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Building Safety Act 2022: where are we at?

30 March 2023

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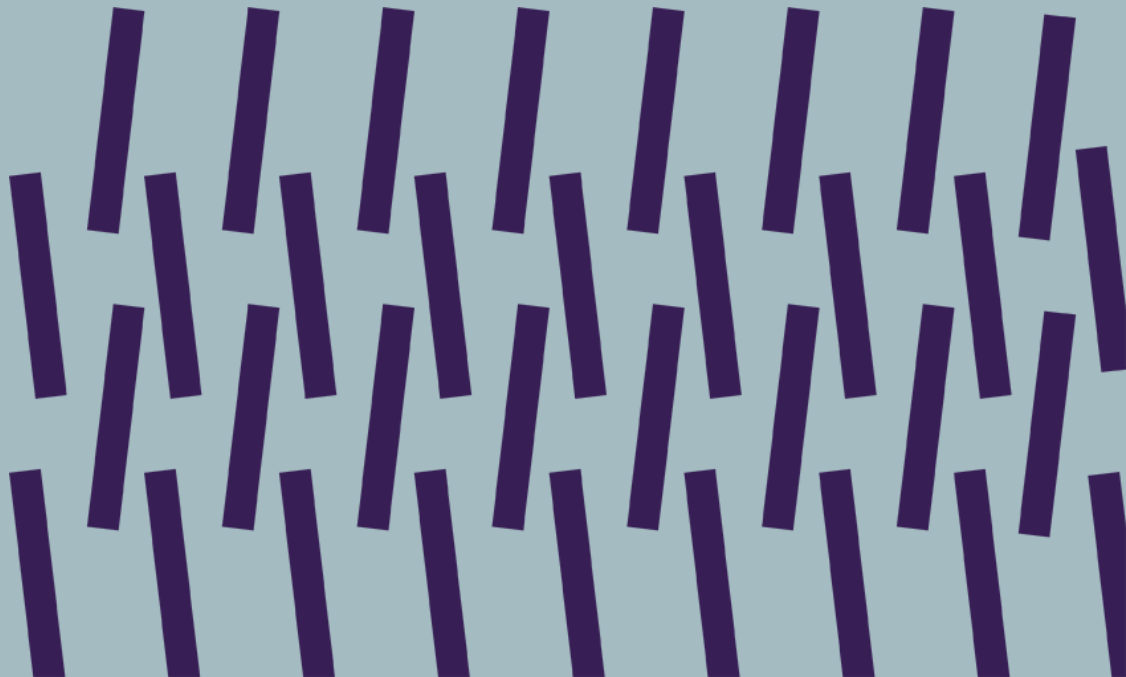
Welcome and introduction



A few words from me

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- The *BSA* aim is to challenge some of the fundamental safety issues in construction by highlighting ownership and responsibility for remedial works …to make a building safe.
- The BSA regime puts in place a *far more stringent oversight*, with *clearer accountability* for the safety of **high-rise residential buildings** '***HRBs***' throughout design, construction, and occupation, *backed by stronger enforcement and sanctions* **to deter and rectify non-compliance**.
- Government is intent on making the industry clean up and pay. A polluter pays philosophy.
- I think the BSA leaves a lot to be desired in its drafting and many cases will test it and the various regulations following in the years ahead.

A recap

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- The Act came about following the Grenfell tragedy in which it was recognised that allocating responsibility for remedial works to make buildings safe required legislature input. The main aim of Act is to **define who should foot bill to remediate both historical cladding defects** and historical non-cladding defects of higher risk buildings.

- It widens the duties on landlords of residential buildings considered higher-risk to remediate building defects, to ensure that the requisite safety standards required by the Act are met (at least 11 metres high or 5 storeys).

- Qualifying leaseholders in England can no longer be charged to remove unsafe cladding systems, and there are legal protections in place for non-cladding costs.

- Building owners are now liable to pay to fix historical fire safety defects if they are (or are linked to) the developer of a building and meet a certain wealth threshold.

A recap…

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"The Act thus eradicates the idea that leaseholders should be the first port of call to pay for historical safety defects".

The new regime places legal responsibilities on all those who: -

(i) participate in the design and construction of higher-risk buildings,

(ii) commission higher-risk building work, and

(iii) those who are responsible for managing structural and fire safety in higher-risk buildings when they are occupied.

