

39 Essex Chambers Fire Law Group



9 May 2023

The Building Safety Act: One year on, where are we now? Seminar

5:30pm (registration from 5pm) to **6.45pm** (followed by a drinks reception)



This seminar will cover:

- Leaseholder rights and remedies
- Remediation orders/remediation contribution orders
- Cladding claims and fire safety defects
- Insurance obligations/part 20 claims

Chaired by Paul Darling KC

Speakers: Kerry Bretherton KC, Kate Grange KC, David Sawtell,
Samantha Jones, Nick Higgs, Samuel Burrett

The impact on leaseholders

9 May 2023

Kerry Bretherton KC

The qualifying lease

- A long lease
- Of a single dwelling
- Liability to pay a service charge
- Lease granted before 14 February 2022
- Only or principle home
- Restrictions on ownership of other dwellings

General observations

- The context is that Schedule 8 is the 2nd limb of protection
- The 1st stage is s133 BSA by which the landlord is obliged to attempt to recover costs elsewhere
- Any covenant which purports to exclude or limit the provisions of Sch 8 is void by Paragraph 18 of Schedule 8.
- If no service charges are payable then the element cannot be taken into account in determining the service charge nor be met by a reserve fund

Where costs cannot be recovered

- The landlord/an associate is responsible
- Cladding
- Net worth of the group
- Value of Lease
- Professional/Legal Service relating to liability for certain defects

Limits on service charge payable

- Where the service charge exceeds the maximum value in the 5 years to 28 June 2022 if the sum payable is £15k in Greater London or £10k elsewhere.
- The sum is £50k if the property is worth £1-2million
- The sum is £100k if the property is worth £2million+
- Special rules in relation to shared ownership leases
- Cap so must not exceed 1/10 of the permitted maximum in regulation 6 in certain cases.

Evidential Issues in Fire Safety Defects Claims

9 May 2023

Nicholas Higgs

Fire Safety Defects



- What is it?
- How should it have been constructed?
- How has it been constructed?
- Is the construction compliant?
- Does it matter?
- How should it be repaired?
- Are further investigations required?
- How many examples are there?
- Have the other experts seen it?

Extrapolation

- *Building Design Partnership Ltd v Standard Life Assurance Ltd* [2021] EWCA Civ 1793: “The parties... are duty bound to find a way of trying out the principal issues between them in **a sensible and proportionate way**” [92]
- *Standard Life v. Gleeds* [2020] EWHC (TCC): Suitable where a party is likely to have produced systemic defects.

But:

- *Amey LG Ltd v Cumbria County Council* [2016] EWHC 2856: biased and unreliable sampling.
- *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd (No 2)* [2017] EWHC 1763: limited and unrepresentative sample.

Expert Evidence / Advice

- Keep fact and opinion evidence separate.
- ‘Clean’ and ‘Dirty’ experts as per Australian practice?
- Take care in what experts are instructed to do.
- Explicit instruction if an advisor is made a ‘Pt 35’ expert.
- Be particularly wary if changing experts...
- Remember, there is no right to adduce expert evidence (see *Dana UK Axle Ltd v Freudenberg FST GmbH* [2021] EWHC 1413 (TCC) [93-94])

Sections 148 and 149 of the Building Safety Act 2022

9 May 2023

Kate Grange KC

Section 148

Liability relating to construction products

- (1) This section applies where Conditions A to D are met.
- (2) Condition A is that, at any time after the coming into force of this section—
 - (a) a person **fails to comply with a construction product requirement** in relation to a construction product,
 - (b) a person who markets or supplies a construction product **makes a misleading statement** in relation to it, or
 - (c) a person **manufactures a construction product that is inherently defective**.
- (3) Condition B is that, after Condition A is met, the construction product referred to in subsection (2)(a), (b) or (c) **is installed in, or applied or attached to, a relevant building in the course of works** carried out in the construction of, or otherwise in relation to, the building.
- (4) Condition C is that, when those works are completed—
 - (a) in a case where the relevant building consists of a dwelling, the building is **unfit for habitation**, or
 - (b) in a case where the relevant building contains one or more dwellings, a dwelling contained in the building is **unfit for habitation**.
- (5) Condition D is that the facts referred to in subsection (2)(a), (b) or (c) were **the cause, or one of the causes, of the building or dwelling being unfit for habitation**.

