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The new Building Safety Act 2022: what you need to know

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Reforms affecting claims & liability

Simon Kerry



The pre-existing landscape

- **Contract** - Only where a contract is in place
- **Tort** - Physical damage, not PEL
- **DPA 1972** - Provision of “new dwelling”

LIMITATION

INSOLVENCY/
CORPORATE VEIL

New routes to recovery

Defective Premises Act 1972

Work to existing dwelling

Construction products

Manufacturing or misselling

Building Act 1984 (when it comes into force)

Section 38

Building Liability Orders

Piercing the corporate veil

Defective Premises Act 1972, section 2A

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(1) *This section applies where a person, in the course of a business, **takes on work in relation to any part of a** [building containing one or more dwellings].*

Compare section 1:

(1) *A person taking on work **for or in connection with the provision of a dwelling** (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty...*

Defective Premises Act 1972, section 2A

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(3) *The person owes a duty to—*

(a) *the person for whom the work is done, and*

(b) *each person who holds or acquires an interest (whether legal or equitable) in a dwelling in the building,*

to see that the work is done in a workmanlike or (as the case may be) professional manner, with proper materials and so that as regards the work the dwelling is fit for habitation when the work is completed.

Liability: **prospective**

Building Act 1984 (when it comes into force, section 38)



(1) Subject to this section—

*(a) breach of a duty imposed by building regulations, so far as it causes **damage**, is actionable, except in so far as the regulations provide otherwise...*

What is “damage”?

(4) In this section, “damage” includes the death of, or injury to, any person (including any disease and any impairment of a person's physical or mental condition).

Government factsheet: “physical damage (e.g. injury or damage to property)”... “Purely financial loss is not covered by section 38...”

Liability: **prospective...** when it arrives!

Construction products

BSA 2022, section 148

*... 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.*

And the “construction product” is used in the construction of a building which, as a result, is unfit for habitation.

Construction products

BSA 2022, section 148

(6) The person referred to in subsection (2)(a), (b) or (c) is liable to pay damages to a person with a relevant interest in relation to the relevant building for personal injury, damage to property or economic loss suffered by that person as a result...

Contrast s. 38 of the Building Act 1984

Liability: **prospective**

Construction products - cladding

BSA 2022, section 149

*... 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.*

Liability: **retrospective!**

Building Liability Orders

- (1) *The High Court may make a building liability order if it considers it just and equitable to do so.*
- (2) *A "building liability order" is an order providing that any relevant liability (or any relevant liability of a specified description) of a body corporate ("the original body") relating to a specified building is also—*
 - (a) *a liability of a specified body corporate, or*
 - (b) *a joint and several liability of two or more specified bodies corporate.*

Building Liability Orders

- (3) *In this section "relevant liability" means a liability (whether arising before or after commencement) that is incurred—*
- (a) *under the Defective Premises Act 1972 or section 38 of the Building Act 1984, or*
 - (b) *as a result of a building safety risk.*

"Associated companies" – parents and sisters.

Limitation

- Contract/Tort – no change
- Defective Premises Act 1972
 - Section 1 – 30 year retrospective limitation
 - Section 1 or 2A – 15 year prospective limitation
- Building Act 1984, section 38
 - 15 year prospective limitation
- Building Safety Act 2022
 - Construction products (s148) – 15 year prospective limitation
 - Cladding products (s149) – 30 year retrospective limitation

Problem areas

1. When will it be “just and equitable” to make a BLO?
2. What is a liability “incurred as a result of building safety risk”?
3. What is a “misleading statement” in relation to the new construction/cladding product causes of action?
4. Does it have to have been intentionally misleading?
5. Practical problems: alleged breaches from 30 years ago...?