A recap…

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- Last year saw the industry starting to get to grips with the Building Safety Act in force since 28 April 2022, alongside other changes such as the extension to liability in the Defective Premises Act in June 2022.
- Whilst 2022 was a monumental year for building safety legislation – 2023 is where the true test begins!
- In March alone there have been two matters I want to mention, the Govt. *Consultation outcome* from the Department for Levelling Up, Housing and Communities (DLUHC) consultation that sought views on proposals for improving the building safety regime for occupied higher-risk buildings.
- Then on 22 March 2023 we saw the **first Building Safety Conference**, hosted by HSE's **Building Safety Regulator** (BSR).
- This year we will see the launch of the Building Safety Act's secondary legislation – for many the practical delivery of projects and management of occupied buildings will change.
- *Registration* …Next month, registration of the 12,500 existing HRBs will open. Six months later that window will close and those with buildings within scope (seven storeys or 18m+, with two or more residential dwellings) will face penalties if they have not registered within this time.
- *Competence* …It is faintly disturbing to think back in 2015 that the construction industry decided defining competence was *too bureaucratic*! Sadly, Grenfell taught us that this is a key area that needs improving. But we need clear building regs too!
- *Gateways* …this urgent priority for those involved in construction projects, both in pre-construction and delivery stage is whether they are ready, or rather organised enough to meet Gateways 2 and 3 requirements that coming into operation in October!

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"Keep 'em peeled!" https://www.gov.uk/guidance/the-building-safety-act-secondary-legislation

Our speakers

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- By all events the construction industry will see major changes this year as the new building safety regime comes into play.
- I am joined by two brilliant lawyers to talk all about these matters over the next 45 minutes…
- First by the barrister **Omar Eljadi** of leading construction set, *Atkin Chambers*, who specialises in disputes within the construction, engineering and energy sectors and an expert in this BSA field having appeared as counsel to the largest group of bereaved families, survivors and former residents in the Grenfell Inquiry.
- And from my own firm ***Ben Smith*** a Senior Associate who is spending much time in this BSA construction field and speaking regularly upon it.

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BSA 2022 in Action

New Claims

- DPA / Building Act / Products
- Building Liability Orders
- Remediation Orders and Cost Contribution Orders and the FTT

Claims in Court

- Limitation
  DPA Claims
- Approach of the Courts

Changes for the Industry

- Developer Remediation Contract & Responsible Actors Scheme
- New Regulations and Parts 3 and 4 of the BSA
- A "match fit" regime?
  What's coming next?

Changes to the DPA 1972

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	DPA 1972	Changes in BSA 2022
Limitation:	6 years (Limitation Act 1980, s. 9).	Prospective: 15 years (Limitation Act 1980, s. 4B(1))
		Retrospective: 30 years (Limitation Act 1980, s. 4B(4))
Refurbishments:	s. 1(1): Provision of a dwelling only	s. 2A of DPA: Work to existing dwellings
		"takes on work in relation to any part of a relevant building".
Case Law:	Very limited.	Will undoubtedly grow.

