

# Redress under the Building Safety Act 2022: how vulnerable are you?

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WHITE PAPER CONFERENCES - CONSTRUCTION LAW  
SHAPING NEW DEVELOPMENTS INTO SOLUTION-FOCUSED ANSWERS FOR YOUR CLIENTS,  
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# Background & Overview

**Grenfell Tower fire** - June 2017

**Cladding with ACM panels**

**Government's programme for screening** - to identify tall buildings, other cladding products

**Independent Review** - Dame Judith Hackitt, B Regs "not fit for purpose"

**Technology & Construction Court (TCC)**  
- a tidal wave of claims, other fire safety defects

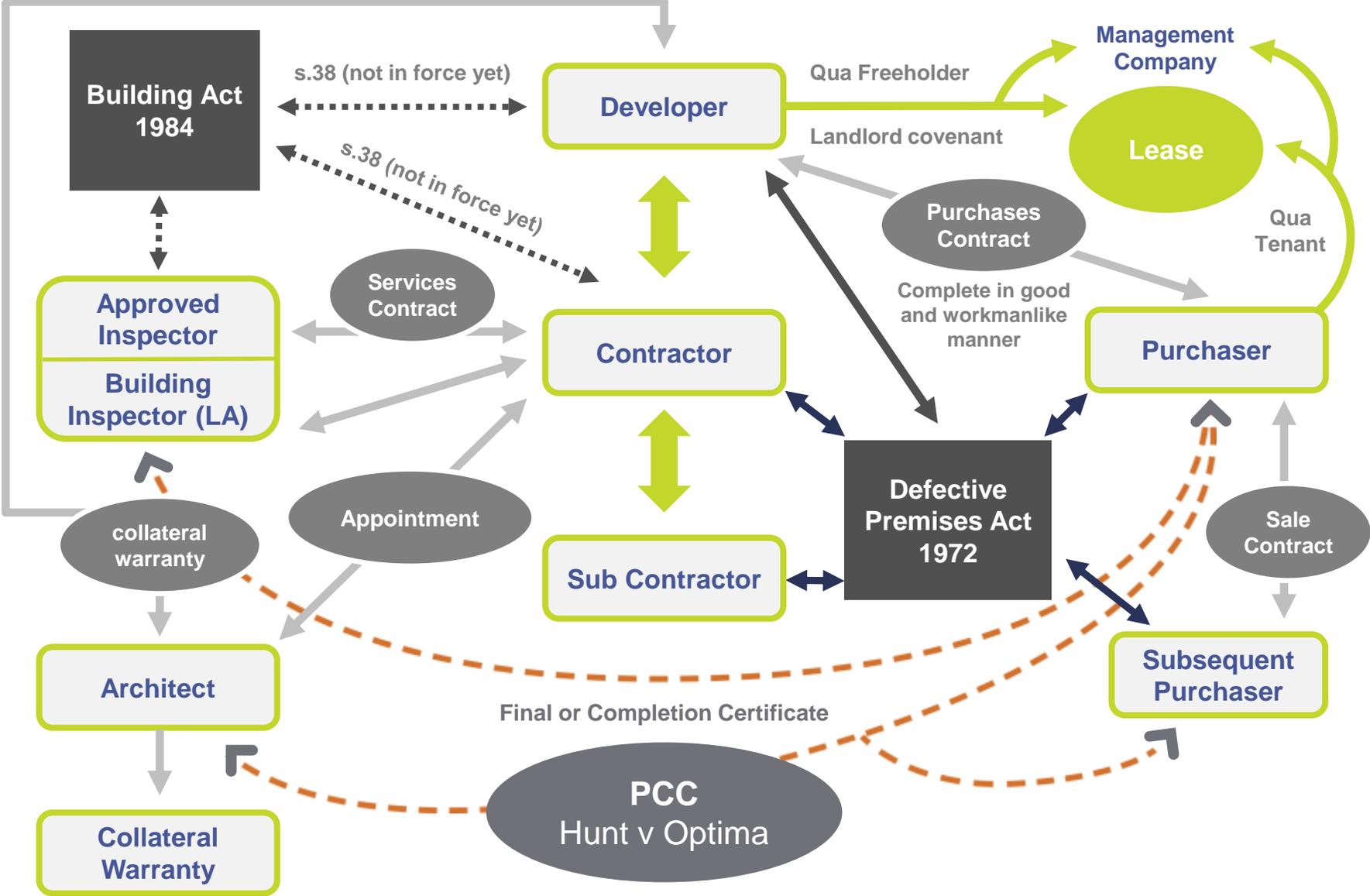
**Nature of claims** - like weeds, contract, tort, statutory duty

