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Building Safety Act Review

Annual update of developments following the Building Safety Act 2022

March 2025 edition

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The Grenfell Tower tragedy was the worst UK residential fire since World War II, resulting in 72 deaths and leaving hundreds of people homeless. The devastating loss of life sent shock waves around the world.

In the wake of the tragedy, it became evident that the issues that led to the fire at Grenfell Tower were widespread within the construction of high-rise residential properties. Leaseholders were facing huge liabilities for the cost of remediating defects in their buildings and there were real concerns that without radical reform of the construction and management of high-rise residential properties there could be another tragedy.

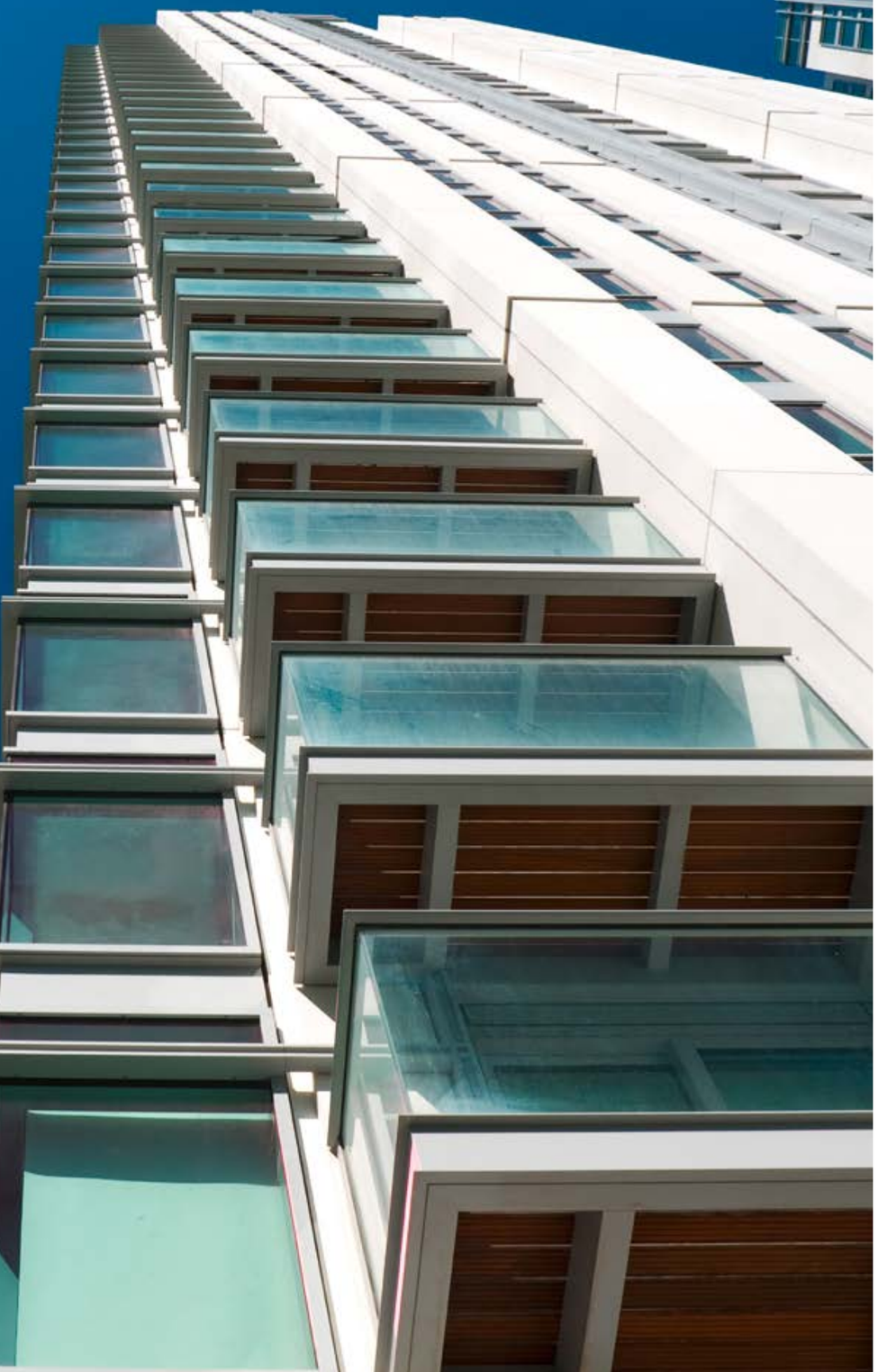
The government introduced the Building Safety Act 2022 ('**BSA**') to address these matters. The BSA sought to strengthen safety standards throughout the lifecycle of a construction project, from pre-construction, handover, and beyond. The BSA created three new bodies, including the Building Safety Regulator, to oversee the BSA's objectives, and also seeks to expedite the resolution of liability issues, particularly targeting those who have profited from residential building ownership. It was clear the intention was for the BSA to infiltrate all aspects of the building and residential property sectors. The detail has subsequently been implemented via hundreds of pieces of secondary legislation.

The industry is still in the early stages of adapting to this new regulatory framework. The next few years will see continued developments as the industry grapples with the BSA in practice. The judiciary will also be busy as the First-Tier Tribunal and Courts exercise their new powers to order Building Liability Orders ('**BLO**') and Remediation Orders ('**RO**').

Government intervention has also played a pivotal role – on 2 December 2024 we received detail of the government's plans for accelerating the remediation of unsafe high rise residential buildings. More recently, on 26 February 2025, the government provided its response to the Grenfell Tower Inquiry Phase 2 Report recommendations. Out of the 58 recommendations 49 were accepted in full by the government and the remaining 9 accepted in principle.

CMS is tier one for real estate, construction and regulatory matters. As such we are uniquely placed to advise our clients on the ramifications of the BSA across multiple specialist areas and practice groups, and throughout all UK jurisdictions. This review of the BSA brings together this expertise, offering insights into the ongoing and future challenges faced by all sectors impacted by the BSA.

Disputes / Liability



Introduction

One of the most significant ways in which the Building Safety Act 2022 ('**BSA**') has affected the construction sector is by expanding the liability exposure of those involved with the commissioning and construction of residential properties.

Extensions to the limitation period; amendments to the Defective Premises Act 1972 ('**DPA**') to include work to existing dwellings; and new rights of action against construction product manufacturers have undoubtedly made a profound impact on the industry.

The BSA also introduced the Building Liability Order regime – providing further ways to bring culpable parties to account.

In 2024 the courts have been busy dealing with claims arising under the BSA, many of which seek to obtain direction on the detail of the BSA – the most notable of which, *URS Corporation Ltd v BDW Trading Ltd*, considered a number of important issues including whether commercial developers can rely on the DPA to recoup losses arising out of carrying out remedial works.

What's next for 2025?

We will no doubt witness a further flurry of action in the courts. Following the granting of the first Building Liability Order, we may hear from the Supreme Court on the URS decision and 2025 may be the year that a claim involving a cladding manufacturer receives judicial treatment.

In addition leave to appeal in *BDW Trading Ltd v Ardmore Construction Ltd* [2024] EWHC 3235 (TCC) has been granted, so the position on whether adjudicators can decide BSA disputes may be confirmed by the Court of Appeal.

TCC narrows scope for Building Liability Orders

A Technology and Construction Court decision dated 27 February 2025 is the first to consider the circumstances in which information orders can be obtained to assist a claimant in applying for a Building Liability Order. The court's decision narrows the scope for such orders to be made from those envisaged in the Explanatory Notes to the Building Safety Act. The decision will be welcome news for developers and large contractor organisations, and may require claimants to consider more carefully whether the benefit to be obtained in bringing historic building safety claims outweighs the time and cost involved in establishing liability and pursuing related parties.

Building Liability Orders: an overview

Section 130 of the Building Safety Act 2022 (the '**BSA**') permits liability for construction work to be extended to associated entities such as parent or sibling companies. Ordered at the court's discretion if it is considered *'just and equitable to do so'*, a Building Liability Order ('**BLO**') can be made in relation to any liability arising under the Defective Premises Act 1972 (as amended), section 38 of the Building Act 1984 or any other claim arising from a *'building safety risk'* (a '**Relevant Liability**').

The concept of an associated entity under the BSA (an '**Associate**') is broad and includes companies which have been parents or siblings of the company primarily liable (the '**Principal Defendant**') *'at any time'* since the works in question were commenced. BLOs could therefore be made in relation to projects or companies which have long since been sold or which have only been recently purchased long after construction has been completed.

Section 132 of the BSA also provides a right for certain persons to apply for information orders (a '**BLIO**') requiring the disclosure of information for the purpose of enabling an applicant to consider whether to make an application for a BLO. Such orders are intended to allow claimants to obtain the information necessary to piece together any complex ownership structures and to evaluate the merits of seeking a BLO.

A recent TCC decision is the first to consider which entities a BLIO may be made against and the extent to which a Relevant Liability must be established before a court will grant a BLIO.

BDW Trading Ltd v Ardmore Construction Ltd [2025] EWHC 434 (TCC)

BDW engaged Ardmore as the design and build contractor for five developments that completed between 1999 and 2005. Following the Grenfell fire disaster, fire safety and structural defects were discovered in the five developments. BDW accepted responsibility to the building owners for these defects and claimed against Ardmore for the costs of remediating them. In relation to one of the developments, BDW successfully obtained an adjudication decision against Ardmore for the payment of GBP14.5m in remediation costs (for our Law-Now relating to the enforcement of that decision please click here). In relation to the other four developments, BDW commenced court and arbitration proceedings against Ardmore. The total amount claimed in these proceedings was approximately GBP 85m.

Although Ardmore had paid the amount of the adjudication decision, BDW became concerned that it would not have the funds to meet similar awards or judgments made in relation to the other four developments. BDW therefore wished to consider the potential for BLOs to be obtained and brought applications for BLIOs to allow it to do so. BDW applied for BLIOs from Ardmore itself as well as other companies in the Ardmore group, including Ardmore's ultimate holding company.

The TCC rejected BDW's applications in their entirety. The court's judgment comments on four significant issues noted below in relation to BLOs and BLIOs.

When can a BLO be made?

The court considered it relevant to determine the point in time at which a BLO can be made as a contextual factor for the interpretation of the BLIO regime under section 132. In the court's view, there was nothing in section 130 which required a party to have already established a Relevant Liability against the Principal Defendant. The court noted that the description of a BLO in section 130 was an order which provided that *'any'* Relevant Liability of the Principal Defendant was also to be a liability of an Associate. The section therefore contemplated that a BLO could be made on an indemnity basis i.e. an order that any Relevant Liability subsequently established against a Principal Defendant would also be a liability held by an Associate.

Can BLIOs be made against Associates?

The terms of section 132 refer only to the making of a BLIO against an entity which is subject to a Relevant Liability. However, BDW relied on the Explanatory Notes to the BSA which provided examples of BLIOs being made directly against Associates rather than a Principal Defendant. The difference is important because, whilst a Principal Defendant is likely to have information about its immediate parent company, it may not have information about ownership arrangements higher up within a corporate group. The granting of BLIOs only against Principal Defendants would therefore significantly restrict the ability of claimants to obtain information about all of the Associates against whom a BLO could be made.

BDW's reliance on the Explanatory Notes was rejected. In the court's judgment, the wording of section 132 was clear and could not be overridden by the Explanatory Notes. In the present case, Ardmore, as the Principal Defendant, was the only entity against which a BLIO could be made.

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Proving a Relevant Liability

The first condition for the granting of a BLIO under section 132 is that *'it appears to the court…that the body corporate is subject to a relevant liability'*. BDW contended that it was sufficient for a claimant to have been advised by competent and qualified experts and by its lawyers that a claim for a Relevant Liability could be made against the Principal Defendant. This interpretation was also supported by the Explanatory Notes.

The court rejected this interpretation, considering it did not do sufficient justice to the requirement that the relevant entity *'is'* subject to a Relevant Liability. This requirement could not be satisfied by showing only that the entity 'might' have a Relevant Liability. At the same time, the fact that the existence of such a liability need only *'appear to the court'* meant that the liability did not have to be positively established by a judgment, award or agreement before a BLIO could be granted.

Where a Relevant Liability is disputed, whilst the jurisdiction to order a BLIO would still exist, the court rejected the suggestion that a merits determination should be carried out in considering whether to grant a BLIO. In the court's judgment, section 132 was ancillary to section 130 and was not:

> *'a vehicle for trying or resolving building disputes… there should be no question at all of having anything like trial procedures…I am little more enamoured of the idea that, when there is an active building dispute…, the applicant should be putting its evidence before the court and inviting an assessment (albeit non-binding) on the merits. Applications under section 132 ought (in my view) to be short and uncomplicated, and I do not consider that they impose on the court any obligation to become embroiled in assessments of the merits of disputed matters. If this means that applications for information orders will be made sparingly in cases where liability is in issue, I cannot see why that is a bad thing.'*

Appropriateness

The second condition for the granting of a BLIO under section 132 is that it is *'appropriate to require information or documents to be provided for the purpose of enabling the application…to make, or consider whether to make, an application for a [BLO]'*. Although section 132 does not address the categories of information and documentation which might be covered by a BLIO, the court noted they would include that which enabled a claimant to identify Associates as well as, *'in any appropriate case'*, matters concerning the financial position of the Associate (that being something which may affect a claimant's decision to apply for a BLO).

In considering the requests made by BDW, the court noted that it would have refused many of them, either because the information and documentation sought were not within the control of Ardmore (as opposed to its parent companies) and/or because commercially sensitive information was sought which was not required for the purpose of identifying Associates or forming a view as to their financial worth.

Conclusions and implications

This is an important decision which provides significant guidance as to how the new BLO regime will work in practice. Whereas the trend of much of the caselaw interpreting the BSA has been to give a broad purposive interpretation in favour of claimant parties (as in relation to Remediation Contribution Orders, for example), the present decision will inevitably make BLOs less accessible to claimants.

The inability to obtain BLIOs against Associates directly, together with the difficulty of obtaining a BLIO whilst a Relevant Liability remains disputed, means that in most cases claimants are unlikely to be able to form an assessment of whether BLOs can be obtained, and the worth of those companies against whom BLOs might be made, until a Relevant Liability has been established against the Principal Defendant. Where the Principal Defendant does not have sufficient means to satisfy a judgment, claimants will need to weigh up the time and cost required to establish a Relevant Liability against the likelihood of obtaining BLOs against more substantial companies based on whatever public information is available to them at the time.

Even once a Relevant Liability is established, claimants may still have difficulty in unravelling complex corporate structures due to the inability to obtain BLIOs against Associates directly. It may be possible for claimants first to obtain BLOs against known Associates, before then obtaining BLIOs against those Associates – as the BLOs may mean that the Associates then have a Relevant Liability – but such a multi-stage process is bound to be time-consuming and costly.

Whilst the court's decision is firmly grounded in the language of section 132, the contrary guidance contained in the Explanatory Notes may suggest that the Government's intention has not been carried through into the language of the section. It remains to be seen whether the decision will be appealed or whether the Government will now consider amending section 132 to accord with the Explanatory Notes.

References:

— *BDW Trading Ltd v Ardmore Construction Ltd* [2025] EWHC 434 (TCC)

Disputes / Liability

TCC enforces first Building Safety Act Adjudication

A December 2024 Technology and Construction Court judgment is the first to enforce an adjudication decision in relation to fire safety defects given under the new liability regime enacted by the Building Safety Act 2022. The adjudication had been brought 20 years after completion of the works in question and the court rejected a number of jurisdictional and natural justice arguments relevant to historical fire safety claims. The court's decision is likely to encourage the pursuit of such claims through adjudication proceedings, giving comfort to claimants that arguments of this nature need not prevent enforcement.

In 2004, Ardmore completed the construction of a residential development known as Crown Heights in Basingstoke, Hampshire for a total contract sum of GBP 22.6m. Fire safety defects were subsequently discovered in the development. In 2024, BDW (as assignee under the original building contract) commenced an adjudication against Ardmore in relation to the defects and received a decision in its favour for GBP 14.5m.

BDW's claim, brought some 20 years after completion, was made possible by:

— Its case, upheld by the adjudicator, that the limitation period for claims under the building contract did not apply due to deliberate concealment of the defects by Ardmore (this being an exception under the Limitation Act 1980).

— The retrospective extension of the limitation period for claims under the DPA brought in by the BSA. For a more detailed explanation of the liability changes made by the BSA, please see our earlier Law-Now here.

Ardmore contested enforcement of the adjudicator's decision on four grounds, three of which are likely to be of more general application to future adjudications in respect of historic fire safety defects. We consider each of these three grounds further opposite.

1. Crystallisation

BDW wrote a Pre-Action Protocol Letter to Ardmore almost two years prior to the adjudication in July 2022. Ardmore took the position that further information and documentation was required in order to allow it to properly consider the claim, bearing in mind the age of the project and the fact that it no longer had access to all of its project records. Ardmore also noted that BDW had not provided details as to the loss suffered and the nature and scope of the remedial works proposed. Ardmore therefore reserved its position pending receipt of the information requested.

BDW provided a small amount of further documentation and invited Ardmore to inspect the defects before remedial works were to commence. Further detail and new particulars of claim were provided 13 days prior to the adjudication, together with a high-level breakdown of the costs BDW was likely to incur on remedial works. BDW's referral in the adjudication included many documents which had not been previously provided to Ardmore, including two new expert reports.

The Technology and Construction Court rejected Ardmore's complaint that a dispute had not crystallised prior to the commencement of the adjudication. BDW's original protocol letter had set out its essential claim well in advance of the adjudication. The lack of documentation and the length of time since completion did not justify Ardmore's stance of refusing to take a position on the claim. In the court's judgment, *'the passage of time should have provided the impetus to investigate the claim that was being advanced as soon as possible'*.

Nor did the fact that the quantum of the claim had only first been set out 13 days prior to the adjudication, and only in high-level terms, justify a conclusion that no dispute over quantum had crystallised. This was sufficient time to give rise to a reasonable inference that the quantum element of the claim was not admitted, particularly in light of prior correspondence as to the liability aspects of the claim which had extended over almost two years.

2. No jurisdiction over DPA claims

The adjudication clause in the building contract permitted the referral of disputes *'under the contract'*. This follows the wording of section 108 of the Housing Grants Construction and Regeneration Act 1996 (as amended) (the '**Construction Act**'). Ardmore argued that this limited the right of adjudication to contractual claims with the result that BDW's claim under the DPA was beyond the jurisdiction of the adjudicator. Ardmore also relied on the fact that an arbitration clause in the building contract was expressed in broader terms to encompass disputes arising *'under this Contract or in connection therewith'*. This was said to confirm a narrower intention with regard to the adjudication clause.

A very similar issue with regard to arbitration clauses had been considered by the House of Lords in the well-known Fiona Trust & Holding Corp v Privalov [2007] UKHL 40 case (decided in 2007). Prior to this case, the scope of an arbitration clause depended upon a careful interpretation of the words used in the clause. A clause referring to disputes arising 'under' a contract had been held to be narrower than a clause referring to disputes arising 'out of' or 'in connection with' a contract. A dispute arising 'under' a contract was not thought to include a dispute which did not concern obligations created by or incorporated in the contract in question.

The application of such linguistic distinctions was rejected by the House of Lords. Instead:

> *'… the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.'*

Since the enactment of the Construction Act, it has been unclear whether this approach would also apply to the right provided in section 108 of the Act to refer a dispute arising *'under'* a construction contract to adjudication at any time. As summarised in our earlier Law-Now here, there have been conflicting the Technology and Construction Court decisions as to the approach to be taken, with some applying *Fiona Trust* and others finding that the statutory requirement for adjudication provides a point of distinction.

After very full consideration, the court in this case decided to apply *Fiona Trust*, finding that BDW's DPA claim fell within the adjudication clause. In the court's judgment, the force of the *Fiona Trust* principle was such that the more expansive wording of the arbitration clause did not *'indicate a clear intention that the jurisdiction of the adjudicator would be narrower than that of the arbitrator'*.

3. Inherent unfairness

Ardmore also argued that the pursuit of a claim for design defects in relation to a 20-year-old project through adjudication proceedings had resulted in an inherently unfair situation in which it had access itself to almost no relevant contemporaneous documentation and had no option but to rely on documents provided by BDW. The paucity and imbalance of documentation available to Ardmore and the fact that the adjudication

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process was not able to adequately address such a problem meant, in Ardmore's view, that natural justice could not be afforded and the decision should not be enforced.

This challenge was also rejected. Ardmore had made various requests for documentation before the adjudication and these had been responded to by BDW. Once the adjudication was commenced, Ardmore sought a direction for the disclosure of a further four categories of documentation. The adjudicator directed BDW to provide these documents and documents were subsequently provided in respect of each category. Ardmore's final submissions in the adjudication did not suggest that there was any significant disclosure deficit which had produced unfairness. The court rejected the suggestion that the adjudication process had insufficient *'teeth'* to ensure Ardmore had access to sufficient documentation.

4. Conclusions and implications

This decision is the first to enforce an adjudication decision in relation to fire safety defects relying on the new liability regime ushered in by the BSA. The three enforcement challenges noted above are ones which are likely to be relevant to many adjudications in relation to historic fire safety defects. The court's rejection of these challenges is likely, therefore, to provide encouragement to claimant parties that such claims are capable of adjudication without being derailed by jurisdictional and natural justice objections of this nature.

References:

— *BDW Trading Ltd v Ardmore Construction Ltd [2024] EWHC 3235 (TCC)*

Supreme Court hears fundamental Building Safety Act issues

A Court of Appeal decision handed down on 3 July 2023 considered a number of issues regarding who should pay for the remediation of historic defects, including issues arising under the BSA and the DPA.

Permission was subsequently granted by the Supreme Court to appeal the Court of Appeal decision. The Supreme Court appeal was heard on 2–5 December 2024 by a panel of seven justices and the decision is yet to be published.

URS Corporation Ltd v BDW Trading Ltd

BDW is a developer responsible for the construction of numerous blocks of flats across the UK. BDW engaged URS to provide engineering services in relation to two separate developments comprising more than 500 apartments across a number of separate blocks (the '**Two Developments**'). The various parts of the Two Developments reached practical completion between 2005 and 2012 and individual apartments were sold to members of the public.

Prompted by the Grenfell Tower disaster in June 2017, BDW undertook a general review of certain of its previous developments. This review led BDW to believe that the structural design for the Two Developments was deficient and remediation was required, although no physical damage to the structures had yet occurred.

Despite having sold the apartments and having retained no other proprietary interest in the Two Developments, BDW incurred significant costs in carrying out investigations, temporary works, evacuation of residents and permanent remedial works. BDW commenced TCC proceedings against URS seeking to recover these costs, claiming that URS's structural design had been negligently performed.

BDW's proceedings raised a number of difficult legal issues, which were considered as a preliminary issue first by the TCC. Following the enactment of the BSA further issues arose, all of which were considered by the Court of Appeal. We summarise the Court of Appeal's findings below.

Liability in Tort

BDW's claim included reliance on tortious duties in order to avoid limitation issues under the Limitation Act. Two issues arose for determination in this regard:

— URS argued that the costs incurred by BDW were properly characterised as reputational damages as BDW had not received any claims from the owners of the apartments and no longer itself had any proprietary interest in the Two Developments. Its motivation for incurring such costs, URS argued, was to preserve its reputation and such costs were not within the scope of URS's tortious duty of care and not, therefore, in the range of damages recoverable in tort. The Court of Appeal rejected this argument, save for one aspect of BDW's claim specifically described as reputational damage. Neither the fact that BDW no longer had any proprietary interest in the Two Developments nor the fact that it had not received claims from owners in relation to the structural issues was sufficient to characterise a claim for investigation and repair costs as reputational in nature.