New Claims

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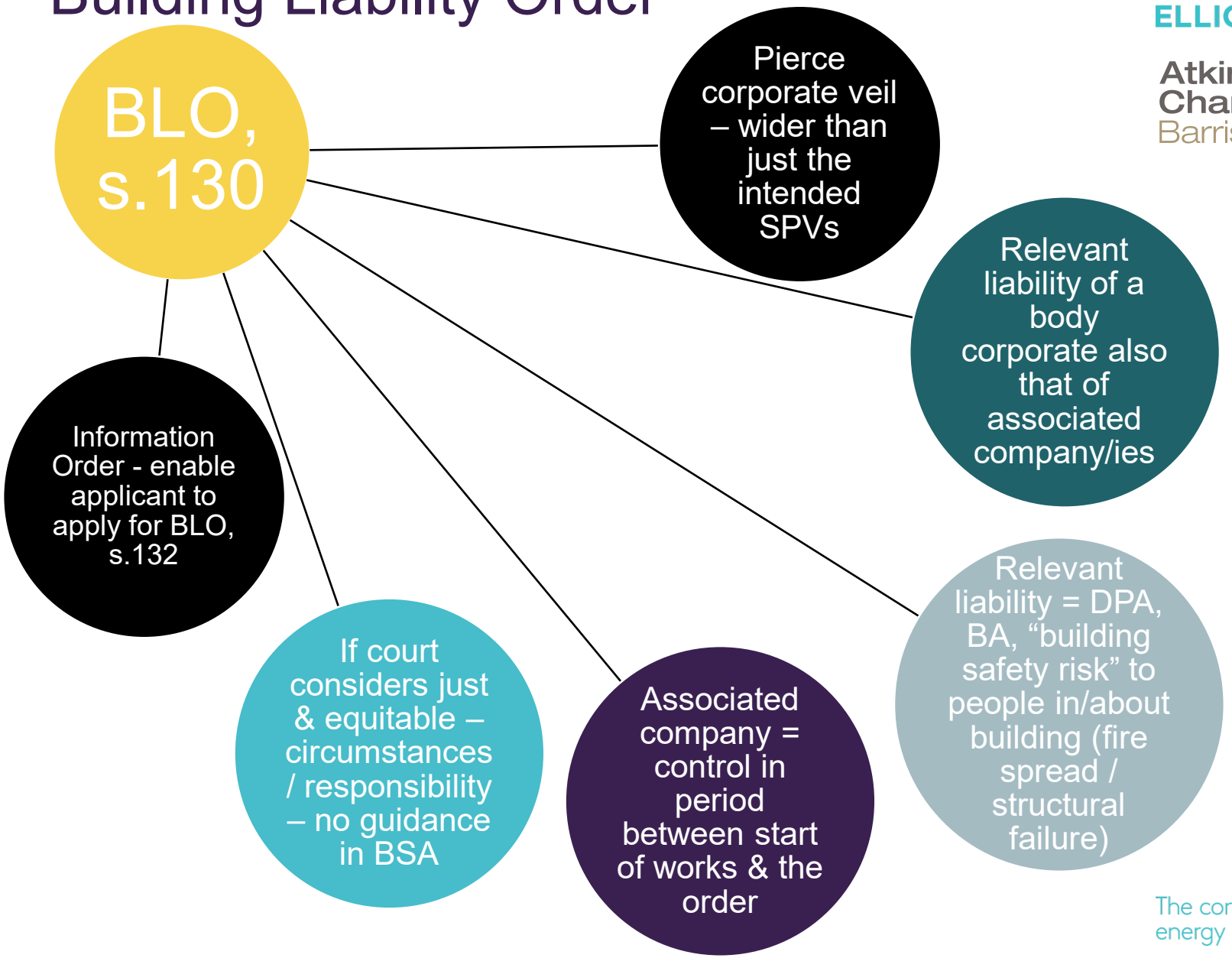
Claim	Defective Premises Act 1972, s.2	Building Act 1984, s.38 (not in force)	Products – BSA 2022, s.148/149
Claimant	Person with legal / equitable interest in the dwelling	Anyone suffering damage because of breach of BR	Person with legal / equitable interest in the dwelling
Defendant	Person working on / in connection with refurb of dwelling (as well as provision)	Any party who has breached BR, causing caused damage	A person who fails to comply with CPR, makes a misleading statement or supplies a defective product *
Building	Any dwelling	Any building	Building consisting of 1 or more dwellings
Duty	Work to be done in workmanlike/prof manner	Comply with BR	* Causes building to be unfit for habitation
Limitation	30 yrs retrospective 15 yrs prospective	15 yrs prospective	30 yrs retrospective 15 yrs prospective

Building Liability Order



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Remediation and Contribution Orders (sections 116 – 125 BSA)

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- Remediation and Contribution Orders are designed to empower "*interested parties*" which includes the HSE, local authority and leaseholders, to bring an action against the "*relevant landlord*" of a "*relevant building*" in respect of a "*relevant defect*", i.e., one which causes a "*building safety risk*". This is defined as risks to safety of people due to the spread of fire or collapse of the building.

- A Remediation Order compels the "*relevant landlord*" – in this case the landlord named on the lease who is required to repair and maintain the building - to remedy the relevant defects in a particular time.

- A Contribution Order compels the "*relevant landlord*", where it is just and equitable to do so, to contribute towards the costs incurred or to be incurred of remedying the defects at a particular time, or on demand.

- The scope of a Contribution Order can be much wider than a Remediation Order as the definition of "*relevant landlord*" includes the immediate landlord, previous landlord, developer or an "associated person" of any of those companies, i.e., a company which has the same partner / director, or is a parent company.

- The definition is deliberately wider for Contribution Orders to enable leaseholders to get around the use of complex company structures, for example, shell companies.

- The risks associated with Remediation and Contribution Orders therefore relate to landlords and developers, albeit they could also apply to main contractors who have taken on the role of developer previously.

The First Tier Property Tribunal

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- Applications for Remediation and Contribution Orders are heard by the First Tier Property Tribunal. This is not a specialist, construction specific forum, unlike adjudication and the TCC. FE have been previously instructed on a application in the FTT.

- *Batish v Inspired Sutton Ltd* (2023) is the first Contribution Order decision to be issued by the FTT.

- The application was made by eighteen leaseholders of fifteen long leases. The building itself is a high-rise block of flats that was converted from office accommodation in around 2017. Inspired Sutton Ltd ("ISL") was both the developer who carried out the conversion and the freeholder of the building.

