

# The Building Safety Act and the Developers' Remediation Contract

The latest considerations for the Insurance  
Market and the road ahead

2 July 2024



**Matthew Olorenshaw**  
Partner, London



**Rebecca Austin**  
Partner, London

# Issues to be covered



---

## The journey so far:

- Building Safety Act 2022 (“BSA”)
- Developers’ Remediation Contract 2023 (“DRC”)



---

## Issues arising for the Insurance Market



---

## What’s on the horizon?

# Key changes brought in by the BSA



New regulatory regime for all building work, and more stringent process for 'higher risk' buildings (18m+ or 7+ storeys, 2 residential units)



New roles and responsibilities:

- Building Safety Regulator (safety oversight / increase Industry competence)
- Accountable persons (new 'dutyholders')



New 30 year retrospective limitation period for claims under Defective Premises Act 1972



Outlaws passing remediation costs on to leaseholders



Remedies for 'interested parties' - Remediation Contribution Orders





# Key obligations under the DRC

1

Developers responsible for the costs of all necessary work to address 'life-critical fire-safety defects' in residential buildings, over 11m in height, they had a role in developing in the 30 years prior to 5 April 2022

2

Developers to reimburse the public purse

3

Developers responsible for:

- cost of carrying out the works plus any cost overruns
- building owner's and leaseholders' professional fees and legal costs
- costs of planning and building control approvals
- cost of decanting residents from the building while the works are carried out where this is reasonably necessary

4

Developer can rely on warranties, insurance policy or other rights of recovery but only if does not delay commencement of remedial works - all necessary work to be carried out 'as soon as reasonably practicable'

# Key obligations under the DRC (2)

- 5 Where the remediation works not yet carried out, any application to the Government's Building Safety Fund should be withdrawn and the works taken over and completed by the developer
- 6 Where remediation works have already been undertaken and paid for, developer must reimburse the Building Safety Fund within 90 days
- 7 Developers will need to pay first and pursue recoveries later
- 8 Responsible Actors Scheme introduced in tandem





# Statutory Framework under the BSA – Part 5, Remediation of certain defects

## **S.117**

“**Relevant Building**” means a self-contained building, or self-contained part of a building, in England that contains at least two dwellings and:

- a) is at least 11 metres high; or
- b) has at least 5 storeys.

## **S.120**

“**Relevant Defect**”, in relation to a building, means a defect as regards the building that:

- a) arises as a result of anything done (or not done), or anything used (or not used), in connection with relevant works; and
- b) causes a 'building safety risk'.

# Statutory Framework under the BSA (2)

- “Relevant Works” includes works relating to the construction or conversion of the building, if the construction or conversion was completed in the relevant period. The Relevant Period is 30 years prior to the commencement of the BSA – so essentially going back to 1992.
- “Building Safety Risk”, in relation to a building, means a risk to the safety of people in or about the building arising from:
  - a) the spread of fire; or
  - b) the collapse of the building or any part of it.







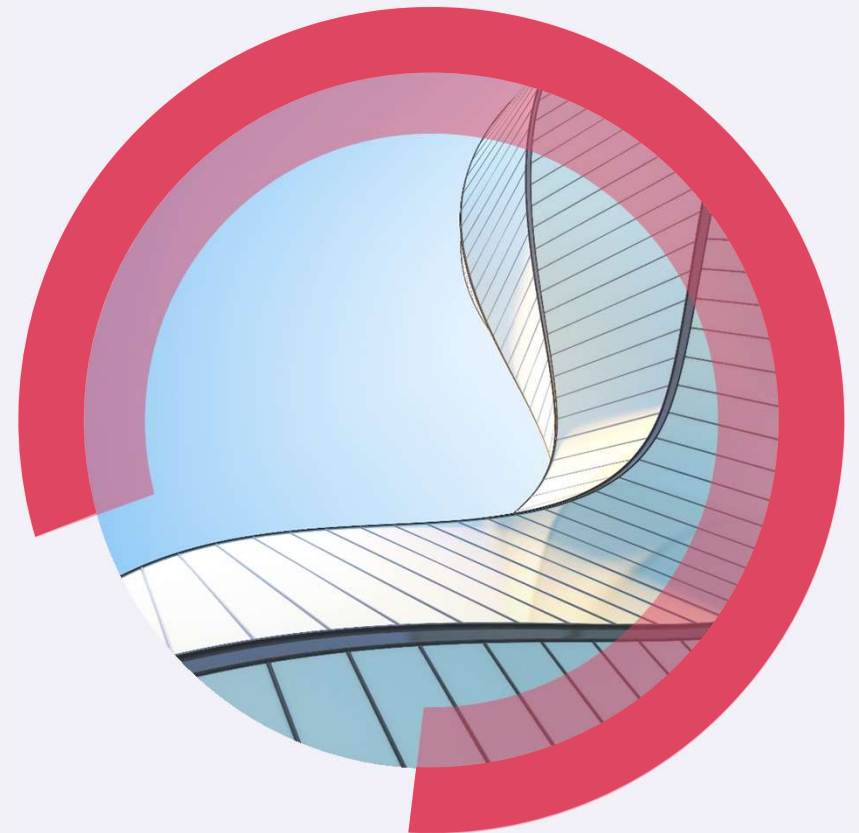
## Statutory Framework under the BSA (3)

