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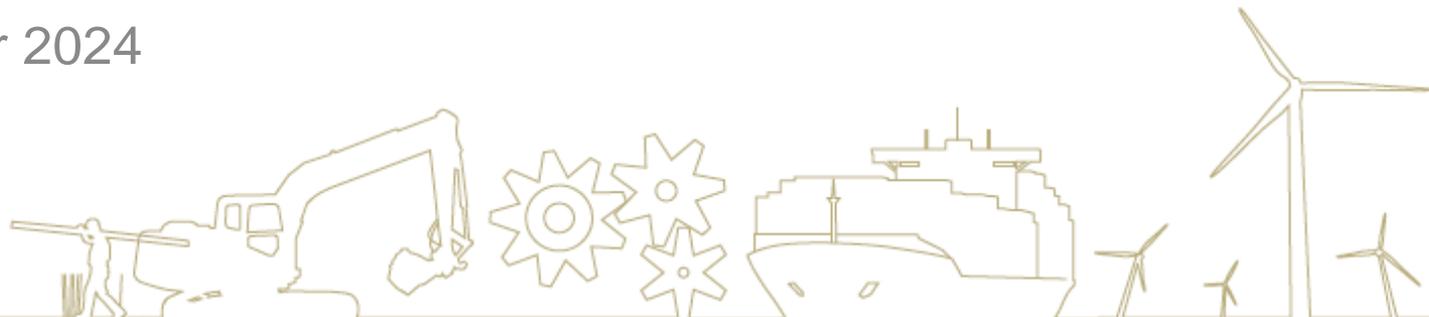
## **White Paper Construction Law Conference**

Steven Walker KC

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The Caledonian Club

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# Introduction

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Up to 60% of buildings with dangerous cladding have not yet been identified, and remediation for buildings within government's portfolio is slow.

Ministry of Housing, Communities & Local Government (MHCLG) modelling indicates an end date of 2035 for completing cladding remediation, but without published milestones, hundreds of thousands of residents have no idea when their building will be made safe.

While most leaseholders are now protected from remediation costs, residents continue to suffer significant emotional and financial distress.

With total estimated costs of £16.6bn and the Building Safety Levy yet to start, there are risks to keeping taxpayer contributions capped at £5.1bn.

(National Audit Office, Press release, 4 November 2024).

# Introduction

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- Fire safety related claims: the BSA 2022
- Issues relating to section 1(1) of the DPA 1972:
  - What is the meaning of “dwelling”?
  - Is a duty owed to the developer?
  - What is the nature of the duty?
  - What is the effect of section 6(3) of the DPA 1972?
  - Statutory contribution: are contractual limitations relevant to apportionment?
- Section 149 of the BSA 2022:
  - When is the causation threshold met?
  - Is a current interest in the building required?
- Grenfell Tower Inquiry Part 14 - Recommendations

# Section 1(1) of the DPA

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*(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-*

*(a) if the dwelling is provided to the order of any person, to that person; and*

*(b) without prejudice to paragraph (a) above, 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, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.*

# The meaning of “dwelling”

- No definition in the DPA
- TCC cases:
  - *Catlin Estates v Carter Jonas* [2005] EWHC 2315 (TCC) at para. 296  
*“In relation to the claim that the Lodge is not a dwelling I conclude that a dwelling house is a building used or capable of being used as a dwelling house, not being a building which is used predominantly for commercial and industrial purposes.”*
  - *Rendlesham Estates plc v Barr Ltd* [2014] EWHC 3968 (TCC) at para. 42:  
*“A more relevant question might be: does the space said to be the dwelling (or part of a dwelling) form part of a single unit with those parts of the premises that are lived in? However, as the cases show, this single unit test does not necessarily provide the answer in the case of, say, a house or flat shared by more than one household. Exclusive possession of a particular space for the purpose of living seems to be a better indicator of what constitutes a dwelling.”*

# The meaning of “dwelling”

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- Section 30(1) of the BSA defines “residential unit” to mean “(a) a dwelling, or (b) any other unit of living accommodation”.
- Section 65 of the BSA defines “higher risk building” as a building in England that (a) is at least 18 metres in height or has at least 7 storeys, and (b) contains at least 2 residential units. Residential unit is defined in section 115 to mean “(a) a dwelling, or (b) any other unit of living accommodation”.
- These provisions suggest that some residential units are not dwellings.

# Is the duty owed to developers?

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- Section 1(1) of the DPA states a duty is owed “*if the dwelling is provided to the order of any person, to that person*”.
- In *URS Corp. Ltd. v BDW Trading Ltd* [2023] EWCA Civ 772, the CA had little hesitation in finding that a developer was owed a duty under the DPA. See Coulson LJ at paras 176 to 190.
- The decision in URS is the subject of appeal to the UKSC which is scheduled to be heard next week.

# What is the nature of the duty?

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- The duty is expressed as being “*to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.*”
- The duty owed under s. 1(1) has been construed as a single duty to see that the outcome is a dwelling fit for habitation when completed. (The correctness of this interpretation is open to doubt for the reasons explained in *Harrison v Shepherd Homes* [2011] EWHC 1811 (TCC) at paras 142 to 153).
- What is the position in respect of professionals who take on work in connection with the provision of a dwelling?

