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BSA, Sections 148 and 149 – Construction product and cladding product claims, a cause of confusion?

Two of the new legal remedies introduced by the BSA are the liability for construction products in section 148 and the liability for past defaults relating to cladding products in section 149. Section 148 applies prospectively only to work completed after 28 June 2022. Section 149 is, as the name indicates, retrospective.

While they have been claims issued under section 149, the law in relation to these remedies is less well developed than other aspects of the new remedies in the BSA. Firstly, there are no reported judgments on liability under either section. Secondly, the consultation period for responses to the Green Paper on Construction Products Reform only closed in May 2025. That consultation is likely to result in the Government issuing construction product regulations as allowed by Schedule 11 of the BSA. Non-compliance with such regulations is one of the possible bases of liability under section 148.

There are four Conditions which must be met to establish liability under both section 148 and 149. This article looks at Condition D which is that the same under both section 148 and 149.

Condition D is that the facts of the failure to comply with the construction or cladding product requirement, or the misleading statement, or the manufacture of the inherently defective product (i.e. Condition A) was *"the cause, or one of the causes, of the building or dwelling being unfit for habitation."*

Fitness for habitation should be assessed in accordance with the established principles under the Defective Premises Act 1972 (see *Rendlesham Estates v Barr* [2014] EWHC 3968 (TCC) and *Keating on Construction* at 15-005).

The more interesting wording in Condition D is *"the cause, or one of the causes"*. Parliament has not adopted the causation language used in breach of contract claims (*"an effective cause"*) or the reliance requirement of the tort of deceit. The person bringing the claim would not, therefore, need to show that they relied on the misleading statement, for example, or that the reliance was reasonable.

What does *"cause, or one of the causes"* mean? Is *"one*

¹ *Boxxe Limited v The Secretary of State for Justice* [2023] EWHC 533 (TCC) cites the limitation provision for these remedies introduced as section 10B of the Limitation Act 1980 however that was as part of considering whether a procurement claim under the Public Contracts Regulations 2015 was time barred.

The Upper Tribunal (Lands Chamber) referred to section 149 briefly at [108] of *Lehner v Lant Street Management Company Limited* [2024] UKUT 0135 (LC). That was an appeal about the leaseholder protections provided by Schedule 8 of the Building Safety Act 2022. The Upper Tribunal referred to section 149 as part of its consideration of how the phrase *"cladding system"* was used and should be understood in the Building Safety Act 2022.

of the causes" different to "an effective cause"? To take a typical scenario with a defective property, if a cladding manufacturer supplied a defective cladding product, but the contractor also installed it poorly, for example failing to install cavity barriers, would Condition D still be satisfied?

For a common law damages claim, the position is generally that where there are both workmanship and design breaches they will both be an effective cause of the loss. In *Martlet Homes Ltd v Mulalley and Co Ltd* [2022] EWHC 1813 (TCC) HHJ Stephen Davies confirmed at [287] that, in a case where there were both design and workmanship failings, "it is not appropriate to apply the but for test, it is sufficient for the claimant to succeed so long as event X is an effective cause of event Y."

The express reference to "one of the causes" suggests that the causation test for liability under section 148 and 149 may be less onerous than a common law damages claim. At the very least, if the product breach is "an effective cause" that should be sufficient for Condition D to be met and a manufacturer to be liable under sections 148 and 149.

The Explanatory Notes support this conclusion. The Explanatory Notes to section 149 state that section 149 is intended to provide a new cause of action against "cladding product manufacturers, where their actions have caused or contributed to a dwelling becoming unfit for habitation." A contribution is a lower bar, apt where many of the claims under section 149 may be made by contractors or architects who have settled with the employer or owner and are looking to recover some of their losses.



On the other hand, beyond Condition D, it has been argued that a third party design or workmanship failure may excuse the manufacturer of liability under section 149 for failure to comply with the Construction Products Regulations 1991 (referred to in section 149 as the "1991 Regulations"). The requirements in the 1991 Regulations include Regulation 3(1):

"A construction product, other than a minor part product, shall have such characteristics that the works in which it is to be incorporated, assembled, applied or installed can, if properly designed and built, satisfy the essential requirements when, where and to the extent that such works are subject to regulations containing such requirements."

The "essential requirements" are defined in regulation 2(1) as "requirements applicable to works which may influence the technical characteristics of a construction product as set out in terms of objectives in Annex 1 to the Directive (which is reproduced in schedule 2) ...". Section 2 of Schedule 2 sets out objectives in respect of the safety in case of fire.

One cladding product manufacturer has argued in its defence that the phrase "if properly designed and built" means that liability is conditional on the cladding product, as installed, being properly designed and built. In other words, installation failure by the contractor, excused the manufacturer for section 149 liability for failing to comply with Regulation 3(1).

However, this argument is not a sensible reading of the words of Regulation 3(1). The wording "can, if" is referring to the hypothetical assessment of the cladding product that is required in assessing whether the manufacturer is at fault. The cladding product should be assessed on the hypothetical basis that it is properly designed and built (to the extent the design and building is not done by the manufacturer). A manufacturer should not be liable for the faults of the contractor or architect. On the other hand, if the manufacturer is at fault for supplying a defective product, then further faults by the contractor or architect would not allow the manufacturer to escape liability.

That argument that a workmanship or design failure would defeat a section 149 claim is also contrary to the causation test in Condition D explained above – it is sufficient to be "one of the causes" – and the stated intent of Parliament behind section 149 to secure redress against cladding product manufacturers and sellers at fault for contributing to fire safety defects (see Explanatory Notes background to section 149 at [1238] to [1245]).