- **S.124 - Remediation Contribution Orders** - The First Tier Tribunal may make a remediation contribution order if it considers it 'just and equitable' to do so.
- "**Remediation Contribution Order**", in relation to a relevant building, means an order requiring a specified body corporate or partnership to make payments to a specified person, for the purpose of meeting costs incurred or to be incurred in remedying relevant defects relating to the relevant building. A body corporate or partnership may be specified only if it is:
  - a landlord under a lease of the relevant building; or
  - a developer in relation to the relevant building; or
  - a person associated with one of the above.



# Statutory Framework under the BSA (4)

- **S.121 - Associated Persons** - 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.
- S.121 enables the 'corporate veil' to be pierced
- No fault regime under s.124 - 'tick box' exercise.
- 'Just and equitable' test is a low bar.



# Issues arising for the Insurance Market



Changing nature of cover available for Fire Safety-related risks



Notifications



Questions around cover being triggered



Mitigation cover



Exclusions



Cooperation and assistance from insureds to obtain relevant information - what information is available?



# Example D&C Insuring Clause

*"We agree to pay on your behalf all sums which you become legally obliged to pay (including liability for claimants' costs and expenses) as a result of any claim first made against you and notified to us during the period of the policy arising out of any:*

*a) negligent act, error, omission, advice...*

*committed by you or on your behalf in the course of your business activities."*

- Cover further constrained by policy memoranda for Fire Safety Claims?
  - Direct remedial costs only
  - Arising directly from negligence
  - Consequential losses (waking watch / decant costs) excluded

