



CON-VERSATIONS

Building Safety Act 2022

Widening the classification of liable parties

Key take-aways

July 2022

The Building Safety Act 2022 was introduced to bring liable parties to account for the rectification of defective health and safety works at high rise residential buildings.

However, the scope of the Act is wider than that. Many third parties, perhaps with no direct involvement in the development or who thought their liabilities had long since ended, can now be held liable for costly rectification works. This is due to a host of new measures such as Remediation Orders, Remediation Contribution Orders and Building Liability Orders, which came into effect from 28 June this year.

This article considers why such changes were introduced, what they involve, and how these provisions change the legal landscape in relation to building safety defects.

Why have third parties become liable under the Act?

- The overarching principle is that tenants in large apartment blocks should not be faced with huge cladding repair bills.
- In principle the Act seeks to shield tenants from the costs of building safety defects, in favour of landlords and developers taking responsibility. However, this is not always straightforward for the following reasons:
 - some landlords may not have sufficient funds and (even with extended limitation periods of up to 30 years) are unable to pursue those original parties who were responsible for the defects
 - this could be because the original parties are no longer in business, have become insolvent, or their business may have been sold or amalgamated into another business
 - alternatively, there might be overseas parties involved, making it difficult to enforce a claim in another jurisdiction
 - corporate entities established to undertake a specific development (sometimes called special purpose vehicles or SPVs) may have insufficient funds to satisfy the cost of rectification or may have been wound up following completion of the development. Usually the assets of such SPVs are limited to those relating to the development for which they are established
 - availability of insurance is limited for these types of claims.

Due to these factors, the legislation had to become more extensive.

Where parties responsible for the defects do not have sufficient funds for rectification costs, the Act proposes to affix liability to other relevant parties that are available or solvent, so that the cost of remediation work does not necessarily fall to the end tenant.

How are third parties liable under the Act?

The Act permits a wide range of interested parties to apply to the court for a Remediation Order, so that the landlord will rectify defects as soon as possible. Interested parties include the regulator, a local authority, a fire and rescue authority, or a person with a legal or equitable interest in the relevant building or any part of it.

The Act also allows these parties or the Secretary of State to apply to the court to make an order for another party to contribute towards the costs (by way of a Remediation Contribution Order).

In addition, the court can order for liability for the defects to be shared with another associated party (by way of a Building Liability Order).

The table on the page overleaf shows who can make an application for an order, which buildings and defects these can apply to, and who can become liable under such orders.

Importantly the Act widens the net of parties that may find themselves liable for defects or the costs of defects by looking through corporate structures, even where companies have gone insolvent.

How does this change the legal landscape for building safety claims?

In England and Wales, it is uncommon for third parties to be responsible for the liabilities of a company (or similar body corporate) without those third parties first agreeing to take on that responsibility (for example by way of a guarantee or indemnity).

This is because an important principle of English corporate law is that a company (or similar body corporate) has its own legal personality, which is separate from that of its shareholders or members. A company is treated as a legal person in its own right. As a result, it is also liable for its own debts and liabilities.

The provisions of the Act allow the liability of a corporate body for historic building safety defects to be shared or transferred to another person or body corporate. This is a major change to the legal landscape in relation to claims for building safety defects.

What do I need to do?

If pursuing claims

- a conventional claim against the original party will be easier to pursue, but these new potential routes of redress will be useful if you are struggling for redress against the original party
- consider applying for a Building Information Order whereby a body corporate is ordered to provide information about who its associated body corporates are
- once armed with this information on who the “associated” bodies are, consider whether any of them are financially worth pursuing for rectification costs
- claims against associated bodies can be pursued even if the original party is insolvent or has been wound up.

If potentially defending claims

- directors, partners, and corporate bodies with no direct involvement in the development, but who are associated with the original party, could be ordered to contribute towards remediation costs and/or to share liability for the defective work.

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	Remediation Order	Remediation Contribution Order	Building Liability Order
Liable party	Landlord under a lease of the building or any part of it who is required to repair or maintain anything relating to the defect.	(a) a Landlord under the lease or any part of it, (b) a person who was such a landlord on 14 February 2022, (c) a developer, or (d) a person associated with any person described in (a) to (c).	A body corporate specified in the order who is associated with the original body.
Meaning of “associated”	Not applicable.	(a) a director or partner at any time 5 years prior to 14 February 2022; (b) a body corporate that had the same director during the 5 years prior to 14 February 2022; (c) a body corporate that is controlled by the original party or where a third body corporate controls them both.	A body corporate that is controlled by the original party or where a third body corporate controls them both. Where a building is held on trust, a corporate body which is the beneficiary of the trust will be regarded as an associated too.
Type of building	A building in England that contains at least two dwellings and is at least 11 metres high or has at least 5 storeys.	A building in England that contains at least two dwellings and is at least 11 metres high or has at least 5 storeys.	Potentially any building.
Nature of defect	A defect that arises as a result of anything done or not done or anything used or not used in connection with the relevant works and which causes a building safety risk, in relation to works that were carried out any time 30 years prior to 28 June 2022.	A defect that arises as a result of anything done or not done or anything used or not used in connection with the relevant works and which causes a building safety risk, in relation to works that were carried out any time 30 years prior to 28 June 2022.	A liability incurred under the Defective Premises Act 1972 (DPA) or s.38 of the Building Act 1984 (BA) or as a result of a building safety risk.
Liability under the order	To remedy the specified relevant defects in the building by a specified time.	Make payments to a specified person, for the purposes of meeting costs incurred or to be incurred in remedying relevant defect(s) relating to the building.	Can order for liability to be shared with an associated body corporate (or to be transferred if the original body corporate is no longer around).
Limitation period	30 years applied retrospectively from 28 June 2022.	30 years applied retrospectively from 28 June 2022.	For s.1 DPA claims, 30 years applied retrospectively if defect occurred before 28 June 2022. Otherwise, 15 years applied prospectively from 28 June 2022.
Applicant	Interested person.	The Secretary of State and an Interested Person.	No specific category of applicant is identified, but only applies where the High Court considers it “just and equitable”.

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Common definitions

Interested person	the Building Safety Regulator, a local authority, a fire and rescue authority, a person with a legal or equitable interest in the relevant building or any part of it, or any other person prescribed by regulations.
Building safety risk	a risk to the safety of people in or about the building arising from the spread of fire or the collapse of the building or any part of it.
Control	means that another body corporate possesses or is entitled to at least half the share capital, half the votes, half the dividends, or half the assets upon winding up.

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