# Fitness for habitation

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- The question whether a dwelling is unfit for habitation falls to be determined by reference to when the dwelling was completed: see *Rendlesham* at paras. 77 and 84iv:

*“When considering whether or not an apartment is fit for habitation, its condition has to be considered at the date when the work was completed (which I consider extends to the end of any relevant defects liability period)”*

- If a residential building that is considered to be unfit for habitation today was considered to be fit for habitation when it was completed, is the building unfit for habitation within the meaning of section 1(1) of the DPA?

# Damages for breach of section 1(1) of the DPA

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- The claimant does not have to prove that the defendants' breach of section 1 was the only cause of the building being unfit: see *Bayoumi v Protim* (1988) 30 H.L.R. 785.
- In *Bayoumi*, the CA adopted the following statement in Halsbury's Laws of England: "*The damages recoverable in respect of a breach of statutory duty are such as are contemplated by the statute and this will include damages which are the natural consequence of the breach.*"
- Should damages be limited to the cost of making the dwelling fit for habitation?
- In *Vainker v Marbank Construction* [2024] EWHC 667 (TCC) Jefford J. answered that question in the negative: see para. 339.

# Limitation clauses

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Section 6 (3) of the DPA:

- *“Any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of the provisions of this Act, or any liability arising by virtue of any such provision, shall be void”.*
- In *Vainker* it was held that a net contribution clause fell foul of section 6(3) and could not be relied upon in relation to liability under the DPA.
- The effect of section 6(3) was touched on in *URS* at paras.185 to 186. Coulson LJ expressed the view that section 6 (3) would not have the draconian effect suggested by URS.

# Contribution under section 1 of the Civil Liability (Contribution) Act 1978

Are contractual limitations relevant to an assessment of contribution under the above Act amongst parties liable under section 1(1) of the DPA notwithstanding section 6(3) of the DPA?

- There is case law which suggests that the amount to be proportioned should not be reduced where one defendant has the benefit of a limitation clause in its contract with the claimant: see *Nationwide Building Society v Dunlop Haywards (DHL) Ltd and Cobbetts (A Firm)*, [2009] EWHC 254 (Comm).
- Where the limitation clause appears in a contract between two defendants, e.g., a contractor and its architect, both of whom are liable to a claimant for breach of section 1(1) of the DPA, is it “just and equitable” for the court to take account of the limitation when assessing contribution? (In this situation, the limitation clause would not be used to limit the liability to the developer or owner under section 1(1) of the DPA.)

# Section 149 of the BSA

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- Section 149 may apply to manufacturers, suppliers and those who market cladding products which are attached to or included in the external wall of a “relevant building”.
- The cause of action is retrospective with a 30-year limitation period for claims arising before 28 June 2022.
- The cause of action applies only in relation to dwellings in a building that is unfit for habitation.
- A term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, any liability arising under this section is void (see section 149 (7)).

# Issues arising from section 149

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- Condition A includes “a person who markets or supplies a cladding product makes a misleading statement in relation to it”.
- The causation test: “*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*”.
- How does a misleading statement in relation to a cladding product renders a building unfit for habitation?
- What is sufficient to render a product one of the causes of the building’s unfitness for habitation? Is any contribution sufficient, or must there be a material contribution?

# Issues arising under section 149

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Section 149 (6) defines the claimant as “*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 of the facts referred to in subsection (4)(a) or (b).*”

A relevant interest is a legal or equitable interest in the building or any dwelling contained in the building (see section 147).

Is an existing interest in the building required to bring a claim under section 149, or is sufficient that the claimant had a relevant interest when the building was completed?

# Grenfell Report recommendations

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- A new Construction Regulator reporting to a single Secretary of State (113.5).
- The definition of a higher-risk building in the BSA should be “reviewed urgently” (113.7).
- A Chief Construction Adviser (113.9).
- Recognition of the profession of fire engineer (113.25).
- Licensing for contractors for work on higher-risk buildings.

# Q&A



**QUESTIONS?**

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# Thank you

# Steven Walker KC



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Steven specialises in advising and representing parties to complex commercial contracts relating to a wide range of subject matter including the design and delivery of buildings, oil and gas installations, power generation plant, process and engineering plant, ships, IT systems, telecommunications systems, PFI/PPP, facilities management and professional services.

He has extensive experience in the energy sector having been heavily involved in a number of projects concerning the design and construction of offshore wind farms, energy from waste plants and other forms of renewable energy.

Transport-related projects have formed an important part of Steven's practice over the past 25 years. His first case in the sector concerned the Eurostar high-speed train sets and since then he has been involved in numerous projects in the road, rail and air sectors including the construction of the HS1 high-speed rail link, airport runways and other airport infrastructure, overground and underground rail and tram systems, road construction/extension, and communication systems.

He has appeared as advocate in the Technology and Construction Court (TCC), the Court of Appeal, numerous arbitrations (including ICC, DIAC, UNCITRAL, HKIAC, LCIA and LMAA) and adjudications, and in expert determination and mediation. His arbitration experience includes substantial international experience.



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