# Future challenges



---

**The new regulatory  
regime**



---

**The anticipated claims  
trends**



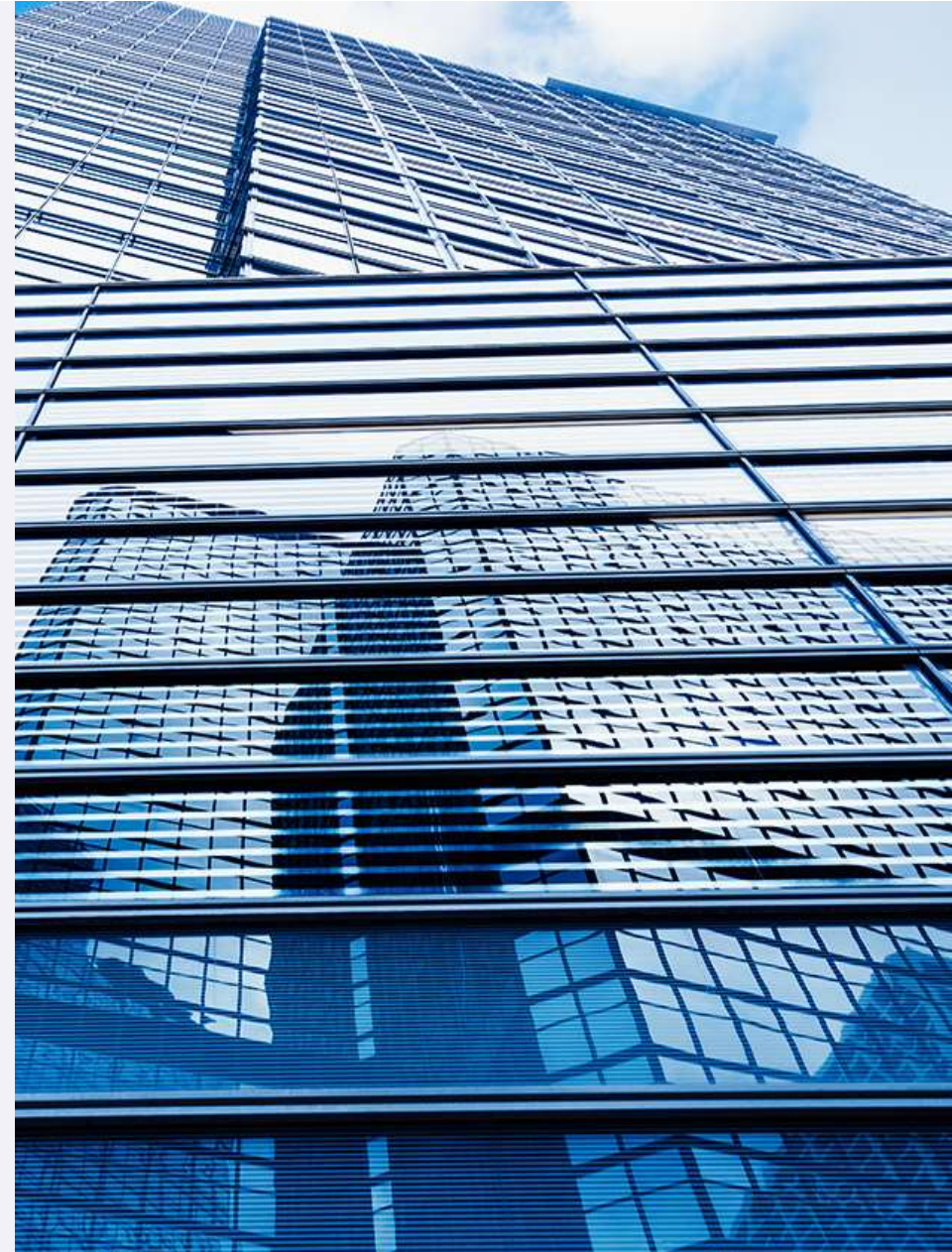
---

**Horizon scanning: the  
political and legislative  
landscape**



# Future challenges: the new regulatory regime

- The new **regulatory regime** for **higher risk buildings**
- Higher Risk Building: 18m or 7 storeys; and two or more 'residential' units
- Gateways: (1) Planning Phase; (2) Pre-Construction; and (3) Completion
- The new **dutyholder regime** to improve accountability
- Dutyholder roles: mirror CDM regulations





# Future challenges: the new regulatory regime

- A greater responsibility to actively consider and manage building safety risks throughout the lifecycle of a project.
- Key issues for Insurers:
  - Insured's exiting the market for HRBs
  - A change to procurement models: end of design & build?
  - An increase in PCSAs and Letters of Intent
  - Approval does not mean it is 100% compliant
  - Increased claims activity arising from new regime
  - 24 April 2024: new guidance issued on change control process and completion certificates

# Claims Trends



---

An increased focus on  
11m - 18m



---

An increase in  
enforcement action



---

An increase in the use of  
alternative remedies  
under the BSA

# Claims Trends: An increased focus on 11m+

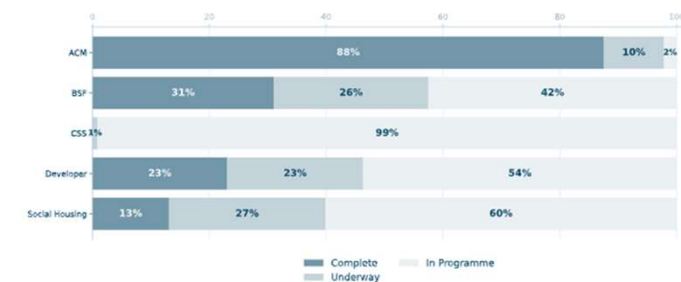
- The **Developer Remediation Contract** (11m+)
- The **Cladding Safety Scheme** (replaced the Medium Rise Scheme) to provide funding for 11m - 18m
- “**Relevant Building**” at least 11m high
- **4,374** buildings 11m and over had been identified with ‘unsafe cladding’ (53% not yet started remediation)
- An estimated **248,000 dwellings** 11m and over that are impacted

## Overall remediation by height

Figure 4: 56% of the 18m+ buildings DLUHC is monitoring the remediation progress of have started or completed remediation on unsafe cladding, compared to 33% of 11-18m buildings



Figure 3: Remediation progress differs across the programmes due to the differing maturity of the schemes.