- The leaseholders and ISL were aware that the materials used in the development, including ACM and HPL cladding, constituted a significant fire risk. Inspired Sutton Ltd therefore engaged contractors to carry our remediation work.

- While the cladding remediation works were funded by government grant, the works to replace balconies that also constituted a fire risk were not. ISL issued invoices to the leaseholders in respect of the balcony remediation works.

- The FTT considered it was "*just and equitable*" to make a Contribution Order as the lessees had paid for cost of works which should have been met by ISL (not clear why the fact the costs had been paid was relevant, given wide scope of Contribution Orders) and such costs were not part of the service charge calculation. ISL was ordered to pay £194,680.62.

Defending Claims after the BSA

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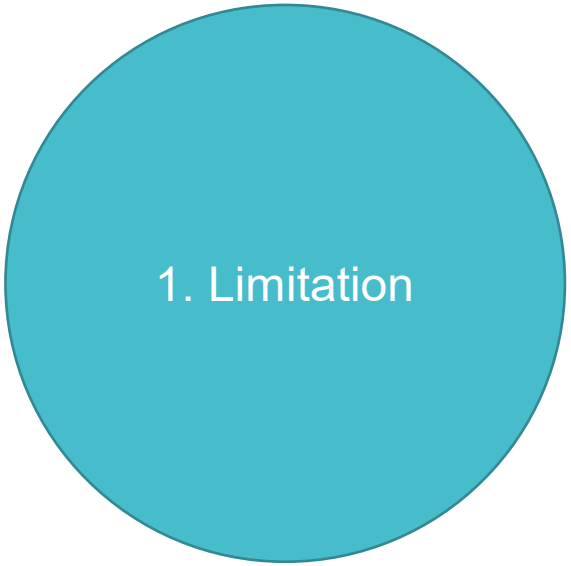

- Still relevant to claims for breach of contract:
  - Building Contract
  - Collateral Warranties.
- Why important? Absolute vs. strict liability obligations
- E.g., Compliance with "Statutory Requirements":

> *"The Contractor shall carry out and complete the works in a proper and workmanlike manner and in compliance with the Statutory Requirements…"*

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Defending Claims after the BSA

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1. **Is it a "dwelling"?**

2. **"Workmanlike" or "professional manner"**

   - Reasonable skill and care

   - Must show breaches of regulations caused by failure to exercise reasonable skill and care

2. **"Proper materials"**

3. **"so that the dwelling will be fit for habitation when completed".**

4. **Whose loss?**

NB. Cannot exclude or restrict liability: s. 6(3)

Defending Claims after the BSA

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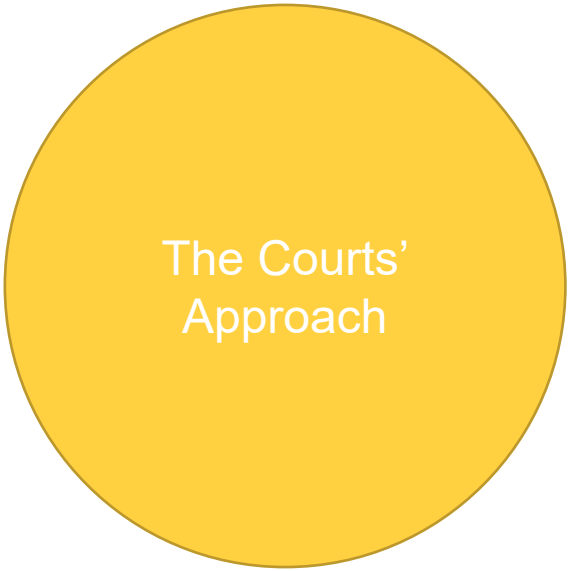

1. *Martlet Homes v Mullaley & Co Ltd* [2022] EWHC 1813 (TCC)

2. *LDC (Portfolio One) Ltd v George Downing Construction Ltd* [2022] EWHC 3356 (TCC)

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Martlett v Mullaley [2022]

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The Facts

- ***Martlett*** claimed it was entitled to refurbish five tower blocks in Gosport which had an external wall Sto render insultation system that included combustible expanded polystyrene insulation (EPS), and defects in the installation of both the fire breaks and the EPS installed by Mullaley.

- ***Mulalley*** denied liability on basis of: the Sto system was compliant with the specification at time of construction and the real cause for the remedial works was due to the '*changed fire-safety landscape'* post-Grenfell, and not Mulalley's specific breaches.