— URS also argued that in the absence of physical damage the alleged cause of action in tort could only accrue upon discovery of the alleged defects. As by this time BDW had no remaining proprietary interest in the Two Developments, it was argued that no cause of action could arise in tort. After a thorough review of the complex and diverse caselaw in this area, URS's argument was ultimately rejected by the Court of Appeal. The Court found that, whilst in cases involving physical damage the cause of action will arise upon the damage occurring, claims in relation to defects not involving physical damage (i.e. pure economic loss) will generally accrue, at the latest, upon practical completion when the works in question are handed over to the employer.

The Defective Premises Act 1972

A number of issues arose for determination under the DPA which was recently amended by the BSA:

— The BSA introduced a 30 year retrospective limitation period for claims under the original form of the DPA prior to its amendment by the BSA. As BDW's proceedings were commenced prior to the BSA, it sought to amend its claim to include DPA claims in reliance on the extended limitation period. URS argued that the retrospective extension of the limitation period did not apply to proceedings that were ongoing at the date on which the BSA came into effect. This argument was rejected.

— URS also argued that the intention behind the DPA (among other things) was to provide consumer protection to individuals and therefore on a proper construction, the rights of action it provided were only available to individual purchasers of a dwelling and not to commercial entities such as BDW who were involved in developing large numbers of dwellings for onward sale to individual purchasers at a profit. The Court of Appeal disagreed with this interpretation, finding that DPA duties could be owed equally to developers as well as individual purchasers.

— In considering whether DPA rights of action extended to commercial entities, the Court of Appeal heard arguments on the interaction between s. 6(3) of the DPA (which provides that contractual terms seeking to limit liability under the DPA shall be void) and the contractual caps on liability parties to construction contracts routinely negotiate and incorporate into their contracts and appointments. Ultimately, the Court of Appeal did not need to give judgment on the application of this provision and made only limited obiter comments.

— URS also argued that any claim BDW may have had under the DPA was lost upon its sale of the apartments and its residual proprietary interest in the Two Developments. However, the Court of Appeal concluded that the rights provided for by the DPA were not conditioned on ownership and remained actionable after ownership had passed.

The Civil Liability (Contribution) Act 1978

The Civil Liability (Contribution) Act 1978 (the '**Contribution Act**') allows two persons who are both liable to a third person for the same damage to recover contribution between themselves if one of them has made a payment to the third party in respect of their liability. In the present case, BDW alleged that both itself and URS were liable to the owners of the apartments and that it was entitled to claim contribution from URS in respect of the costs it had incurred in effecting repairs to the Two Developments.

URS argued that the right to contribution required a claim to be made by the third party, in this case the owners. It argued that BDW had incurred the repair costs voluntarily in the absence of a claim by the owners and could not, therefore, seek contribution under the Contribution Act.

The Court of Appeal disagreed with this interpretation, finding that a formal claim was not required before the right to claim contribution arose. The Court of Appeal also noted that the need for a payment to be made to the third party could be satisfied by a 'payment in kind' such as the carrying out of remedial works where the liability in question related to defective work.

The Supreme Court

The Supreme Court appeal hearing took place between 2–5 December 2024, and was heard by a distinguished panel of seven justices. The Supreme Court considered a number of points of significance for those in construction, real estate and insurance industries arising out of the new Building Safety Act, together with fundamental questions relating to the law of negligence, scope of duty and economic loss which will be of interest to the legal community more generally.

In considering the appeal, the Supreme Court was asked to consider:

— The scope of an engineer's common law duty of care to a developer and the extent to which the House of Lords decision in Pirelli remains good law.

— The scope of a construction professional's duty to a developer under s1(1) of the DPA.

— The meaning and effect of s.135 of the BSA, which seeks to give retrospective effect to the 30-year limitation period for DPA claims introduced by that Act.

— The meaning and effect of the Contribution Act 1980.

— The appeal will be the first occasion on which the Supreme Court will consider the DPA and the BSA.

Commenting on the significance of the appeal, Steven Williams, Partner and Co-head of the Infrastructure, Construction and Energy ('**ICE**') Disputes Group at CMS, said:

> *'We anticipate the appeal to be instrumental in shaping the answer to questions as to which of those parties with historic involvement in the construction and development of high-rise residential premises should bear the legal responsibility for the costs of rectifying recently discovered defects in those premises.*
>
> *Our market leading team, alongside a preeminent counsel team, is committed to navigating the intricacies of this important case and contributing to development of the law in the construction and real estate sectors.'*

Conclusions and implications

This is a highly significant matter which will affect not just developers and contractors (but also professional service providers (and their insurers) who provide advice and services to the construction industry in connection with both residential and non-residential buildings. The Appeal decision confirmed developers' rights to bring claims under the DPA and gives guidance on the operation of the 30-year retrospective time period. But it stops short of dealing with the commercially important question of whether contractors and professionals in the supply chain will be able to rely on negotiated caps on liability in defending such claims or whether these will be rendered void by s. 6(3) of the DPA. This will be of great concern to both the construction and insurance industry. Moreover, the decision raises fundamental issues regarding the extent that statute should be allowed to retrospectively interfere with privately agreed rights. We await to hear from the Supreme Court on whether these issues are clarified.

* CMS acted for URS in these proceedings.

References:

— *URS Corporation Ltd v BDW Trading Ltd* [2023] EWCA Civ 772

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Building Safety Act 2022: a shift in the liability landscape

The BSA was enacted on 28 April 2022 and made profound changes to the liability landscape in the UK construction industry. A number of new rights of action were introduced, extended and retrospective limitation periods now apply and liability can now be extended across corporate structures by order of the court in certain circumstances.

New rights of action

One of the Government's aims in passing the BSA was to expand the avenues available to stakeholders to bring those parties responsible for construction defects to account, particularly in the residential sphere. To achieve this, three new legal avenues of claim were introduced: a direct right of action against manufacturers and suppliers of construction products; a general right of action for breach of the Building Regulations; and the expansion of existing rights under the DPA. We discuss each of these in more detail below.

Construction products

The traditional contract structures used for large construction projects typically involve a main contractor and one or more sub-contract tiers. Sub-contractors will usually be responsible for purchasing construction products and materials required for the sub-contract works. Save in rare cases where specific product warranties are procured in favour of the employer or main contractor, the doctrine of privity of contract means that only the sub-contractor in such a scenario will have rights of recourse against the product manufacturer in relation to the costs of remediating dangerous or defective products. This is still the case even where the sub-contractor has provided a warranty to the employer or the ultimate owner of the building in question.

The 'liability gap' which this position gives rise to has been highlighted by the cladding remediation issues which have arisen in the wake of the Grenfell Tower disaster. Despite the blame for dangerous cladding lying with manufacturers in some cases, claims against them can be difficult to make out and may be excluded by the conditions of supply contracts agreed by the original sub-contractor or not available at all where the sub-contractor is no longer in existence.

Sections 147 to 151 of the BSA seeks to change this position by introducing a freestanding cause of action against construction product manufacturers which cannot be excluded by contract. The new cause of action is available to persons with a legal or equitable interest in a dwelling which is unfit for habitation. The manufacturer of a construction product used in the dwelling will be liable to pay damages in such a case if unfitness for habitation has been caused by one of the following failings:

- the product fails to comply with a statutory requirement;
- the product is inherently defective; or
- a misleading statement has been made in relation to the product.

Liability in relation to misleading statements also applies to anyone who *'markets or supplies'* a construction product. Recoverable losses include damage to property and economic loss.

Whether a dwelling is unfit for habitation is a question of fact in each case, although a broadly similar test applies under the DPA (discussed below) and existing caselaw is likely to provide guidance. These cases suggest that a dwelling must be significantly defective before it is rendered uninhabitable; basic inconvenience will not suffice.

Causation is likely to be a key issue in claims brought under these new provisions. The burden is on the claimant to evidence that one of the failings noted above has rendered the dwelling uninhabitable. Difficulties can arise where a combination of causes have led to the issue complained about. The BSA addresses this to some extent by making clear that the failings noted above need only be *'one of the causes'* for the dwelling being uninhabitable.

Defective Premises Act 1972

The DPA provides a course of action against those involved in the construction of a dwelling that is determined to be unfit for habitation upon completion. The entity that originally commissioned the work and any person with a legal or equitable interest can claim i.e. leaseholders and subsequent purchasers are included. Claimants must show that work in connection with the dwelling was defective in failing to be *'workmanlike'* or *'professional'* (as the case may be) or that *'proper materials'* were not used. In a similar way to sections 147 to 151 discussed above, these failings must also be shown to have caused the dwelling to be uninhabitable.

Aside from limitation period amendments (considered further below), the BSA has amended the DPA so that work to an existing dwelling (providing it is done in the course of a business) is now covered. Formerly, the DPA only covered the construction of new dwellings.

Section 38 of the Building Act 1984

Section 38 of the Building Act 1984 provides a general right of action for breaches of the Building Regulations. The section has not yet been brought into force, notwithstanding the Government indicating its intention to bring it in at the same time as the amendments to the DPA were to come into force on 28 June 2022.

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The scope of section 38 may potentially be very broad for a number of reasons:

— Schedule 1 to the Building Regulations contains specific requirements in relation to construction work, but more general duties are imposed in the body of the regulations. Regulation 7, for example, imposes a general duty that building work be carried out *'in a workmanlike manner'* and with *'adequate and proper materials'*. Section 38 allows parts of the Building Regulations to be excepted from its scope by regulation, but short of that both the general and specific requirements will become actionable.

— The section does not restrict the class of persons who can bring a claim and appears therefore to permit claims to be made outside the contractual structure of a project (i.e. a contractor against a sub-sub-contractor) or by third parties uninvolved with the original construction work.

— The rights given by the section may not be capable of exclusion or limitation by contract. This is likely to depend on the extent to which there is held to be a public interest in upholding the right of action conferred by the section (in accordance with the House of Lords' decision in *ICI v Shatwell*). It is notable that sections 147 to 151 of the BSA relating to construction products discussed above include an express prohibition against contracting out whilst section 38 is silent on the topic.

— The scope of damages recoverable under the section is open to debate. The Government's *'Redress: factsheet'* (which has subsequently been withdrawn) published alongside the BSA stated that *'purely financial loss is not covered by section 38'* but the section itself refers to *'damage'* without qualification. An interesting comparison can be made with the Nuclear Installations Act 1965 which imposes a duty to avoid *'damage to any property'*. Cases in England and Scotland have reached different conclusions as to whether this language requires physical damage (see *Blue Circle Industries Plc v Ministry of Defence [1998] EWCA Civ 945* and *Magnohard Ltd v United Kingdom Atomic Energy Authority [2004] SC 247)*. A similar debate seems likely under section 38.

Extended limitation periods

The BSA also introduced extended limitation periods for the rights of action discussed above, some of which apply retrospectively. A summary of these periods is set out in the table below.

Claims under	Claims for	New limitation period
Defective Premises Act 1972	Work in relation to new dwellings already completed (i.e. section 1 only).	30 years, retrospective.
	Future work.	15 years, prospective.
Section 38 of the Building Act 1984	Damage caused by breach of the Building Regulations	15 years, prospective.
Sections 147 to 151 of the Building Safety Act 2022	Dwellings rendered unfit for habitation as a result of a construction product being inherently defective, mis-sold or where there has been a breach of existing construction product regulations.	15 years, prospective – all construction products.
		30 years retrospective – cladding products only.

The retrospective introduction of a 30-year limitation period has attracted criticism from some quarters. The BSA itself contemplates that in some circumstances this retrospective change may breach rights guaranteed by the European Convention on Human Rights which is applied domestically by the Human Rights Act 1998. In such circumstances, the new limitation period is not to apply and a court is required to dismiss any action brought in reliance on it. The BSA also confirms that previous settlements or court decisions are not to be disturbed as a result of the new retrospective limitation periods.

Building Liability Orders

Sections 130 to 132 of the BSA contain highly significant provisions which allow liability for construction work to be extended to associated entities such as parent or sibling companies. Ordered at the court's discretion if it is considered *'just and equitable to do so'*, a Building Liability Order can be made in relation to any liability arising under the DPA (as amended), section 38 of the Building Act 1984 or any other claim arising from a *'building safety risk'*.

The concept of an associated entity under the BSA is very broad and includes companies which have been parents or siblings of the company primarily liable *'at any time'* since the works in question were commenced. Building Liability Orders could therefore be made in relation to projects or companies which have long since been sold or which have only been recently purchased long after construction has been completed.

The BSA also provides a right for certain persons (to be prescribed by regulation) to apply for information orders requiring the disclosure of information as to persons who are or have at any time since the commencement of the relevant work been associated with the company primarily liable. Such orders will allow claimants to obtain the information necessary to piece together any complex ownership structures or dispositions which will in turn allow Building Liability Orders to be made in relation to associated entities.

Complementing these rights is the passing earlier this year of the Economic Crime (Transparency and Enforcement) Act 2022 which provides for an Overseas Entities Register requiring beneficial owners of 'overseas entities' who own property in the UK to be registered with Companies House. This raises the prospect of claims against foreign entities in relation to UK properties although jurisdictional and enforcement issues may arise.

The BSA does not give any guidance as to when a Building Liability Order will be *'just and equitable'*. This will need to be addressed by the courts on a case-by-case basis as claims are made. It is anticipated, however, that Building Liability Orders will provide a flexible remedy where purchasers are left without a defendant to bring a claim against for serious building defects.

In *Triathlon Homes LLP v SVDP, Get Living and EVML [2024] UKFTT 26 (PC)*, the First-Tier Tribunal ('**FTT**') considered whether it would be 'just and equitable' to make an RCO. The FTT:

— Found that the test was broad, and allowed for broad discretion.

— Concluded that it would be just and equitable to make the RCO, where on the facts this was a situation where the developer was ultimately responsible for the defects and should be responsible for the remediation costs as the BSA 2022 intended.

— Referred to the fact that it was intended that RCOs would be a no-fault mechanism to allow the cost of remediation to be recovered without arguments as to liability.

— Considered that the developer should pay for the remedials, rather than the taxpayer (via the Building Safety Fund).

In essence, Building Liability Orders disrupt many historic legal norms – including the doctrines of privity of contract and lifting of the corporate veil. It will no longer be possible for parties to utilise sophisticated corporate structures to insulate themselves entirely against liability.

References:

— *ICI v Shatwell [1965] AC 656*

— *Triathlon Homes LLP v SVDP, Get Living and EVML [2024] UKFTT 26 (PC)*

— *Blue Circle Industries Plc v Ministry of Defence [1998] EWCA Civ 945*

— *Magnohard Ltd v United Kingdom Atomic Energy Authority [2004] SC 247*

Government and Inquiries

Introduction

The UK Government has played an active role in progressing the remediation of high rise unsafe residential properties – Michael Gove's developer remediation contract saw 54 major housebuilders and large developers agree to take responsibility for life-critical fire safety defects in their buildings. More recently, Angela Rayner's Remediation Acceleration Plan (the '**RAP**') focused on forcing developers and those with repairing obligations to speed up remediation. Under this scheme, all buildings over 11m with unsafe cladding will either have been remediated or have a date for completion by the end of 2029.

In addition, Government initiated independent inquiries, consultations and reviews (including Dame Judith Hackitt's independent review of building regulations and fire safety) have done much to identify the underlying causes of industry wide failings. The findings of Sir Martin Moore-Bick's Grenfell Tower Inquiry were damning, revealing that numerous industry and governmental stakeholders had contributed to systemic issues that led to the disaster.

What's up next in 2025?

The UK Government has promised to provide a further progress update on the RAP in the summer of 2025. In early February 2025, the Government confirmed that it will set up a new body to enforce cladding remediation on higher risk buildings. It is understood that the Building Safety Regulator ('**BSR**') is working with the Ministry of Housing, Communities and Local Government to create a new enforcement unit that will sit within the BSR. The approach is designed to hold owners of buildings with ACM cladding to account while *'enforcing remediation where necessary'*.

Separately, the Building Safety Levy is intended to come into force this autumn with the purpose of ensuring those profiting from property development contribute to the cost of remediating defects in historic developments. The plan is for a single payment prior to the issuing of the building control certificate, and the levy will be calculated on the floorspace area of a property.

In addition to, and alongside its commitment to accept 58 (49 in full and 9 in principle) of the Grenfell Tower Inquiry Phase 2 report recommendations, the government announced a Construction Products Reform Green Paper consultation on 26 February 2025, concerning 'proposals for institutional and regulatory reform of the construction products regime'. The consultation will end on 21 May 2025 – we await the results.

Government and Inquiries

The Government's Remediation Acceleration Plan – a push for change with the remediation of unsafe buildings

Notwithstanding the Government's multifaceted approach to progressing remediation following the Grenfell fire, seven years after the tragedy, numerous[1] unsafe buildings are yet to be remediated. With this in mind and the recognition that the current regime is not fit for purpose, on 2 December 2024, Angela Rayner, Deputy Prime Minister and Secretary of State for Housing, Communities and Local Government announced the Government's Remediation Acceleration Plan ('**RAP**') to try and tackle the slow progress.

Following Grenfell, from 2017 onwards, the Government has worked to compel building owners to identify and remediate life-critical fire safety materials in the external wall build of their buildings. This scheme has evolved over time, with the opening of the Government backed remediation fund in 2020[2]; the enactment of the Building Safety Act 2022 (bringing with it extended limitation periods and new rights of action against liable parties); and more recently the introduction in early 2023 of remediation contracts whereby developers agreed to meet remedial costs for their buildings. The remit of the height of buildings requiring remediation and the type of products that are not compliant has also expanded over time.

Barriers to progress and the core objectives

Barriers to progress remedial works

The RAP is focused on forcing developers and those with repairing obligations (including landlords and freehold owners) to speed up remediation. The Government identified six barriers to making buildings safe including reluctance on behalf of landlords to undertake measures to assess and remediate buildings; issues with contractor capacity to undertake remediation; and developer disputes with freeholders over access to properties. Regulator issues, including scarcity of resource is also blamed for the lack of progress.

The objectives of the RAP

The objectives of the plan are three-fold: 1) to fix buildings faster; 2) to identify buildings with unsafe cladding; and 3) support residents who face difficulties (including financial) while waiting for remediation works to take place.

Landlords and developers

Developers and landlords face particular criticism for failures to remediate. To tackle this, the Government has set the following timescales:

Landlords

Landlords face the threat of severe penalties if, by the end of 2029, buildings with unsafe cladding of:

— 18m plus have not been remediated; or

— 11m plus have not been remediated, or a completion date for remedial works has not been set.

Developers

Developers are encouraged to sign up to a 'joint plan' (discussed further below) which also includes 'ambitious' targets[3] for developers including:

— finalise the assessment of outstanding buildings by 2025; and

— starting remediation work on all buildings by July 2027.

Developers – the Joint Plan

Criticism is levied against the developer signatories[4] to the developer remediation plan[5] for failure to progress remedial works as they promised to do. In light of this, a group of major developers met with the Government earlier in November to discuss the problems with remediation, and following this committed to a number of outcomes[6] under a joint remediation plan (the '**Joint Plan**'). This included agreement to speed up remediation work, and the establishment of a developer-government working group to overcome progress blockers.

As at the date of the Government's announcement, at least 29 developers (accounting for over 90% of the buildings the developers need to remediate) had *'endorsed the commitments'* to the Joint Plan.

Reference is also made to Government plans for taking *'formal performance action'* against developers who fail to prioritise the assessment of building remediation. The Government will also publish guidance where third party disputes are delaying remediation works. It is not clear at this stage what the guidance will look like.

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[1] The National Audit Office's report 'Dangerous cladding the Government's remediation portfolio' produced with the Ministry of Housing, Communities and Local Government on 4 November 2024, estimated there are around 1,392 of between 9,000 and 12,000 buildings requiring remediation, where remediation works were complete as at August 2024 Dangerous cladding: the government's remediation portfolio.

[2] GBP 5.1bn of funding has been made available through Government funded schemes.

[3] The complete list of 'targets': – finish assessing all their buildings by the end of July 2025; – start or complete remedial works on 80% of their buildings by the end of July 2016; – start or complete remedial works on all their buildings by the end of July 2027; resolve all current cost-recovery negotiations with social housing provides by the end of July 2025.

[4] In January 2023, 54 developers signed a contract requiring the developer to take responsibility for remediating life-critical fire-safety defects in buildings over 11m that they developed or refurbished, and to reimburse any funding provided for those works.

[5] Developer remediation contract – GOV.UK

[6] The complete list of targets: – improving resident experience of remedial works; – accelerating work to find all unsafe buildings requiring remedial works; accelerating work to fix buildings; accelerating resolution of cost-recovery negotiations between developers and social housing providers; establishing a developer-government working group to unblock remaining barriers to remediation.

Government and Inquiries

Letters to those responsible for remediation

Alongside the announcement, Rayner wrote to organisations responsible for the remediation of buildings registered with Building Safety Fund or the Cladding Safety Scheme here to *'clarify [the] government's expectations regarding the remediation of unsafe cladding'*. The Government's expectation, as set out in the letter, is that remediation of these buildings will start *'as soon as possible in 2025'* and those who are required to undertake remedial works and fail to achieve this will be held to account. Direct legal action is threatened.

New legal powers and legal / regulatory issues

Separately, to facilitate the progress of remediation, the Government proposes to legislate in a number of ways:

- **Penalise landlords:** threats are made to pursue those with repair obligations that fail to take action to remediate unsafe buildings, by creating a legal obligation on them to do so. It is noted that 50 plus local authorities have already taken enforcement action (involving 482 buildings of 11m and over with unsafe cladding) and in addition, legislation will be brought in *'to create a clear and legal duty on those responsible for buildings 11m and over to take the necessary steps to fix their buildings within clear timescales'*. Reference is made to criminal sanctions for those who ultimately fail to remove unsafe cladding.
- **Strengthen enforcement powers:** The Government will also work to strengthen (including providing additional funding to the relevant bodies) the enforcement powers of regulators and other entities with enforcement capabilities, including local authorities and the fire and rescue service (the latter two who can, for example, apply to the First-Tier Tribunal (Property Chamber) for remediation contribution orders against non-compliant landlords)).
- **Identifying parent and associated companies:** Rayner also highlighted the difficulties with identifying the parent/associated companies that sit behind the legal owners of properties – i.e. those taking the financial benefit and with the decision-making powers. New legislation is to be brought in to force building owners to disclose their beneficial ownership chains, and the Secretary of State and regulators will be provided with the powers to compel these entities to do so where necessary.
- **Better fund access to legal advice:** A new Remediation Enforcement Support Fund is to be launched with the aim of providing local and fire and rescue authorities with the means to access specific legal advice to facilitate the pursuit of those responsible for fixing the cladding.
- **Increase the capacity of the Recovery Strategy Unit ('RSU'):** This unit has already forced owners of 10 properties to undertake remediation, and the RSU has already applied, via an undisclosed number of remediation contribution orders, seeking to recover up to GBP 72m for remedial work costs. These powers will be bolstered, and as part of the RAP, additional funding will be provided to the RSU to increase the number of RO and RCO applications.

Next steps

With recognition that *'the scale and importance of the challenge is so significant'* Rayner promises to provide a further progress update in the Summer of 2025, with a plan to announce a long-term strategy on accelerating remediation of social housing properties in spring 2025.

Government and Inquiries

Grenfell Tower Inquiry Final Report: key findings and recommendations

On 4 September 2024, the public inquiry into the Grenfell Tower disaster (the '**Inquiry**') released its final report (the '**Report**'). The Inquiry was created to examine the circumstances leading up to and surrounding the Grenfell Tower fire. The Inquiry found that the majority of the entities involved in the Grenfell Tower refurbishment, including the construction parties, product manufacturers, accreditation bodies, and Government departments, failed adequately to ensure fire safety standards were upheld. The Report was particularly critical of the ACM manufacturer and the project architect.