Section 149

149 Liability for past defaults relating to cladding products

- (1) This section applies where Conditions A to D are met.
- (2) Condition A is that, at any time before the coming into force of this section—
 - (a) a person **fails to comply with a cladding product requirement** in relation to a cladding product,
 - (b) a person who markets or supplies a cladding product **makes a misleading statement** in relation to it, or
 - (c) a person **manufactures a cladding product that is inherently defective**.
- (3) Condition B is that, after Condition A has been met, the **cladding product is attached to, or included in, the external wall of a relevant building** in the course of works carried out in the construction of, or otherwise in relation to, the building.
- (4) Condition C is that, when those works are completed—
 - (a) in a case where the relevant building consists of a dwelling, the building is **unfit for habitation**, or
 - (b) in a case where the relevant building contains one or more dwellings, a dwelling contained in the building is **unfit for habitation**.
- (5) Condition D is that the facts referred to in subsection (2)(a), (b) or (c) were **the cause, or one of the causes, of the building or dwelling being unfit for habitation**.

Remediation Orders and Remediation Contribution Orders

9 May 2023

Samantha Jones

Remediation Orders & Remediation Contribution Orders

Remediation Orders: section 123 of the BSA 2022

- (1) The Secretary of State may by regulations make provision for and in connection with remediation orders.
- (2) A “remediation order” is an order, made by the First-tier Tribunal on the application of an interested person, requiring a relevant landlord to remedy specified relevant defects in a specified relevant building by a specified time.
- (3) In this section “relevant landlord”, in relation to a relevant defect in a relevant building, means a landlord under a lease of the building or any part of it who is required, under the lease or by virtue of an enactment, to repair or maintain anything relating to the relevant defect.
- (4) In subsection (3) the reference to a landlord under a lease includes any person who is party to the lease otherwise than as landlord or tenant
- (5) In this section “interested person”, in relation to a relevant building, means—
 - (a) the regulator (as defined by section 2),
 - (b) a local authority (as defined by section 30) for the area in which the relevant building is situated,
 - (c) a fire and rescue authority (as defined by section 30) for the area in which the relevant building is situated,
 - (d) a person with a legal or equitable interest in the relevant building or any part of it, or
 - (e) any other person prescribed by the regulations.
- (6) In this section “specified” means specified in the order.
- (7) A decision of the First-tier Tribunal or Upper Tribunal made under or in connection with this section (other than one ordering the payment of a sum) is enforceable with the permission of the county court in the same way as an order of that court.

Remediation Orders & Remediation Contribution Orders

“Relevant building” – section 117 of the BSA 2022

(2) “Relevant building” means a self-contained building, or self-contained part of a building, in England that contains at least two dwellings and—

- (a) is at least 11 metres high, or
- (b) has at least 5 storeys.

This is subject to subsection (3).

(3) “Relevant building” does not include a self-contained building or self-contained part of a building—

- (a) in relation to which a right under Part 1 of the Landlord and Tenant Act 1987 (tenants’ right of first refusal) or Part 3 of that Act (compulsory acquisition by tenants of landlord’s interest) has been exercised,
- (b) in relation to which the right to collective enfranchisement (within the meaning of Chapter 1 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993) has been exercised,
- (c) if the freehold estate in the building or part of the building is leaseholder owned (within the meaning of regulations made by the Secretary of State), or
- (d) which is on commonhold land.

(4) For the purposes of this section a building is “self-contained” if it is structurally detached.

Remediation Orders & Remediation Contribution Orders

“Relevant defect” – section 120 of the BSA 2022

- (2) “Relevant defect”, in relation to a building, means a defect as regards the building that—
- (a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works, and
 - (b) causes a building safety risk.
- (3) In subsection (2) “relevant works” means any of the following—
- (a) works relating to the construction or conversion of the building, if the construction or conversion was completed in the relevant period;
 - (b) works undertaken or commissioned by or on behalf of a relevant landlord or management company, if the works were completed in the relevant period;
 - (c) works undertaken after the end of the relevant period to remedy a relevant defect (including defect that is a relevant defect by virtue of this paragraph).

“The relevant period” here means the period of 30 years ending with the time this section comes into force.

- (4) In subsection (2) the reference to anything done (or not done) in connection with relevant works includes anything done (or not done) in the provision of professional services in connection with such works.