- The Court specially considered the Building Regulations 2000 and 2010, BRE 135 (1988 and 2003 editions), Approved Document B (2002 and 2006 editions) and the BBA Certificates relating to the Sto system (1995 - 2017) and made the following findings which are relevant to fire safety claims and, arguably, all defect claims.

Martlett v Mullaley [2022] (cont)

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Breach

- There were defects in the installation of both the fire breaks and the EPS (which would have only justified repair, not replacement) and *Mullaley* had not complied with the specification at the time of construction.
- As regards the specification breach, it was not sufficient for Mulalley to rely on the 1995 BBA certificate to prove the system complied with BR. BBA Certificates *"cannot be said to amount to a form of "guarantee" or "passport" to compliance with the Building Regulations"*.
- You need to assess the cladding as a system. The Sto system should not have been used in the absence of any evidence which showed that it met the performance standards in Annex A of BRE 135 (2003 edition) in accordance with the test method set by BS 8414. There was also no evidence that the system satisfied all the BRE 135 (2003) criteria so replacement was justified.
- The Court was also clear that widespread use of that type of cladding was no excuse, and said that Mulalley's argument that "*everyone else was doing it*" was not a "*get out of jail free card*".

Causation

- The Judge found *Mulalley's* breaches were "an effective" cause of the loss. It does not matter that there may have been other effective causes. Query how "effective" it has to be.

Martlett v Mullaley [2022] (cont)

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Loss

The decision to undertake remedial works must be reasonable, but claimants will not be criticised where:

- They were caused by a breach of another party.
- Urgent decisions had to be taken.
- Decisions had to be made with incomplete information.
- Reasonable does not mean “cheapest”.
- It is more likely to be reasonable if based on expert advice (provided the advice was not negligent), although this is not conclusive.
- The court will be influenced by the Claimant doing the right thing; i.e. keeping people safe.
- A Claimant can reject proposals made by Defendants (although they should document why and have a good reason).
- If the cladding system was not proven to be compliant (e.g. had not passed a BS 8414) then replacement is more likely to be reasonable.

LDC v (1) George Downing; (2) European Sheeting (in liquidation)

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- The first defendant was George Downing Construction Limited ("Downing"), which was the main contractor. The second defendant was European Sheeting Limited ("ESL"), which was in liquidation, and was the specialist external wall sub-contractor with responsibility for the installation of the cladding.

- The claim was for re-cladding and associated remedial works to cure fire safety and water ingress issues in relation to the external wall construction of three 18m+ halls of residence carried out by LDC.

- The main contract between LDC and Downing and the subcontract between Downing and ESL were intended to be back to back and contained the following common provisions:

  - The main contract required Downing to comply with "*all Statutory Requirements*"

  - The subcontract confirmed ESL had knowledge of the terms of the main contract and that ESL was required to execute the subcontract so as not to put Downing in breach of the terms of the main contract. ESL also had an obligation to carry out the subcontract works with reasonable skill and care.

LDC v (1) George Downing; (2) European Sheeting (in liquidation)

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- Two weeks prior to trial, Downing agreed a settlement with LDC for £17,650,000. In effect, LDC and Downing both agreed that the blocks did not comply with Building Regulations as a result of numerous defects in its design and installation.

- In the proceedings, Downing sought an indemnity and/or contribution from ESL in the amount of the settlement sum, plus its reasonable costs of defending the claim brought against it by LDC. The liquidator for ESL stated that she did not object to judgment being entered. ESL also submitted a defence which was therefore considered by the Court.

- ESL argued that it was only subject to the reasonable skill and care obligation and the remedial works were unreasonable and/or constituted an enhancement or betterment to LDC.

LDC v (1) George Downing; (2) European Sheeting (in liquidation) (cont)

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The Court found:

Breach

- All "*all Statutory Requirements*" included the Building Regulations.
- ESL was obliged to comply with provisions of the Main Contract and therefore had a strict obligation to comply with the Building Regulations (citing *Martlet Homes Ltd v Mulalley & Co Ltd)*.
- The Court commented that treating the more onerous strict obligation as qualified by the duty of reasonable skill and care would render the more onerous strict obligation redundant and ESL's interpretation would defeat the commercial intent to create back-to-back contracts.
- The Court also found, with respect to the water ingress issues and fire safety defects, that where there is a failure to comply with Building Regulations it is also a failure to act with reasonable skill and care.
- Significantly, and while not an automatic presumption, this appears to indicate that if guidance in Approved Document B and the Building Regulations have not been complied with then the starting assumption may well be that a party is negligent.