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Key aspects of the Building Safety Act

Michael Levenstein



Building Safety Regulator (BSR)



- Section 3(1):
 - (a) secure the safety of people in buildings
 - (b) improve the standard of buildings
- Core statutory functions:
 - Implement new regulatory regime for “higher-risk buildings”
 - Oversee safety and standard of all buildings
 - Improve competence of persons

BSR Duties and Powers

- Other duties and powers:
 - System for giving building information
 - Building Advisory Committee
 - Residents' Committee (including for disabled residents)
 - Also has powers to direct local authorities to do anything required to assist the regulator
- Enforcement Powers:
 - Compliance and Stop Notices
 - Investigatory powers and possible imprisonment

“Higher-risk buildings”

- Parts 3 and 4 relate to “higher-risk buildings”
- Part 3 enables BSR to be the Building Control Authority for “higher-risk buildings”:
 - 18m / 7 storeys; contains 2+ residential units / is a hospital / care home
- Part 4 relates to completed buildings’ safety management:
 - 18m / 7 storeys; contains 2+ residential units
- Occupation stage: no hospitals or care homes

Dutyholders



- Dutyholders scheme applies to **all** buildings and runs from planning to occupation stages
- Key dutyholders during construction:
 - Client; principal designer; principal contractor; other designers and contractors
- Client's duties include ensuring work is done in compliance with regulations and **competency requirements**:
 - *“skills, knowledge, experience and behaviours necessary”*

Dutyholders' Duties

- General duty to ensure all work is done in compliance with requirements
- Designer:
 - Cannot start work until satisfied that client is aware of their duties
- Contractor:
 - Provide **each worker** with appropriate instructions to ensure work is done in compliance with regulations
- Contravention of building regulations is a criminal offence
- Offences committed with consent of a corporate officer could render the individual liable

The Golden Thread



- Original client must arrange for “golden thread information”
 - Safety information about the building
 - Information management systems
- Purpose
 - Single record of building’s safety information to be passed down
 - Prevent new owners/landlords having inadequate information about fire doors/building materials

The Accountable Person

- The Dutyholder with statutory responsibility in an occupied building, per section 72:
 - A person who holds a legal estate in possession in any of the common parts
 - A person who does not hold such an estate but is under a repairing obligation
- Principal accountable person:
 - Person who holds legal estate in relevant parts of structure/exterior of the building or has a repairing obligation
 - Landlord/management company/occupiers

Responsibilities of the Accountable Person

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- Apply for Building Assessment Certificate or register existing higher-risk buildings
 - Failure is a criminal offence
- Also assess building's safety risks; manage these risks; produce safety report
 - Managing risks includes repair works
- Failure could result in compliance notice (contravention is a criminal offence)

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Practical implications

David Bebb



Introduction



1. Focus on how a project is procured and what contract may need to say going forwards.
2. It's a moving target. Some provisions are in draft and not yet in force (could be 18 months away) and therefore not seeing this addressed in contracts. Can't share real life experience.
3. We are lawyers not designers or contractors. BSA has huge impact on them in terms of how a project gets to site, gets built and can be occupied. BSA has a very different impact than previous legislation (eg the Construction Act).
4. Lawyers really need to understand the ins and outs of a particular project before advising.
5. Cover: gateway systems, change management, risk of delays both starting on site, during construction and at pc. All the usual suspects in terms of causes of problems on projects.
6. Won't focus on any form of contract. Principles apply to all forms of contract and across the suite of contracts (eg main contracts, sub-contracts and appointments).

Gateway 2 – before work can start



1. The Building (Higher-Risk Buildings) (England) Regulations. The most useful read in terms of the practical requirements of getting the job designed, built and signed off.
2. “Higher Risk Building”: at least 18m in height or has at least 7 storeys and of a description specified in Regs.
3. “HRB Work”: construction of higher-risk building; work to existing building which causes it to be higher-risk building; change of use to higher-risk building.
4. Replaces the “deposit of plans” (or plans-check) stage part of Building Control for Higher-Risk-Buildings (HRB). Under current regime decision given in 5 weeks (or 2 months if agreed).

Gateway 2 – before work can start cont'd



5. Application to include various information (around 30 items) and regulator must approve within 12 weeks or such longer agreed period. Over twice the current statutory timeframe under the plans-check regime.
6. Some of the greyer requirements warrant their own schedule (e.g. definitions of “*construction control plan*”, “*design and build approach document*” and “*fire and emergency file*” are in Schedule 1.
7. Current Govt factsheet includes the following: “*Building regulations should be considered holistically with an outcome focused approach*” and “*all plans and documents must be realistic for the building and not rely on unreasonable assumptions about the occupied building once built*”.
8. Relevant part of the Regs: Part 3, Regs 3-9 (about 5 pages).

