) have sometimes been left out of the conversation. *A History of the Technology and Construction Court on its 150th Anniversary* provides a valuable resource for anyone seeking to redress the balance. This collection of essays written by judges, practitioners, and academic construction lawyers has three principal aims. The first is to explain the somewhat humble origins of what is now an integral part of the English High Court and a global leader in the specialist resolution of construction, engineering, and technology disputes. The second is to record how the court evolved from those origins, with a focus on the part played by individual judges and referees. The third is, as the editors put it, to “showcase” the range of work which is presently conducted by the TCC, and the ways in which that work may change in response to anticipated environmental, technological, and legal developments.

The early chapters tell the story of the TCC’s roots in the procedural reforms of the late Nineteenth Century, and the early evolution of the ORs. In Chapter 1 Dr Elizabeth Norton explains how dissatisfaction with the delay and expense of jury trials led to provision in the Judicature Act 1873 for the appointment of “permanent officers to be called Official Referees”. Official Referees could deal with complex issues of fact referred by judges of the High Court and Court of Appeal. Building on the Common Law Procedure Act 1832, section 56 of the 1873 Act allowed judges to direct an inquiry and report from an OR, which if adopted would be enforceable as a judgment. More importantly, section 57 allowed questions of fact to be referred for trial by an OR, without the parties’ consent, if in the judge’s opinion their determination required “any prolonged examination of documents or accounts, or any scientific or local investigation” which was unsuitable for trial by jury.

In Chapter 2, Dr Laura Lintot explains the gradual development of the ORs’ role, powers and reputation. By 1910 the bulk of referrals were for the trial of lengthy

disputes arising from construction operations or leases. By 1940, though lacking original jurisdiction, Lintot suggests ORs “had the powers of High Court judges, [but] lacked the status” (pp. 40). Dr Michael Reynolds’ Chapter 3, dealing with case-management innovations introduced by OR Sir Francis Newbolt KC, supports this analysis. Reynolds notes that by the 1920s, High Court judges had adopted the invariable practice of referring whole causes or matters for trial by an OR, not just “matters of fact and account” as envisaged in 1873 (pp. 63). ORs were now deciding points of law which could, following the Administration of Justice Act 1932, be appealed directly to the Court of Appeal. However, institutional reluctance to accord them a status commensurate with the true nature of their work persisted. By the 1950s, the ORs had become known as a specialist court for factually complex construction and real property disputes. But ORs did not take the judicial oath until the Administration of Justice Act 1956. They achieved the status of circuit judges only as a result of the Courts Act 1971. Litigation could not be commenced in the ORs’ court, as opposed to being referred there, until 1982.

Chapters 4-6, written by former TCC judges Lord Justice Coulson (assisted by David Sawtell) and Lord Dyson, cover the more recent history of the ORs and events surrounding the creation of the TCC. Lord Coulson describes a significant rise in the ORs’ reputation as a specialist construction court during the final quarter of the twentieth century. He then records some “Difficult Years” in which a high level of overturn by the Court of Appeal, sometimes accompanied by stinging criticism, led to a fall in the ORs’ standing and bad press. This was a matter of particular concern in a field where arbitration and other forms of ADR have always played a major role: as Lord Coulson puts it, “in the dispute resolution business, perception is all” (pp. 111). The difficult period was followed, however, by “The Redemption” brought about by Jackson J (as he then was) as Judge in Charge of the TCC. A major plank of Jackson’s strategy to rescue the court was to ensure that weightier TCC cases were heard by High Court judges. Importantly, he also persuaded leading figures from the Construction Bar to apply for the High Court bench, a trend which has continued ever since.

Lord Dyson’s chapter on “The Birth of the TCC” tells an overlapping story from a different perspective. During the “difficult years” Lord Dyson, then a High Court judge, was tasked by the Master of the Rolls and Lord Chancellor with addressing

concerns about the ORs' performance. The primary solution he identified was that the ORs should be fully assimilated into the High Court. This would involve a change of name for both the ORs' court, which became the TCC in October 1998, and the ORs themselves, who were henceforth referred to as judges and addressed, like other judges of the High Court, as "My Lord". But it ultimately required, in Lord Dyson's view, the recruitment of leading specialist practitioners to sit in the TCC as High Court Judges. His reforms laid a crucial foundation for this to occur.

These engaging chapters, which contain the personal recollections of both the authors and members of the Construction Bar, are important sources for scholars working in the field of judging and the courts, and the sociology of law more broadly. They help fill a gap in existing studies such as Penny Darbyshire's *Sitting in Judgment: The Working Lives of Judges* (2011) which overlook the TCC. Of similar importance to these and other scholars are chapters 8 and 9, also written by judges, which address the contemporary work of the TCC in London and in the regions. Chapter 9 exposes the dialogue between specialist courts of the High Court in London, and those located in District Registries. Chapter 8 offers thoughtful reflections on the importance of extra-curial dispute avoidance and resolution mechanisms in the construction industry's normal functioning, and the TCC's role in those cases where a court ruling is nonetheless needed. As in several other chapters, there is a focus on how innovative procedures have been developed to meet the challenge of determining factually complex cases at proportionate cost. The expansion of the TCC's expertise to include procurement challenges and IT and energy disputes is also highlighted.

The remaining chapters deal with particular areas of law which form the TCC's core diet. Of interest to tort scholars is Chapter 12, in which barristers Rachel Ansell KC and Dr Douglas Maxwell trace the history of the regulation of fire safety in buildings from 1873 to the present day. While this is largely a story of public law regulation through byelaws and Building Regulations, the Building Safety Act 2022 creates new private law claims, and expands the scope of existing ones, where physical or economic loss is caused by non-compliance with the regulatory framework. The Act is, as Ansell and Maxwell put it, a "game changer" (pp. 313). It deserves more scholarly attention than it has so far received.

In Chapter 13, co-editor David Sawtell highlights the dearth in reporting of construction law cases in general, and decisions of the ORs in particular, until the arrival of the Building Law Reports and Construction Law Reports in the 1970s and early 1980s respectively. Sawtell makes the argument, echoed by Lord Dyson in Chapter 6 and often found in scholarly and extra-judicial writing on construction law, that cases decided by the ORs and TCC have nonetheless formed an important but under-appreciated part of the general law of contract and tort. This is clearly correct, and an understandable focus in a book produced to celebrate the TCC's 150th Anniversary. But construction lawyers have much more to offer in the dialogue with wider academia. Judges and practitioners in the Commercial Court and Chancery Division have shown how experience in a specialist field can form the basis of valuable contributions to scholarly debate on more general points of private law. Perhaps in the next phase of its history, the TCC's similar potential will be more fully realised.

The History of the Technology and Construction Court on its 150th Anniversary will be of great interest to anyone who has practised (or sat) in the TCC and ORs' court, and those teaching and researching construction law. These groups are its primary intended audience. But the book is also a rich and valuable resource for a wider range of legal scholars. We should all pay more attention to the TCC.

Charlotte Ellis
Northumbria University