# Claims Trends: A heightened focus on enforcement – deadline Spring 2024

*"Enough is enough. This legal action should act as a warning to the rest of industry's outliers - big and small. Step up, follow your peers and make safe the buildings you own or legal action will be taken against you."* **Levelling Up Secretary of State, Simon Clarke**

- July 2023: Joint Regulatory Statement on Remediation Enforcement (DLUHC; BSR; Local Government Association and the National Fire Chief's Council). Spring 2024 (18m+)
- Building Safety Regulator: Strategic Plan. April 2026 (all Buildings)
- Improvement Notices - Local Authorities and Fire Brigade
- DLUHC - BSF funding recovery actions

# Claims Trends: The increased use of remedies under the Building Safety Act



## Remediation Orders

To compel a Relevant Landlord to remedy Relevant Defects by a specified time  
(Section 123)

## Remediation Contribution Orders

An order for payment to meet costs incurred or to be incurred in remedying **or otherwise in connection with** Relevant Defects  
(Section 124)

## Building Liability Orders

To provide that any relevant liability is also the liability of another body corporate  
(Section 130)

# Remediation Orders

- The first reported Judgments from the FTT on Remediation Orders (*Leigham Court; Orchard House; Centrillion Point; Space Apartments; Spur House; Vista Tower*)
- A Remediation Order: to compel a 'relevant landlord' to carry out works to remediate 'specified relevant defects' in a 'specified relevant building' by a 'specified time'
- An increased use of these Orders to enforce remediation action
- FTT approach
  - A discretionary remedy
  - A balance: protection of leaseholders
  - The practicalities
  - A consistent approach?
- From Insurers perspective, it shows another route to enforcement that is being used and will force landlords to consider recovery actions which will turn into an increased volume of claims through the supply chain.







# Remediation Contribution Orders: Triathlon Homes

- The Olympic village - a claim for £16.03million. The relevant Parties:
  - Triathlon Homes - freeholder
  - Stratford Village Development Partnership ("SVDP") - developer
  - Get Living - leaseholder and original owner of SVDP
  - EVML - management company
- Triathlon claimed against SVDP / Get Living. Get Living argued that remedial works were funded and underway and therefore a Remediation Contribution Order was unnecessary: Triathlon could and/or should pursue the culpable parties.
- The key issues was whether it was "just and equitable" for the RCO to be made. Yes:
  - The purpose of the BSA (and Section 124) was to create a "hierarchy" of liability
  - The Developer and/or its associated companies sit at the top of that hierarchy - irrespective of fault
  - The motivation for the application and/or the fact remedial works were underway and being funded was irrelevant
  - Where the requirements of Section 124 were met, the availability of other remedies is irrelevant

Note: increased scope of costs - "*remedying or otherwise in connection with relevant defects*"



# Building Liability Orders: Willmott Dixon v Prater & Others

- The first reported case on Building Liability Orders (“BLOs”)
- BLOs were introduced by section 130 of the Building Safety Act 2022 to address the inevitable consequences where a Development is carried out by a SPV and then wound up.
- I.e. to avoid the corporate group having no “long-term liability” for its Developments.
- BLOs operate to pierce the corporate veil where it is “just and equitable” to do so.
- An important remedy in the context of recovery actions → an application against Co-Defendant.
- Practical Guidance:
  - “if the making of an application for a Building Liability Order is contemplated, it will generally be sensible and efficient for the company against whom that order is going to be sought to be made a party to the litigation and for that application to be heard together with the main claim” (Mrs Justice Jefford)