**Building Safety Act 2022** - an Act of six parts to secure the safety of people in or about buildings and to improve the standard of buildings

**New remedies** - Remediation Contribution Orders / Building Liability Orders / New cause of action against building product manufacturers/suppliers / Costs Contribution Orders

**New limitation periods** - Defective Premises Act 1972; Building Act 1984

# The Nature of Cladding & Fire Safety Claims



# Building Safety Act 2022

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- **New Limitation Periods**
- **The Building Liability Order**
- **Remediation Contribution Orders**
- **Claims against the Manufacturers**



# New Limitation Periods

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- **Defective Premises Act 1972** (DPA 1972)
- **Building Act 1984** (BA 1984)

# DPA 1972

- **Statutory duty**

“A person taking on work for or in connection with **the provision of a dwelling... owes a duty... to every person who acquires an interest** (whether legal or equitable) in the dwelling; **to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner...** so that as regards that work the dwelling will be **fit for habitation when completed.**”

- **Refurbishment works**

- not just new dwellings

- **Thirty years** - retrospective claims (completed works), back to 1992....

- **Fifteen years** - prospective claims (buildings completed >28 June 2022)

## BA 1984, s.38

- **Civil liability**
  - *"breach of a duty imposed by building regulations, so far as it causes damage is actionable"*
- **Fifteen years**
  - via new s.4B of the LA 1980
- **Not in force**
  - been on the statute books since 1984....  
*"partially in force with changes pending"*

# Building Liability Orders

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- **BSA 2022, Sections 130 to 132**

# New route around the company veil

- **Section 130(2) defines a BLO**  
“..an order providing that **any relevant liability** .... of a **body corporate** (“**the original body**”) relating to a specified building is **also...a liability of a specified body corporate**, or...**a joint and several liability of two or more specified bodies corporate**”.
- **Conditions plus discretion**  
High Court to consider whether it is:  
*“just and equitable to do so”*
- **Not limited to SPVs**  
No wording that limits the application to the originally intended scenario: to stop developers’ use of SPVs to absolve themselves of responsibility for a building; applies equally to group companies
- **Hot topic: what is an “associate”?**  
Defined at s.131 BSA 2022

# Conditions for a BLO

## Relevant liability

"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**."

**NB: "Liability" is not further defined: court judgment, arbitration award, probably not an adjudication decision, liability under a settlement may suffice.**

"**building safety risk**" is defined as:

"..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;
- (c) any other prescribed matter."

**NB: Not merely fire safety**

# Conditions for a BLO

## Liability of original body

Relevant liability must be that of a "body corporate (*"the original body"*) relating to a specified building", (**the original body**).

## Associated in relevant period

Body corporate to be "*specified*", (i.e. referred to in the BLO), has to be, or have been, "*associated*" with the original body in the "*relevant period*", where relevant period means anytime between **start of works** (out of which relevant liability was incurred) until **making of the order**.

**NB: not enough to be associated via a person.**

# What does “associated” mean - BLOs?

- **For the purposes of BLOs, s.131**

“(1) For the purposes of section 130,  
**a body corporate (A) is associated with another body corporate (B)** if –

- (a) **one of them controls the other**, or
- (b) **a third body corporate controls both of them.**

Subsections (2) to (4) set out the cases in which a body corporate is regarded as controlling another body corporate.”