LDC v (1) George Downing; (2) European Sheeting (in liquidation) (cont)

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In respect of ESL's position that the remedial costs were unreasonable the Court commented:

- that the remedial costs actually incurred will always be the starting point as to what is reasonable, particularly where those costs are incurred following advice

- that where a party had followed the advice of an expert this could convert expenditure into reasonable expenditure. In the present case LDC had engaged various experts to advise on the remedial works.

- when considering the reasonableness of alternate remedial schemes, it is necessary to consider their cost, efficacy and any guarantees or bonds issued by the relevant manufacturer or contractor.

- following *Martlett v Mullalley* the Court will not be too critical of a Claimant's actions where it is acting as a matter of urgency, or on the basis of incomplete information.

- It is not an answer for the Defendant to point to an alternative, cheaper means of carrying out the works; it must show that Claimant's scheme was unreasonable.

LDC v (1) George Downing; (2) European Sheeting (in liquidation) (cont)

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- With regards betterment to LDC, the Court stated that a deduction for betterment will not usually be made where the Claimant has no choice but to carry out the repair or reinstatement work even where that results in the Claimant having a newer or better building. This is still the case where, the Claimant is obliged to comply with new or enhanced requirements.

- With regards to reasonable settlement The question was whether the settlement sum Downing had agreed with LDC was reasonable, the Court found:

  - The test for reasonableness was whether "the settlement was, in all the circumstances, with in the range of settlements which reasonable people in the position of the settling party might have made"
  - Here, the settlement reflected parties' experts' views on the costs of the remedial works and was agreed following legal advice, plus avoided costs of a trial, so was reasonable.
  - Dowding, was entitled to recover amount of the settlement plus its reasonable costs in defending the claim from ESL = >£21m.

What is coming up?

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- ***URS Corporation Limited v BDW Trading*** (Court of Appeal; April 2023): Concerns effect of s. 135 and the retrospective effect of the extended limitation period.
- ***Grenfell Tower Inquiry, Phase 2 Report:***
  - Not clear when coming.
  - Likely to heavily influence judicial decision making re. reasonable skill and care.

Developer Remediation Contract

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Government letter to developers 30/1/23.

Sign the new contract, with these terms, by 13/3/23:

Responsible for necessary work to address life-critical fire-safety defects arising from design & construction of buildings >11m developed / refurbished over last 30 years in England..

Keep residents informed on progress towards meeting this commitment.

Reimburse taxpayers for funding spent on remediating their buildings.

Or face:

Ban from Responsible Actors Scheme

Naming & Shaming

Government review of its contracts / relationships

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Responsible Actors Scheme

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Schemes - set up for any purpose connected with securing safety of people in or about buildings in relation to risks arising from buildings or to improve the standard of buildings (BSA s.126).

Regs can describe who can be members and eligibility criteria to join and remain; e.g. remedying defects, contributing to remediation costs, using construction products (or not) of prescribed persons (linked to their scheme membership / conduct), providing info, competence or conduct of directors.

SofS can block anyone who is eligible to join a scheme, but has not, from developing land. The prohibition can be for any purpose connected with securing safety of people in or about buildings in relation to risks arising from buildings or to improve the standard of buildings. (BSA s.128)

SoS can also block them from going through the building control process for the same purpose, so the development would stall. (BSA, s.129)

The Responsible Actors Scheme is the first.

Consequence of not participating are severe – blocked from developing or progressing a development, so effectively taken out of the market.

The Building (Amendment) (England) Regulations 2022

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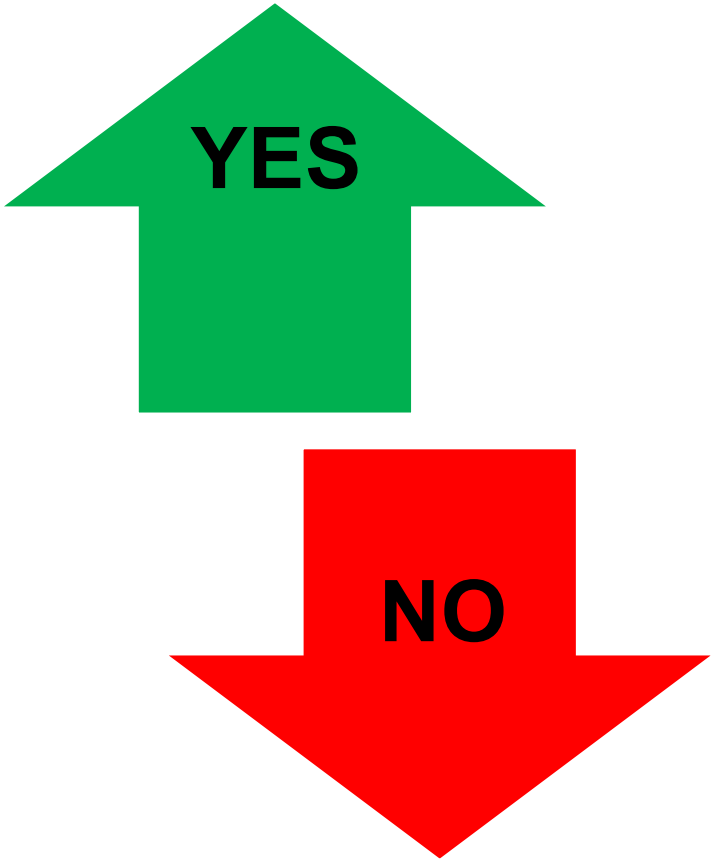
- Response to consultation process on changes introduced by the Building (Amendment) Regulations 2018, banning combustible materials in external walls of buildings >18m in England.
- Applies with effect from 1/12/22, unless the initial notice was lodged before 1/12/22 and works had started or will have started within 6 months.