The Inquiry recommended wholescale updates to the regulation of the construction industry, including the introduction of a new 'Construction Regulator', and proposed an urgent review of Approved Document B ('**ADB**'), which the Inquiry found to be inadequate and unhelpful.

The construction parties – criticism and recommendations for change

It was determined that none of the construction parties properly understood their contractual and statutory fire safety obligations.

— **Clients:** those commissioning work are required to better understand their obligations as provided for under the Building Regulations (‘**BR**´).

The Inquiry recommends: no further action – the requirement under the Building Safety Act 2022 for a BR compliance statement approved by the client is sufficient.

— **Contractors:** these entities need to become more technically competent, take a more active role in ensuring fire safety requirements are met, and ensure the responsibilities of each contractor are clearly defined. The Grenfell Tower contractor was found to have assumed that *‘someone else was responsible for matters affecting fire safety´*.

The Inquiry recommends: a new licensing system (operated by the new Construction Regulator) for those working on Higher-Risk Buildings (the definition of which, under the Building Safety Act, has been recommended for urgent review). In addition, the Gateway 2/Building Control Application should be accompanied by a personal undertaking from a ‘Senior Manager´ (from the Principal Contractor) that the Higher-Risk Building is safe as required by the BR.

— **Architects:** the architect was found to have fallen below the required standard of care in the selection of insulation and rainscreen panels, in addition to failing properly to check subcontractor’s designs or confirm the fire strategy was completed.

The Inquiry recommends: a statement from a ‘Senior Manager´ (from the Principal Designer) be included in the Gateway 2/Building Control Application, confirming that reasonable steps have been taken to ensure safe building designs.

— **Fire engineer:** was insufficiently qualified, lacked the requisite technical expertise to determine whether fire safety had been achieved, and failed to produce a final fire strategy.

The Inquiry recommends: the profession should be formally recognised and its function dictated by statute. In addition, an independent body should be established to regulate the profession. It is also recommended that an authoritative statement defining the knowledge and skills expected of the fire engineer be produced.

— **Fire risk assessors:** the competency of those undertaking fire risk assessments is criticised.

The Inquiry recommends: a government established mandatory accreditation certifying competency be implemented.

— **Building Control inspector:** the Building Control inspector was seen as primarily a source of assistance, as opposed to an impartial compliance body. The conflict of interest in approved inspectors having a commercial interest in acquiring customers was noted.

The Inquiry recommends: change the role of the Building Control inspector to an independent and national authority.

Legislation and guidance – criticism and recommendations for change

The system for regulating high-rise residential building works was deemed to be *‘seriously defective´*. Over time it had become *‘too complex and fragmented´* with involvement from too many Government departments[1].

To further compound the issues, the primary statutory guidance (i.e. ADB) was poorly worded, susceptible to misinterpretation by those responsible for design work, and failed to provide appropriate instructions to practitioners as to how to design a safe building.

[1] Functions relating to fire safety are exercised by the MHCLG, the Home Office, and the Department for Business and Trade.

The industry erroneously took the ADB guidance as conformation of compliance with the BR. This coupled with a regulatory failure from the Government – specifically a failure to make changes to regulations that were urgently required, resulted in an unworkable regulatory regime.

The Inquiry recommends: an urgent review of ADB with *‘fresh minds´* (including from those of the academic community) and reviewing/ revising the BR and associated regimes with a focus on safety considerations.

The Government

The Government ignored recommendations relevant to fire safety in the 25 years preceding the Grenfell fire, and was criticised heavily for its failure to act on:

— numerous warnings about the risks of ACM panels and polymeric insulation;

— coroner recommendations to urgently review ADB after the Lakanal House fire; and

— calls from the fire sector to regulate fire risk assessors.

The Inquiry recommends: the appointment of a Chief Construction Advisor to *‘provide advice on all matters affecting the construction industry´* including monitoring BR work, in addition to creating a new Construction Regulator – a single body responsible for regulating the construction industry.

Testing and accreditation

— **Testing regime:** The current large scale test methods (including BS 8414) and the BR 135 classification are not fit for purpose (significantly a BR 135 compliant system could still allow non-compliant spread of fire), and in any event, are not a proper substitute for a robust fire engineered analysis.

— **Certification of test data:** Product marketing material was heavily criticised for insinuating compliance (where there was no evidence the relevant requirements were met), while those who sold the panels *‘engaged in [a] deliberate and sustained [strategy] to manipulate the testing process, misrepresent test data and mislead the market´*. On top of this, accreditation bodies were found wanting, with the Inquiry concluding that the Building Research Establishment had been *‘complicit´* in these misrepresentations for certain products and that the dishonest strategies of those selling the panels had succeeded in large measure due to the *´incompetence´* of the British Board of Agrément.

Vulnerable residents

Phase 1 recommended the preparation of Personal Emergency Evacuation Plans (‘**PEEPs**´) for all vulnerable residents be completed and placed in the information box. The LGA guide currently states individual evacuation plans were unrealistic, the Inquiry however concluded responsible persons should collect sufficient information about vulnerable occupants to ensure appropriate measures be taken to assist their escape in a fire.

The Inquiry recommends: the LGA guide and Phase 1 recommendation be reconsidered.

Key takeaways

In his statement following the publishing of the Report, Keir Starmer confirmed that those contractors named in the Report would be barred from being awarded government contracts.

On 26 February 2025 the government responded to the Inquiry findings, effectively accepting all 58 recommendations (49 in full and 9 in principle). This included an initial review with the BSR of the definition of a HRB, with plans for ongoing review in the summer of 2025. In addition, various proposals for regulatory reform were announced. The first phase will take place from March 2025 to 2026, with the second phase of reform spanning 2026 to 2028.

For the time being contractors should ensure they allocate additional budget and time resource to ensuring fire safety matters are properly considered, and for the professional qualifications of all parties involved in design, construction, product selection and fire safety to be properly interrogated and appraised.

References:

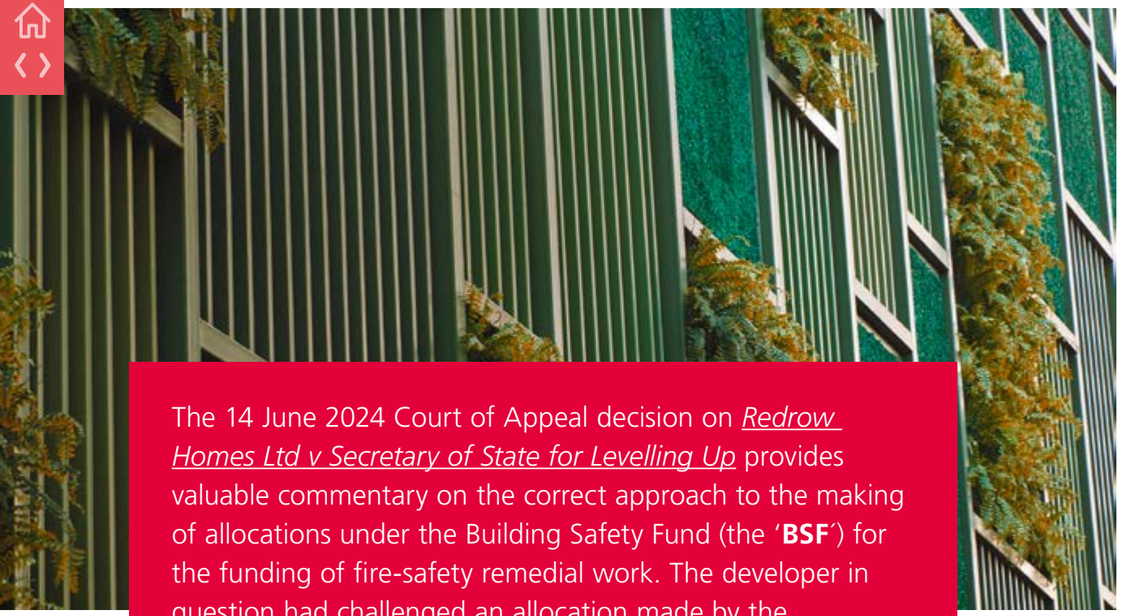
— Grenfell Tower Inquiry phase 2 report, published on 4 September 2024

— Government response to Grenfell Tower Inquiry phase 2 report

Government and Inquiries

Court of Appeal guidance on allocations under the Building Safety Fund

Redrow Homes Ltd v Secretary of State for Levelling Up – 14 June 2024



The 14 June 2024 Court of Appeal decision on *Redrow Homes Ltd v Secretary of State for Levelling Up* provides valuable commentary on the correct approach to the making of allocations under the Building Safety Fund (the '**BSF**') for the funding of fire-safety remedial work. The developer in question had challenged an allocation made by the government on the basis that insurers of the buildings had accepted liability and that recoveries from insurers should be enforced prior to the making of any allocation under the BSF.

The Building Safety Fund

The BSF is overseen by the Ministry of Housing Communities and Local Government (the '**MHCLG**') and has more than GBP 5bn available to fund the carrying out of fire-safety works. The government has issued guidance detailing how applications for allocations from the fund will be dealt with (the '**Guidance**'). The Guidance states that the fund is intended to *'meet the cost of addressing life safety fire risks associated with cladding on high rise residential buildings where building owners (or other entities responsible for making buildings safe) are unwilling or unable to afford to do so.'*

To be eligible for an allocation, an applicant to the BSF must establish that it is a 'Responsible Entity', which means that it has a legal obligation or right to carry out works to rectify life-critical fire-safety risks associated with cladding; for example, a freeholder, head lease owner, or management company with a legal entitlement or obligation to repair. The applicant must detail the life-critical fire-safety risks that are present in the relevant building and outline what remedial works are required to rectify them. If the application is approved, MHCLG will release funds to the applicant to cover the costs of necessary remediation work, including the costs of removing any unsafe cladding and ensuring the completed works comply with fire-safety standards and regulations.

The purpose of the BSF is to ensure that these safety-critical defects can be rectified without delay. In the words of the Guidance, the BSF is intended to ensure that residents of high-rise buildings *'are safe – and feel safe – in their homes now'*.

The economic viability of the BSF is underpinned by legally enforceable Deeds of Bilateral Contracts between a large number of developers and the MHCLG (the '**DBCs**'). Under the DBCs, the developers agree to carry out or fund work to remediate life-critical fire-safety issues on high-rise buildings they have played a role in developing or refurbishing over the last 30 years in England. The developers have also agreed to reimburse the BSF in relation to any funding allocated to Responsible Entities.

In addition to reimbursement by developers, allocations under the BSF may also be recovered through claims available to Responsible Entities, such as under insurance policies, the original construction contracts or consultant appointments in relation to the building, or under statutory rights of action such as the Defective Premises Act 1972. Consistent with this, the Guidance requires applicants to have taken *'all reasonable steps to recover the costs of addressing the life safety fire risks caused by the cladding from those responsible through insurance claims, warranties, legal action etc.'* Where any such action is successful, the applicant is required to reimburse the BSF in respect of any monies recovered. Whether such claims need to be prosecuted to a conclusion before an allocation is made from the BSF was considered in the case reported below.

Redrow Homes Ltd v Secretary of State for Levelling Up

Redrow is a signatory to the developer pledge and the developer of two high rise residential tower blocks in Birmingham known as 'Hemisphere' and 'Jupiter 2'. Many residents who acquired long leases in these developments purchased 10-year home warranty insurance policies.

Government and Inquiries

The two tower blocks were subsequently identified as having cladding defects which posed life-safety fire-risks. The leaseholders claimed on their respective insurance policies and, in April 2022, insurers accepted liability in relation to the Hemisphere defects. Acceptance of liability in respect of Jupiter 2 followed in September 2022.

In the interim, the management companies for the two developments applied for an allocation under the BSF. MHCLG consulted with Redrow over these applications. Redrow objected to the making of any allocation due to the fact that insurers had accepted liability in relation to the defects. Redrow relied on the Guidance as requiring an applicant to exhaust other avenues of recovery. Given that insurers had accepted liability, Redrow claimed that MHCLG should require the management companies to fund the works through insurance recoveries.

MHCLG disagreed with Redrow's stance, noting that insurance recoveries would not be available to allow the remediation works to commence by their proposed commencement dates in September and October 2022. MHCLG instead proposed to make an allocation to allow the works to commence on time, with Redrow reimbursing MHCLG in respect of those funds and any insurance proceeds subsequently being credited back to Redrow. After confirming that Redrow had no interest in carrying out the remediation works itself, MHCLG decided to proceed in this way and sought reimbursement from Redrow in late August 2022.

Redrow brought proceedings to challenge MHCLG's decision. As Redrow only entered into a DBC with MHCLG in March 2023 it did not have a contractual basis for its challenge, but sought judicial review instead. Although a number of procedural matters were raised in the proceedings, the primary basis for Redrow's challenge was its contention that MHCLG had not followed the Guidance by wrongly prioritising the swift commencement of remediation works over the need for all reasonable steps to be taken to recover the costs of remediation from others, particularly where insurers had accepted liability. Redrow's challenge was dismissed at first instance and then appealed to the Court of Appeal.

Decision upheld

The Court of Appeal upheld MHCLG's decision and dismissed the appeal. The fact that the Guidance required applicants to have taken *'all reasonable steps'* to recover the costs of remediation elsewhere did not imply that those steps needed to have been exhausted or proved to be unsuccessful. A key objective of the BSF as set out in the Guidance was to resolve life-critical fire-safety issues as quickly as possible. The need to act swiftly was *'baked into the whole rationale for the BSF'*. Implying such a requirement was therefore unnecessary and at odds with the purpose of the scheme.

MHCLG was therefore justified in prioritising the need to keep the proposed commencement dates for the remediation works over the potential to fund the works through insurance recoveries. Although noting that the need for speed will be a significant factor in any decision to allocate funding under the BSF, the Court of Appeal noted that it will *'not necessarily be a 'trump card' in every situation'*.

The Court of Appeal also noted that the management companies had taken all reasonable steps in relation to their insurance claims. Admissions of liability had been obtained, but the insurers were in administration and obtaining payment could be delayed or liability subsequently disputed. That was not something which ought to prevent an allocation of funding under the BSF.

Prior to the Court of Appeal's decision, insurers for one of the developments had written to say that in light of the allocation of funding, they no longer considered a claim under the policy to be viable. The Court of Appeal took the opportunity to comment on this development, noting that such an argument *'may not be sound in law'* due to an earlier case (*Design 5 v Keniston Housing Association* [1986] 34 B.L.R. 92) which had held that the receipt of public funds to carry out remedial works could not be taken reducing the loss suffered by a claimant, the claim in that case being against an architect.

References:

- *Design 5 v Keniston Housing Association Ltd* [1986] 34 B.L.R. 92
- *Redrow plc v Secretary of State for Levelling Up, Housing and Communities* [2024] EWCA Civ 651

Government and Inquiries

Construction

Introduction

The implementation of the Building Safety Act 2022 (‘**BSA**’) continues to significantly impact the construction industry. In October 2023, key provisions of the BSA came into force, including the introduction of the Building Safety Regulator (‘**BSR**’) and the new Gateway regime for higher-risk buildings (‘**HRB**’). The BSR and the regime for HRBs create additional layers to the development process, and have implications for procurement, programming, and risk allocation in Construction projects.

Of particular significance is the requirement for BSR approval at critical stages of construction, introducing what the Health and Safety Executive terms a ‘hard stop’ before work can commence on site. This new regulatory framework, coupled with the parallel implementation of the Responsible Actors Scheme and Developer Remediation Contracts, places unprecedented obligations on developers and contractors alike. The industry must now navigate stringent competency requirements, enhanced documentation procedures through the ‘golden thread’ principle, and potential exposure to remediation costs for historical defects dating back 30 years.

What’s next for 2025?

As we look ahead to 2025, the construction industry must prepare for further developments and potential adjustments to the regulatory landscape; there are incoming changes, such as the amendments to Approved Document B, including the requirement for a second staircase in blocks of flats of 18 metres or taller (being brought into effect on 30 September 2026).

Following the publication of statistics on Gateway 2 building control applications evidencing significant delays including a six month wait for approval, the BSR has promised to improve its operations and speed up the applications process. With the impact of these delays felt across the industry (including resulting in increased project delivery costs), it is hoped that these issues will be addressed in 2025.

Construction

Negotiating remediation agreements in building safety disputes

Fire safety and cladding remain a key focus for the Government. In December 2024, the UK Government outlined its Remediation Acceleration Plan with timelines for remediation of buildings with unsafe cladding. The response in Scotland has been more muted with the Housing Minister confirming that the Scottish Government will not be setting out target timelines at this time. However, on 6 January 2025, all provisions of the Housing (Cladding Remediation) (Scotland) Act 2024, not already in force, came into force which is likely itself to be a driver for progress.

With a renewed focus on getting buildings remediated, increasing attention is being given by building owners and developers to require those responsible for the original build to rectify problems. Where a settlement can be reached with these parties, it may take the form of a lump sum payment or a remediation agreement under which the original parties will arrange for the problems to be rectified. A number of questions arise as to how these remediation agreements will work in practice, particularly with the overlay of the BSA and its implications. In this article, we take a closer look at these issues.

The regulatory framework

Part 4 of the BSA introduced a new regulatory framework for higher-risk buildings that, for the purpose of points addressed in this article, refers to buildings in England which are at least 18m in height or with at least 7 storeys and which contain at least 2 residential units. This definition would include student accommodation.

That framework includes two new approval stages: 'Gateway 2' and 'Gateway 3', with 'Gateway 1' being the planning approval process. The purpose of this is said to be to provide rigorous inspection of Building Regulation requirements and ensure that building safety (in particular fire safety) is considered at each stage of design and construction.

It is important to consider these gateways in the context of entering into any agreements to carry out remedial schemes. In very brief summary, Gateway 2 is a critical 'stop / go' point before commencement of building work or any 'major changes' to planned work requiring the BSR to be satisfied that design and construction proposals satisfy the requirements of the Building Regulations and the BSA. The BSR's target response time for Gateway 2 applications is 12 weeks for commencement applications and 6 weeks for 'major changes'.

Gateway 3 requires the BSR to be satisfied that the completed works comply with the Building Regulations and that the building is safe to occupy. Full as-built drawings are required to be submitted with the application. BSR approval must be obtained before registering and occupying a higher-risk building. Gateway 3 carries an eight week approval period.

It is early days but while the BSR builds up its capacity and develops its operational functions, there have been many reported delays in the processing of applications. The BSR itself has recently confirmed that the average period for Gateway 2 is 22 weeks, almost double the intended target. Some of the delay has been driven by the volume of applications, but much also by a large number of applications being incomplete or failing to demonstrate full compliance with building regulations leading to these being rejected. However, in the meantime, this leaves a real risk for projects of delays associated with the gateway process.

Practical Considerations in Agreements

- **Programme and Risk Allocation:** Remedial work agreements should reflect the gateways in the programme and include provision for which party is to bear the time and cost risk of BSR delay. This would include provisions for extending target completion dates or longstop provisions due to BSR delay (which, as noted above, is likely) and reaching agreement on costs incurred as a result. There is not yet a market position on the risk allocation so each case will be negotiated on a bespoke basis.
- **Variations and Delays:** If there is a variation that triggers a further Gateway 2 process, parties will need to include a mechanism related to any delay and cost arising as a result.
- **Access Windows:** Consideration is required for how delays will impact access windows, especially when, as is likely, the work is to an operational or occupied building. This includes restrictions on working hours or days, the use of decant facilities to facilitate access or where access is being taken in a holiday period.
- **Practical Completion Requirements:** These should be set out, including whether the Gateway 3 regime is a prerequisite for completion or if it is to be treated separately. At the least, the provision of as built information is likely to feature as a requirement. The BSA and its secondary legislation introduced the concept of the golden thread of information: information describing the building and how it complies with building regulations. Whilst this information is required to satisfy the BSR, even where remedial works are on buildings not described as 'high risk', it would be prudent to adopt the same concept providing an audit trail of the remedial works undertaken as the direction of travel is towards more stringent requirements and evidence of compliance will be valuable.
- **Occupancy and Financial Implications:** Building owners need to consider the potential for at least a 12-week period after work is completed before the building can be occupied. This has implications for occupiers being allowed to use the building and on financial claims such as loss of profit, loss of income during the period of the works or compensation payments to occupiers.

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Contractual Guidance

For pre-existing agreements, if they are silent on the position of BSR delay, there is some guidance in the standard form contracts if these have been used as a basis for work being undertaken.

In JCT contracts, variations are Relevant Events and Relevant Matters. If a variation is instructed which triggers a re-run of the Gateway 2 process, relief for delay to the completion date and loss and expense is a possibility although that would not necessarily flow through to extension of any bespoke longstop provision.

If the BSR was considered to be a Statutory Undertaker (executing work in pursuance of its statutory obligations) then there may be other routes. Impediment, prevention or default by an Employer's Person (which includes a Statutory Undertaker) is also both a Relevant Event and Relevant Matter. There is a further Relevant Event (but not Matter) for a Statutory Undertaker carrying out, or failure to carry out, work in pursuance of its statutory obligations in relation to the Works.

In NEC4 contracts, it is a compensation event triggering entitlement to a change to the Prices and a change to the Completion Date if the Project Manager gives an instruction changing the Scope. There is the same relief for 'Others´ not working within times shown on the Accepted Programme. Others are people or organisations who are not the Client, Project Manager, Supervisor, Adjudicator or member of Dispute Board, Contractor (or employees), Subcontractor or supplier meaning that it could could include the BSR. Relief on this ground would require the Accepted Programme to include activities or milestones related to BSR approvals.

NEC4 also allows for events which are the Client's liability to be compensation events. That would require the definition of the Client's liability to be extended to include BSR related delay.

Remedial scope and standards

Decisions need to be made regarding the scope of remedial work. Ordinarily, the remedy for breach of contract would be for the party in breach to put the other party in the position it would have been in had it not been for the breach. When carrying out remedial work, that would often be regarded as undertaking work so that it complies with the contract.

However, with latent defect cases, including many of the fire safety claims, the issue is arising many years after completion.

Property owners increasingly have fire rating of buildings high on their checklists when considering both the safety of occupants and the value of the property now and into the future. Looking forward, the direction of travel is towards stringent standards being applied and potentially to a wider range of properties.

The above may lead building owners to decide to remediate to a higher (or updated) standard than that mandated in the original contract which is likely to lead to discussions around what cost is to be borne by the original contractor and design team and whether any contribution towards the 'betterment´ is to be made by the owner, especially if the only way to remediate is to do so to modern standards.

A further difficult issue is that under the BSA, there are a number of parties who could potentially have a claim against a project team. Difficulties can arise where contractors reach agreement over the scope of remedial works with a developer but not with leaseholders or funders who may take a different view and raise their own separate claims under the DPA or via a Remedial Contribution Order. In order to address this risk, contractors are seeking indemnities from developers in order to protect themselves from further claims.

Future considerations

The Grenfell Phase 2 Inquiry report included recommendations which could impact the Gateway regime and the categories of buildings this applies to.

The report includes a recommendation that a fire safety strategy produced by a registered fire engineer be submitted with applications at Gateway 2 for the construction or refurbishment of any higher-risk building and for it to be reviewed and re-submitted at completion (Gateway 3). The strategy should take into account the needs of vulnerable people, including the additional time they may require to leave the building or reach a place of safety within it and any additional facilities necessary to ensure their safety.

The Inquiry also considered that defining a building as 'higher risk´ by reference only to its height is not satisfactory. It was suggested that it is more relevant to consider how the building is used and, in particular, the likely presence of vulnerable people, for whom evacuation in the event of a fire or other emergency would be likely to present difficulty. The Inquiry recommended that the definition of a higher-risk building for the purposes of the Building Safety Act be reviewed urgently with this in mind. That clearly points to the potential for a much broader category of buildings falling within the higher risk regime.