**NB: “Associate” is defined via control**

## Control under s.131(2) to (4)

**(2)** A body corporate (X) **controls a company** (Y) if X possesses or is entitled to acquire—

- (a) **at least half of the issued share capital** of Y,
- (b) such rights as would entitle X to exercise **at least half of the votes exercisable in general meetings** of Y,
- (c) such part of the issued share capital of Y as would entitle X to **at least half of the amount distributed**, if the whole of the income of Y were in fact distributed among the shareholders, or
- (d) such rights as would, in the event of the winding up of Y or in any other circumstances, entitle it to receive **at least half of the assets** of Y which would then be available for distribution among the shareholders.

**(3)** A body corporate (X) controls a **limited liability partnership** (Y) if X—

- (a) holds **a majority of the voting rights** in Y,
- (b) is a **member of Y and has a right to appoint or remove a majority** of other members, or
- (c) is a **member of Y and controls** alone, or pursuant to an agreement with other members, **a majority of the voting rights** in Y.

**(4)** A body corporate (X) controls another body corporate (Y) if **X has the power, directly or indirectly, to secure that the affairs of Y are conducted in accordance with X's wishes.**

# High court discretion

## **Just and equitable, s.130**

High court will have to exercise its discretion. Familiar wording from other acts, but no guidance in the BSA 2022 as to how it should operate: c/f

## **The Civil Liability (Contribution) Act 1978, s.2(1)**

Assessment of contribution: court to assess the amount of contribution recoverable *"to be just and equitable **having regard to the extent of that person's responsibility for the damage in question**"*.

## **The Financial Services and Markets Act 2000, s.28(3)**

Allows the court a discretion to permit enforcement of agreements which are rendered unenforceable by Sections 26 or 27, or to allow monies or property transferred under such an agreement to be retained ***"If the court is satisfied that it is just and equitable in the circumstances of the case..."***.

# Who does this affect?

- **Any corporate targets in a group company arrangement**
  - potential for “association” with the original body
- **More defendants within scope of claim**
  - no need for a cause of action against ‘target defendant’
  - expands litigation but increases recovery
- **Corporate veil**
  - lies in tatters
  - no longer limited to assets of defendant
  - no longer limited to LOI or pursuing a ‘difficult’ claim for personal liability
- **Blunt instrument**
  - threats to pursue or join other companies as leverage

# Remediation Contribution Orders

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- **BSA 2022, Sections 116 to 120**
- **BSA 2022, Sections 121 to 125**
- **BSA 2022, Schedule 8 Remediation Costs under qualifying leases etc**

# A new statutory regime

- **Leaseholder protections** leaseholders' liability for service charge under relevant leases cannot be used to claw back costs of remediating historical safety defects
- **Remediation Orders (ROs) s.123** FTT order requiring a relevant landlord to remedy specified relevant defects in a specified relevant building by a specified time.
- **Remediation Contribution Orders (RCOs), s124** FTT order requiring a specified body corporate or partnership to make payments for costs incurred in remedying relevant defects
- **Associated persons** via s.121 the RCO regime can be expanded to 'associated persons' via similar control provisions to the BLO regime

# relevant building, qualifying lease & time

- **relevant building** - self-contained building or part thereof, of 2 or more dwellings, at least 11m high or at least 5 storeys (s.117)

**NB: Not just high rise (>18m), also medium**

- **qualifying lease /qualifying time**  
- means a long lease of a single dwelling in a relevant building (> 21 years); tenant liable to pay service charge; lease granted before qualifying time (14 Feb 2022); tenant's home or only UK owned property or owns no more than 2 additional properties in UK (s.119)
- **NB: the lease itself qualifies at the qualifying time - not the leaseholder, and the lease' status passes to new owners**

# relevant defects, relevant works & period

- **relevant defect**

*"a defect as regards the building that...arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works and causes a **building safety risk**."* s.120(2)