Gateway 2 – before work can start cont'd



Main contract signed *before* Gateway 2 is passed then consider:

1. Clear matrix of responsibility for Gateway 2 requirements along with dealing with any assumptions made. Affects ability to pass Gateway 2 and therefore start of work.
2. Implications of Gateway 2 not being passed because of employer / employer design team delay. Will existing contract provisions still work?
3. Obligation not to start work until Gateway 2 passed
4. Implication of staged approval process - consider all the 'what if' scenarios?
5. Implication of agreeing longer than the statutory 12 weeks with the Building Regulator and why agreement was needed.
6. Implication of delay by Building Regulator. Will existing contract provisions still work? Will Building Regulator be sufficiently resourced?

Gateway 2 – before work can start cont'd

7. Implication of refusal by Building Regulator or granting approval subject to requirements (see Reg 7(3)). Requirements include: (1) provide specified document within specified period (2) allow work to progress only to a specified stage. Consider all the 'what if' scenarios with express obligation on contractor not to proceed beyond the point specified by Building Regulator.
8. Regulator can require that (1) notice is given when a specified stage of work has been reached and/or (2) specified work is not covered up for a specified period (Reg 8). What is the implication of this under the contract?
9. Any other issues which arise from the Regs and could affect the project and are different from how the current regime works. Construction lawyers need a really good grasp of the project. Over time the industry will adjust but there will be a learning curve.

Gateways 2 and 3: During the Work

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1. Regulations set out detailed change control process (Regs 11 – 18).
2. More likely cause of problems because programme is ticking and work is up and running. Very difficult to stop work. VE impact? Impact of the unexpected (eg when converting existing building (note the definition of HRB Work))?
3. Covers changes carrying out the works ‘otherwise in accordance with the current plans’ (wide?), how the work is done (eg changes to construction control plan) and changes to the golden thread arrangements (Reg 11(1)). Known as ‘*controlled changes*’.
4. Controlled changes include ‘*notifiable changes*’ and ‘*major changes*’. Regs do not yet define what these are. *Notifiable*: wait 14 days before carrying out. *Major*: cannot carry out until change control application granted.
5. Detailed requirements for application: explain change and why, who has advised on change (eg fire engineer), explain why change complies, revised version of the drawing, spec etc.
6. Regulator has 4 weeks to determine change control application (currently in draft).

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Gateways 2 and 3: During the Work cont'd



Things to think about in the main contract and appointments:

1. Very similar obligations to those where contract signed *before* Gateway 2 (eg delay by Building Regulator, etc). All need to be considered. This will be a learning curve.
2. Consider the reason for the change. Client driven (eg VE,) or contractor driven (proposal to change design to overcome issues (eg supply chain, unforeseen issues in an existing building). Risk of BSB sit with the party that initiates the change?
3. Risk of errors in the Gateway 2 design that come to light after construction has started. Is this any different to current D&B contracts? The design will have to be varied and will need to comply with Statutory Requirements.
4. Design submission procedure (status A, B, C).

Gateway 3: Handing over the work

1. Regulations set out detailed requirements (Regulation 31-36).
2. Numerous documents to be handed over along with compliance declarations from contractor and designers. This should not be an information dump.
3. Building Regulator must attend site and inspect before issuing completion certificate (Reg 33). Does not say this can *only* be done *after* receipt of the application. Early engagement to reduce timeframes? Perhaps of limited use.
4. 12 weeks to determine or such longer period as may be agreed with the applicant (Reg 34). 12 weeks still to be confirmed.
5. If 12 week period cannot be improved on (eg through early engagement of Building Regulator) then (in effect) building is finished but cannot be occupied. Impact on Agreements for Lease etc? No different to current regime other than more hurdles to clear?

Gateway 3: Handing over the work cont'd

6. Requirement for PC may include Gateway 3 and this will be a negotiation point. Well advised contractors will be thinking about: (1) cashflow (2) retention (3) delay by Building Regulator.
7. Appeal process (Reg 38). Who decides to appeal and bear the risks of the outcome?
8. Impact on funding (eg final drawdown only once Gateway 3 achieved).
9. Partial completion certificates (Reg 36). Buildings that lend themselves to sectional handover are usually designed that way anyway (cost/benefit analysis). Should the 12-week period now be factored into that analysis? 6 week period to determine (Reg 36(9)).
10. Expiry of bonds and start of defects periods.

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Thank you!
Questions?

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