On 26 February 2025, the government provided its response to the Grenfell Tower Inquiry Phase 2 Report recommendations. Out of the 58 recommendations 49 were accepted in full by the government and the remaining 9 accepted in principle. This included an initial review with the BSR of the definition of a HRB, with plans for ongoing review in the summer of 2025. In addition, various proposals for regulatory reform were announced.

Whilst parties will be keen to make progress on remediating buildings, it is important to consider the above points and identify how these issues should be addressed.

Higher-Risk Buildings approval regime came into force on 1 October 2023

The BSA provides for a significant overhaul of the regulatory framework in England for the approval of higher-risk buildings, being buildings of at least 18 metres (seven storeys) that contain at least two residential units.

New regulations came into force on 1 October 2023. Among the regulations are The Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 (SI 2023/ 909) which specify the procedural requirements when a new higher-risk building is being designed and constructed or when building work is being carried out on an existing higher-risk building.
Key points to note are:

— **Gateway 2 and before starting work on site**

- Before building work, or a stage of building work, can begin on a higher-risk building, an application must be submitted to, and approved by, the BSR. This introduced a new 'hard stop´ before relevant building work starts. Recent HSE guidance on the new gateways states that starting work is the undertaking of any element of permanent building work as described in the building control approval application. For example, the carrying out of site set up, demolition of previous buildings, stripping out works or the excavation of trial holes or installation of test piles would not be considered as starting work.
- The information required for this stage is prescribed and further guidance about how to make a building control approval application is likely.
- As expected, the BSR, on receipt of a valid application, has 12 weeks (eight weeks for work to an existing higher-risk building) to notify the applicant and determine the application beginning with the date the application is received. The BSR must first confirm that the application is valid. A failure by the BSR to approve a valid application on time will not result in the application being automatically treated as approved. The applicant can apply to the Secretary of State to determine a valid building control approval application when the BSR fails to make a decision within the required time.
- The client must give the BSR at least five working days' notice before starting higher risk building work on site.
- Specific information and documents must be kept as part of the golden thread of information before building work begins on a higher-risk building. This golden thread of information must be kept electronically and handed over to occupation phase dutyholders on completion. The digital nature of this facility is not prescribed so as to allow for innovation, but it must be kept up to date, be able to effectively deliver safe outcomes and must be transferrable. The use of BIM standards is encouraged and further guidance on golden thread requirements is expected.

— **During construction:**

- The client must give the BSR another notice when the work has met the new definition of 'commencement' noted below.
- Changes are controlled with some requiring BSR approval (BSR has six weeks to determine a valid change control application for 'major changes´, as defined, and the work to implement the major change cannot start until approved).

— **Gateway 3 and before occupying the building:**

- Before the building can be occupied, a further application must be submitted to, and approved by, the BSR. That approval will take the form of a completion certificate. The completion certificate is required for the registration of a new higher-risk building and the building must be registered before it can be occupied.
- The BSR, on receipt of a valid application, has eight weeks to determine the application. This period is contrary to the 12 weeks that many expected given the previous draft regulations and Government consultation. As with Gateway 2, a failure by the BSR to approve a valid application on time will not see the application automatically treated as approved and the applicant may apply to the Secretary of State for determination.
- A Gateway 3 application can only be made once completion is achieved and full as-built plans and information, among other things, will need to be submitted. Completion seems to include completion of snagging work, as all applicable requirements of the building regulations must have been complied with before a completion certificate can be issued. However, the government has said that it intends to work with the BSR to consider how to provide clarity about snagging work.
- These requirements are likely to have a significant impact on timings given that a further period is needed for the application to be determined and the building registered.

— **Building work in existing higher-risk buildings follows different building control routes depending on the work that is being carried out.**

— **Transitional provisions apply in different circumstances. Broadly speaking, the various transitional provisions in respect of higher-risk buildings may apply where an initial notice describing the higher-risk building work has been given to a local authority and accepted before 1 October 2023 (or full plans describing such work have been deposited, and not rejected, with a local authority before 1 October 2023) and the works have been 'sufficiently progressed´, depending on the type of building work, within 6 months.**

As expected, where the applicant and BSR agree, the prescribed time periods for BSR decision-making can be longer than specified. It is likely that for very complex projects it may be necessary for an extension of time for BSR approval to be agreed.

If the BSR indicates that it needs a time extension to consider approval, the applicant may be put in a difficult situation because if it declines the extension it may find the BSR failing to make any decision, let alone giving an approval, in time.

Where these new procedural requirements apply they will have an impact on construction procurement, both traditional and design and build, and on issues such as practical completion, extensions of time and additional costs. How the market approaches this and addresses these issues remains to be seen.

Also among the regulations are The Building Regulations etc. (Amendment) (England) Regulations 2023 (SI 2023/ 911) which specify new dutyholder and competence requirements which will apply to all building work, including that undertaken on higher-risk buildings. Clients, consultants and contractors must comply with various obligations and it is key that a client ensures its designers and contractors, including the Principal Designer and the Principal Contractor, have the necessary competencies to meet the new dutyholder requirements. These regulations also give a new definition of 'commencement' of work for existing and new buildings; and individual buildings that do not meet the definition after three years from when the building control approval was granted will suffer an automatic lapse of building control approval.

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Developer Remedial Contracts and the Responsible Actors Scheme: a closer look

In July 2023, regulations under the Building Safety Act 2022 giving effect to the Government's 'Responsible Actors Scheme' were passed into law. These regulations, and the Developer Remediation Contracts which have been entered into as a result of them (the '**DRCs**'), form a central plank of the Government's strategy for ensuring the remediation of historic cladding defects in the wake of the Grenfell disaster. In this article we take a detailed look at the terms of the DRC and the regulations, which are likely to form a significant feature of the construction industry landscape in the UK for some years to come.

Introduction

On 30 January 2023 the Government wrote to large developers asking them to sign DRCs. As of 14 October 2024, 54 developers had signed the DRC. Upon signature, the DRC constitutes a legally binding agreement between the relevant developer (referred to as '**Participant Developer**' or '**PD**') and the Ministry for Housing Communities and Local Government. Further, the Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023 (the '**RAS Regulations**') was passed into law as of 3 July 2023.

The RAS Regulations introduced sanctions on eligible developers that fail to comply with the 'Self Remediation Terms' set out within the DRC. The overarching purpose of both the RAS Regulations and the DRC is to facilitate the remediation of residential buildings, which were developed or refurbished during the relevant period (as defined in the RAS Regulations) and which are assessed to possess life-critical fire safety defects (the '**Building Requiring Works**').

The RAS Regulations and the DRC consider a developer responsible for the remediation works if any corporate body within a developer's group company carried out the development or refurbishment during the relevant period, regardless of whether the group was formed before or after the development or refurbishment of such relevant building. As a result, developers will need to actively investigate the development history of all the companies within their company structure so as not to inadvertently breach the requirements of the RAS Regulations and the DRC.

The Developer Remedial Contracts

To fully achieve the requirements of the DRC, a PD is required to fulfil the obligations set out in the 'Self Remediation Terms' within the DRC. We provide an overview of the key features of the Self Remediation Terms below.

Obligation to identify and assess Buildings Requiring Works

Clause 5 obliges the PD to use reasonable endeavours to investigate and identify all Buildings Requiring Works. To achieve this as early as reasonably practicable, the PD is to appoint a competent fire assessor to provide up-to-date fire safety assessments (and with regards to the guidance in the PAS 9980) and up-to-date Fire Risk Appraisal of External Wall ('**FRAEW**') surveys for all Building Requiring Works in accordance with the standard applicable at the date of the relevant assessment. The PD is obliged to send the findings of the fire assessor to the MHCLG within ten business days.

The obligation to conduct the fire assessments will not apply in cases where (i) the PD can provide a written agreement to the Ministry of Housing Communities and Local Government (the '**MHCLG**') to confirm that it has previously entered into a settlement or compromise with the Responsible Entity (such settlement agreement must have been agreed after 14 June 2017 but prior to the PD entering into the DRC); or (ii) the Responsible Entity is not being cooperative with PD; although the PD will need to continue to use best endeavours to work with the Responsible Entity and will remain obliged to take into account any options for resolving the issues as proposed by the MHCLG.

Obligation to engage with and report to third parties

Clause 8 of the DRC sets out that upon identifying the Building Requiring Works, the PD is required within 40 business days to contact the Responsible Entity and occupiers to confirm its target dates for completing the remediation works and establish an effective process for communications relating to the works. The PD is further required to respond to requests for information from any occupiers of the building within 10 business days whilst it must promptly respond to any requests for information from the MHCLG.

Additionally, the PD is required to submit a data report, an 'assessment order and method statement' a 'works order and method statement' and any information it holds in respect of the fire safety assessments to the MHCLG. This initial submission is required within 30 business days of entering into the DRC, with subsequent Data Reports due by the tenth business day after each reporting date (as prescribed in the DRC). As the obligation to submit updated versions of the Data Report is ongoing, PDs may need to continuously review details provided in previous Data Reports. Following 20 Business Days' written notice to the PD, the MHCLG can audit the information used in the preparation of the Data Reports once every 6 months.

To evidence completion of the remediation works, the PD is required to engage an independent and suitably experienced relevant assessor to conduct a qualifying assessment in accordance with the standard prevalent at the time of the remediation works; this is the case regardless of such standard being different to or more onerous than the standard applicable at the time of the original works. Within two years of completion and on providing 20 business days written notice to the PD, the MHCLG may choose to audit the qualifying assessment. Once the qualifying assessment has been submitted to the MHCLG and/or following the successful completion of the audit by the MHCLG, the PD will be fully released from its obligations under the DRC in respect of the Building Requiring Works.

As the information provided by the PD may be published and the MHCLG has rights to audit, the PD should ensure that relevant information is stored in a manner compliant with the 'golden thread' principle under the Building Safety Act 2022 and for a minimum of two years.

Obligation to carry out and complete the Works

Under clause 6 of the DRC, the PD is required to without delay, remediate and/or mitigate, or fund the remediation of the Building Requiring Works (the '**remediation works**'). This involves prioritising the completion of the remediation works regardless of whether the fire assessment was carried out prior to 5 April 2022 and over its interest in recovering its own costs from available routes in the supply chain (e.g. subcontractors/suppliers engaged by the PD). However, clause 7 of the DRC provides that the PD is exempt from carrying out the remediation works where the defects are solely as a result of alterations made by an entity that is not within the PD's group company or where the MHCLG has awarded funding for the remediation works through a relevant government cladding remediation scheme such as:

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— the Building Safety Fund);

— the Private Sector ACM Cladding Remediation Fund ('**PSCRF**'); or

— the Social Sector ACM Cladding Remediation Fund ('**SSCRF**'),

collectively referred to as the 'Government Funds'.

The PD is obliged to bear all costs associated with the completion of the remediation works including costs of obtaining access, relocating residents, appointing professional advisers (as pre-agreed in writing with the Responsible Entity). The PD is liable for any costs incurred by an owner or tenant of the Building Requiring Works in respect of any negligence in performing the remediation works or breach of the terms of the DRC. However, the terms of the DRC confirm that the PD is not responsible for costs relating to (i) interim safety measures such as waking-watch costs; and (ii) increases in building insurance premiums.

Where the PD chooses to carry out the remediation works themselves or utilise a subcontractor, the PD must use reasonable endeavours to agree with the Responsible Entity a written contract that at a minimum includes the specific contractual terms as listed in paragraph 6.3 of the Self Remediation Terms within the DRC. One of such contractual terms is for third party rights to be granted in favour of the MHCLG so that the MHCLG can enforce the terms of the written contract against the PD.

Alternatively, the PD can agree to fund the costs of a Responsible Entity arranging for the carrying out of the remediation works, provided the Responsibility Entity agrees to this. Where this route is chosen, the PD is relieved of its obligation to carry out the remediation works, but will remain liable for any cost overruns in respect of the remediation works arranged by the Responsible Entity provided they are within the scope of the Self-Remediation Terms and are not due to the fault, negligence, act or omission of the Responsible Entity or persons employed by it in relation to the works.

The PD will still able to rely on any warranties or indemnities provided by contractors engaged in the original works, including any rights of recovery or subrogated rights under any insurance policies maintained in respect of original works, but this would be dependent on if the suppliers remain solvent or if sufficient professional indemnity insurance exists to cover these costs.

Delay

Where the obligations are qualified by 'all reasonable endeavours', 'as soon as reasonably practicable' and 'as early as reasonably practicable', the PD's ability to carry out such obligations are interpreted with regards to:

— the life-critical fire-safety risk to the leaseholders, residents, occupiers and other users of the Building Requiring Works;

— the information available to the PD at the time in respect of the defects in the Building Requiring Works;

— availability of contractors such as the fire safety assessors or external wall assessors or professional consultants to perform the works;

— the ease of engaging relevant third parties such as the Responsible Entity (where it is not a group company of the PD);

— insurability;

— willingness of lenders to extend loans secured by interests in the Building Requiring Works; and

— guidance issued by the MHCLG in respect of the works.

As such, if the PD is delayed for any of the above reasons it may be interpreted as a circumstance out of the PD's control. With regards to the PD's ability to procure a loan against a Building Requiring Works, it is worth noting that the practical process to be followed for granting an interest in the relevant building to a lender where the PD no longer owns or have any interest in such building except to perform the remediation works remains unclear.

Transfer of Buildings and Reimbursement of Government Funds

The DRC requires remediation work already being arranged or carried out pursuant to a Government fund to be transferred to the PD and/or for the PD to reimburse the Government for payments made in respect of those works.

In respect of remediation works, the PD may choose to take over completion of remediation works that have commenced under a fund, or where the remediation works are yet to commence, the PD must request for the transfer of the Building Requiring Works from the Government Fund. In both instances, the PD is obliged to keep the Responsible Entities, occupiers and MHCLG updated on the progress of the remediation works in line with the notice requirements set out below.

Given the PD is required to bear the costs of all remediation works, there is possibility of claims or complaints from leaseholders requiring the remediation works to be completed urgently.

Consequences introduced by the RAS Regulations

Eligible developers[1] that neglect the notice of invitation from the Secretary of State to join the RAS Regulations or any developer that has its membership revoked under regulations 24 will be placed on a prohibitions list, along with any corporate body controlled by such developers.

The proposed sanctions for developers on the prohibitions list include:

— the planning prohibition: affected developers will be prevented from being able to obtain planning permission to carry out major developments[2] in England and have to notify the Local Planning Authority if they acquire interest in land which has the benefit of planning permission for major development and the building control prohibition: local authorities and approved inspectors are prevented from accepting from or issuing to a prohibited developer, documents and certificates relating to building control approval (together the 'Prohibition List').

The introduction of the Prohibitions List by the RAS Regulations will inevitably affect the profitability and market reputation of developers in the event that these sanctions hinder their ability to start or complete projects.

Conclusions and implications

The terms of the DRC and the RAS Regulations apply retrospectively to relevant buildings that were developed up to 30 years ago which will result in a significant number of buildings qualifying for remediation works. Considering the pressure that the terms of the RAS Regulations and the DRC seek to place on PDs to commence the remediation works promptly, PDs are likely to have reduced bargaining power in negotiating contracts with remedial works contractors, fire assessors and the like. Shortages in the required professional services, materials and resources may also lead to price instability over the short-term.

PDs will also need to carefully consider their resource, knowledge and financial capability to undertake the onerous administrative tasks imposed by the DRC such as investigations into relevant buildings, data reporting, adhering to notice requirements and deadlines for communicating with third parties, and the electronic archiving of information or documents. Moreover, for PDs that are obliged to perform remediation works on relevant buildings that do not qualify for funding or other routes of relief, such PDs may be compelled to enter into loan facilities in the current high interest rate economy which may have longer term consequences to the business of these PDs.

References:

— Form of Developer Remediation Contract

— The Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023

[1] To satisfy the profit condition, a developer must have an average adjusted operating profit of GBP 10m or higher over the financial years ending 2017, 2018 and 2019 (excluding non-recurring items and unrealised valuation adjustments).

[2] This refers to schemes providing 10 or more residential units, residential schemes on a site at least 0.5 hectares in size (where it is not known if it will provide 10 units or more), commercial development creating at least 1,000 square metres of floorspace and development on a site over 1 hectare in size.

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Real Estate

Real Estate

Real Estate Introduction

The Building Safety Act 2022 ('**BSA**') has reshaped the landscape of residential property ownership and management in England, introducing changes to both existing buildings and future developments. The BSA creates new obligations for building owners and seeks to enhance leaseholder protection. At its core, the legislation establishes a dual approach: addressing historical building safety defects through remediation orders and contribution mechanisms, whilst implementing a new forward-looking regime for the management of higher-risk buildings.

The introduction of the 'accountable person' concept, coupled with the Leasehold and Freehold Reform Act 2024's clarification of remediation orders, has created a web of responsibilities for landlords and building owners. Of particular significance is the prohibition on recovering cladding remediation costs through service charges and the stringent caps on non-cladding related defect costs.

These measures demonstrate a decisive shift in the allocation of building safety costs away from residents. For real estate investors, developers, and managers, these reforms continue to require a careful consideration of risk assessment, property management structures, and financial planning for both existing portfolios and future acquisitions.

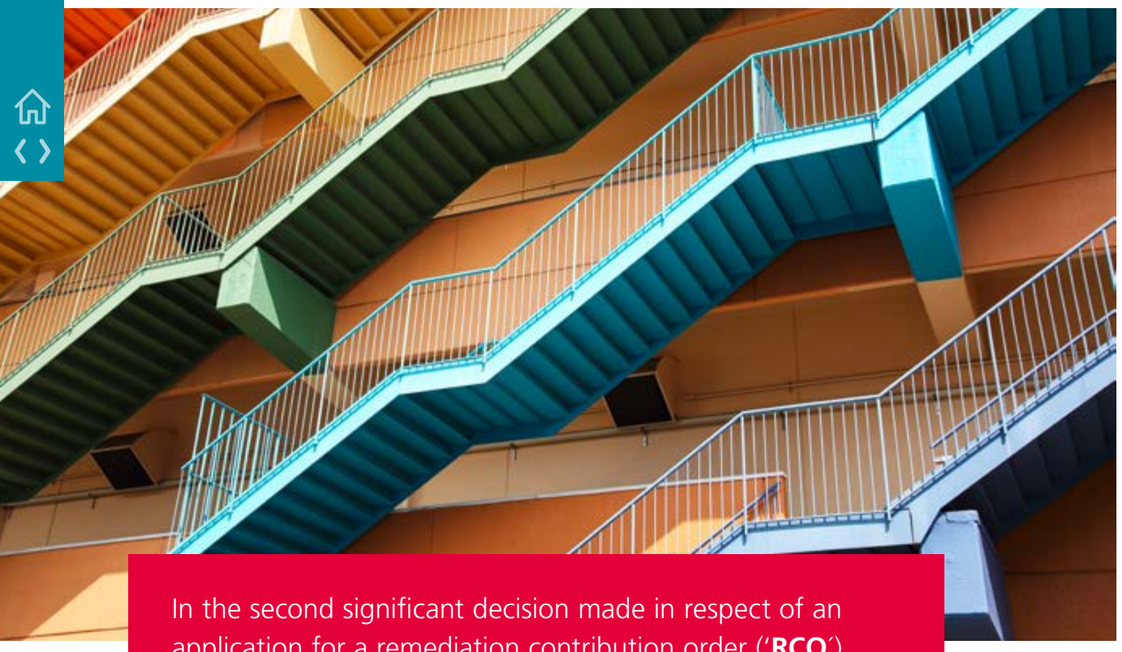
What's up next for 2025?

In March 2025, two of the leading cases that deal with matters impacting leaseholders are due to be heard in succession by the Court of Appeal by the same panel of judges:

— The first case, *Adriatic Land 5 Ltd v Lessees of Hippersley Point* [2023] UKUT 271 (LC), will allow the Court of Appeal to reconsider whether Schedule 8 of the BSA (which provides that 'no service charge is payable' in respect of many provisions) has retrospective effect;

— The second case (*Triathlon Homes LLP v Stratford Village Development Partnership & Others* [2024] UKFTT 26 (PC)) where the decision to allow an Remedial Contribution Order to be made to retrospectively recover costs incurred prior to the BSA coming into force is being contested. Other grounds for appeal in this case also include the First Tier-Tribunal's narrow interpretation of when it is considered 'just and equitable' to make a RCO.

Remediation Contribution Orders – FTT gives guidance for criteria for associated parties



In the second significant decision made in respect of an application for a remediation contribution order ('**RCO**') under section 124 of the Building Safety Act 2022 (the '**BSA**'), on 24 January 2025 the First-Tier Tribunal Property Chamber made an RCO for GBP 13m. The order was made against 76 parties, including the developer and associated parties, for fire safety defects in a residential tower block in Stevenage. This decision provides helpful further guidance on the application of the 'just and equitable' test in respect of RCOs. The 76 respondents liable to pay the order were found to be linked by certain individuals and financial dealings and had been involved in property and/or property development. The tribunal excluded those entities who appeared to be independent with external investment.

Background

Vista Tower, an office building constructed in the 1960s, was converted into residential flats by Edgewater (Stevenage) Limited in 2015-2016. The building was the subject of the Government's first successful application for a remediation order under section 123, made against the building's owner, Grey GR Limited Partnership, the applicant in the RCO application proceedings. At the time of the application, the applicant was also seeking a building liability order against certain of the respondents under section 130 of the BSA.

The tribunal provided helpful guidance on a number of aspects of RCOs:

1. The meaning of *'defect'* and *'building safety risk'*;
2. Scope of the RCO; and
3. The 'just and equitable' test.

Under section 124 of the BSA, the tribunal may make an RCO requiring payment to meet costs incurred or to be incurred in remedying or in connection with relevant defects. Relevant defects are defined in section 120 as defects that:

— arise as a result of anything done or not done or anything used or not used in connection with relevant works, and

— cause a building safety risk.

The tribunal considered the meaning of *'defects'* and *'building safety risk'* in the context of RCOs.

'Defects'

The tribunal found that *'defect'* was not limited to building work that did not comply with Building Regulations in force at the time of construction, as had been agreed by the fire experts and argued by the developer. It decided that non-compliance with Building Regulations is *'merely one way, not the only way, in which something can be a 'defect' for these purposes'*, noting that it would be surprising if the BSA limited *'defect'* to non-compliance with the pre-Grenfell version of the building regulations, which the Hackitt Review had found unfit for purpose.

'Building safety risk'

The tribunal rejected the developer's argument that *'building safety risk'* did not include risks considered to be *'tolerable'* or *'medium'* fire risks under the PAS9980 standard. Again, the tribunal favoured a wider definition, finding that *'any risk above 'low' risk (understood as the ordinary unavoidable fire risks in residential buildings and/or in relation to PAS 9980 as an assessment that fire spread would be within normal expectations) may be a fire safety risk'*. It confirmed that the risk need not be of catastrophic fire spread but need only be a risk to the safety of people arising from the spread of fire in a tall residential building.

Scope of the RCO

The tribunal acknowledged that certain works were not relevant defects, for example works to the fire doors. However, the tribunal found that in light of the very serious relevant defects found in the external walls and compartmentation, it was appropriate to include within the RCO the cost of certain works that did not strictly arise from relevant defects to seek to reduce harm to occupants that might result from a fire pending remediation to the external walls.

'Just and equitable' test

The tribunal noted that the developer of a building is a key target in the context of identifying sources of funds to remediate fire safety issues, 'at the top of the hierarchy of liability (or waterfall)', referring to *Triathlon Homes LLP v Stratford Village Development Partnership & others* (see our Law Now on this here). This was the case even where the developer had committed no wrongdoing, pointing out that *'the new jurisdiction appears essentially not to be fault-based, providing a route to secure funding for remedial works, with the emphasis on protection of leaseholders/residents and helping to expedite remedial action'*.