- **relevant works** *"works relating to the construction or conversion of the building...works undertaken.. if the works were completed in the relevant period"* or afterwards to remedy a relevant defect s.120 (3)
- **relevant period**
  - means 30 years ending with when section came into force (28 June 2022)

# Recovery of costs of remediation

- **s.122**

*"Schedule 8 provides that **certain service charge amounts relating to relevant defects in a relevant building are not payable and..makes provision for the recovery of those amounts from persons who are landlords** under leases of the building (or any part of it)."*

- **s.123 "remediation order"**
- *"..an order..by First Tier Tribunal..requiring a relevant landlord to remedy specified relevant defects in a specified relevant building by a specified time."*
- Pursued by an "interested person": local authority, FRA or person with legal or equitable interest in the relevant building or part of it

# What does “associated” mean – RCOs?

- **s 124 “remediation contribution order”**

- A First Tier Tribunal order “...requiring a specified body corporate or partnership to make payments to a specified person, for the purposes of meeting costs incurred or to be incurred in remedying relevant defects ..relating to a relevant building.”

- Pursued by an “interested person”: local authority, FRA or person with legal or equitable interest in the relevant building or part of it

- **s.121 Associated persons**

“(1) For the purposes of sections 122 to 125 and Schedule 8, a partnership or body corporate is **associated with another person** in the circumstances mentioned in subsections (2) to (5)”.

# Test for association with a person under s.121

**(2)** Where **a person's interest in a relevant building was held on trust at the qualifying time**, any partnership or body corporate which was **a beneficiary of the trust at that time** is to be regarded, for the purposes of the provisions mentioned in subsection (1) as they apply in relation to the relevant building, **as associated with the person**.

**(3)** A partnership is associated with any person who was a partner in the partnership, other than a limited partner, at any time in the period of 5 years ending at the qualifying time ("the relevant period").

**(4)** A body corporate is associated with any person who was a director of the body corporate at any time in the relevant period.

**(5)** A body corporate is associated with another body corporate if—

(a) at any time in the relevant period **a person was a director of both of them**, or

(b) at the qualifying time, **one of them controlled the other or a third body corporate controlled both of them**.

Subsections (6) to (8) set out the cases in which a body corporate is regarded as controlling another body corporate.

**NB: control tests are same as for BLOs.**

# Claims against manufacturers

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- **BSA 2022, Sections 147 to 149**
- **BSA 2022, Section 150** (limitation)

# New statutory cause of action

- **Construction product manufacturers**
  - and economic operators “person who markets or supplies a construction product”
- **Product mis-sold, inherently defective or breaches existing regulations**
  - Schedule 11 of the BSA 2022, Construction Products Regulations 1991, Regulation (EU) No.305/2011, the Construction Products (Amendment etc ) (EU Exit) Regulations 2019.
- **Includes economic loss**
  - “The person...is liable to pay damages to a person with a relevant interest in relation to a relevant building for personal injury, damage to property or economic loss suffered by that person as a result of the facts referred to...”
- **Conditions for application**
  - A to D at s.148(2) to (5) BSA 2022

## Conditions A to D

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.

