

How is the Building Safety Act  
(BSA) influencing practice and  
what strategies can give your  
clients an edge, particularly over  
Remediation Contribution Orders  
and Building Liability and  
Information Orders?

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# Background to the BSA 2022

- Grenfell Tower Fire June 2017
- Screening programme to identify tall buildings and unsafe cladding
- Hackitt Report May 2018 “*regulatory system...not fit for purpose*”
- Building a Safer Future consultation April 2020 – proposals for long-term reform building safety system
- Phase 2 Grenfell Inquiry commenced 2020

# Building Safety Act 2022

- Royal Assent 28 June 2022
- Some parts enforceable since 28 June 2022
- An act of six parts and eleven schedules
- Amends existing legislation including Defective Premises Act 1972 (DPA) and Limitation Act 1980
- Part 5 – includes provisions about remediation and redress

# Section 124 Remediation Contribution Orders

What is a remediation contribution order (s.124(2))?

- Order by First Tier Tribunal
- Requires a specified body corporate or partnership
- Make payments to a 'specified person'
- For purpose of meeting costs incurred or to be incurred in remedying \*relevant defects (or specified relevant defects) (\*building safety risk – fire/collapse)
- For relevant building (11m/5 storeys, at least two dwellings)

# Purpose – Explanatory Notes

- Part of the “leaseholder protections”
- Intended to contribute to timely remediation of buildings
- New legal remedy to require developers to pay for the costs of remediation
- Context: landlords, including freeholders, being liable for some or all of costs connected with remediating their buildings (Schedule 8)
- Allows landlords to recover remediation costs from developer. Also gives leaseholders ability to apply against developer (e.g. already paid costs of remediation before leaseholder protections in force)
- Enables order to be made where developer SPVs wound up

# Just and equitable

- Acid test in s. 124(1) - tribunal can make a RCO if it considers it just and equitable to do so

# Who specified to make payments?

s.124(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).

# Test of associate

s.121 - partnership or body corporate associated with another person

Will include

- Company with beneficial interest
- Company with same directors
- Company with overall control of group
- Holding company with the share capital
- Partner in partnership (other than limited partner) at any time in 5 years before 14 Feb 22
- NB. Wider than test of associate for Building Liability Orders (s.130)

# Who can apply – the ‘interested person’?

s.124(3)

- Secretary of State
- Regulator
- Local authority
- Fire and rescue authority
- A person with a legal or equitable interest in the relevant building or any part of it
- Any other person prescribed by regulations made by the Secretary of State

# Who may be specified as the ‘beneficiary’ of the payment?

- Left undefined but likely to be the person with the repair obligation such as the landlord or management company

# Form of order

s.124(4)

- Payments of a specified amount or a reasonable amount in respect of remediation of specified relevant defects (or in respect of specified things done or to be done for the purpose of remedying relevant defects)
- Payment to be made at specified time or to be made on demand following occurrence of a specified event

# Application

- Will apply to historical refurbishment works (30 year retrospective DPA liability does not apply to refurbishment works – only 15 year limitation for future).
- So developer of historical refurbishment works may not be liable under DPA but could be caught RCO
- *Batish v Inspired Sutton* (13 January 2022) FTT
  - Application RCO for service charges already paid towards remediation relevant defects under 15 separate leases
  - Accepted that service charges fell para 2, Schedule 8 (landlord responsible for defect) and not payable by leaseholders
  - RCO made against freeholder and developer for £194k

# Section 130 Building Liability Orders

- 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 liability of a specified body corporate (or joint a several liability of two or more specified bodies corporate)
- Relevant liability includes a liability under the Defective Premises Act 1972 (DPA) or as a result of a building safety risk

# Specified body corporate?

- Body corporate may be specified only if it has
- at any time in the relevant period (between beginning of carrying out of the works and ending with the making of the order)
- been associated with the original body

# Test of associate

- s.131
- Body corporate associated with another body corporate if:
  - One of them controls the other
  - A third body corporate controls both of them
- No comparable provisions about directors as with s. 121
- Early days but in many cases won't be difficult to apply in practice
- In construction context many such relationships straightforward and will be caught by associate test

# Just and Equitable

- High Court can make a BLO if it considers it just and equitable to do so
- Little guidance on how will apply in this context
- Lords Hansard debates - some suggestion Judicial College may give guidance – but nothing materialised
- Lord Greenhalgh: *“We expect the High Court to consider a variety of factors when deciding whether to grant a building liability order, including the extent of the damages being sought and whether a fair trial can take place”*
- S. 124 explanatory notes: all appropriate factors; wider public interest in securing the safety of buildings, as well as the rights and interests of the individual against whom an order might be made

## Likely approach to just and equitable?

- Insolvency: *Re Klimvest plc* [2022] EWHC 596 (Ch) [184] to [199] - wide general words to be construed generally and taken at face value; not to be reduced to sum of particular instances
- *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, at 378 courts too timorous in giving these words full force; involves consideration of rights, expectations, obligations of individuals
- 1978 Contribution Act: *Samsung Electronic Co Ltd v LG Display Co Ltd* [2023] 1 All ER 227 - (1) culpability and (2) causation [16]

- **But** note s. 123 remediation order decision *Waite & Others v Kedai Limited* 9 August 2023 (FTT) (paragraphs 69-71)

*“This Part of the Act and section 123 in particular are drafted very broadly indeed and give wide power to the Tribunal. We do not consider ourselves restricted in the interpretation of section 123 by reference to other statutory provisions or case law*

*...each one of the other regimes, while dealing with the condition of buildings and housing and fire safety, arises in its own circumstances, on its own terms and applying its own tests and criteria. Here, we are dealing with a statutory remedy in simple terms, arising from certain limited criteria being satisfied. In short, the objective of the BSA is (with occasional overlap) different to all other regimes...*

*...The BSA creates a freestanding regime designed to address a specific problem. Although other regimes may amount to a “heft of good sense” they are not conclusive as to the Tribunal's jurisdiction or the extent of its powers.”*

# Information Order

- s.132
- Order requiring specified body corporate to give information/documents relevant to whether associated with a body corporate
- Person of prescribed description can apply to High Court for information order
- “any person making or intending to make an application for a BLO...” Building Safety (Leaseholder Protection) (England) Regulations 2022 – Regulation 12
- Information order can only be made if it appears to the court:
  - That body corporate is subject to a relevant liability (s 130)
  - That it is appropriate to require information or documents to be provided for the purpose of enabling the applicant to make, or consider whether to make, an application for a BLO

# Strategy when pursuing/defending RCO/BLOs

- Understand the regulatory environment in fire cases – functional requirements of Building Regulations, status of Approved Documents, industry guidance, testing regime
- Experts – careful choice
- Document retention – jigsaw puzzle with historic claims
- Identify those in client team best placed to assist you

s. 130:

- DPA 1972 now in the spotlight – know the tests and the defences
- Importance of *URS Corp Ltd v BDW* [2023] EWCA Civ 772 – developer can bring own DPA claim under section 1, mood music pro recovery where liabilities incurred
- Interaction between section 130 and Civil Liability (Contribution) Act 1978 – likely to be determined at some stage