The tribunal observed that the power to make RCOs against associated bodies corporate and partnerships is a radical departure from normal company law but does not pierce the corporate veil as it does not expose individuals. The tribunal confirmed that the source of extent of the assets and liabilities of the respondents would not carry much weight as to whether it was just and equitable to order them to bear the costs of remediation. In relation to the wider context of the development, if no or modest profits had been made from the development, it would still be just and equitable to include in a RCO the costs of remediation required by the defects that formed part of the development of the building.

The tribunal found that there is no presumption that any associate must be made liable unless they can show good reasons why not, particularly where they are associated only by common directorship. However, some circumstances will suggest linking factors to the developer that the tribunal will take into account.

Real Estate

The tribunal included 76 of the 97 respondents identified in the RCO, for the following reasons:

1. the business of each of these companies involved the property, property development and/or building sectors;
2. the companies were presented to potential funders and/or third parties as if they were part of a group;
3. they were all linked to the families of the two key individuals acting for the developer, who had been directors of each of the companies and had day to day control; and
4. the companies were likely to be linked by financial or other dealings and their records are opaque and/or do not appear reliable.

The RCO was made in the sum of approximately GBP 13m in joint and several terms, the tribunal rejecting arguments that it was not in the tribunal's power to do so, and remarking that in circumstances where the relevant respondents had provided only limited information as to why an order would not be just and equitable, they should all be made responsible for payment.

The future of RCOs

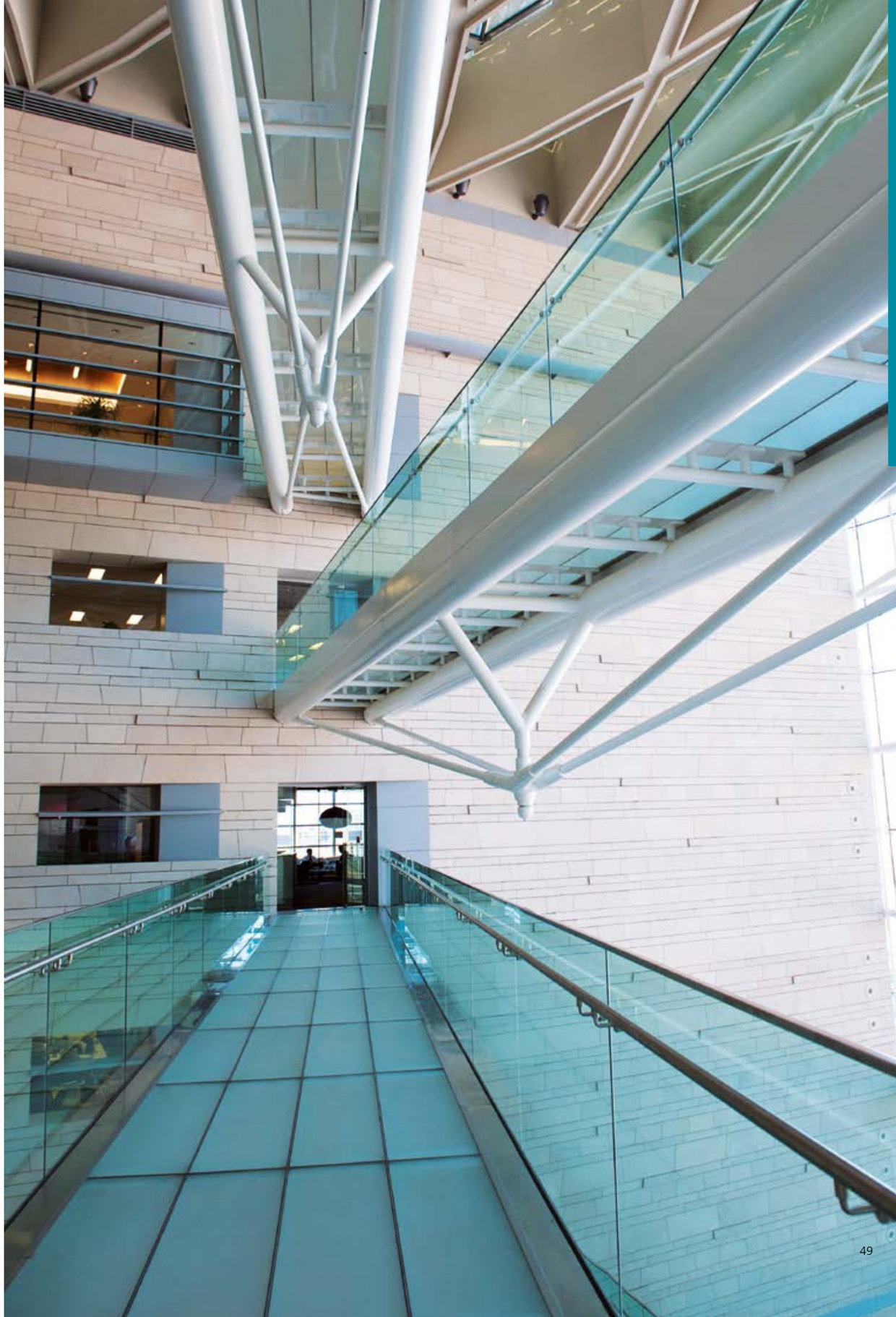
This decision provides insight into how the tribunal will approach applications for RCOs in this new area of law. The decision is not binding on future tribunals and as noted in the decision, such cases will be very fact-sensitive and will be a matter for the tribunal's discretion. However, it confirmed that the just and equitable test is deliberately wide *'so that money can be found'* and the new jurisdiction is to ensure that the *'pot is filled promptly'* so that remedial work can be carried out and/or public money from grant funding can be recovered promptly. Whilst acknowledging this intention behind the RCO mechanism, the tribunal nevertheless undertook a detailed review of the defects, remedial works and the background of each respondent, including individuals, considering each element and excluding those respondents who were genuinely independent with external investors.

Whilst the tribunal observed that the BSA provisions regarding associated parties do not pierce the corporate veil, the reach of these new powers ordering payment from associated parties may come as a surprise to those in construction and property development. Developers seeking to limit future exposure should bear in mind the comments as to separate entities being presented as a group and maintain clear records that demonstrate that financial dealings between companies remain separate.

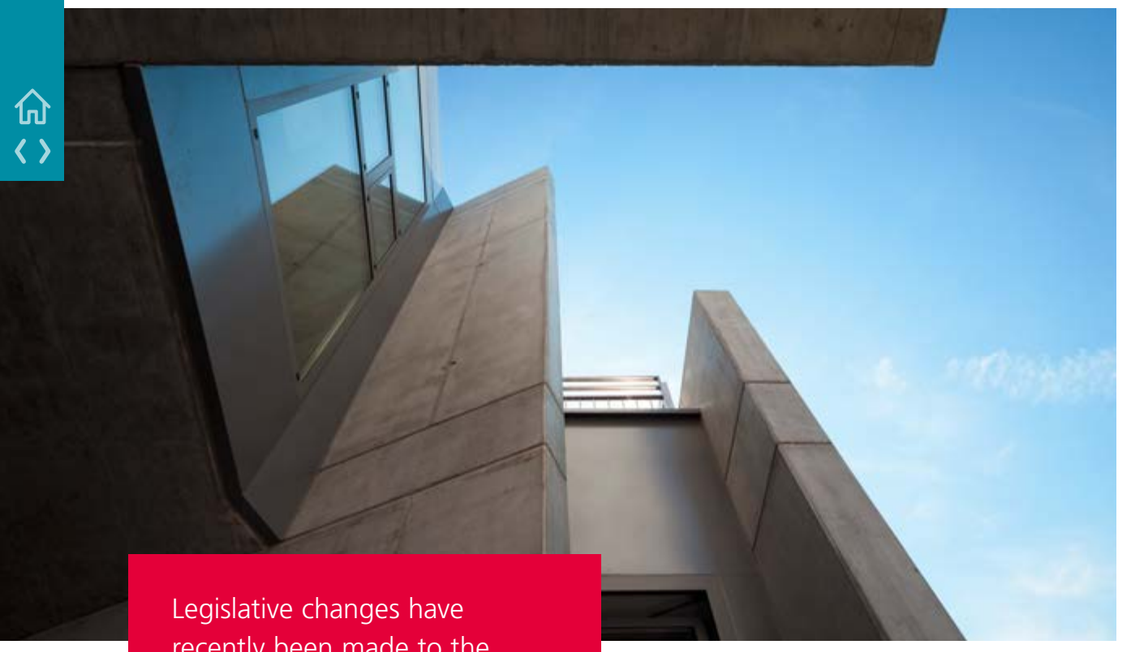
References:

— *Grey GR Limited Partnership v Edgewater (Stevenage) Limited and others* CAM/26UH/HYI/2023/0003

— *Triathlon Homes LLP -v- Stratford Village Development Partnership and others*



Changes to the Remedial Order and Remedial Contribution Order regime under the Building Safety Act



Legislative changes have recently been made to the Remediation Order (‘**RO**’) and Remediation Contribution Order (‘**RCO**’) regime brought in by the Building Safety Act 2022. These changes follow various ROs and RCOs made by the First-Tier Tribunal (Property Chamber) (the ‘**Tribunal**’) and provide some much needed clarity as to the functionality of these types of orders, including the scope of recoverable losses.

What are ROs and RCOs?

ROs and RCOs are both orders that can be made by a Tribunal. An RO is an order requiring the named parties to remedy specified relevant defects or take certain steps, whilst an RCO requires the named parties to make payments to a specified person for the purpose of meeting costs incurred or to be incurred in remedying relevant or specified defects. The combined effect of the orders is to compel such parties to undertake, or contribute to the cost of undertaking, remedial works, and to remedy building safety risks (a risk to people in or about a building arising from the spread of fire, the collapse of the building or any other prescribed matters), which includes flammable balconies, cladding panels not of limited combustibility, and defective foundations.

These measures act as a tool to enable enforcement action to be brought against landlords and developers for failing to fulfil their legal obligations to make their buildings safe.

For ROs, an application is made by an ‘interested person’ (including persons with legal/equitable interests in the property and the Secretary of State). The orders are made against ‘relevant’ landlords – those who have repair obligations – including management companies that are a party to a lease and freehold owners.

An RCO will be made if the Tribunal considers it is ‘just and equitable’ to do so and can be made against a landlord, a developer, or a company associated with either of those entities.

What has happened since the BSA was enacted?

Since the introduction of the RO/RCO process, a number of RO and RCO applications have been made to the Tribunal (including, for example, the Centrillion Point application, which determined that, for an RO, the BSA only requires high level details of the defects, as opposed to a full remedial works scope), the most notable of which is the Triathlon case which we have previously reported on (see our Law-Now here). In that case, RCOs were granted against the developer of five Stratford-based residential buildings and the order provided clarity on the type of costs that could be awarded under an RCO, including:

— costs incurred before the commencement of the BSA; and

— costs for any measure which either eliminates a defect altogether, or reduces it to a point where it no longer presents a risk to safety.

What are the changes?

Changes to the RO and RCO regime have now been made by the Leasehold and Freehold Reform Act 2024 (‘**LFRA**’). These changes add detail to the wider RO/RCO provisions in the BSA providing clarity on matters such as: the scope of costs that are recoverable under a RO and a RCO, the steps Landlords are required to take regarding defect mitigation, and practical matters where the ‘responsible person’ for a building is insolvent. These changes are likely to have been informed by Tribunal decisions noted above and confirm that a broader scope of costs are recoverable.

The detail of the amendments is provided below:

— **Relevant Steps:** An RO can also now require a Landlord to not just remedy a specified defect, but also to undertake mitigation measures (referred to as ‘Relevant Steps’) with regards to a ‘Relevant Defect’. This is likely to include steps such as waking watch measures and the installation of sprinkler systems and fire alarms in order to prevent or reduce the likelihood of a fire or collapse of a building, to reduce the severity of any such event and/or to prevent or reduce the harm to people by such event. The amendments also confirm that the costs of these measures can also be included in an RCO.

— **Mitigation measures – recoverable costs:** Costs that are the subject of an RCO have been expanded to include decant costs, expert fees and (as mentioned above) the costs of mitigation measures.

— **Expert reports:** The Tribunal now has the power to order Landlords to produce expert evidence to deal with defects and/or mitigation measures.

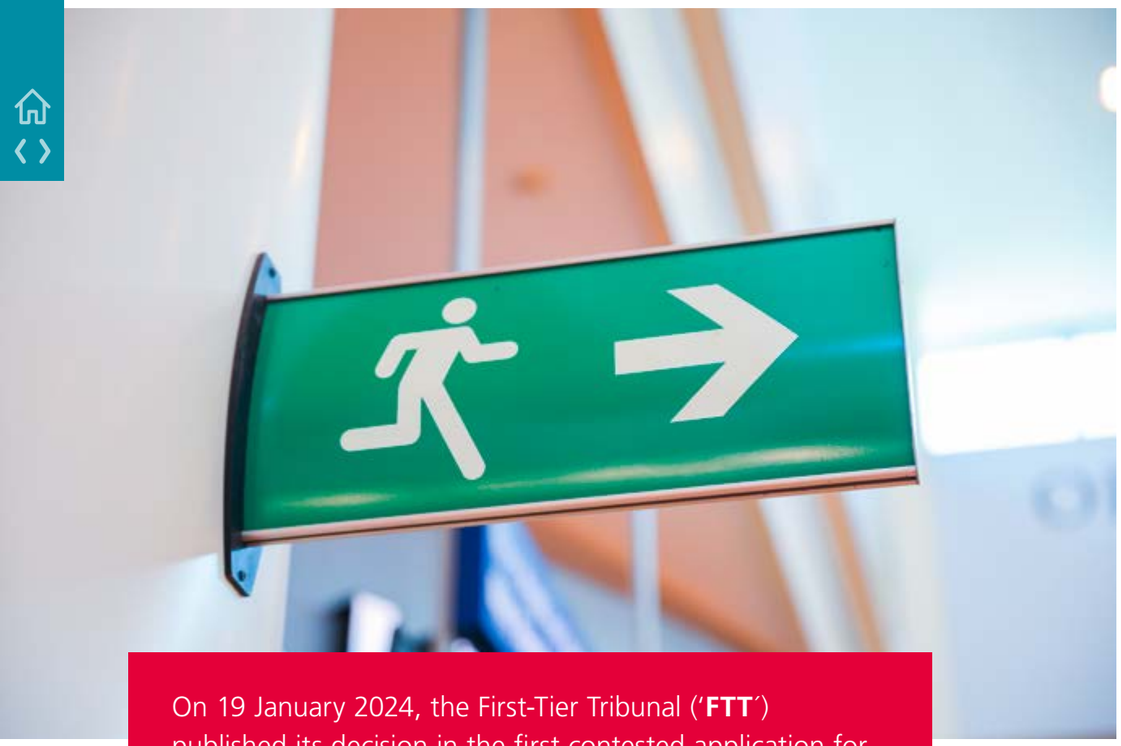
— **Insolvency practicalities:** Within 14 days of an insolvency practitioner being appointed in relation to an accountable person for a higher-risk building, information is required to be provided to the regulator including an official copy of the register of title, title plans and information under the Insolvency (England and Wales) Rules 2016.

The outcome

It is hoped that the changes brought in by the LFRA will bring more certainty to the RO and RCO process and result in fewer applications being made to the Tribunal in the longer term. In the short term, existing proceedings before the Tribunal may require amendment to take advantage of the changes, as the LFRA makes clear that the changes apply to pending Tribunal proceedings, as well as those commenced after the changes came into force on 31 October 2024.

Real Estate

FTT makes first contested Remediation Contribution Order under the Building Safety Act



On 19 January 2024, the First-Tier Tribunal ('**FTT**') published its decision in the first contested application for a Remediation Contribution Order ('**RCO**') under section 125 of the Building Safety Act 2022 ('**BSA**'). In granting orders against the original developer and its parent company, the FTT has clarified the extent of the power to grant RCO's and the way in which its 'just and equitable' discretion will be exercised in the future. The FTT's decision will be required reading for any parties involved in bringing or responding to applications for RCOs.

Background

The case concerned five residential buildings in Stratford which were originally developed by Stratford Village Development Partnership ('**SVDP**') as accommodation to be used by athletes and officials participating in the London 2012 Olympic Games. After the conclusion of the Olympic Games, the development (now known as 'East Village') was redeveloped as a residential estate comprising both private rented and affordable housing.

The Applicant, Triathlon Homes LLP ('**Triathlon**') was established to provide affordable housing at East Village and owns all of the social and affordableive housing. The Second Respondent, Get Living Plc ('**GL Plc**') is a property company specialising in the private rental market and owns all of the private housing at East Village. GL Plc also now owns SVDP, although it did not at the time the property was originally developed.

The Third Respondent., East Village Management Limited ('**EVML**') is the management company and is responsible for the repair and maintenance of the structure and the common parts of the development. EVML is jointly owned by GL Plc and Triathlon.

As a result of the Grenfell Tower fire, EVML undertook investigations into the materials used in the construction of the blocks at the development. These investigations established that ACM was present as well as other materials and defects which caused fire safety risks.

A waking watch was therefore implemented until an additional alarm and heat detection system was installed as a temporary measure.

Ultimately, the cladding was to be removed and replaced at a cost of more than GBP 24.5m. This was initially to be funded by the Building Safety Fund (a successful application was made and the works were being implemented).

The Application

Triathlon applied for RCOs under section 125 of the BSA requiring SVDP and GL Plc to reimburse:

— service charges already paid by Triathlon to EVML relating to the investigations and interim measures put in place;

— further service charge liabilities demanded by EVML but not yet paid (and costs anticipated but not yet demanded); and

— GBP 16.03m, being Triathlon's share of the total remediation costs.

As a leaseholder, Triathlon constituted an 'interested person' for the purposes of the BSA and it was therefore entitled to make an application for a RCO. There was no dispute over whether the blocks were relevant buildings for the purposes of the BSA or whether the defects discovered were relevant defects.

Real Estate

The FTT considered the following questions:

1. **Can a RCO be made in relation to costs incurred before the commencement of the BSA?**
   Yes. Section 125 of the BSA clearly states RCOs can be made for the purposes of meeting costs incurred or to be incurred and this is supported by the Explanatory Notes. It is also consistent with the way in which the FTT interpreted the Schedule 8 protections in *Adriatic Land 5*.
2. **By whom must the costs have been incurred?**
   Although it wasn't necessary to decide this, the FTT said it would have been minded to find it was necessary for costs to be incurred by the person who remedied the relevant defect.
3. **Can a RCO be made in respect of the costs of preventing risks or reducing the severity of risks or only in respect of the cost of remedying relevant defects?**
   Yes. The FTT stated that any measure which either eliminates a defect altogether or reduces it to a point where it no longer presents a risk to the safety of people in/about the building from fire/building collapse would cause it to cease to be a relevant defect. In that case the relevant defect would have been 'remedied'.
4. **Is it 'just and equitable' to make a RCO against SVDP and GL Plc?**
   There is no guidance in section 124 on how the FTT is to exercise its 'just and equitable' discretion. However, the FTT considered a number of factors as part of its analysis of whether it was 'just and equitable' to make the RCO. Those factors of particular importance included:

   — SVDP was the developer – the policy of the BSA is that primary responsibility for the cost of remediation should fall on the original developer and that others who have a liability to contribute can pass on the costs their incur to the developer.

   — SVDP depends on GL Plc for financial support – the purpose of the association provisions under the BSA is not to enable wealthy parent companies to evade responsibility by hiding behind a separate development company with limited means.

   — The fact that funds for the remediation works had already been obtained from the BSF was not a reason against making a RCO. The public interest in securing reimbursement of those funds as quickly as possible so that they could be used to remediate other buildings pointed strongly in favour of making an order. Further, the FTT did not consider it would ever be just and equitable for a party well able to fund remediation works to be able to claim that the works should instead be funded by the 'public purse'.

   — Evidence of hardship by individual property owners particularly where this is caused by remedial works being delayed by a lack of funding (although it is of much less weight where funding has been secured).

By contrast, the following considerations were found to be of little or no weight in the exercise of the discretion:

— Changes of beneficial ownership in SVDP and GL Plc. Parties which acquire development vehicles rather than purchasing land and buildings were said to accept the risk that the development vehicle will incur liabilities in relation to the development.

— The source or extent of SVDP's and GL Plc's assets or liabilities.

— The ability of SVDP or GL Plc to pursue third-parties in respect of the costs of remediation.

— The ability of Triathlon, as applicant, to pursue third-parties in respect of the costs of remediation. Section 124 is an independent remedy which is essentially non-fault based and which seeks to avoid an applicant having to become involved in, or to wait upon, the outcome of other claims in relation to the defects.

— Existing contractual relationships involving Triathlon, SVDP and/or GL Plc. Parties cannot contract out of the BSA.

Conclusion

The FTT granted RCOs against SVDP and GL Plc (with provision for contributions/repayment in the event that litigation against other members of the design and/or construction team were successful). The RCOs required the money to be paid to EVML, who were the party ultimately incurring the cost of the works.

The FTT's decision provides a great deal more clarity over the circumstances in which RCOs will be granted and, in particular, as to how the 'just and equitable' test will be applied. The decision emphasises the irrelevance of fault-based arguments as to whether or not an RCO should be granted, prioritising the BSA's policy aim of holding developers and their associated entities responsible for remediation costs in the first instance pending the recovery of those costs through any fault-based proceedings.

Please Note: This decision is currently being appealed and is due to be heard in the Court of Appeal in March 2025 where FTT's reasoning for making the RCO and what is considered 'just and equitable' will be challenged.

References:

— *Triathlon Homes LLP v Stratford Village Development Partnership* [2024] UKFTT 26 (PC)

Building Safety Act 2022: implications for leaseholders and the cost of making buildings safe

The Building Safety Act 2022 has had a particular impact for landlords and tenants in relation to who are responsible for funding the required remediation projects for existing fire safety defects and also in relation to how building safety will be managed going forward and how the costs of that will be recovered.

Funding remediation projects for existing defects

The provisions relating to the remediation of existing fire safety defects came into force on 28 June 2022 and relate to all buildings that are at least 11 metres or 5 storeys tall. Landlords are absolutely prohibited from seeking to recover the costs of cladding remediation as a service charge and there will now only be very limited circumstances in which landlords can seek to recover the costs of remediating non-cladding related fire safety defects from leaseholders. Even in circumstances where landlords can seek to recover the costs, they will be capped.

In each case, building owners will need to take steps to deal with unsafe cladding as soon as possible and, in relation to other fire safety defects, will need to carefully consider what the defect is, how it has arisen and whether it causes a building safety risk i.e. *'a risk to the safety of people in or about the building arising from (a) the spread of fire, or (b) the collapse of the building or any part of it'*.

Leaseholder protections: letter to building owners, Michael Gove's letter to freeholders, building landlords and managing agents (issued on 27 June 2022) made it clear that building owners must take responsibility for remediating unsafe buildings and that any parties who continue to seek to recover costs from leaseholders in relation to historic defects, will be committing a criminal offence.

Landlords are also expected to take reasonable steps to obtain funding and ascertain whether any third parties (e.g. developers, manufacturers, contractors) can be pursued for the defects (or risk tenants going to the Tribunal to seek an order that any remediation costs incurred are not service charge recoverable).

Government has also published the following guidance on the protections for leaseholders as a result of the BSA: Leaseholder protections on building safety costs in England: frequently asked questions. The Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 also came into force on 21 July 2022.

Management of building safety in higher-risk buildings

Whilst the initial focus of the BSA in a property context is the remediation of historic defects, the BSA also contains a variety of provisions (mostly amending existing legislation) which have an impact on landlords and tenants and the recovery of the costs of managing building safety going forward. These provisions initially related to higher-risk buildings only i.e. those buildings in England that are at least 18 metres or 7 storeys high and contain at least 2 residential units however, On 17 August 2023, in response to the consultation on the definition of higher-risk buildings completed in July 2022, the Government announced a suite of secondary legislation known as the Higher-Risk Buildings Approval Regime which came into force 1 October 2023.