## Conditions A to D (contd)

(4) Condition C is that, **when those works are completed –**

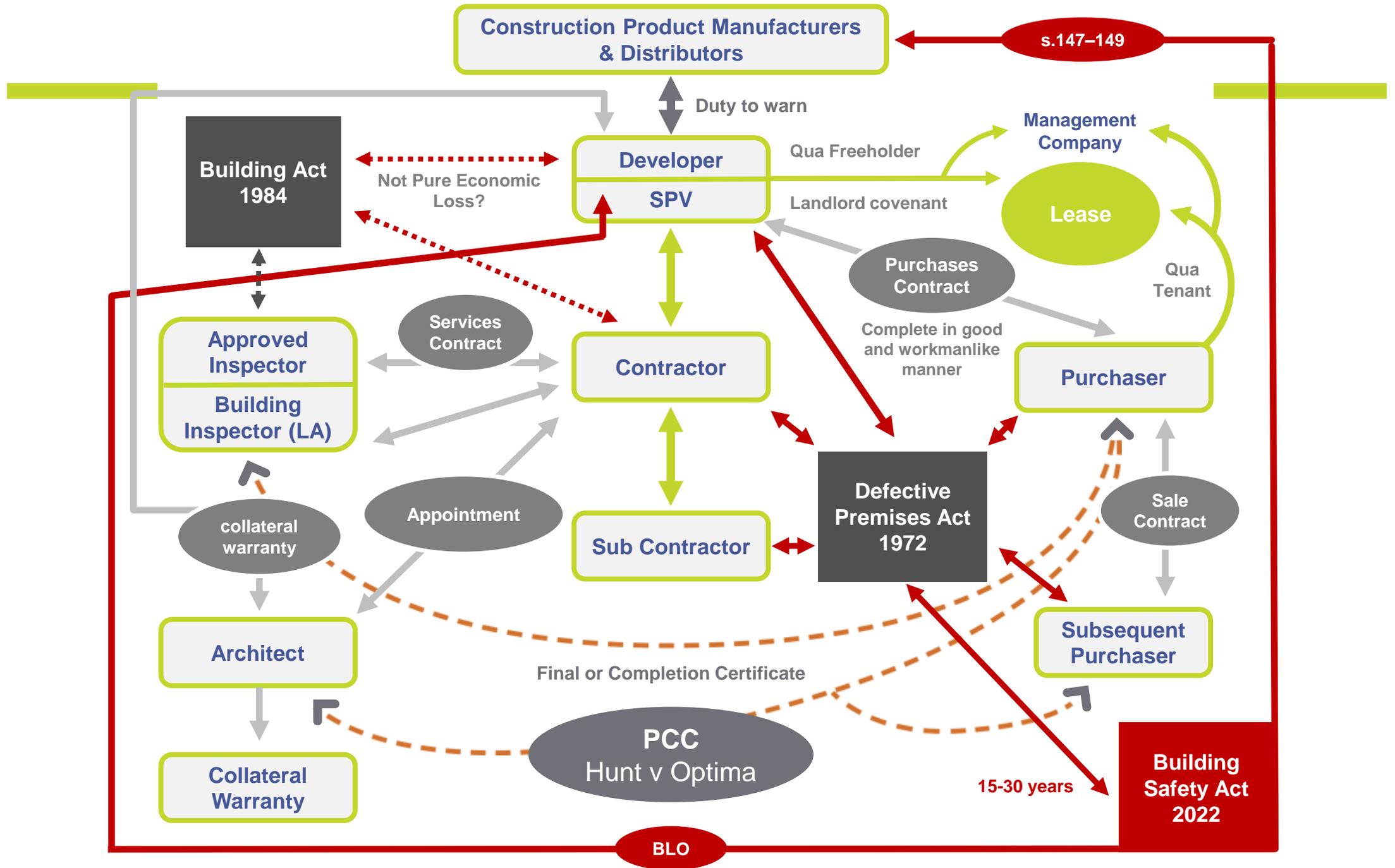
(a) in a case where the relevant building consists of a dwelling, **the building is unfit for habitation**, or

(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.**

# Who could bring claims against manufacturers?

- **Claimant with “relevant interest”**
  - legal or equitable interest in building or dwelling within building (potentially: building owner, leaseholder, freeholder, prop co, management co)
- **Suffered a loss**
  - due to the dwelling being unfit for habitation (consequential losses due to unable to occupy, obligations to repair/reinstate, fire safety requirements)
- **Pursued in name of claimant**
  - insurer’s rights to ‘step in’
- **Route for contribution claim**
  - via same damage “unfit for habitation”
- **Also for cladding products / past defaults**
  - s.149 similar regime
- **Limitation**
  - completed works/retrospective claims 30 years; buildings completed >28 June 2022/prospective claims, 15 years





“Go ahead. But I should warn you, you’re setting a very dangerous precedent.”

# Thank you

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