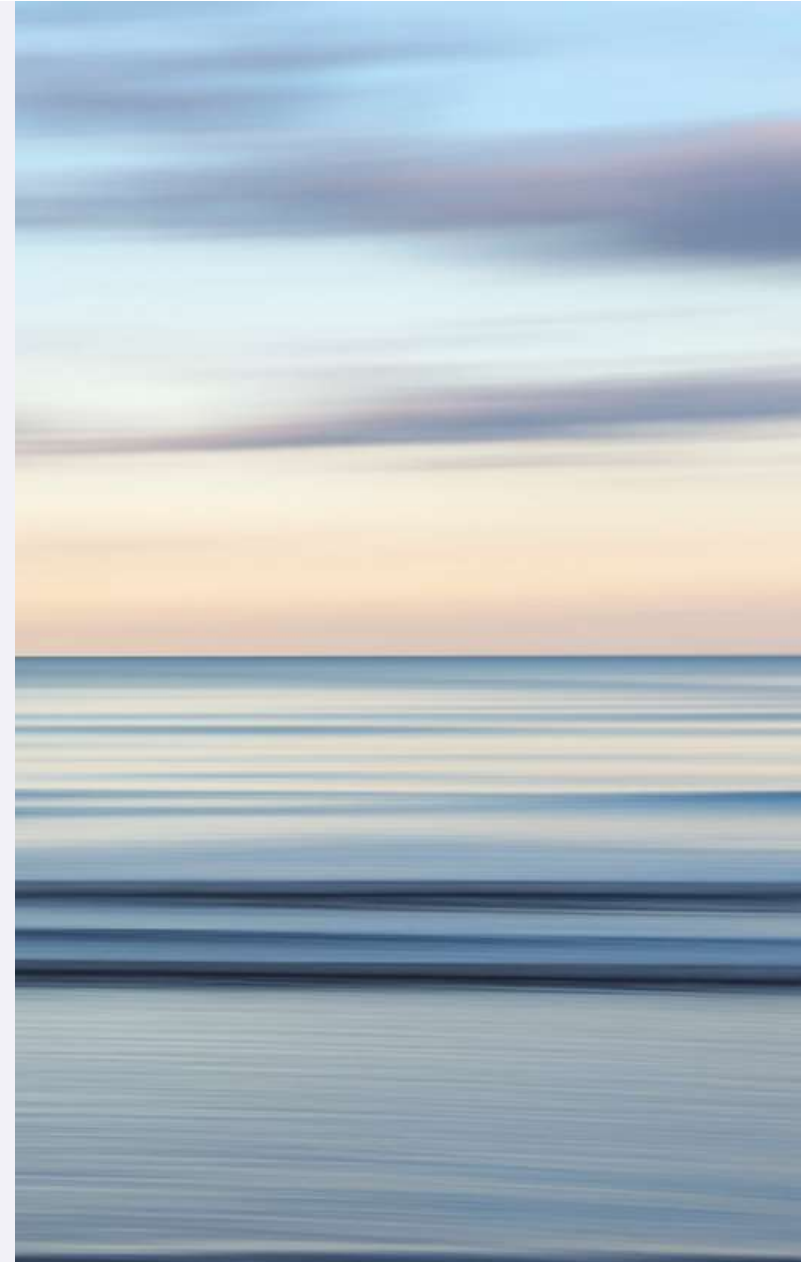


# Claims Trends: What can we learn?

- An increased use of these methods
- An increased speed in recovery
- An increase pressure on coverage issues
- An increased pressure on claims and third-party recovery actions

# Future challenges: legislative and political horizon

- The political agenda, including the Grenfell Report - September 2024
- The legislative framework
  - New Home Warranties (15 years) - TBC
  - Building Safety Levy - still under consultation
- Further amendments to Approved Document B
  - Second common stair guidance from 30 September 2026
- Construction Products







# Future challenges: conclusion

1.

The new regulatory regime is designed to make the as built sector safer and subject to greater scrutiny

2.

The anticipated claims trends are that these will increase particularly in relation to buildings over 11m and where there is an exposure under the wider powers under the BSA (RCOs; BLOs)

3.

The political and legislative landscape suggests that continued pressure on developers as we move through 2024 and will increase pressure on supply chain as 'waterfall' chain of enforcement continues



# Contact details



**Matthew Olorenshaw**  
**Partner**

**T:** +44 (0) 20 7894 6444

**M:** +44 (0) 7813 832190

[molorenshaw@dacbeachcroft.com](mailto:molorenshaw@dacbeachcroft.com)



**Rebecca Austin**  
**Partner**

**T:** +44 (0) 20 7894 6729

**M:** +44 (0) 7900 138816

[raustin@dacbeachcroft.com](mailto:raustin@dacbeachcroft.com)



[dacbeachcroft.com](https://www.dacbeachcroft.com)

 Follow us: [@dacbeachcroft](https://twitter.com/dacbeachcroft)

 Connect with us: [DAC Beachcroft LLP](https://www.linkedin.com/company/dac-beachcroft-llp)

DAC Beachcroft publications are created on a general basis for information only and do not constitute legal or other professional advice. No liability is accepted to users or third parties for the use of the contents or any errors or inaccuracies therein. Professional advice should always be obtained before applying the information to particular circumstances. For further details please go to [www.dacbeachcroft.com/en/gb/about/legal-notice](https://www.dacbeachcroft.com/en/gb/about/legal-notice). Please also read our DAC Beachcroft Group privacy policy at [www.dacbeachcroft.com/en/gb/about/privacy-policy](https://www.dacbeachcroft.com/en/gb/about/privacy-policy). By reading this publication you accept that you have read, understood and agree to the terms of this disclaimer. The copyright in this communication is retained by DAC Beachcroft. © DAC Beachcroft.