Accountable person

The BSA introduces the concept of an 'accountable person' in relation to higher-risk buildings. The accountable person will usually be the person who holds the legal estate in possession in any part of the common parts unless another party is responsible for the repair of those parts (who will then be the accountable person). The common parts include the structure and exterior of the building and any part of the building provided for the use, benefit and enjoyment of the residents of more than one residential unit. Therefore, it is likely that in many leasehold structures, there will be more than one accountable person (for example, where responsibility for the structure/exterior remains with the freeholder and a long lease of the residential parts, including areas used in common, is let to a management company).

The accountable person has a number of duties and obligations under the BSA. However, of particular interest in a leasehold context are the duties relating to the assessment and management of building safety risks which are contained in the BSA. A 'building safety risk' in relation to a higher-risk building means a *'risk to the safety of people in or about a building arising from any of the following occurring as regards the building (a) the spread of fire (b) structural failure or (c) any other prescribed matters'*.

In addition, in order to facilitate the performance of the accountable person's duties and/or determine whether a resident has breached their obligations, the accountable person may make a written request for access to any premises controlled by a residential occupier/owner (e.g. an individual flat) at a reasonable time on at least 48 hours' prior notice. The notice must set out the purpose for which it is made and why it is necessary to enter the premises in question for that purpose.

Implied terms on building safety

All leases which consist of or include a dwelling in a higher-risk building will also include the following implied terms:

— For landlords, where they are the accountable person, to comply with their building safety duties and, where someone else is the accountable person, to cooperate with them in relation to compliance with their building safety duties. The 'building safety duties' are the duties of the accountable person pursuant to the BSA.

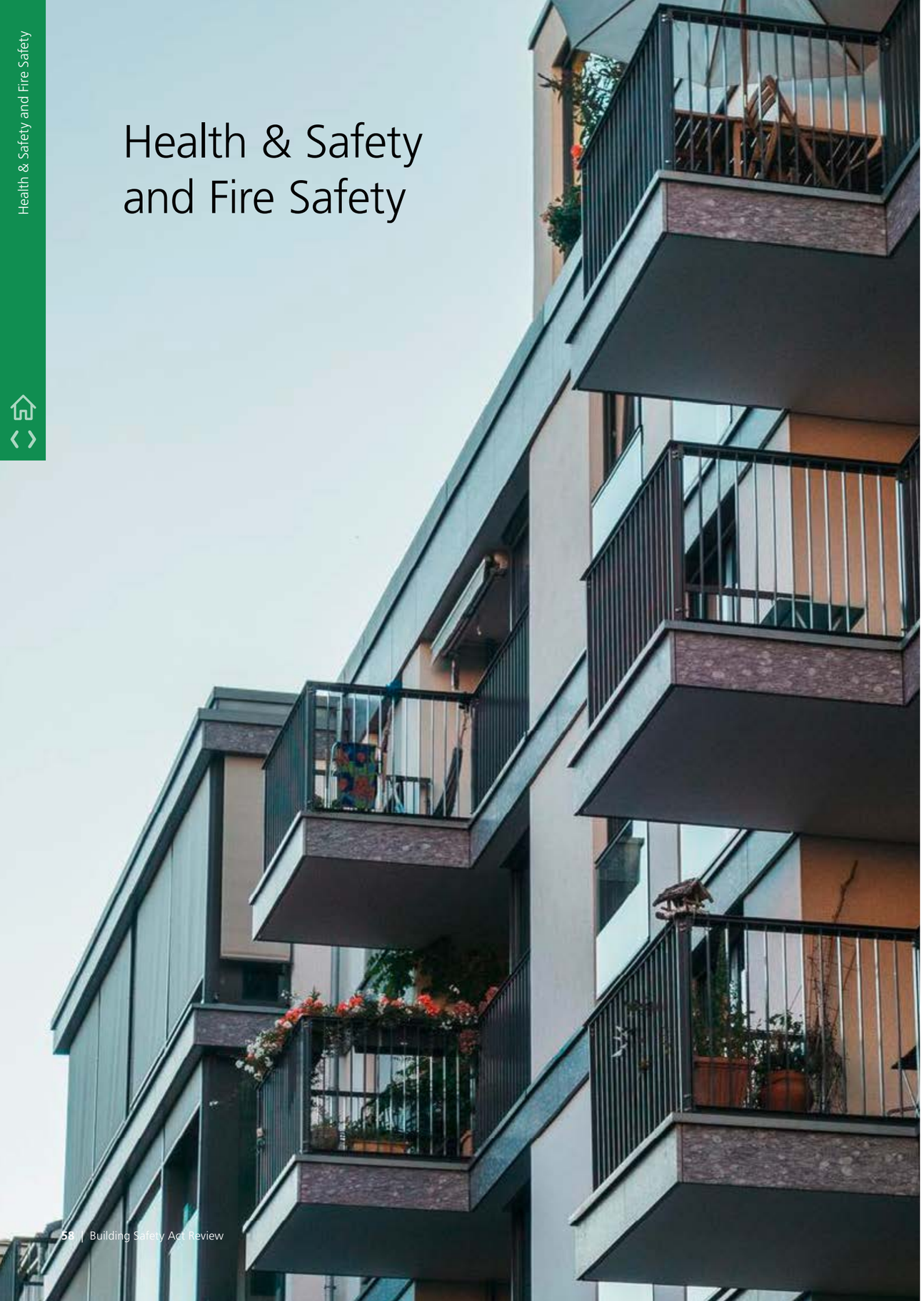
— For tenants, covenants requiring them to (i) allow the landlord or other accountable person (or person authorised on their behalf) to enter the premises to inspect or carry out works in connection with compliance with their building safety duties; and (ii) comply with their obligations under the BSA.

Service charges for building safety

The first draft of the BSA proposed that a separate building safety charge would be payable in addition to the conventional service charge. However, this did not make the final version. Instead, the BSA states that leases of premises in a higher risk building (of seven years or more under which the tenant is liable to pay a service charge) will have effect *'as if the matters for which the service charge is payable under the lease included the taking of building safety measures by or on behalf of a relevant person (insofar as this would not otherwise be the case'*.

The 'building safety measures' include (amongst others) assessing building safety risks in accordance with the accountable person' duties under the BSA, taking reasonable steps to manage building safety risks (other than steps involving the carrying out of works) and making a request to enter premises. For these purposes, legal and other professional fees, fees payable to the regulator and management costs incurred in connection with the relevant measure, will be regarded as incurred in taking that measure. This is an area where we can see that disputes may well arise, for example due to the potentially wide interpretation that may be given to 'management costs'. However, landlords and tenants will not be permitted to contract out or limit these obligations and any agreement that seeks to do so will be void.

In the same way that certain prescribed information must already be included on residential service charge demands, or the sums will not be due until that information is given, any written demand given to a tenant of a higher-risk building will also be required to contain 'relevant building safety information' and will not be considered due from the tenant until that information is given. It would therefore be sensible for landlords to update their demands now so they are fully compliant.



Health & Safety and Fire Safety

Health & Safety and Fire Safety

Introduction

Given the context in which the Building Safety Act ('**BSA**') originated, in the wake of the Grenfell Tragedy, the regulation of Higher-Risk Buildings unsurprisingly forms a significant part of the BSA and is the subject of extensive secondary legislation. Part 4 of the BSA designates persons responsible for the registration as HRBs of occupied, multi-occupancy buildings over 18 metres or seven storeys and the management of information in respect of the HRB and regular risk assessments. Duty holders have extensive responsibilities and obligations to maintain a record of building and safety information as well as engagement with residents.

Sitting alongside the requirements of the BSA, new fire safety regulations have also been introduced, concerned with the fire safety of multi-occupancy buildings of all heights. Here too, responsible persons have wide reaching obligations to carry out checks and provide information to residents and others such as the Fire and Rescue Service.

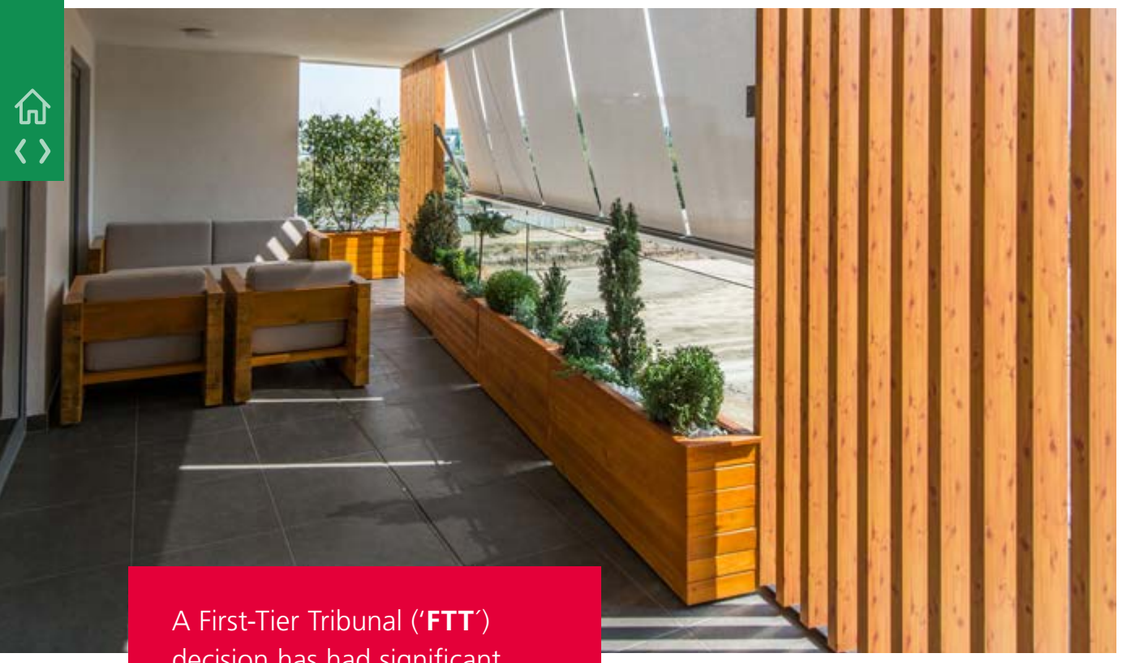
It is crucial for all duty holders to be well versed in their responsibilities which require proactive steps to be taken regularly throughout the period the relevant building is occupied.

What's next for 2025?

Draft legislation in the form of The Fire Safety (Residential Evacuation Plans) (England) Regulations 2025 was published at the end of 2024 and is anticipated to come into force in mid to late 2025. The regulations would require all 'responsible persons' in 'specified residential buildings', those above 18 metres with two or more residential units or those above 11 metres with a simultaneous evacuation strategy, to use reasonable endeavours to identify relevant residents (those with cognitive or physical conditions compromising their ability to evacuate) and offer them a 'person-centred fire risk assessment'. The responsible person must also put into place mitigation measures including a personal emergency evacuation plan.

Following its consultation on Emergency Evacuation Information Sharing and Personal Emergency Evacuation Plans, the Government intends to deliver a five steps process to deal with identified issues. This includes requiring the Responsible Person for the building to maintain and update the written Residential Personal Evacuation Plans for vulnerable residents. Secondary legislation will be brought in to implement the regime.

Higher-Risk Buildings: Tribunal Rules on Government Guidance on Roof Terraces



A First-Tier Tribunal (‘**FTT**’) decision has had significant implications for the classification of higher-risk buildings (‘**HRBs**’).

Background

In the Smoke House and Curing House case an application for a Remediation Order (‘**RO**’) under section 123 of the Building Safety Act 2022 was made by the leaseholders of a forty-five unit development. The application included remediation to the roof terrace, and other combustible elements within the building. The landlord (the respondent) initially proposed a remediation of just the timber cladding within the internal courtyard of the building.

On 3 July 2024, the FTT made a RO in support of the applicants finding that the respondent’s suggestion to remediate just the internal courtyard was insufficient and did not adequately consider the building’s status as a HRB. As part of their decision, the FTT determined that government guidance, specifically the Criteria for determining whether a building is a higher-risk building during the occupation phase of the new higher-risk regime on HRBs was not relevant to the determination of how buildings with roof terraces are classified as HRBs under the new higher-risk regime. The Tribunal instead relied solely on statutory interpretation, concluding that an unenclosed rooftop terrace or garden should be counted as a ‘storey,’ when determining if a building is a HRB.

This decision was contrary to the interpretation set out in government guidance with the FTT specifically pointing out the breath of contradictions contained within the guidance as a potential justification for its reasoning.

As a consequence, the FTT has now confirmed the prior general consensus that government guidance such as this (as well as guidance from the Construction Leadership Council (the ‘**CLC**’)) is unlikely to have the force of law. This has implications for a wide range of BSA related issues where government guidance has also been issued to accompany statute such as:

— Duty holder competence;

— The golden thread for HRBs; and

— The design and construct phases of new buildings and refurbishments.

Recent Developments

Following this decision, in October 2024, the government updated its guidance on the criteria for the height of HRBs to follow the FTT’s decision on roof terraces and gardens being classified as a ‘storey’ within the relevant building. However, despite the FTT’s decision that government guidance may not have the force of law or be relevant when making their determinations, in this recent guidance, Criteria for determining whether a new building that is being designed and constructed is a ‘higher-risk building’ it is still recommended for regulatory bodies and the sector in general to refer to (and thus rely on existing guidance). Additionally the JCT 2024 also recommends for allowances to be made for Contractors to adhere to new government guidance.

Implications

This decision is crucial for property developers, contractors, and building owners, as it clarifies that government guidance cannot be solely relied upon to determine HRB status. It may also be necessary for the status of certain buildings with unenclosed roof terraces or gardens to be revisited as they may have been may now be subject to the new HRB regime in light of this new decision.

Health & Safety and Fire Safety

Part 4 of the Building Safety Act 2022 – Are you clear on your duties?

The Building Safety Act 2022 contains measures that are intended to improve and maintain the safety of Higher-Risk Buildings (‘**HRBs**´) throughout the building lifespan. The BSA is split into various sections, with Part 4 placing a raft of obligations on dutyholders to ensure the safety of residents during occupation.

The BSA is large, complex and heavily supplemented by secondary legislation, as well as government guidance.

Supplementary Regulations

A brief snapshot of the regulations that add meat to the bones of Part 4 is provided here:

1. The Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023 (the ‘Descriptions and Supplementary Regulations 2023´)
Assists dutyholders in identifying whether a building is a HRB for the purposes of Part 4.

2. The Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations 2023 (the ‘Registration Regulations 2023´)
Deals with the mandatory registration process for HRBs and sets out the information to be submitted. Existing, occupied HRBs were required to be registered by 30 September 2023.

3. The Higher-Risk Buildings (Key Building Information etc.) (England) Regulations 2023 (the ‘Key Building Information Regulations 2023´)
Sets out the key building information (‘**KBI**´) required to be submitted 28 days after registration of a HRB and clarifies what parts of the HRB the Accountable Person (the ‘**AP**´) is responsible for.

4. The Building (Higher-Risk Buildings Procedures) (England) Regulations 2023
Sets out procedural requirements for HRBs and the processes for the gateways, up to completion and occupation of HRBs. For the purposes of Part 4, these regulations set out prescriptive requirements (amongst a raft of other things) in relation to:

- the handover of information on completion of construction works to Part 4 dutyholders;
- practical considerations in respect of the golden thread of information, which is to be retained and kept up to date throughout the HRB’s lifespan;
- the mandatory occurrence reporting system, insofar as it relates to the construction phase. (Dutyholders under Part 4 also have obligations in relation to the mandatory occurrence reporting system); and
- the application, consultation, inspection, and decision-making in relation to the grant of completion certificates, which is required as part of the registration process under Part 4.

5. The Higher-Risk Buildings (Management of Safety Risks etc.) (England) Regulations 2023 (the ‘Management of Safety Risks Regulations 2023´)
Sets out supplementary information on some Part 4 obligations, such as the content and form of the safety case report, mandatory reporting requirements and resident engagement strategies.

6. The Higher-Risk Buildings (Keeping and Provision of Information etc.) (England) Regulations (the ‘Keeping of Provision of Information Regulations´)
Sets out the information and documents that the APs must keep as the ‘golden thread of information´, who the APs must provide information to, what information they must provide, and exemptions.

The BSA and its interaction with existing fire safety legislation

The BSA sits alongside existing regulatory frameworks concerning fire safety. *The Regulatory Reform (Fire Safety) Order 2005* (as amended by the Fire Safety Act 2021) (the ‘**RRO 2005**´) and the *Fire Safety (England) Regulations 2022* (the ‘**FSER 2022**´) remain in force and organisations may be a responsible person as well as or instead of being a dutyholder under the BSA.

There should be clarity around this, and in particular, a clear understanding of who is responsible for what, so that nothing slips through the net.

The dutyholders under the BSA must co-operate with each other and any responsible person carrying out their duties under the RRO 2005 and FSER 2022.

Health & Safety and Fire Safety

Part 4 of the BSA (the 'in occupation' phase)

Set out below are key steps and provisions in Part 4 that dutyholders need to be aware of in respect of a HRB. Also indicated is where the prescriptive requirements can be found.

1. Establishing a HRB

1.1 What is a HRB?

For the purposes of Part 4, a HRB is a building that:

— is at least **18 metres** in height or has at least **7 storeys**; and

— contains at least **2 residential units**.

The Descriptions and Supplementary Regulations 2023 and associated guidance provide further clarification around how a HRB can be identified and measured. It confirms certain buildings such as hotels and care homes are out of the scope of Part 4.

1.2 Occupation

Part 4 only applies when a HRB is 'occupied'. A HRB is occupied if there are residents of more than one residential unit in the building.

2. Establishing who is responsible

2.1 APs

Broadly speaking, an AP for a HRB is someone:

— who holds a legal estate in possession in any part of the common parts of the HRB; or

— does not hold a legal estate in any part of the building but who is under a relevant repairing obligation (i.e., a repairing obligation imposed by lease or legal enactment) in relation to any part of the common parts of the HRB.

The Key Building Information Regulations 2023 set out the detail of how to determine the parts of the HRB which the AP is responsible for.

In the case of multiple APs for a single HRB, the APs must co-operate and co-ordinate.

2.2 Principal Accountable Person

The principal accountable person (the '**PAP**') is:

— in relation to a HRB with one AP, that person; and

— in relation to a building with more than one AP, the AP who:
  - holds a legal estate in possession in the structure and exterior of the HRB; or
  - does not hold a legal estate in any part of the building but is under a relevant repairing obligation (i.e., a repairing obligation imposed by lease or legal enactment) in relation to the structure and exterior of the building.

The PAP and APs can be individuals, partnerships or corporate bodies. To establish who the dutyholders are for each HRB, the property ownership structure must be analysed on a case-by-case basis. It is not always the case that the freeholder will be the PAP.

3. Key obligations

3.1 Registration

All occupied HRBs should now be registered with the Building Safety Regulator. If a HRB is not registered but remains occupied, the PAP is committing a criminal offence.

For new HRBs, the PAP must register the building prior to occupation.

The Registration Regulations 2023 and the *Key Information Regulations 2023* set out the information to be provided as part of the registration application.

The KBI must be submitted to the BSR **within 28 days of registration**. A failure to submit this information may result in the BSR issuing a compliance notice. A failure to comply with the notice is also a criminal offence.

In the event of a change in the information submitted as part of the registration, the PAP has 14 days to provide details of the change to the BSR (commencing from the day that they become aware of the change). Any change to the submitted KBI must be notified to the BSR within 28 days of the PAP becoming aware of the change.

3.2 Assessment and Management of The Building Safety Risks

APs must carry out an assessment of the building safety risks for the part of the HRB that they are responsible. Hazards that originate in an area outside of their responsibility, but which turn into a risk which enters the area they are responsible for should form part of their assessment.

After the HRB becomes occupied, an assessment must be made as soon as practicable, or, if later, when a person becomes the AP for the building. Subsequent assessments should then be made at regular intervals and when the AP has reason to suspect that the current assessment is no longer valid. Note that the BSR can also direct a review.

As a result of the assessment, APs must take all reasonable steps to:

— prevent a building safety risk; and

— reduce the severity of any incident from such a risk materialising.

Reasonable steps may involve the APs carrying out works to prevent a building safety risk.

The Management of Safety Risks Regulations 2023 set out prescribed principles the AP must apply when discharging its dutyholder obligations.

The duty to adhere to the principles will be imposed as soon as the HRB becomes occupied, and any necessary steps must be taken promptly. The duties will run in parallel with obligations on the responsible person to undertake a suitable and sufficient risk assessment under the RRO 2005.

3.3 Safety Case Reports

PAPs are required to produce and maintain a safety case report. The safety case report comprises the full body of evidence relating to the (i) assessments and (ii) ongoing management of the building safety risks. PAPs will be required to submit the safety case report to the BSR as part of the building assessment certificate process (see below), or at the request of the BSR.

One safety case report is required for each HRB.

The Management of Safety Risks Regulations 2023 set out what should be included in the safety case report, which includes but is not limited to:

— a description of the possible scenarios of building safety risks that have been identified by each AP through the risk assessment process;

— the likelihood of those risks materialising;

— the assessment of the likely consequences if they do materialise; and

— a description of how the steps taken by each AP demonstrate compliance with their obligations to manage those building safety risks.

As soon as reasonably practicable after preparing or revising a safety case report, the PAP is under an obligation to notify the BSR and provide a copy (should the BSR require one).

3.4 Building Assessment Certificate

The PAP must apply for a 'building assessment certificate' for a registered HRB within 28 days of a BSR requesting to do so. It is an offence not to make the application without a reasonable excuse.

For existing occupied buildings, the BSR will create tranches (based on height and other risk factors), calling in buildings in stages over a period of five years from April 2024.

The BSA broadly sets out that the application for a building assessment certificate must include:

— a copy of the most recent safety case report;

— prescribed information about the mandatory occurrence reporting system;

— prescribed information that demonstrates that APs are meeting their duties with regard to provision of information; and

— a copy of the residents' engagement strategy.

The Management of Safety Risks Regulations 2023 provides further detail on the information that must be provided with the application.

The intention of the building assessment certificate is to allow for the BSR to assess whether the APs are complying with their duties under Part 4.

The BSR will issue a building assessment certificate if it is satisfied that the relevant duties placed on APs and PAPs are being compiled with.

Once received, the PAP must display the certificate in a prominent position in the building.

3.5 Mandatory Occurrence Reporting

The PAP must establish and operate an effective mandatory occurrence reporting system. All PAPs must ensure that reportable information related to the safety of the occupied HRB is given to the BSR.

This system will be assessed as part of the building assessment certificate application.

Any structural or fire safety event that occurs in or about the part of a HRB for which the AP is responsible and which represents a significant risk to life or safety must be reported.

The Management of Safety Risks Regulations 2023 set out further requirements in relation to mandatory occurrence reporting, and in particular:

— reporting should occur where a safety occurrence (i.e., an incident or situation relating to the structural integrity of, or spread of fire in a HRB that meets the 'risk condition') takes place in an area for which the AP is responsible; and

— the information provided must be:
  - a brief description of the nature of the safety occurrence; and
  - a report including (but not limited to) details of the safety occurrence i.e., details of injuries, recent building work and the measures taken to mitigate or remedy them.

3.6 Keeping and Providing Information

APs must keep and maintain certain required information about the HRB (referred to as the 'prescribed information' or the 'golden thread of information') and ensure that it is up to date as far as possible.

The Keeping and provision of Information Regulations set out what should be included as part of the golden thread of information. It also sets out the information to be provided to the BSR, local fire and rescue service, residents, other APs and others.

The Management of Safety Risks Regulations 2023 gives further guidance around the standards of the prescribed information to be retained, and requires that the information is:

— kept in an electronic format;

— accurate and intelligible; and

— kept in a way that means it is accessible on request.