- Combustible materials in fibre optic cables, insulation up to 300mm from ground level, ground floor awnings and (for 18-months only) cavity trays in all forms of construction.
- Combustible materials in residential buildings (and balconies) >11m but <18m, provided the overall external wall construction meets performance requirements in BR 135 using full test data from BS 8414 test. (ADB updated).

- Combustible materials (i.e. do not meet euro class A1 or A2 s-1,d0 performance criteria) in external walls of residential buildings >18m / 7+ storeys, including hotels, hostels and boarding houses.
- Combustible materials in curtains / slats of solar shading devices.
- Use of “Grenfell MCM” in **ALL** new / modified buildings.

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Fire Safety (England) Regulations 2022

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"*Keeping the public safe is our utmost priority and we are committed to ensuring that the Grenfell tragedy must never happen again*".

These Regulations impose onerous obligations on "Responsible Persons" (in control of the building, e.g. owner or landlord), who can be fined / imprisoned for failing to comply.

All

- Give fire safety instructions (inc. info on how to report a fire, what to do in a fire) to residents; and
- Provide residents with information regarding the importance of fire doors in managing fire safety.

>11m

- Check flat entrance doors annually and all fire doors in common parts quarterly.

>18m

- Check firefighters / evacuation lifts & firefighting equipment, monthly.
- Report any defects to Fire Service if cannot be fixed within 24 hours.
- Install/maintain a secure information box containing RP's contact details and building floor plans;
- Install signage to be seen in low light or smoke, including floor and flat numbers in stairwells.
- Supply local Fire Service (electronically) with current floor plans and info about design / materials of external walls.

Came into force on 23 January 2023 and apply to buildings including 2+ residential dwellings, in England only.

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

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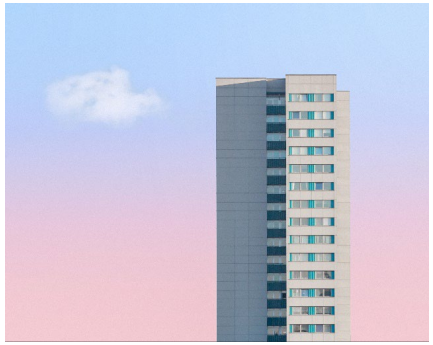
- Draft, which comes into force on 6/4/23.
- Government's response to consultation on definition of "*higher-risk building*" used in the BA 1984 and BSA 2022.
- Looks at two periods:
  - Design & construction
  - Occupation
- How to measure / what constitutes a "storey":
  - Ground level to the top of floor surface on top storey.
  - Discount anything under ground floor and purely plant rooms on the top.
  - Mezzanines >50% of floor space.



- The Higher-Risk Buildings (Key Building Information etc.) (England) Regulations 2023. Draft, which comes into force on 6/4/23.
- The Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations 2023, coming into force 6 April 2023.