Remediation Orders & Remediation Contribution Orders

“Building safety risk” – section 120(5) of the BSA 2022

(5) For the purposes of this section—

“building safety risk”, in relation to a building, means 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;

Remediation Orders & Remediation Contribution Orders

Remediation Contribution Orders – section 124 of the BSA 2022

- (1) The First-tier Tribunal may, on the application of an interested person, make a remediation contribution order in relation to a relevant building if it considers it just and equitable to do so.
- (2) “Remediation contribution order”, in relation to a relevant building, means an order requiring a specified body corporate or partnership to make payments to a specified person, for the purpose of meeting costs incurred or to be incurred in remedying relevant defects (or specified relevant defects) relating to the relevant building.
- (3) A body corporate or partnership may be specified only if it is—
 - (a) a landlord under a lease of the relevant building or any part of it,
 - (b) a person who was such a landlord at the qualifying time,
 - (c) a developer in relation to the relevant building, or
 - (d) a person associated with a person within any of paragraphs (a) to (c).
- (4) An order may—
 - (a) require the making of payments of a specified amount, or payments of a reasonable amount in respect of the remediation of specified relevant defects (or in respect of specified things done or to be done for the purpose of remedying relevant defects);
 - (b) require a payment to be made at a specified time, or to be made on demand following the occurrence of a specified event.

Remediation Orders & Remediation Contribution Orders

Recent Example:

- Application for a remediation contribution order:

Batish and Others v Inspired Sutton Limited and Others (13 January 2023)
(FTT Property Chamber)

The Developer Remediation Contract and the Responsible Actors Scheme

9 May 2023

David Sawtell

The Developer Remediation Contract

- Currently voluntary agreement between the Secretary of State for Department for Levelling Up, Housing and Communities and major developers.
- Gives effect to the Developer Pledge.
- Relates to residential and mixed-use buildings 11m and higher.
- The parties are the participant developer and the Secretary of State.
- Obliges a participant developer to identify building requiring works, and to undertake at its own cost all necessary remediation works.
- Detailed provisions as to what is a PD Group Company, so as to bring in associated entities who developed buildings; and for apportionment of costs.

Responsible Actors Scheme

- Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023 were published in draft on 25 April 2023.
- Eligible developers will be asked to join the Responsible Actors Scheme:
 - principal business is residential property development; they meet the ‘profits condition’; and they developed or refurbished 11m+ residential buildings in England in the last thirty years (other than solely as a contractor);
 - they are a developer who meets the ‘profits condition’; and developed or refurbished (other than solely as a contractor) two or more buildings assessed as eligible for a relevant government cladding remediation scheme; or
 - they are a developer who developed or refurbished (other than solely as a contractor) at least one 11m+ residential building that qualifies for remediation under the developer remediation contract; and they volunteer to join the Scheme.
- Eligible non-members will be prohibited from carrying out major development of land.

BSA 2022: The Insurance Implications

9 May 2023

Sam Burrett

Areas of potential additional liability to insure

1. New and expanded causes of action:

- New cause of action against manufacturers and suppliers for defective construction and cladding products: s.147-151 BSA 2022
- Expansion of DPA 1972 to include right to recover for defective refurbishment or rectification work: s.134 BSA inserting s.2A DPA 1972
- Bringing into force s.38 of BA 1984 to create a cause of action for damage suffered as a result of a breach of the building regulations

2. New remedies:

- a. Remediation and Remediation Contribution Orders: s.123-124 BSA 2022
- b. Building Liability Orders: s.130-132 BSA 200

Areas of potential additional liability to insure

3. Extensions of limitation period

- Relevant date for applicable limitation period: 28 June 2022
- Claims under s.1 DPA: prospective to 15 years, retrospective to 30 years
- Claim under s.2A DPA: prospective to 15 years
- Claim under s.38 BA 1984: prospective to 15 years
- Claim under s.123-124 BSA: prospective to 15 years, retrospective to 30 years
- Claim under s.148 BSA: prospective to 15 years
- Claim under s.149 BSA: prospective to 15 years, retrospective to 30 years

What can we expect?

1. Increase in premiums?
2. Lower coverage limits?
3. Higher levels of self-insurance?
4. Exclusions in policies against the additional potential liabilities?
5. Bespoke coverage for the additional potential liabilities?
6. More coverage disputes?
7. Increased contribution/Part 20 claims?
8. Subrogated claims for BLOs and RCOs?
9. Withdrawal of insurers from the market?

QUESTIONS?

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