There are also relevant obligations around the provision of information in instances where the AP for a part of a HRB changes (i.e., a change in ownership) that dutyholders will need to be aware of.

3.7 Resident Engagement

Finally, PAPs have a duty to engage with 'relevant persons', who are:

— residents of HRBs who are 16 years old or older; and/or

— owners of the residential units of the relevant HRB.

Amongst other resident engagement obligations, PAPs must prepare a residents' engagement strategy for promoting the participation of the relevant persons in the making of building safety decisions.

The strategy should comprise information relevant to the management of the building safety risks, such as:

— information that will be provided to the relevant persons about decisions relating to the management of the HRB;

— the aspects of those decisions that relevant persons will be consulted about;

— the arrangements for obtaining and taking into account the views of relevant persons; and

— how the appropriateness of methods for promoting participation will be measured and kept under review.

The Management of the Safety Risks Regulations 2023 set out the required contents of the strategy, including (but not limited to) providing information about works resulting from a building safety decision, consultation in the event of works, and record keeping.

Each AP must give a copy of the residents' engagement strategy to the residents and owners of the residential units. A resident or unit owner can request information and copies of documents from the AP, such as fire risk assessments, maintenance and repair schedules and safety inspection outcomes.

The PAP must review the strategy at least every two years and within a reasonable period after a mandatory occurrence report is submitted to the BSR or a material alteration to building occurs.

Health & Safety and Fire Safety

The Fire Safety (England) Regulations 2022 came into effect on 23 January 2023

The Building and Fire Safety legal arena has evolved considerably over the past few years. The Fire Safety Act 2021 amended the Regulatory Reform (Fire Safety) Order 2005 (‘**FSO**´) and clarified that external walls, flat entrance doors and structures of buildings are all covered by the FSO and must be accounted for in fire risk assessments for higher risk buildings.

The Building Safety Act 2022 reformed the building and fire safety regime during both the design and construction and in-occupation phase.

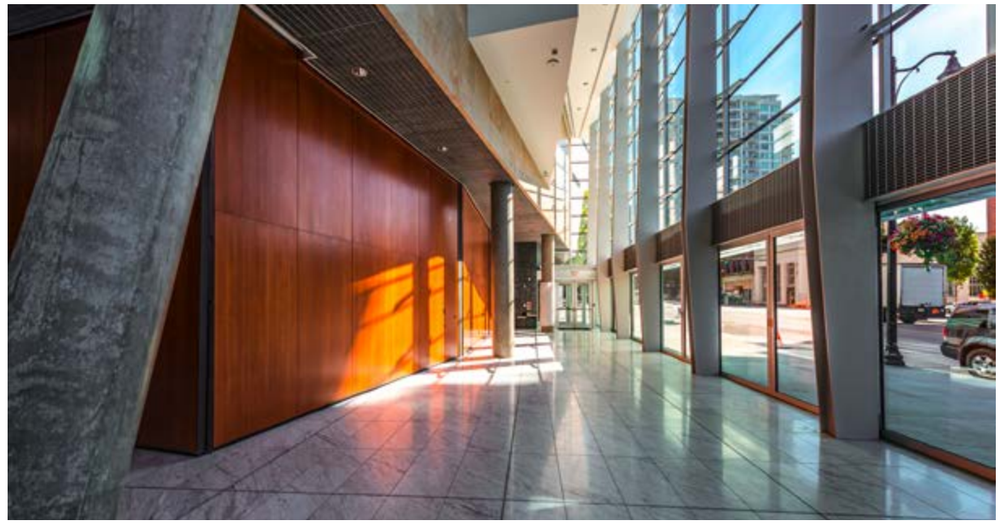
On 23 January 2023, the Fire Safety (England) Regulations 2022 came into force and applies to all buildings in England comprising two or more domestic premises (including residential parts of mixed-use buildings and student accommodation). The obligations do not apply within individual flats, other than where measures are installed inside for the safety of other residents (e.g. sprinklers).

The obligation on the responsible person differs depending on the height of the building:

— Under 11 metress;

— Between 11 and 18 metress; or

— Over 18 metress.



The **general obligations** on the responsible persons in relation to **all multi-occupied residential buildings** are:

— To display and provide residents with fire safety instructions including the evacuation strategy, information on how to report a fire and what to do if a fire occurs.

— To provide residents with key information about the importance and operation of fire doors including; (i) fire doors should be kept shut when not in use (ii) residents and their guests should not tamper with self-closing devices and (iii) residents should report any fault or damage immediately to the responsible person.

— Residents should be reminded about the key information annually.

In residential buildings **between 11 metres and 18 metres** the responsible person is required to:

— Undertake annual checks and complete remedial works on flat entrance doors. This is to be done on a ‘best endeavours basis´ and ‘record the steps taken to comply with this obligation´.

— Undertake checks and complete remedial works on communal area fire doors at least every 3 months.

In **high-rise residential buildings (over 18 metres)** the responsible person is required to:

— **Floor and Building Plans** – provide the local Fire and Rescue Service with up-to-date electronic building and floor plans and to place a hard copy in the secure information box.

— **External Wall Systems** – provide to the local Fire and Rescue Service information about the design and materials of the external wall system including the level of risk the system gives rise to and mitigating steps taken. The record should be updated if there are significant changes to these walls.

— **Lifts and other Key Fire-Fighting Equipment** – undertake monthly checks on any lifts intended for use by firefighters, and evacuation lifts in the building and check the functionality of other key pieces of firefighting equipment. Any fault discovered must be rectified within 24 hours or it must be reported to the local Fire and Rescue Service electronically. The outcome of checks must be recorded and made available to residents.

— **Information Boxes** – install and maintain a secure information box containing the name and contact details of the Responsible Person and hard copies of the building and floor plans.

— **Wayfinding Signage** – install signage visible in low light or smoky conditions that identifies flat and floor numbers in the stairwells of relevant buildings.

It is essential for responsible persons within buildings containing 2 or more domestic premises to keep abreast of the new and developing laws to ensure continued compliance with the various building and fire safety requirements. This continues to be an evolving area.

Scotland

Introduction

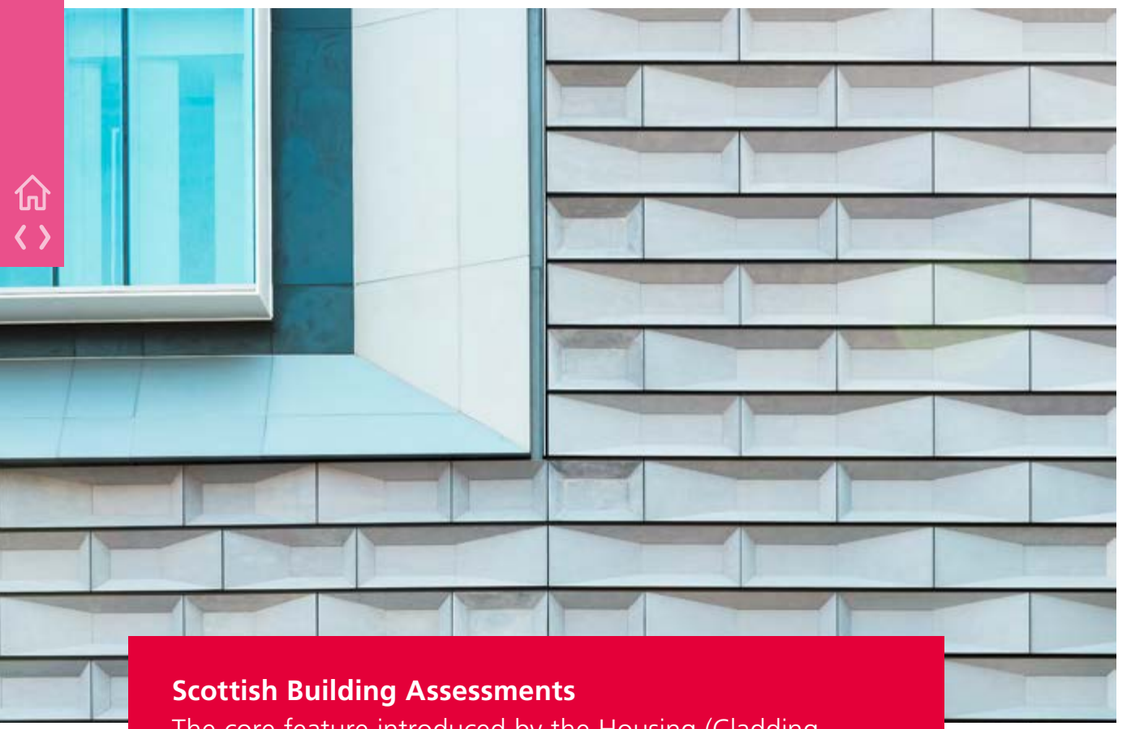
Whilst Scotland is subject to certain elements of the Building Safety Act ('**BSA**') (including rights of action in respect of construction products), the main body of building safety legislation changes in Scotland is to be found in the Housing (Cladding Remediation) (Scotland) Act 2024. A different approach has been taken by the Scottish Government in several areas, such as the adoption of a direct procurement approach for the remediation of building safety issues. The Housing (Cladding Remediation) (Scotland) Act 2024 came into effect on 6 January 2025, and is aimed at accelerating the remediation of buildings with potentially defective external wall cladding and introduces measures intended to overcome barriers to remediation. However, secondary legislation, still in the process of being introduced, will set out much of the detail as to how the legislation will operate in practice so practitioners are advised to keep a close eye on developments.

What's next for 2025?

The Scottish Government plans to introduce a new Building Safety Levy to fund Scotland's Cladding Remediation Programme. This levy, similar to the UK Government's Building Safety Levy for England, will function as a devolved tax paid by developers constructing new-build residential properties, including homes, build-to-rent properties, and purpose-built accommodation such as student accommodation.

Scotland

The Housing (Cladding Remediation) (Scotland) Act 2024



Scottish Building Assessments

The core feature introduced by the Housing (Cladding Remediation) (Scotland) Act 2024) (the '**Act**') (enacted on 21 June 2024 and came into force on 6 January 2025, was Single Building Assessments ('**SBAs**') to be undertaken on properties with potentially dangerous cladding. The Act retains the focus firmly on multi-residential buildings over 11m in height, and with a form of external cladding wall system. The buildings must also have been built or refurbished between 1 June 1992 and 1 June 2022, showing the emphasis on rectifying historic issues. The Act provides scope for this to be extended to properties of other ages or heights in the future using secondary legislation, but not for it to be extended to non-residential properties.

SBAs can be ordered by a building owner or developer, or the Scottish Ministers where this has not otherwise been done (or where it is an orphan building). The output of the SBA will be a recommendation as to whether work is required on the property to eliminate or mitigate a risk to human life directly or indirectly created or exacerbated by a building's external wall cladding system.

It is anticipated the SBA will require input from both fire engineers and architects and/or surveyors, so that the risk presented by the building is fully understood and considered holistically. The final Assessor must though be a chartered fire engineer. In June 2024 the Scottish Government published an SBA Specification Document. The document outlines how Assessors should evaluate a building's performance, providing a uniform standard for assessing various aspects of a potentially unsafe building. The assessment will consider the condition of the internal common areas of the building and the external wall system. The assessment also includes a fire risk appraisal of external walls ('**FRAEW**'), which will be based on PAS9980 – a code of practice also used in England and Wales. That is with the express aim of benefiting from UK-wide expertise on external wall issues. This means a risk-based approach will be applied to the building with works only required where a fire risk is seen to pass the threshold to be 'intolerable'.

The SBA specification does however leave significant questions unanswered. The most significant of those is likely to be the interaction with the Building Regulations regime. A building warrant will still be required for much of the work, increasing the cost and administrative burden on local authorities in reviewing such applications. It also raises the question of what should happen where the extensive nature of remedial works triggers an obligation to bring the works up to current standards even on non-cladding, or even non-fire safety related issues. There remains a question as to what value completing the work required under an SBA would have if other fire safety issues have potentially been left unaddressed.

The specification also leaves open a route for Assessors to continue to rely on BR135 assessments previously completed a building, if the Assessor is satisfied the building reflects the BS8414 test on which the BR135 study is based. The Act provides Assessors with powers to demand information from those involved in the construction of a building for information on its construction, specification and the materials used. The Act makes it a criminal offence (with individual criminal liability) to knowingly or recklessly provide incorrect information to an SBA assessor, which places additional pressure on those involved in historic projects which might now come under scrutiny. However, the SBA specification encourages Assessors to undertake their own intrusive opening up works rather than rely on project documents, so it may be that this power is rarely exercised.

In light of the significant concerns around testing protocols which have arisen in the Grenfell Tower Inquiry, there are likely to be concerns remaining about those building reliance placed on a BR135 assessment. Equally, there may well be challenges to the decisions of Assessors who find a building has a 'tolerable' risk, especially if passing the 'tolerable / intolerable' risk threshold is tied to the receipt of funding to undertake remedial works.

The Act also introduces a mechanism for 'Additional Work Assessments' to cover the situation where additional works are identified either in the course of completing the works recommended in an SBA or after the remedial works have been completed. The latter situation could arise where the project is audited by the Scottish Ministers and the auditor disagrees with the approach adopted by the assessor. The suggestion that the SBA may not be a comprehensive overview of the remedial works required will be a concern to developers who are self-funding works, and has the potential to undermine the confidence which can be placed in the SBA system.

Cladding Assurances Register

The Act acknowledges the impact that uncertainty on this issue has had on property owners and in the housing market. To address this, the Act allows creation of a Cladding Assurances Register. When an entry is first created on the register, it will list properties where an SBA has been undertaken and what work (if any) has been identified as being needed to eliminate or mitigate risks. The entry requires to be amended after any Additional Work Assessments have been carried out. The entry is also amended after the Scottish Ministers are satisfied that any remedial works required under the SBA and/or the Additional Work Assessments have been completed. This will be accessible by, among others, conveyancers and mortgage lenders, with the hope that the market for these properties will be strengthened by the assurance a review has been undertaken and issues resolved. This raises significant questions for professional consultants agreeing to undertake these assessments as to who is entitled to rely on them (and whether it is possible for a consultant to limit this) and what liabilities might result from an assessment incorrectly carried out. It is also unclear whether this is a role which professional liability insurers will be willing to offer cover for. The SBA is a highly technical specialist assessment, requiring specific technical qualifications, and if the Scottish rules prescribe that a wide range of parties are able to rely on its conclusions, that may be too high a risk to be attractive to insurers.

Scotland

Responsible Developers Scheme

The cost of the Scottish Building Assessment programme and resulting remedial works anticipates being funded from the GBP 400m funding received from the UK Government. In England this is being part-funded by the Building Safety Levy, and the Scottish Parliament has since been granted the power to introduce a similar levy in Scotland.

The Act also envisages the creation of a Responsible Developers Scheme, similar to that put in place by the UK Government for England. The aim of this is to support negotiation of Scottish Government Developer Remediation contracts, again similar to those in England. A number of developers have already committed, in principle, to funding remediation work for Scottish properties. While the details are to be set out in secondary legislation, the intention seems to be to mirror the approach of the English system. It has been suggested that the profit levels for entry to the scheme may be similar to England. This is perhaps driven by the fact that the majority of developers in Scotland are SMEs.

To encourage developers to join the register, significant penalties will apply to those who are eligible to join the Register but do not. The conditions of membership are to be set out but look likely to include having (i) proactively undertaking SBAs on properties they have a connection with, (ii) making financial contributions towards remedial works, and (iii) assisting in the provision of information. A list will be published of 'prohibited developers' who are in principle eligible for membership, but have not satisfied the conditions – for example, by not making financial contributions to rectification works. These 'prohibited developers' will face sanctions including restrictions on future developments in planning law.

Comment

The passing of the Act is a significant milestone towards addressing the outstanding issues of potentially unsafe cladding in Scotland. However, eight months on, much of the secondary legislation required to fully implement the Act is yet to be released, and will significantly affect how these provisions operate in practice.

The Act does however show that while the Scottish approach will be heavily informed by the changes in the UK following the introduction of the Building Safety Act 2022, there remain areas where the Scottish Government will take their own approach. One example is in the mechanism for addressing these issues – while the UK Government has firmly adopted a grant-based system, the Scottish Government will be using a direct procurement model going forwards. This could be justified by the lower volume of buildings potentially requiring remediation in Scotland as against England. Initial surveys suggest 732 buildings across Scotland which might require work, the vast majority of which are concentrated in the local authorities in Lothian, Glasgow and Aberdeen. This does though indicate the Scottish Government intends retain its centralised approach.

The Act remains firmly focussed on historic cladding issues, though the establishment of a Responsible Developers Scheme could encourage cultural change within the industry for future developments. There is no equivalent proposal for the full reform of the building standards regime as has occurred in England & Wales as aspects of Gateways 2 and 3 were already present in the Scottish regime and are therefore not in need of reform. Neither is it clear how buildings seen as presenting a 'tolerable' risk will have that risk level monitored on an ongoing basis. While the England & Wales freehold system means managing agents provide a single entity with responsibility for monitoring risk and ongoing maintenance, the differences in the Scottish regime (where each flat owner owns the outside of their flat and every block of flats has a deed of conditions where factors are appointed to ensure that building insurance is in place and common parts are looked after) mean there are no managing agents to undertake monitoring of tolerable risks.

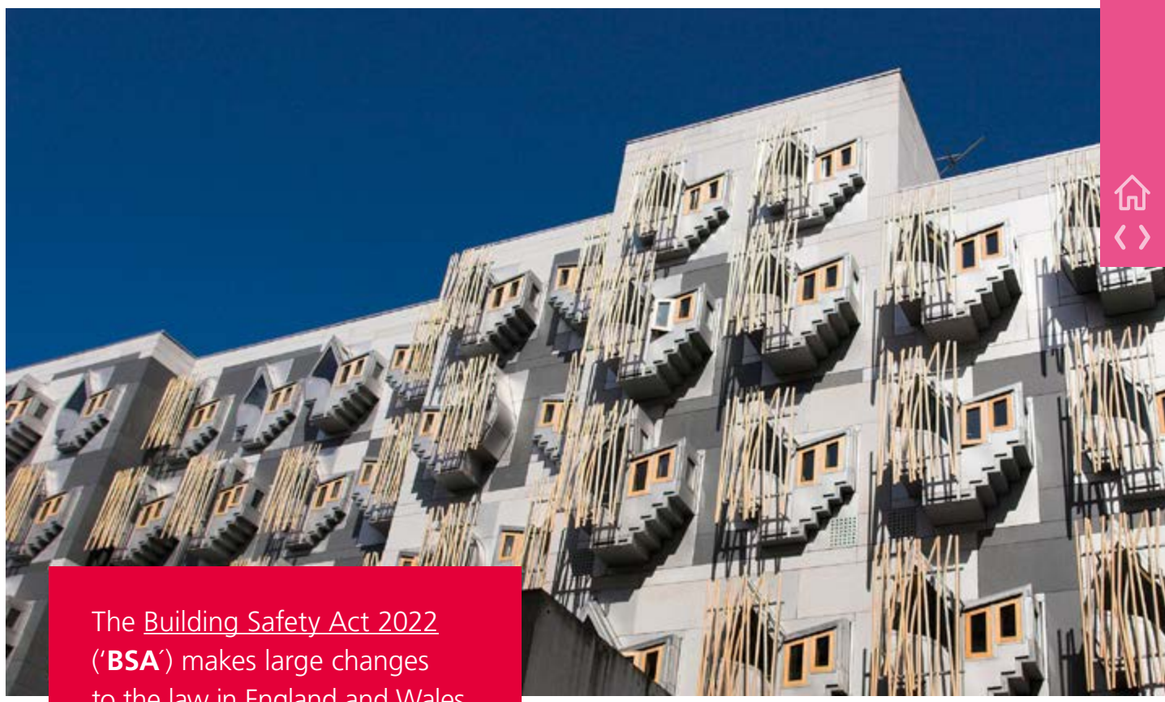
The effectiveness of the proposals will also depend on whether a Building Safety Levy is ultimately introduced in Scotland as planned. The Building Safety Levy would be a new national devolved tax paid for by developers of new-build residential properties, equivalent to the UK Government's Building Safety Levy for England. A consultation concerning the levy was undertaken between September and November 2024, and the Scottish Government plans to publish and analysis / response in early 2025.

In its absence, the focus has remained on encouraging developers to rectify issues – with potentially significant sanctions if they do not engage. If this has the presumably intended effect of developers meeting part of the cost, developers are going to look at whether claims can be made against their project team. As Scotland doesn't have an equivalent of the Defective Premises Act 1972, claims (other than claims in respect of construction products) are still subject to the Prescription and Limitation (Scotland) Act 1973. This will significantly impact on a developer's ability to pass on claims.

The Act has therefore provided a helpful starting point and direction of travel, even if much of the detail of the proposals is yet to come. Cladding issues will however remain on the agenda for some time to come.

Scotland

Building Safety Act 2022: the Scottish perspective



The Building Safety Act 2022 ('**BSA**') makes large changes to the law in England and Wales in relation to construction projects, health and safety regulation and leaseholder rights. Whilst many aspects of the BSA do not extend to Scotland, some do and their impact is likely to be significant. An overview of the BSA's impact on the Scottish legal landscape is provided here.

Construction product liability

The most notable impact of the BSA in Scotland is the introduction of new rights of action in relation to construction products. These rights are contained in Sections 148 and 149 of the BSA and are given effect in Scotland by Section 151. Both sections have been given lengthy prescription periods and Section 149 also applies retrospectively, meaning that it imposes liability for past acts committed long before the BSA was passed.

These sections impose liability to pay damages for personal injury, damage to property or economic loss where a number of conditions are satisfied (referred to as Conditions A to D). The conditions can be summarised as imposing liability on persons who:

1. fail to comply with certain statutory requirements for a construction product;
2. make a misleading statement in relation to a construction product; or
3. manufacture a product which is inherently defective,

in circumstances where the product in question has been used in the construction of a relevant building and has caused the relevant building to be unfit for habitation. The term 'unfit for habitation' comes from the Defective Premises Act 1972 and will be familiar to those operating in England and Wales where that Act applies, whereas the term is a new category under Scottish law.

Some of those liable will have no contractual link with the claiming party (for example a homeowner who claims against a manufacturer) and so these sections significantly extend the range of people who can bring claims in relation to the three failings listed in paragraphs (1) to (3) above. The usual arguments, related to economic loss not being recoverable in such situations (i.e. in delict) will not assist as the BSA specifically provides for this to be recovered.

The BSA also amends the Prescription and Limitation (Scotland) Act 1973 (the '**Prescription Act**'), increasing the period of prescription so that:

1. any action relating to liability for construction products under Section 148 can be brought up to 15 years after the date on which the right of action accrued, being either: (i) the construction of the building is completed, if the works relate to the construction itself or (ii) the completion of works, where these do not relate to the construction of the building;
2. any action relating to cladding products under Section 149 can be brought (i) on a retrospective basis up to 30 years from the date on which the right of action accrued if this was before the commencement date of the BSA and (ii) up to 15 years from the date on which the right of action accrued if this was on or after the commencement date of the BSA.

These extended and retrospective prescription periods are of possibly greater significance in Scotland than in England, given the general negative prescriptive period in Scotland is 5 years. This compares with what is often a 12-year limitation period in England where a contract has been executed as a deed. The introduction of such a lengthy prescription period in Scotland is also notable for the fact that it comes amidst current reforms to the Prescription Act, some provisions of which are now in force with the remaining provisions coming into force in 2025.

We will have to wait and see how these new rights of action impact the construction industry in Scotland. Will there be greater scrutiny of claims in marketing materials, for example? Businesses providing and installing construction products, particularly cladding products, will need to consider how to protect themselves moving forward, including considering quality control, paper trails of decisions on materials, checking performance of materials and how to handle supply chains.