Design & Construction

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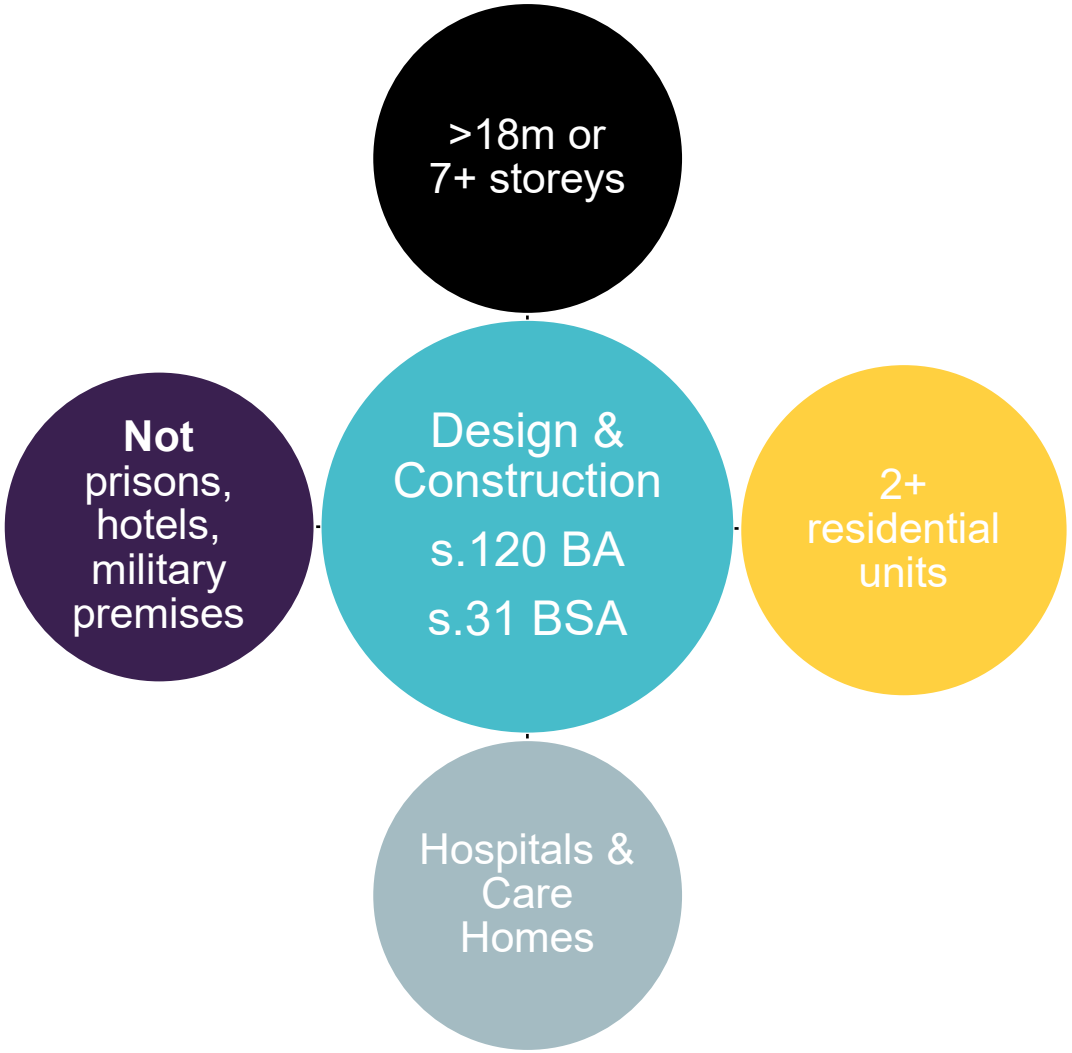

- Part 3 of the BSA
- Building Act 1984
- Building Control Authorities and Building Regulations
- Dutyholders
- Gateways
- Golden Thread

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Occupation

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- Part 4 of the BSA
- Higher-Risk Buildings
- Regulation of occupied HRBs
- Accountable Persons and Principal Accountable Persons
- Registration
- Assessments
- Compliance Notices

What is coming up?

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- The results of a number of government consultations should be published including:
  - Implementing the new building control regime for higher-risk buildings and wider changes to the building regulations (closed).
  - Building Safety Levy (closed).
  - Consultation for changes to the building control profession and the building control process for approved inspectors (closed).
- Publishing of secondary legislation for the Responsible Actors Scheme (Building Industry Scheme).
- April 2023 Registration for existing occupied HRBs opens for high-rise residential buildings which are 18m tall or higher, or at least seven storeys.

What is coming up? (cont)

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- Gateways two and three to come into operation (October 2023).
- October 2023 remains the deadline for the BSR to become the building control authority for High-rise Residential Buildings which will include the following steps:
  - Mandatory registration of building inspectors and building control approvers.
  - Mandatory registration of new occupied high-risk residential buildings.
  - Establishment of a Building Advisory Committee to advise the BSR on developing future building regulations.
  - Establishment of the Industry Competence Committee to publish public guidance on industry competence and advise the Building Safety Regulator on this issue.
- New duties on the Accountable Person with regard to managing safety risks in higher-risk buildings.
- Commencement of mandatory occurrence reporting pertaining to fire and structural safety issues.

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Thank you. Questions?

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