Although the biggest concern will be around backward-looking claims for long-completed buildings.

Other applicable provisions

There are other, less wide ranging, aspects of the BSA which are applicable in Scotland. This includes the establishment of the new homes ombudsman scheme, which allows for a new forum for complaints against members of the scheme (which is open to all developers) by relevant persons, which will be investigated and determined by an independent ombudsman.

The BSA also makes amendments to the Architects Act 1997, including setting out amendments to the Architects Registration Board particularly with regard to discipline, continuing professional development and appeal committees. In addition, amendments are made to the Health and Safety at Work etc Act 1974. This includes, but is not limited to, amendments to the definition and role of building safety regulator with regard to the Building Advisory Committee and the powers of the Executive. Both of these amendments extend to Scotland.

Finally, the BSA confers powers on the UK Government to make regulations applicable to Scotland governing the supply and marketing of construction products. This will be highly relevant to the new rights of action under sections 148 and 149 discussed above.

Conclusion

In short, despite the limited attention given to the applicability of the BSA in Scotland prior to it receiving Royal Assent, there are some wide ranging effects which reach north of the border. These extend both to liability and the applicable prescriptive periods with regard to construction products fitted or installed in Scotland.

Scotland

Wales

Introduction

In Wales, the Welsh Government is taking a phased approach to introducing legislation. The first phase includes the definition of HRBs, which includes a wider category of buildings compared with the regulations applying in England. However, there is some commonality across these jurisdictions as the BSR will also be responsible for the registration and maintenance of the register of Building Inspectors and Building Control Approvers in Wales. as well as England. The Cabinet Secretary for Housing and Local Government in Wales has indicated that the upcoming Building Safety (Wales) Bill which forms the next step in the reform of building safety in Wales, will include tighter regulations of higher-risk buildings, duty holder roles, Gateways, the golden thread of information, mandatory occurrence reporting and compliance, and stop notices.

What's next for 2025?

A consultation in respect of the Building Safety (Wales) Bill was originally planned for the end of 2024 but will now be launched in spring 2025. The Bill is scheduled for introduction before the end of July 2025.

Building Safety Act Implementation – Wales: An Update

The implementation of the Building Safety Act regime for higher-risk buildings in Wales, differs from England.

Definition of Higher-Risk Building

The definition of a higher-risk building in Wales (which differs to England) has now been formalised in the Building Safety (Description of Higher-Risk Building) (Design and Construction Phase) (Wales) Regulations 2023. It captures a building that is at least 18 metres in height, or has at least seven storeys and (unlike England) contains:

— at least one residential unit;

— a hospital that has at least one bed intended for use by a person admitted to the premises for an overnight stay;

— a care home; or

— a children's home.

However, similarly to England, hotels, managed accommodation, residential institutions and buildings for military use are excluded.

While there has been some commentary as to the issues differing definitions may cause across the two nations, there are significantly fewer buildings in Wales that will be captured even by this broader definition. As such, one can understand why the Welsh Government is willing to extend the scope.

Building Safety Regulator

While the Health and Safety Executive will not be the building safety regulator in Wales, the Building Safety Regulator arm of the HSE is responsible for the registration and maintenance of the register of Building Inspectors and Building Control Approvers in Wales. This means that there is a unified regulator and point of contact for Building Inspectors and Building Control Approvers across both England and Wales.

Whereas, in England, the Building Safety Regulator oversees compliance with and enforces the new regulatory regime in relation to higher-risk buildings, since April 2024 building control functions for higher-risk buildings in Wales can only be performed by local authorities, and not by private bodies.

What Comes Next

The Welsh Government has been clear that their work to date only represents the first phase of reform, and that they are taking a staged approach to implementation to allow the industry to adapt to change as smoothly as possible and to cause minimum disruption.

The Building Safety (Wales) Bill is scheduled for introduction in 2025. Following the publication of the Grenfell Tower Inquiry Phase 2, the Welsh Government announced that, while the development of the Bill is advanced, it was taking time to reflect on the recommendations to identify where it may wish to revise its policy.

The Cabinet Secretary for Housing and Local Government in Wales has indicated that the Bill will include tighter regulations of higher-risk buildings, dutyholder roles, gateways, the golden thread of information, mandatory occurrence reporting and compliance, and stop notices. A consultation was originally planned for the end of this year, but will now be launched in spring 2025. However, the Bill is still to be introduced before summer recess in 2025, as originally planned.

Wales

Defined terms

Accountable Person
— Broadly speaking, an AP for a HRB is someone:
  - who holds a legal estate in possession in any part of the common parts of the HRB; or
  - does not hold a legal estate in any part of the building but who is under a relevant repairing obligation (i.e., a repairing obligation imposed by lease or legal enactment) in relation to any part of the common parts of the HRB.

Building Assessment Certificate
— The PAP must apply for a 'building assessment certificate' for a registered HRB within 28 days of a BSR requesting to do so. It is an offence not to make the application without a reasonable excuse.

Building Liability Orders
— Provisions under the BSA which allow liability for construction work to be extended to associated entities such as parent or sibling companies. Ordered at the court's discretion if it is considered 'just and equitable to do so', a Building Liability Order can be made in relation to any liability arising under the DPA (as amended), section 38 of the Building Act 1984 or any other claim arising from a 'building safety risk'.

Building Safety Fund
— The BSF is overseen by the Ministry of Housing Communities and Local Government and has more than GBP 5bn available to fund the carrying out of fire-safety works.
— The purpose of the BSF is to ensure that these safety-critical defects can be rectified without delay. In the words of the Guidance, the BSF is intended to ensure that residents of high-rise buildings 'are safe – and feel safe – in their homes now'.

Building Safety Levy
— The purpose of the Building Safety Levy is for those profiting from property development to contribute to the cost of remediating defects in historic developments. The plan is for a single payment prior to the issuing of the building control certificate, and the levy will be calculated on the floorspace area of a property.
— The Government intends the levy to raise around GBP 3.4bn to contribute towards making buildings safe. The intention is for the levy to come into force later in 2025.

Building Safety Regulator
— The BSR was set up under the Building Safety Act 2022 to regulate higher-risk buildings; raise safety standards of all buildings; and help professionals in design, construction, and building control, to improve their competence.
— The BSR sets out rules to protect the design and construction of higher-risk buildings. They help give residents confidence in the safety and standards of their building. BSR has a legal responsibility to consult with residents through the residents panel (see here).

Building Safety Risk
— Under the BSA, a 'building safety risk' in relation to a higher-risk building means a 'risk to the safety of people in or about a building arising from any of the following occurring as regards the building (a) the spread of fire (b) structural failure or (c) any other prescribed matters'.

Cladding Assurance Register
— Register under the Housing (Cladding Remediation) (Scotland) Act 2024. An entry will list properties where an SBA has been undertaken and what work (if any) has been identified as being needed to eliminate or mitigate risks.
— The entry requires to be amended after any Additional Work Assessments have been carried out.
— The entry is also amended after the Scottish Ministers are satisfied that any remedial works required under the SBA and/or the Additional Work Assessments have been completed.
— This will be accessible by, among others, conveyancers and mortgage lenders, with the hope that the market for these properties will be strengthened by the assurance a review has been undertaken and issues resolved.

Deeds of Bilateral Contracts
— Under the Deeds of Bilateral Contract, entered into between developers and the MHCLG, developers agreed to carry out or fund work to remediate life-critical fire-safety issues on high-rise buildings they have played a role in developing or refurbishing over the last 30 years in England. The economic viability of the BSF is underpinned by legally enforceable Deeds of Bilateral Contracts.

Developer Remediation Contracts
— A legally binding agreement between the relevant developer (referred to as '**Participant Developer**' or '**PD**') and the Ministry of Housing Communities and Local Government to facilitate the remediation of residential buildings, which were developed or refurbished during the relevant period (as defined in the RAS Regulations) and which are assessed to possess life-critical fire safety defects (the '**Building Requiring Works**').

Higher-Risk Building
— In England, for the construction phase, a HRB is a building that is at least 18 metres high or has at least 7 storeys; and
  - contains at least two residential units; or is a care home or a hospital; and
  - does not comprise entirely of a secure residential institution; a hotel; or military barracks.
— In England, for the purposes of Part 4 of the BSA, (the occupation phase) a HRB is a building that:
  - is at least 18 metres in height or has at least 7 storeys; and
  - contains at least two residential units.
— In Wales this means: a building that is at least 18 metres in height, or has at least 7 storeys and (unlike England) contains:
  - at least one residential unit;
  - a hospital that has at least one bed intended for use by a person admitted to the premises for an overnight stay;
  - a care home; or
  - a children's home.
— In Scotland there is currently no primary or secondary legislation setting out what constitutes a HRB. However, the Housing (Cladding Remediation) (Scotland) Act 2024 states that the legislation applies to properties over 11m with at least on residential unit. With this in mind, the following are likely to constitute a HRB in Scotland:
  - domestic buildings or residential buildings with any storey at a height of more than 11m above the ground;
  - educational establishments (schools, colleges, and universities), community/sport centres;
  - hospitals; and
  - residential care buildings.

Joint Remediation Plan
— A plan entered into by major developers and the government in November 2024, under which the developers agreed to speed up remediation work, and the establishment of a developer-government working group to overcome progress blockers.

Mandatory Occurrence Reporting
— The PAP must establish and operate an effective mandatory occurrence reporting system. All PAPs must ensure that reportable information related to the safety of the occupied HRB is given to the BSR.
— The Higher-Risk Buildings (Management of Safety Risks etc) (England) Regulations 2023 set out further requirements in relation to mandatory occurrence reporting, and in particular:
  - reporting should occur where a safety occurrence (i.e., an incident or situation relating to the structural integrity of, or spread of fire in a HRB that meets the 'risk condition') takes place in an area for which the AP is responsible; and
  - the information provided must be:
    - a brief description of the nature of the safety occurrence; and
    - a report including (but not limited to) details of the safety occurrence i.e., details of injuries, recent building work and the measures taken to mitigate or remedy them.

Principal Accountable Person
— The principal accountable person (the '**PAP**') is:
  - in relation to a HRB with one AP, that person; and
  - in relation to a building with more than one AP, the AP who:
    - holds a legal estate in possession in the structure and exterior of the HRB; or
    - does not hold a legal estate in any part of the building but is under a relevant repairing obligation (i.e., a repairing obligation imposed by lease or legal enactment) in relation to the structure and exterior of the building.

  (NB: The PAP and APs can be individuals, partnerships or corporate bodies. To establish who the dutyholders are for each HRB, the property ownership structure must be analysed on a case-by-case basis. It is not always the case that the freeholder will be the PAP)

Principal Contractor
— The Health and Safety executive defines a principal contractor, as the contractor with control over the construction phase of a project involving more than one contractor.
— They are appointed in writing by the client (commercial or domestic) to plan, manage, monitor and coordinate health and safety during this phase.

Principal Designer
— The Health and Safety executive defines a principal designer as a designer who is an organisation or individual (on smaller projects) appointed by the client to take control of the pre-construction phase of any project involving more than one contractor.
— Principal designers have an important role in influencing how risks to health and safety are managed throughout a project.
— Design decisions made during the pre-construction phase have a significant influence in ensuring the project is delivered in a way that secures the health and safety of everyone affected by the work.

Relevant Persons
— PAPs have a duty to engage with 'relevant persons', who are:
  - residents of HRBs who are 16 years old or older; and/or
  - owners of the residential units of the relevant HRB.

Remediation Acceleration Plan
— Government's plan to tackle the slow progress of remediation of unsafe buildings following the Grenfell tragedy.

Remediation Contribution Order
— A remediation contribution order was brought in by the Building Safety Act 2022. An RCO, 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, or in connection with, relevant defects (or specified relevant defects) relating to the relevant building. The RCO will be made if it considered "just and equitable" to do so.
— Examples of relevant defects include flammable balconies, cladding panels not of limited combustibility, and defective foundations.

Remediation Order
— A remediation order was brought in by the Building Safety Act 2022 and is an order made against a 'relevant landlord'. It is an order requiring a landlord to remediate certain building defects.
— A relevant landlord is defined as a landlord under a lease of the building or any part of it who is required, under the lease or by virtue of enactment, to repair or maintain anything relating to a relevant defect. This is commonly known as a repairing obligation.

Safety Case Reports
— PAPs are required to produce and maintain a safety case report. The safety case report comprises the full body of evidence relating to the (i) assessments and (ii) ongoing management of the building safety risks. PAPs will be required to submit the safety case report to the BSR as part of the building assessment certificate process, or at the request of the BSR.

Single Building Assessment
— Introduced by the Cladding Remedial (Scotland) Act 2024 to be undertaken on properties with potentially dangerous cladding.
— SBAs can be ordered by a building owner or developer, or the Scottish Ministers where this has not otherwise been done (or where it is an orphan building).
— The output of the SBA will be a recommendation as to whether work is required on the property to eliminate or mitigate a risk to human life directly or indirectly created or exacerbated by a building's external wall cladding system.

Defined terms

Primary and Secondary Legislation

Architects Act 1997

— As amended by the BSA to set out amendments to the Architects Registration Board particularly with regard to discipline, continuing professional development and appeal committees

Building Act 1984

— Section 38 provides a general right of action for breaches of the Building Regulations, however this section is not yet in force.

Building Act 1984 (Commencement No.3) (England) Order 2023

— Brings into force (as of 1 October 2023) section 33 of the Building Act 1984 which has provisions in relation to testing and sampling in conformity with building regulations.

Building (Approved Inspectors etc. and Review of Decisions) (England) Regulations 2023

— Amends the Building Regulations 2010 related to the role of Approved Inspectors, to support the new higher-risk building control regime, and provides for the BSR to be the only building control authority for all higher-risk buildings.

Building (Higher-Risk Buildings Procedures) (England) Regulations 2023

— Sets out Building Control processes that apply to all Higher-Risk Buildings.

Building (Public Bodies and Higher-Risk Building Work) (England) Regulations 2023

— Amends the Building Act 1984 making use of powers in section 54A of the Building Act 1984 (inserted by section 47 of the Building Safety Act 2022). Ensures that the BSR is the building control authority for all higher-risk building work carried out on public body buildings.

Building Regulations etc. (Amendment) (England) Regulations 2023 (SI 2023/ 911)

— Specifies new dutyholder and competence requirements which will apply to all building work, including that undertaken on higher-risk buildings

Building (Restricted Activities and Functions) (England) Regulations 2023

— Sets out the restricted activities that local authorities and RBCAs must carry out through a registered building inspector.

Building Safety Act 2022 Commencement Regulations 2022. (No.1 to No.7) (2022–2024)

— Various commencement regulations made under the BSA.

Building Safety Act 2022 (Consequential Amendments etc) Regulations 2023

— Makes amendments consequential to the BSA Part 3 coming into force. Replaces references in primary legislation to deposit of plans with references to applications for building control approval and reflects that the BSA transfers procedures for appeals under the Building Act 1984 from the magistrates' court to the to the First-Tier Tribunal.

Building Safety Act 2022 (Consequential Amendments and Prescribed Functions) and Architects Act 1997 (Amendment) Regulations 2023

— Makes consequential amendments arising from section 9(3) of the BSA which abolishes the Building Regulations Advisory Committee for England. Prescribes the function of acting as statutory consultee under the Town and Country Planning Act 1990 and section 54 of the Planning and Compulsory Purchase Act 2004 in relation to higher-risk buildings as a function of the regulator, the Health and Safety Executive under BSA s3, and amends Schedule 1 of the Architects Act 1997 to ensure committee members have the appropriate voting rights to fulfil their function.

Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022

— Provides for the recovery, from a relevant landlord, of amounts not recoverable under a lease as a result of the leaseholder protections, and requires leaseholders to give prescribed information on their qualifying status, property value and shared ownership status. Finally, it provides for applications for remediation orders via the First-Tier Tribunal.

Building Safety (Regulator's Charges) Regulations 2023

— Regulations authorising the BSR to recover its costs in connection with the performance of its functions under the BSA and the Building Act 1984.

Building Safety (Description of Higher-Risk Building) (Design and Construction Phase) (Wales) Regulations 2023

— Formulises the definition of a higher-risk building in Wales.

Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations 2023

— Deals with the mandatory registration process for HRBs and sets out the information to be submitted. Existing, occupied HRBs were required to be registered by 30 September 2023.

Building Safety (Wales) Bill

— Scheduled for introduction in 2025. Following the publication of the Grenfell Tower Inquiry Phase 2, the Welsh Government announced that, while the development of the Bill is advanced, it was taking time to reflect on the recommendations to identify where it may wish to revise its policy. The Bill is still to be introduced before summer recess in 2025

Civil Liability (Contribution) Act 1978

— Allows two persons who are both liable to a third person for the same damage to recover contribution between themselves if one of them has made a payment to the third party in respect of their liability

Defective Premises Act 1972

— Provides a course of action against those involved in the construction of a dwelling that is determined to be unfit for habitation upon completion. The entity that originally commissioned the work and any person with a legal or equitable interest can claim i.e. leaseholders and subsequent purchasers are included

Fire Safety (England) Regulations 2022

— Applies to all buildings in England comprising two or more domestic premises (including residential parts of mixed-use buildings and student accommodation). The obligations do not apply within individual flats, other than where measures are installed inside for the safety of other residents (e.g. sprinklers).
  - The obligation on the responsible person differs depending on the height of the building:
  - Under 11 metres;
  - Between 11 and 18 metres; or
  - Over 18 metres.

Health and Safety at Work etc Act 1974

— Amended by the BSA to amend the definition and role of building safety regulator with regard to the Building Advisory Committee, amongst other matters

Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023

— Assists dutyholders in identifying whether a building is a HRB for the purposes of Part 4 of the BSA
— It also confirms certain buildings such as hotels and care homes are out of the scope of Part 4.

Higher-Risk Buildings (Keeping and Provision of Information etc.) (England) Regulations

— Sets out the information and documents that the APs must keep as the *'golden thread of information'*, who the APs must provide information to, what information they must provide, and exemptions.

Higher-Risk Buildings (Key Building Information etc.) (England) Regulations 2023

— Sets out the key building information ('**KBI**') required to be submitted 28 days after registration of a HRB and clarifies what parts of the HRB the Accountable Person (the '**AP**') is responsible for.

Higher-Risk Buildings (Management of Safety Risks etc.) (England) Regulations 2023

— Sets out supplementary information on some Part 4 obligations, such as the content and form of the safety case report, mandatory reporting requirements and resident engagement strategies.

Housing (Cladding Remediation) (Scotland) Act 2024

— The core feature introduced by the Housing (Cladding Remediation)(Scotland) Act 2024) (the '**Act**') (enacted on 21 June 2024 and came into force on 6 January 2025), was Single Building Assessments ('**SBAs**') to be undertaken on properties with potentially dangerous cladding. The Act retains the focus firmly on multi-residential buildings over 11m in height, and with a form of external cladding wall system. The buildings must also have been built or refurbished between 1 June 1992 and 1 June 2022, showing the emphasis on rectifying historic issues. The Act also allows the creation of a Cladding Assurances Register.

Key Information Regulations 2023

— Sets out the information to be provided as part of the registration application of HRBs with the Building Safety Regulator

Leasehold and Freehold Reform Act 2024

— Provides clarity as to the functionality of Remediation and Remediation Contribution Orders including the scope of recoverable losses

Limitation Act 1980

— Provides timescales within which a claimant can take action against liable parties. The BSA extended some of the traditional limitation periods under the Limitation Act.

Prescription and Limitation (Scotland) Act 1973

— Amended by the Building Safety Act 2022, increasing the period of prescription for any action relating to liability for construction products under section 148 of the BSA to 15 years; and in relation to cladding products under 149 on a retrospective basis up to 30 years and 15 years for rights of action accrued on or after the commencement of the BSA.

Regulatory Reform (Fire Safety) Order 2005

— Amended by the Fire Safety Act 2021 and clarified that external walls, flat entrance doors and structures of buildings are all covered by the FSO and must be accounted for in fire risk assessments for higher risk buildings

Primary and Secondary Legislation

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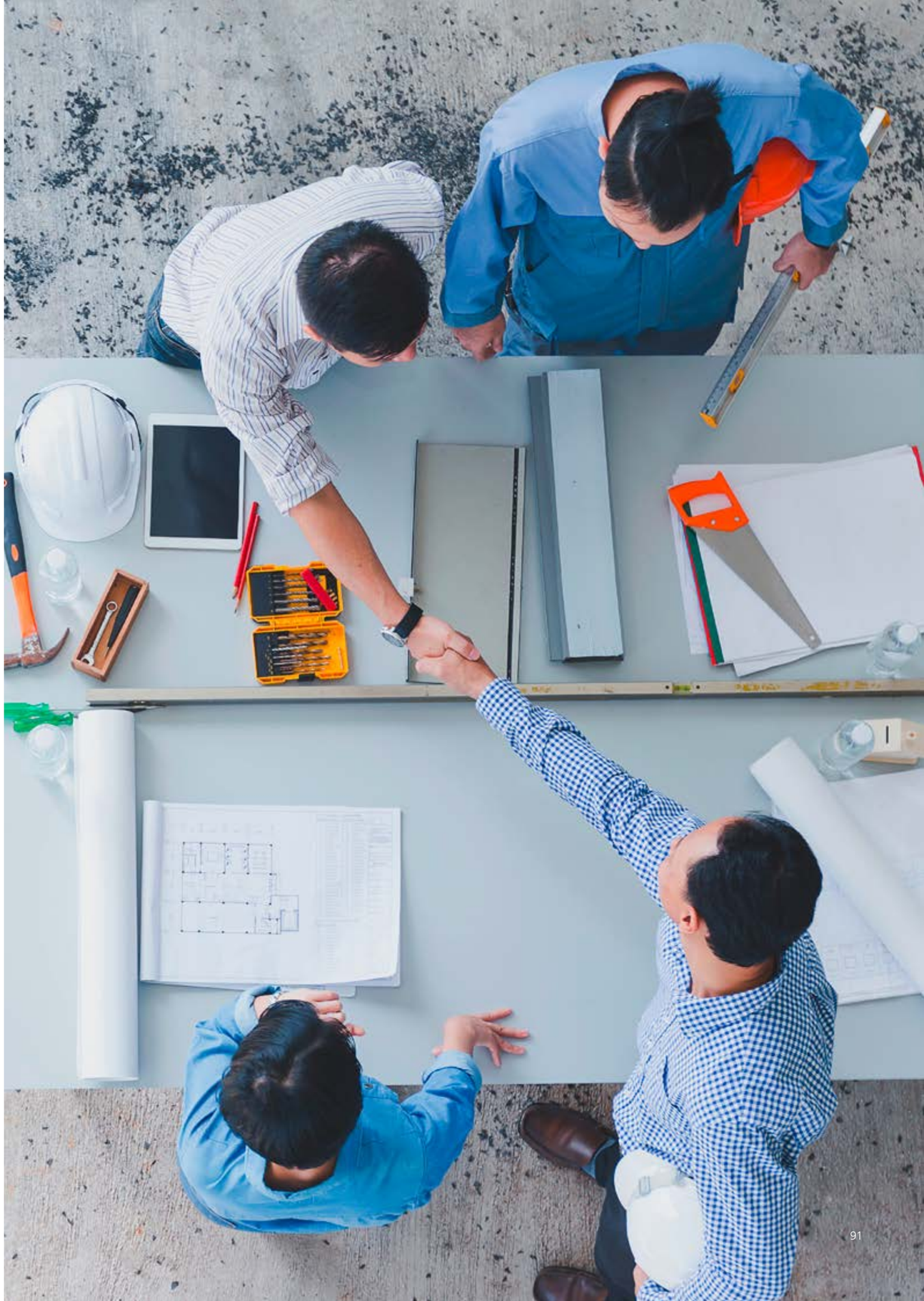

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